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LEGAL MASTERPIECES

SPECIMENS

OF

ARGUMENTATION AND EXPOSITION

BY

EMINENT LAWYERS

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VAN VECHTEN VEEDER

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PREFACE.

The purpose of this collection is to bring together, from the whole field of legal literature, specimens of the best models of the various forms of discourse and composition in which the lawyer's work is embodied. The aim has been to select, as far as possible, topics of general interest and importance, and to present these topics through the medium of some great legal personality. Much will be made of style and form; but it must not be supposed that substance is thereby underrated. Knowledge and invention, or the power of supplying ideas, is the first and essential step in all discourse and composition. Without clearness of thought, there can be no precision of statement; and clearness, as Webster said, is the great power at the bar. These specimens are designed simply to indicate the best methods of making the thought most effective; to show discourse as a system of thought animated by a rational order and sequence of ideas, and to display the effect of skill and taste in expression.

The practical value of such studies will be obvious to every one who is at all familiar with practice in the courts. The amount of time wasted in unnecessary discussion is simply incalculable. Much of this is due to inadequate preparation and loose thinking. A large proportion results from what Justice Buller described as the "garrulity sometimes called eloquence,"—the habit of dwelling upon a strong point after its strength has been exhausted; or, as Samuel Dexter called it, "the talent for keeping the sound a-going after the sense has gone." The bench is not without similar shortcomings. If Lord Bacon's plan to "cut off the tautologies and impertinences" of judicial opinions were now carried into effect, it would make short work of the mass of case law. Interminable opinions on questions of fact, elaborate restatement of well-settled principles, and the needless and mechanical citation of precedents are among the principal causes of the present deluge of reports. A closer study of the best models would bring about a better conception of intellectual reserve, a finer sense of proportion, and more wholesome mental habits of discrimination.

The value of such a study is by no means confined to the legal profession. Mr. John Morley, in his address on popular culture,[1] has recommended such a study of "reasoning in real matter" as part of a practical education; it "would make such a manual," he says, "as no other matter could, for opening plain men's eyes to the logical pitfalls among which they go stumbling and crashing, when they think they are disputing like Socrates or reasoning like Newton. They would see how a proposition or an expression that looks straightforward and unmistakable is yet, on examination, found to be capable of bearing several distinct interpretations, and meaning several distinct things; . . . . how necessary it is, before you set out, to know exactly what it is you intend to show, or what it is you intend to dispute. . . . . It is from the generality of people having neglected to practice the attention on these and the like matters that interest and prejudice find so ready an instrument of sophistry in that very art of speech which ought to be the organ of reason and truth."

V. V. V.

[1] Miscellanies, iii, 21-24.

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INTRODUCTION.

A recent critic has classified the productions of lawyers among the raw materials of literature.[1] Judicial opinions are excluded from the domain of literature because they are writings where the registration of a fact or the conveying of information is the sole object sought, and the sole end attained. Forensic arguments are granted a somewhat higher place. "Occasionally these arguments are so perfect, in their way, as to be almost entitled to be called artistic. Such arguments are among the highest achievements of the human mind; but they are not literature, because they are addressed to the intellect solely, and not to the imagination. In the oration, the feelings are appealed to, and the imagination is aroused. The oration is a literary form; the argument is not." Such a view, which is not uncommon, misconceives the nature and scope of the subject. Science alone appeals solely to the intellect. The fine arts, on the other hand, appeal to the emotions. Selecting typical forms of each class, it may be said that algebra is the antithesis of music. The former appeals directly to the intellect; the latter directly to the emotions. Between these two extremes there is infinite variation. Words may be used to express the things with which science deals, but they are rather symbols than language; the things exist in themselves, not by virtue of our understanding of them. In all the fine arts save music, the appeal to the emotions is made in part, at least, indirectly through the medium of intellectual conceptions. The appeal, in some form, to the feelings, is the ultimate characteristic of literature as a fine art. The typical form is poetry, in which the appeal to the feelings is the chief aim. In all other forms of literature (indeed, to some extent, in the highest poetry) this emotional element is combined with other qualities; for literature, having to do with thoughts, necessarily deals with definite intellectual conceptions. When these conceptions are supplied by the imagination, we have the domain of *belles lettres;* when they are supplied by facts, we have either the raw materials of literature, or a product which, whatever its avowed object, is literature in so far as it is animated

[1] Chas. F. Johnson, Elements of Literary Criticism, 23, 24.

by the saving literary graces of emotion, imagination, thought, and form. It may be admitted that law ceases to be literature in the same degree that it is capable of severe scientific treatment. To what extent such treatment is possible it is unnecessary in this connection to inquire. A mere manual of legal principles would ordinarily fall outside the domain of literature; but then, so, also, would a chronicle of mere facts of any kind. Yet even a legal or historical treatise may be so colored by the author's mind as to attain certain literary qualities. The mere impulse to utter a fact or an idea implies some feeling about it, and the coloring derived from this feeling distinguishes the finished product from the raw material. Such, for instance, is Blackstone's Commentaries, and, in a higher degree, the work of Sir Henry Maine. Even in pure exposition, some happy turn of phrase or flash of imagination may illuminate a whole train of thought, and so not merely adorn, but illustrate. So, in the law reports, in the midst of much that possesses clearness and unity alone of literary qualities, we may occasionally find cases in which the discussion goes to the historical or scientific foundations of legal principles, where there is an ample display of imagination at work among the dry bones of legal formulae; or, in the application of legal principles to human actions, we may be moved by the largeness of the thought, or the imposing and imaginative way in which the real proportions of the problem are displayed. The opinions of Lord Bowen may be cited as examples.[2]

A large proportion of the advocate's work, like all customary oratory, is inseparably mixed with practice. The development of legal principles is by no means the sole occupation of the advocate. Often he has to apply settled rules to particular facts; more often to persuade a jury to reach certain conclusions from conflicting testimony. "Trial," as Erskine said in his defense of Lord Gordon, "is nothing more than the reference of facts to a certain rule of action." And the arguments of lawyers bear about the same relation to jurisprudence that pulpit oratory bears to theology. The very art of rhetoric, in its largest sense, as the art of discourse, was regarded by the ancients as the art of persuasion. In fact, the theory or science underlying the art had its origin in the judicial and deliberative orations of the Greek rhetoricians, which appealed to the mind and emotions with a view to influencing action. These masters of the art understood the metaphysics of persuasion.

[2] See C. T. Winchester, Principles of Literary Criticism, for a scholarly discussion of the subject.

Their object was to influence the will, which controls all deliberate action. But they knew that the will seldom, if ever, initiates action; it acts in connection with the intellect and the feelings. The intellect is moved by arguments and explanations and facts which furnish material for reasoning. The feelings are stimulated by means of narration, description, and occasionally by exposition. Through one or both of these faculties the will must be reached. The orator finds or excites in his audience some desire. He has then to satisfy their intellect that a certain course of action will satisfy that desire. The appeal to the feelings is, therefore, an important, and at times a vital, element in persuasion; indeed, we call emotions which tend to influence the will, motives of action.[3]

Now it must be borne in mind that there are two spheres of advocacy. Judge and jury alike are sworn to do justice according to the law and the evidence. Theoretically, then, their motive is the same; but in practice it is seldom so, and this difference effects a real distinction between the two spheres of advocacy, and materially enlarges the scope of forensic oratory. The trained judge may be reasonably supposed to be so uniformly influenced by motives of truth and justice that it is only necessary to prove a case in order to receive a favorable decision. The address in such cases will be directed almost entirely to the intellect, and here we may expect to find the best specimens of pure argumentation. The training and cultivation of the audience enables the advocate to employ his highest powers of expression, and the persuasive element, being intellectual, rather than emotional, does not ordinarily lose its effect when viewed, apart from its delivery, as a composition. Benjamin R. Curtis is a typical illustration of this order of mind. In jury trials, on the other hand, where the motives upon which the desired action depends cannot be relied upon to be so uniformly present, or, at least, where they are easily overbalanced by other motives, the emotional element becomes of the first importance. The scope of this form of advocacy is practically unlimited. It deals with persons, things, and acts,—the facts in issue,—and with the law applicable to such facts. Of the various methods of expression, it is obvious that the principles of narration and description are as applicable to forensic as to other discourse. Exposition and argument are limited in part to legal logic, and to rules concerning the admission of evidence. In determining the facts of a case, the advocate depends upon reasoning common to all men. In determining the rule of law by which the issue is

[3] See W. B. Cairns, Forms of Discourse, and Geo. P. Baker, Principles of Argumentation.

to be governed, he depends, first, upon a knowledge of rules special to a small area, and, secondly, upon the application of these rules to the facts by universal methods of reasoning. In other words, the special knowledge necessary for the advocate depends upon and is surrounded by knowledge of the universal methods of reasoning.[4]

Although, therefore, not susceptible of being ranked with the more æsthetic forms of literature, which appeal directly to the emotions through the imagination, the advocate's work may still be literature; for it is not necessary that the quality which makes a work literature should be its primary object and purpose. The power to appeal to the emotions is always combined in literature with other qualities, and sometimes the purpose and worth of the work depend upon these other qualities. For instance, we do not value a history mainly for its vivacity, picturesqueness,and pathos, essential though they may be to literary quality. We value it primarily for its accuracy, justice of view, and truth; but the excellence of the work as historical literature will depend upon the skill of the author in combining historical and literary virtues. It is so in the work of the advocate. Although the intellectual element predominates, what we call force, energy, vigor, vivacity are only names for this incidental power to stir the emotions which characterizes literature; and its rank as literature will depend upon the power to combine clearness and accuracy with this emotional interest. Although this interest is supplied by facts, rather than by the imagination, these facts are human facts, which can never be adequately comprehended by the intellect alone; for human action always involves moral quality, and that can never be understood or rightly estimated save through the sympathies. The advocate must give his facts not merely as dry memoranda; he must portray living men and action. It is his task, not merely to arrange and chronicle facts, but rather, from scattered, fragmentary, and conflicting evidence, to show the real, living persons whose acts and motives are to be made clear to us. His imagination will seize and concentrate attention upon features that give the most vivid and characteristic impression. His efforts to give adequate expression to his insight will evoke at every step associated images and emotions. When his facts and arguments are thus warmed by his sympathies and vivified by his imagination, the result is literature. Not all arguments are literature, but, whenever they

[4] W. C. Robinson, Forensic Oratory, 60.

are literature, they will be found to possess this appeal to the feelings. Such, for instance, was the advocacy of Daniel Webster.

There are certain limitations common to oratory in general—limitations arising out of the mental and emotional temperament of the audience, its attitude towards the speaker, and his subject and the end in view—which apply in varying degrees to different occasions.[5] If oratory be regarded as the art of persuasion, its character must obviously be adapted to the audience and the occasion. In the every-day work of the advocate before ordinary juries, it would be absurd to expect a severe standard. He seeks to accomplish a desired result, with reference only to the requirements of the occasion. The forensic orator, as Scarlett said in this connection, "comes prepared to discuss a precise question upon which the issue is joined between the parties. His duty is to make such use of his facts, and of the topics which his own imagination may suggest, as will lead to the conviction of the jury in favor of his client. His sole object ought to be to persuade these twelve men to come to a specific conclusion. He must always be working upon the concrete, and pointing to his conclusion." If an advocate has skill and insight, the substance, form, and style of his address will yield to and vary with the circumstances of different cases and the minds of different jurors. He will half guide, half follow, the moods of the jurors towards the desired end. He may believe in his conclusions, but he will not always believe in the reasons which he assigns for them. He will catch at disputable premises because the jurors seem to adopt them, and draw inferences from them which suit a momentary purpose.[6] Such arguments serve their purpose, and are forgotten.

[5] The emotional character of popular oratory satisfies the sense of the untrained mind for the melodramatic, and constitutes, in a vague way, its apprehension of eloquence. It is curious to observe how the same mind, called to a deliberation or judicial occasion, in which action is sought to be influenced, at once becomes suspicious of methods which, on other occasions, were entirely satisfactory. The average person resents the thought of being readily susceptible to persuasive influences. He has an instinctive feeling that eloquence, as he understands it, is largely humbug. When he is persuaded, he usually feels that he has been listening to "plain common sense." Mr. Justice Wightman gives an amusing illustration of this in an anecdote of a Yorkshire assize, where Brougham and Scarlett were opposing counsel in most of the cases. Brougham was then at the height of his reputation as an orator. Scarlett had the reputation of being the greatest verdict winner of his generation. Wightman asked a juror what he thought of the two leading counsel. "Well," was the reply, "that Lawyer Brougham be a wonderful man; he can talk, he can. But I don't think nowt of Lawyer Scarlett." "Indeed," exclaimed Wightman, "you surprise me. Why you have been giving him all the verdicts." "Oh, there's nothing in that," replied the juror. "He be so lucky, you see; he be always on the right side."

[6] When Erskine was asked, at the close of an argument, why he so iteratively, and with such singular illustration, prolonged one part of his case, he said: "It took me two hours to make that heavy-looking foreman join the eleven. No more than one idea could stay in his thick head at a time, and I resolved that mine should be that one; so I hammered on until I saw by his eyes that he had got it." Rufus Choate once said: "I have been so often disappointed in the sudden turn which jurors' minds take,—I have proved them false on such trivial points,—that, as I grow older, I argue every point, even at the risk of tedium."

It is to great occasions that we must look for great efforts,—occasions when great principles and passionate feeling lift a tribunal above personal peculiarities and individual motives, and seem to appeal to our fundamental human nature. Such oratory, it is true, is rare; but it is as frequent in the law courts as elsewhere. The following collection contains specimens which, in all the elements —breadth of view, grasp of principles, cogent reasoning, apt illustration, lucid style, warmth of feeling, and real imagination—rank with the oratory of literature.

For purposes of selection we are confined, for substantial reasons, to recent times. In the first place, the records are not available. The early language of the law was not English, but Latin and French. Not until 1731 was Latin supplanted by English as the formal language of the law; and the supremacy of French as the literary language of the law was undisputed until the time of Fortescue. The speech of litigants and their advisers was French; and far into the sixteenth century, after the lawyers had long been thinking and speaking in English, they continued to write of the law in French. Cromwell made a firm stand for English, and during his time the dozen volumes of reports then extant were translated into the newly-established court language. From the Commonwealth to the Revolution, reports multiplied rapidly. They came from an active press in "flying squadrons"; but they were mostly second-rate copies and translations of loose notes of cases, and, as a class, they are the most worthless of all the reports. The practice of private and often posthumous publication of fugitive and irregular reports was, at best, inefficient and unsatisfactory, and it is only since the beginning of the Term Reports, in 1785, that the decisions of the English courts have been accurately and systematically reported. Except in the ecclesiastical courts, it was not the custom, until recent years, to render written opinions, and, with the methods of reporting then in use, it is useless to look for formal accuracy. The substance of most of the opinions of the early judges is preserved with more or less accuracy; but, except in the rare cases in which the reports were prepared by the judges themselves, they have not come down to us in such shape as to warrant quotation for form and style. As for the arguments of counsel, it has never been the practice to give in the regular reports more than a mere statement of the points made. Aside from occasional pamphlet publications, most of the arguments preserved in anything like completeness are contained in the standard collection of State Trials.

However, having the substance, it is not likely that we have lost much in the failure to preserve the form and style. An examination of our early legal literature almost satisfies one of the literal truth of Bentham's reluctant admission that Blackstone was the first lawyer to discuss legal topics in the language of the scholar and the gentleman. Coke, whom Carlyle calls the "common law incarnate"—"tough old Coke"—dominated early English law, and, as far as style and method are concerned, it would be difficult to find a worse model. There is hardly a trace of order in his form of presenting a topic. "Throughout all parts, his inexhaustible learning breaks forth; case is followed by case, quotation leads to quotation, illustration opens to illustration, and successive inference is made the premise for new conclusions, every part, moreover, being broken with conclusions and exceptions, or separated in a labyrinth of parentheses, till order, precision, and sometimes sense itself is lost in the perplexed, though imposing, array." Coke's pre-eminence in the common law is universally admitted; his reports are satisfactory evidences of his industry and learning. But with the common law his vast, but not varied, learning began and ended. Of general literature he knew little, and cared still less; the philosophy of law was to him a matter of idle speculation. "A mere dry legist, he cared more for the six carpenters than he did for the seven sages of Greece."

Lord Bacon was a complete contrast to Coke. From the vantage ground of science, Bacon's comprehensive mind penetrated into the very spirit of jurisprudence. The problem which he sought to solve by his plan for amending, consolidating, and condensing the law is the same problem that confronts us to-day; and Bacon's method is still the most feasible means of securing the harmony and symmetry of our legal system. It may well have seemed to Bacon in his old age that he was "better suited to hold a book than to play a part." The spirit of the times was against him. But he set at work the forces by which the edifice which Coke had completed has been largely demolished.

Coke and Bacon had many successors, of whose learning the reports bear abundant testimony; but the old law was, at best, unpromising material. Yelverton, Saunders, Rolle, Glynn,—all able jurists,—and the great names, even, of Hale, Holt, and Nottingham have come down to us in work which, though invaluable in substance, shows, as a rule, small approach to art.

With respect to forensic arguments the case is not much better. In this sphere we find Coke, again, as a leader. Rough, over-

bearing, and disrespectful to the court, insulting and brutal to the prisoner,—denouncing Raleigh as a "viper" and a "spider of hell," —he displayed, at that early day, an ingenuity in persecution and sharp practice which, although too often imitated, has never been surpassed in our own day. A few of Bacon's arguments, published among his collected works, are stamped with his admirable style. For instance, no reader of the Essays would be likely to mistake the authorship of the following opening statement in his argument of the Case of Impeachment of Waste:

"The case needs neither repeating nor opening. The point in substance is but one, familiar to be put, but difficult to be resolved,—that is, whether, upon a lease without impeachment of waste, the property of timber trees after severance be not in him that is the owner of the inheritance. The case is of great weight, and the question of great difficulty. Weighty it must needs be, for that it doth concern, or may concern, all the lands in England; and difficult it must be, because this question sails *in confluentiis aquarum*,—in the meeting or strife of two great tides. For there is a strong current of practice and opinion on the one side, and there is a more strong current (as I conceive) of authorities, both ancient and late, on the other side, and therefore, according to the reverend custom of the realm, it is brought now to this assembly; and it is high time the question received an end, the law a rule, and men's conveyances a direction."

Such a temperate and rational spirit seems, however, to have been very rare. Ascham's characterization of the lawyers of his day as "roaring like bulls, and doing their best when they cry loudest," is justified by the reports of their labors. They seem to have regarded persuasion as a variety of coercion. Indeed, such a competent literary critic as Mr. Leslie Stephen is forced to ask "whether any English lawyer, with one exception, ever made a speech in court which it was possible for any one not a lawyer to read in cold blood. Speeches have, of course, been made, beyond number, of admirable efficacy for the persuasion of judges and juries; but so far as the State Trials inform us, one can only suppose that lawyers regarded eloquence as a deadly sin,—perhaps because jurymen had a kind of dumb instinct which led them to associate eloquence with humbug. The one exception is Erskine, whose speeches are true works of art, and perfect models of lucid exposition. The strangely inarticulate utterance of his brethren reconciles us, in a literary sense, to the rule—outrageous in a moral and political point of view—which for centuries forbade the assistance of counsel in the most serious cases."[7]

Some expressions of contemporary opinion afford a partial explanation of this general lack of method among early English law-

[7] Hours in a Library, iii., 310.

yers. Cecil, Earl of Salisbury, tells Sir H. Yelverton, in 1610, in a sketch of the lawyers of the reign of James I.: "Most of our lawyers and judges, though learned in their profession, yet, not having other learning, they, upon a question demanded, bluntly answer it, and can go no further, having no vehiculum to carry it by discourse or insinuation, to the understanding of others." And Sir Thos. Eylot, in his "Gouvernor," observes, with reference to the law, that inasmuch "as the tongue wherein it is spoken is barbarous, and the stirring of the affections of the mind in this nature was never used, therefore there lacked elocution and pronounciation, two of the principal parts of rhetoricke." In other words, the lawyer of that day sought only the commendation of his brethren. There was no public watching,—no considerable number of general observers, who would measure their work by absolute standards, unbiased by professional isolation and pedantry. Law and literature were completely divorced. The study of law was no longer academic; scholasticism was as supreme in law as in theology. As late as the end of the seventeenth century, one of the most prominent advocates of that day was content to close his argument in the great case of the Seven Bishops with such a peroration as this:

"The defendants have not acted as busybodies. The other side would have this petition work by implication of law to make a libel of it; but by what I have said it will appear that there was nothing of sedition, nothing of scandal, in it,—nothing of the salt and vinegar and pepper that they have put into the case. We shall prove the matters that I have opened for our defense, and then I dare say your lordships will be of opinion that we have done nothing but our duty."

By the time of Blackstone, Mansfield, and Erskine, the situation had changed. Many agencies, too well known to require enumeration, had been at work to produce the transformation; public opinion had expanded and overflown. With Addison, Steele, and Swift, taste invaded the law courts as well as parliament. Speech, as Taine says, was elevated and enlarged at the same time that the public was refined and multiplied. Modern culture introduced into technical reasoning freedom of discourse and a breadth of general ideas. Before this time, indeed, there had been great orators at the bar, such as St. John, Somers, Cowper, and Talbot; but their reputation was mostly won in parliament. Blackstone, Mansfield, and Erskine popularized the law. Blackstone made it possible, for the first time, to acquire a knowledge of law as part of a liberal education. Mansfield infused into the body of the common law the liberal spirit of universal justice, with such a force

of masculine reasoning, and so careful an appreciation of style and method, as to bring his work within the attention of cultivated minds. In the great state trials of the Revolutionary period, Erskine instilled the principles of constitutional liberty into the minds of jurors in arguments which may well be called true works of art and perfect models of lucid exposition.

From this time there are scholarly lawyers in abundance; the difficulty arises from the failure to report their work. We have, for instance, the highest testimony of Hardwicke's scholarship, but the dozen or more volumes through which his opinions are scattered enable us, for the most part, to do little more than piece together the substance of his decisions; and of such celebrated forensic efforts as Dunning's argument in Leach v. Money,[8] and Romilly's argument in Huguenin v. Baseley,[9] we have only the mere outline. Chancellors Camden, Thurlow, Loughborough, Lyndhurst, and Brougham, and Sir William Grant, the master of the rolls, were orators of repute, and at least two of them were profound jurists. A comparison of the style of the brothers Scott, who, as Lord Stowell and Lord Eldon, acquired lasting fame by their material contributions to their respective departments of the law, might well serve as a text for this introduction. Eldon's diffuse and rambling style as an advocate prompted Horne Tooke, whom he prosecuted, to declare that, if he (Tooke) were tried again, he would plead guilty, rather than hear John Scott repeat his argument; and the same careless habits of expression characterized Eldon's work as a judge, especially in later life, when his senile habit of doubting led him into all the by-paths of reasoning. Lord Stowell, on the other hand, was hardly surpassed in form and expression by any writer of his time.

In the early part of the Victorian era, Baron Parke attained an ascendancy over his brethren comparable to that held by Coke in his day; and the influence was almost equally demoralizing from a literary point of view. Parke was a very learned lawyer, and rendered great service to English law; but it was his habit to attempt to reconcile all the decided cases bearing upon an issue; and it is needless to say that one who attempts this must leave perspicuity and symmetry behind. Willes and Blackburn, who were of a similar cast of mind, had their learning under control. They present a matured opinion, rather than the mere raw materials of an argument. And there were men then at the bar, like

[8] 19 State Trials, 1002.
[9] 14 Vesey, 273.

Bethel, Cairns, Cockburn, Coleridge, and Selborne, who were destined to enrich the law with scholarship, as well as with legal ideas.

Richard Bethel, better known as Lord Westbury, excelled in epigrammatic precision of style. The critical keenness of his mind enabled him to express the most subtle shades of thought in language as clear as crystal. Hence his judicial opinions are a mine of legal maxims. His intellect was comprehensive, as well as keen, and he possessed in a remarkable degree the power of luminous exposition. The intellect of Lord Cairns was of a still higher order. With a versatility of powers seldom equaled, he achieved the highest eminence in public affairs and in his profession. His feeble physical constitution, and his participation in public affairs, combined to render the volume of his work in the reports relatively small; but what there is of it is of the highest value. He displayed singular facility in going straight to the heart of a question, and bringing out the truth with a single thrust. This method was rendered luminous by his cultivated imagination, which infused into his simplest statement a wealth of suggestion and inference. Lord Selborne shared with Cairns the honors of the profession. He was in many respects a man of remarkable powers; but his habit of pursuing a fine train of reasoning on matters collateral to the main point of an argument resulted in an excessive elaboration and minuteness, which deprived his work of the fine simplicity which characterized all Cairns' efforts.

Finally, in Sir George Jessel and Lord Bowen, England produced two jurists who, in different ways, represent the highest standards of judicial capacity. Sir George Jessel brought to the law the aptitudes of a man of business. His knowledge of affairs was wide and accurate; his apprehension remarkably quick and keen. His phenomenal memory, combined with an acute and disciplined logical faculty, made it possible for him to grasp and solve the most complicated problems with marvelous dispatch. A student of the philosophical system of the Roman law, he revolted against the anomalies and technicalities of the English system with an energy of expression which reveals his principal shortcoming,—a want of taste and refinement. Lord Bowen, on the other hand, was a scholar of the finest cultivation. To a knowledge of the law at once profound and acute, he brought a penetration and precision of expression as lucid as it was subtle; and he shared with Cairns the cultivated imagination which is essential to the exercise of the highest art. In his discussions of the scientific and historical

foundations of legal principles, mere legal terminology seems no longer a dead thing, but rather vital and animate.

Many of the early American lawyers who contributed so largely to the formation of the constitution of the United States were orators of high rank, but we have, for the most part, no records of their forensic efforts. Patrick Henry's argument in the case of the British debts, and Alexander Hamilton's argument in the Croswell libel case, two of the most celebrated efforts of that day, have been in a measure restored from brief notes taken at the time. Andrew Hamilton's speech in the Zenger libel case, and John Adams' defense of the British soldiers indicted for participation in the Boston massacre, from a still earlier time, have been preserved in the same way. This method of reporting is, however, entirely inadequate and unsatisfactory.

William Pinkney was the first American lawyer to win a national reputation at the bar. His supremacy in the supreme court of the United States is so strongly attested that it does not admit of doubt; and yet we have nothing to sustain such repute. The speeches reproduced by Mr. Wheaton from his notes certainly do not confirm the eulogies of Pinkney's contemporaries. The power of elaborate amplification which, according to Judge Story, characterized Pinkney's oratory, was apparently in the ascendant at the beginning of the century; but it soon gave way under the example of Marshall and Webster. The change may be observed in the case of Wirt, whose early style, as shown in the Burr trial, was characterized by an almost fanciful luxuriance. After Wirt went to Washington as attorney general, he made a persistent and partly successful effort to acquire a simpler style. His letters to his friends and students are filled with advice to cultivate, above all things, force and directness; and he illustrates this advice again and again by the example of Marshall.

"Teach these young Virginians," he wrote to his young friend Gilmer, "by your example, the insignificance of their affected swelling and 'rotundification' of frothy sentences, and of the duplification and reduplification and infinite accumulation of chaotic and confounding Irish metaphors. . . . . I lost the best part of my life indulging the frolics of fancy, and the consequence of it is that it will take me all the rest of it to convince the world that I have common sense. . . . . Let the first and predominant impression you make upon the world be that you have a mind of adequate strength for the highest achievements of your profession, and for some years use the curb, rather than the spur, with your imagination, . . . Direct your chief aim to acquire a reputation for deep and correct thinking, leaving eloquence to shift for itself, and seeking merely to convey your ideas in the most simple, perspicuous, and apposite language. . . . Be not in haste to raise

the superstructure of your oratory. This was my fault. For want of better advice, I began my building at the top, and it will remain a castle in the air till the end of time. The advantage of the training I am pressing on you for the fortieth time, I believe, was strikingly illustrated in the case of Marshall. Marshall's maxim seems always to have been, 'Aim exclusively at strength;' and from his eminent success I say, if I had my life to go over again, I would practice on his maxim with the most rigorous severity, until the character of my mind was established."

With Webster, the amplified or florid style of oratory may be said to have gone out of vogue,—at any rate in the supreme court of the United States. Marshall's influence was mainly professional; but Webster's was universal, and his care in preparing his speeches for publication made them a permanent force as literature.

If one may judge from the uniform impression that he made upon his contemporaries, and the measure of his success with juries, Rufus Choate was the greatest forensic orator who has ever appeared at the American bar. He appears to have had, in rare combination, a large measure of those qualities which characterize the highest oratory. Beneath all the luxuriance of his metaphoric style may be observed a masculine understanding. He had at once an observing and an analyzing mind; a keen perception of particulars, and a logical faculty to generalize and group them. He had, moreover, a splendid imagination, which gave light and vivacity to all the operations of his mind. To these qualities of strength and imagination he added an emotional and enkindling temperament; a physical warmth, as well as a moral and emotional susceptibility. His sensibilities were by nature lively, and his mind grasped things with great brightness and fullness of detail, calling into play, with corresponding intensity, the appropriate accompanying feelings. From such characteristics sprang his remarkable ability to force any part of his subject altogether out of its natural relations, and then, by his mingled imagination and sensibility and wealth of language, invest it with a character not its own. "Do I misstate facts?" he would reply to the interruption of a bewildered opponent. "I'm only arguing upon them." He would invariably have the main facts correctly,—he was only painting them with his own colors. The contagious and irresistible enthusiasm with which this imaginative conception, distorting description, and passionate expression carried him over the weak spots in his argument has been well compared to a skater skimming the crackling ice. Scarlett used to wheedle juries across the weak places. Choate rushed them over. This power was greatly enhanced by a vocabulary beggaring all description for copious-

ness, variety, novelty, and effect, which colors and gilds and lights up his ideas and sentiment by words which are in themselves metaphors and pictures. But, after all, the most general traits of his compositions are to be summed up as an indescribable mixture of truth and reason, extravagance and intensity, beauty and pathos. Here was his real power. The force of his will and intellectual passion was such that he compelled his hearers, in spite of themselves, to admire and sympathize with what, from another, might be wholly condemned; for when he seemed utterly carried away by the rush and storm and glitter of passions and of pictures sweeping over his mind, his hearers went with him in spite of themselves.

It must be apparent from this description that it is hopeless to attempt to give on a printed page any adequate conception of Choate's power. Very few of his arguments were reported with even tolerable accuracy. The best specimens that we have are his argument before the Maine legislature on the removal of Judge Davis, and his argument in the Dalton divorce case. The former, while an able effort, is not particularly distinguished; the latter, a mere newspaper report, preserving, as Choate facetiously said, "the general non-sense of the thing," conveys some idea of his strength before a jury, but the argument deals with such a mass of testimony, requiring such elaborate explanation, that it is hardly suitable for selection. Indeed, as compositions, his speeches (except the occasional orations revised and published by him) are by no means safe models. As Mr. Story says: "The double desire of limitation and exposition, combined with his wide range of active and imaginative thought, led him often to overflow his banks with a prodigal stream, which disdained the boundaries of simple periods. . . . . His sentences refuse to come to a conclusion. A new illustration or variation or development, limitation, or side light strikes him before he can come to a pause, and carries him away with it, and, with parenthetical involvements, excursions beyond the direct line, inclusions of suspected objections which he is eager to anticipate, or imaginative illustrations and memories that will not be refused, he sweeps an undulating train of lengthening clauses along, anaconda-like in its movement, yet strong of grasp as are the anaconda's folds, until his sentence has grown into a paragraph."

Benjamin R. Curtis was a complete contrast to Choate. Curtis was the most consummate master of pure intellectual style among American lawyers of recent times. He was also the last advocate

whose style was sufficiently distinctive and distinguished, and whose position was sufficiently commanding, to exercise an extended influence on professional methods. His style, furthermore, exactly coincided with the requirements of modern conditions. Wholly lacking in imagination, Curtis went straight to the reason with a precision of thought, clearness of statement, and simplicity of diction which enabled him to compass the most intricate problems with the utmost dispatch. His arguments were fully wrought, in every essential detail, with a calm, clear, and unimpassionate rhetoric that is the perfection of its kind. In this respect Marshall was his only equal.

Our judicial literature is too well known to require detailed examination. With the beginning of the present century, Kent, Marshall, Tilghman, and Parsons began to lay the foundations of our jurisprudence in decisions which are still among the best models of judicial composition. In the succeeding generation came Story, Ruffin, Gibson, and Shaw,—a legal galaxy of unsurpassed ability. New England has maintained her ascendancy with such jurists as Theodore Sedgwick, Isaac Parker, Theron Metcalf, George Tyler Bigelow, E. R. Hoar, and Oliver Wendell Holmes, of Massachusetts; Samuel Ames and Thomas Durfee, of Rhode Island; Samuel Church and William R. Storrs, of Connecticut; Ira Perley and Charles Doe, of New Hampshire; Isaac L. Redfield and Asahel Peck, of Vermont. A long line of distinguished judges represent the contributions of the great Middle Atlantic States to our jurisprudence: Esek Cowen, Hiram Denio, George F. Comstock, William J. Allen, Charles A. Rapallo, Charles Andrews, and Francis M. Finch, of New York; William Tilghman, Jeremiah S. Black, and George Sharswood, of Pennsylvania; Henry W. Green, Mercer Beasley, and David A. Depue, of New Jersey; Thomas Clayton and Williard Saulsbury, of Delaware. In the South, North Carolina has been pre-eminent with Thomas Ruffin, Richmond M. Pearson, and William N. H. Smith; from Georgia we have had Eugenius A. Nisbet and Joseph H. Lumpkin; and from Maryland, John C. Le Grand and Richard H. Alvey. In the West, Michigan reached a high standard with John V. Campbell and Thomas M. Cooley. Other representative jurists from this section are Luther S. Dixon and Edward G. Ryan, of Wisconsin; William K. McAllister, of Illinois; Rufus P. Ranney, of Ohio; Jeremiah Sullivan, of Indiana; and Abiel Leonard, of Missouri.

In the supreme court of the United States the standard established by Marshall and Story has been maintained in uninterrupted succession. It will be sufficient to mention such names as Grier, Campbell, Curtis, Miller, Bradley, and Gray.

LORD MANSFIELD.

[William Murray, first Earl of Mansfield, fourth son of Viscount Stormont, was born at the Abbey of Scone, 1704. He was educated at Oxford, where he took high rank as a scholar. In 1727 he received his B. A. degree, and won the university prize, in competition with William Pitt, for a Latin poem on the death of George I. Having proceeded M. A. in 1730, he was in that year called to the bar at Lincoln's Inn. He got rapidly into practice, and in 1742 was made king's counsel and solicitor general. In parliament he soon became the acknowledged leader of the House. In 1754 he became attorney general, and two years later lord chief justice of the king's bench. In 1756 he was sworn of the privy council, and was offered, but declined, the great seal. On two occasions he held the seals of the exchequer. In 1776 he was advanced to an earldom. Ill health compelled him to resign office in 1788. He died in 1793, and was buried in Westminster Abbey.]

Lord Mansfield was accustomed to refer his advancement to his fortunate birth. He was fortunate indeed in that respect, but it was the fortune of an opportune time, rather than the inheritance of rank and station. He came into office at a critical period in the history of English law, when the rapid development of commerce, the changed relations of the individual to society, and the expansion of the rights of property, had originated new necessities. It was indispensable that the law should expand to meet them. To the demands of this high occasion Lord Mansfield was entirely equal. The principles which he laid down, and the precedents which he established, are the principles and precedents which, in the main, govern the administration of the law in the present day. Moreover, no judge ever impressed so forcibly upon the jurisprudence of his country the peculiar qualities of his own mind. Many of the most important branches of modern law derive their character from his genius, and remain enduring monuments of the admirable manner in which his powerful mind created a system of law adapted to all the exigencies of civilization.

Of his work at the bar we have few records. We know, however, that his Scotch connection carried him rapidly into

practice. In 1732, within two years of his call, he argued the case of Paterson v. Graham in the house of lords. In 1737 he won great reputation by his opposition to the proposed disfranchisement of the city of Edinburgh on account of the Porteous riots; and his successful defense of Mrs. Cibber, the celebrated actress, in the action brought against her by her husband, the scoundrel son of Colley Cibber, brought him into general prominence. The Duchess of Marlborough became an influential client. Pope, Bolingbroke, and Warburton were his friends. Pope has perpetuated his friendship and admiration in many a line. Mansfield confined his practice to the chancery courts, and the contemporary reports of Atkyns bear ample evidence of his application and learning. His speech as solicitor general in prosecution of Lord Lovat, in 1747, is one of the few speeches by him which have been authentically preserved. Although this speech is little more than a concise and lucid statement of the evidence, it brought him a singular compliment from the defendant, who, it seems, was a distant connection. "I heard him with pleasure, though it was against me," said Lord Lovat; and then, after apologizing for his own speech, he concluded: "I had need of my cousin Murray's eloquence for half an hour, and then it would have been more agreeable."

During his career at the bar he established a great reputation as a parliamentary orator. He had improved an early talent for declamation at Oxford by assiduous study of the classical models. He translated the orations of Cicero into English, and then back into Latin. He declaimed in his chambers before a mirror, with Pope as a critic. By such cultivation he acquired an elocution which became famous. His articulation was slow and distinct, and his voice is said to have been sweet in all its tones. His eloquence was always of an argumentative, metaphysical cast. It was subtle and insinuating, rather than forcible and overpowering. Walpole says: "He had too much and too little of the lawyer. He refined too much and could wrangle too little for a public assembly." As a parliamentary orator it was inevitable that he should be compared with his great rival Pitt. There was a strong contrast between the impetuous, passionate, and imperious Pitt and the calm, plausible, and graceful Scotch lawyer. Mansfield excelled in lucidity of statement and force of argument, but he was incapable of those bursts of fiery eloquence with which his great rival awed and charmed. He sought not to drive, but to lead; not to overwhelm the mind by appeals to the feelings, but to aid and direct its inquiries. Lord Shelburne says that Mans-

field's oratory "resembled a full and tranquil river which rolls onward with even current, always transparent, and never chafed by rock or tempest. Pitt's was like a mighty torrent, which was sometimes turbid and obscure, sometimes spent itself in wayward digressions, but, where it poured forth all its strength, was irresistible." In Macaulay's characterization: "Mansfield far surpassed Pitt in correctness of taste, in power of reasoning, in depth and variety of knowledge. His parliamentary eloquence never blazed forth into sudden flashes of dazzling brilliancy, but the clear, placid, mellow splendor was never for an instant overclouded." He was lacking, however, in moral character. Though wanting neither energy nor courage, he quailed under the assaults of Pitt and Camden. As a statesman he undoubtedly took an excessive view of the royal prerogative, especially in the dispute with the American colonies.

Although Blackstone had just summarized the legal system of the day from the standpoint of one who regarded it as the perfection of human wisdom and experience, the time was ripe for change. The common-law system which had sprung up during Norman and Plantagenet times may have been fairly adapted to the needs of a community in which land was the only property worth considering. But in the reign of George II., England had become the leading manufacturing and commercial country of the world, while neither the legislature nor the judiciary had made any systematic effort to develop her jurisprudence. When, therefore, questions arose respecting the bargain and sale of goods, affreightment of ships, marine insurance, and bills of exchange, no one knew how they were to be determined. Upon such questions, the law reports furnished no guide, swarming as they did with controversies over trial by battle, customs of manors, etc.

His work as a judge merits unqualified praise. The period of the Revolution, which had seen so many improvements in the public laws and in the law relating to real property, was mainly a period of legislative activity. The common-law judges, in particular, seemed to have a peculiar aversion to the discussion of general principles. A notable exception was Chief Justice Holt, who, with great sagacity and boldness, led the way to some of the most important improvements by his well-known judgment in Coggs v. Bernard, in which the law of bailments is expounded with philosophical precision. "I have said this much on the case," he said in concluding that opinion, "because it is of great consequence that the law should be settled on this point; but I don't know whether I may have settled it, or may not rather have

unsettled it. But, however that may happen, I have started these points, which wiser heads in time may settle." It was this work which Mansfield carried on to such great perfection, moulding the law in accordance with the needs of a rapidly expanding commerce and manufacture. "His ideas go," as Burke said, "to the growing inclination of the law, by making its liberality keep pace with the demands of justice and the actual concerns of the world; not restricting the infinitely diversified occasions of men and the rules of natural justice within artificial circumscriptions, but conforming our jurisprudence to the growth of our commerce and our empire." At the Guildhall, where he trained and attached to himself a select body of jurors, who were regularly impaneled for mercantile causes, and taught him the usages of trade, he did much, by his instructive grasp and power of formulating the general principle underlying particular cases, to convert the various and conflicting customs of merchants into something like a rational system of law. "Before that period," said his colleague Buller, in Lickbarrow v. Mason, "we find that in courts of law all the evidence in mercantile cases was thrown together. They were left generally to the jury, and they produced no established principle. From that time we all know the great study has been to find some certain general principles which shall be known to all mankind, not only to rule the particular case, but to serve as a guide for the future. Most of us have heard these principles stated, reasoned upon, enlarged, and explained, till we have been lost in admiration of the strength and stretch of the human understanding." When he was raised to the bench, the contract of insurance was little known, and a few important *nisi prius* decisions were all that was to be found on the subject. Yet this branch of the law grew under his administration into a system. In many other branches of the law the same progress is observable, particularly with reference to evidence and procedure. He put a stop to the interminable delay that characterized the old trial procedure. Cases were continued only for cause. Reargument was refused in all but exceptional cases, and judgment followed the verdict without unnecessary delay. He rationalized the law of evidence, and turned it to practical use. "We do not sit here," he informed the bar, "to take our rules of evidence from Siderfin and Keble." The technicality which required a deed to be indented he abrogated by holding any deed an indenture which had not its edge mathematically straight. In the case of Perrin v. Blake he departed from the narrow rule in Shelley's case.[1] His

[1] 1 W. Bl. 672.

application of the rules of evidence may be studied to good advantage in the case of Hamilton v. Davis.[2] In the case of Edmonstone v. Edmonstone[3] he struck off, according to Lord Campbell, the fetters of half the entailed estates in Scotland. In Somersett's case he enlisted English law in the cause of freedom.

In this great achievement in constructive jurisprudence, Lord Mansfield necessarily relied to a great extent upon the original powers of his own mind; he dealt with principles, rather than with precedents. "The law of England," he said, "would be a strange science indeed if it were decided upon precedents only. Precedents only serve to illustrate principles, and to give them a fixed authority, But the law of England, which is exclusive of positive law enacted by statute, depends upon principles, and these principles run through all the cases, according as the particular circumstances of each have been found to fall within one or the other of them."[4] "As times alter," he said in another case,[5] "new customs and new manners arise, and these occasion exceptions, and justice and convenience require different applications of the exceptions within the general rule." But it must not be supposed that he was indifferent to the necessity of established rules. In Rex v. Mayor of Carmarthen,[6] for instance, he gave full effect to a mere technical objection, while contriving a method by which the merits of the case could be reached. "General rules," he said, "are wisely established for attaining justice with ease, certainty, and dispatch. But, the great end of them being to do justice, the courts are to see that it be really attained. What I have suggested seems to be the true way to come at justice, and what we ought therefore to do; for the genuine test is, *boni judicis ampliare justiciam,* not *jurisdictionem,* as it has been often cited." He frequently deferred to the authority of prior adjudications establishing property rights, although lamenting their adoption as inconvenient and absurd, or founded upon the subtleties of artificial reasoning. But in adverting to an erroneous practice of computing interest upon a debt to the commencement of an action, he expressed his satisfaction in being able to correct a practice which was not founded in law, but in a mistake, observing that, when an error upon which a rule of property depends has taken root, and become established, it ought to be adhered to by judges until the legislature thinks proper to alter it, lest the new determination should have a retrospective effect, and shake ques-

[2] 5 Burrow, 2732.
[3] 2 Pat. App. 255.
[4] Jones v. Randall, Cowper, 37.
[5] Corbett v. Poelnitz, 1 Term R. 5.
[6] 1 Burrow, 292.

tions already settled; but the reformation of erroneous points of practice could have no such consequences, and might therefore be altered at pleasure when found to be absurd or inconvenient.

Mansfield has been charged with leaning too much to equitable principles, and certainly some of his decisions have been departed from on this ground. It cannot be denied that the amelioration of the common law was to a great extent effected by the introduction into the workings of the elder system of principles developed by its rival. Mansfield, whose practice had been largely in chancery, made no concealment of his preference. He said he never liked the law as much as when it was most like equity. Speaking of actions on the common counts for money had and received and money paid (the means by which much of the improvement of the common law was brought about), he said: "It lies for money paid by mistake, or upon a consideration which happens to fail, or for money got through imposition (express or implied), or extortion, or oppression, or an undue advantage taken of the plaintiff's situation, contrary to laws made for the protection of persons under those circumstances. In one word, the gist of this kind of action is that the defendant, upon the circumstances of the case, is obliged, by the ties of natural justice and equity, to refund the money."[7]

It is obvious from such a statement that the common law had gone far towards adopting the principles of equity. Some two years later Justice Buller, who often sat in equity for Thurlow, expressly compared the action on the common counts to a bill in equity; and therefore, he said, the plaintiff must show that he had equity and conscience on his side.[8] The process, in fact, which Blackstone described as working around him, was continued long after his day, until in many cases, where it granted relief, rather than conducted an administration, and chiefly by the development of the common law in the manner described, the extraordinary jurisdiction of the court of chancery came to be concurrent with that of the courts of common law. A scholar, and well read in the civil law, Mansfield was charged by Junius[9] with the offense of corrupting the simplicity of the common law with principles drawn from the *corpus juris*. His preference for reason, rather than routine, offended the pedants. His learning, also, has been questioned; and perhaps his mind was not deeply imbued with the more recondite knowledge of the profession. So great, however, was the grasp of his intellect, and so lively and quick

[7] Moses v. Macferlan, 2 Burrow, 1012. [8] Straton v. Rastall, 2 Term R. 366.
[9] Letter XLI.

his powers of apprehension, that his sagacity seemed able to dispense with technical learning.

In any consideration of Mansfield's career, much allowance must be made for his admirable method and manner. He had essentially a legal intellect,—clear in thought, accurate in discrimination, sound in judgment, and strong in reasoning power. To an adequate knowledge of jurisprudence, and large experience in the details of practice, he added a remarkable facility in the dispatch of business, and extraordinary powers of application. According to the testimony of Lord Sandwich, "his talents were more for common use, and more at his fingers' ends," than any man of the time. He excelled particularly in exposition,—the principal feature of judicial composition. Burke said that his statement was itself worth the argument of any other man. He arranged the facts in an order so lucid, and with so nice a reference to the conclusion to be founded on them, that his hearers fell into the very train of thought that he wished them to take when they should come to consider his argument, and inclined them to be convinced before they heard it. The observations which followed seemed to suggest trains of thinking, rather than to draw conclusions, and so skillfully did he conceal his art that his hearers thought they formed their opinion in consequence of the workings of their own minds. Omitting all unnecessary ideas, he seized with great acumen on the strong points of a subject, which he held constantly before the mind as he moved toward the desired result. Although he was always impersonal, it was the effect of the most subtle argumentation and refined dialectic. To this he added a rare power of detecting remote analogies,—extracting, by the aid of a refined logic, from the doctrines of our old law, general principles, and applying those principles in the determination of questions unknown in earlier times. The administration of law enlisted all his energies. It appealed to his imagination and his heart, as well as his judgment. "A judge on the bench," he once said to Garrick, "is now and then in your whimsical situation, between tragedy and comedy,—inclination pulling one way, and a long line of precedents another."

Such was his ascendancy over his colleagues, who were by no means insignificant lawyers, that the only case during his long service in which there was an irreconcilable difference of opinion was the case of Perrin v. Blake, in 1769, on the question of literary copyright at common law. Not a single bill of exceptions was ever tendered to his direction, and of his numerous judgments only two were directly reversed. His views on the re-

spective province of the court and jury in cases of criminal libel, and on the validity of general warrants, conflicted with the public sentiment of his time, and brought him into public disfavor, although they were abundantly supported by the authority of his predecessors.[10]

So great was his contemporary reputation that his court was largely attended to hear him deliver judgment, and his judicial opinions were often printed in the newspapers. To law students he was particularly courteous and attentive. Dunning (afterwards Lord Ashburton) once said to Sir Joshua Reynolds: "I can well remember when I used to attend the court of law as a student for instruction; and I always made it a point of going whenever I understood that Mansfield was to speak. This was as great a treat to me, Sir Joshua, as a sight of the finest painting by Titian would be to you." "Ninety-nine times in a hundred he was right," said Thurlow, "and, when once in a hundred he was wrong, ninety-nine men in a hundred could not discover it."

More than a century has gone by since Mansfield finished his labors, but his fame is secure. In the words of Mr. Justice Story's eulogy:

"Wherever commerce shall extend its social influences; wherever justice shall be administered by enlightened and liberal rules; wherever contracts shall be expounded upon the eternal principles of right and wrong; wherever moral delicacy and juridical refinement shall be infused into the municipal code,—the name of Mansfield will be held in reverence. . . . . The maxims of maritime jurisprudence which he engrafted into the stock of the common law are not the exclusive property of a single age or nation, but the common property of all times and all countries. They are built upon the most comprehensive principles and the most enlightened experience of mankind. He designed them to be of universal application, considering, as he himself declared, the maritime law to be, not the law of a particular country, but the general law of nations. . . . . *Non erit alia lex Romae, alia Athenis; alia nunc, alia posthea; sed, et apud omnes gentes et omni tempore, una eademque lex obtinebit.*"

[10] See the cases of Wilkes, Almon, Woodfall, and Miller.

JUDICIAL OPINION IN THE CASE OF THE CHAMBERLAIN OF LONDON AGAINST EVANS, IN THE HOUSE OF LORDS, 1767.

STATEMENT.

This case arose out of an ingenious plan to build a new mansion house for the lord mayor of London at the expense of dissenters. Under the protection of the toleration act, the dissenters had become prosperous and wealthy, and it was proposed to levy contributions upon their wealth by means of a municipal by-law imposing a fine of £600 on any person who should be elected sheriff and decline to serve. Some wealthy dissenter was chosen sheriff, and, as the test and corporation acts rendered him incapable of serving, he was compelled to decline. He was then fined £600, under the by-law. Numerous appointments were thus made, and £15,000 were actually paid in from this source. At length Allan Evans, who had been selected as a victim, refused to pay the fine. In an action by the city to recover the fine, he pleaded his rights under the toleration act, but judgment was rendered against him. On appeal to the court of common pleas, this judgment was reversed, whereupon the city took the case before the house of lords on a writ of error. The judges of the court of king's bench were consulted, and all but one were of the opinion that Evans' plea was a good defense. In moving judgment in the house of lords, Lord Mansfield made the following speech, which is one of the best specimens of his style. It has the characteristics of an argument, rather than a judgment, except that, as an opinion on the case, it assumes an acquaintance with the facts. Judgment was entered in accordance with Lord Mansfield's motion.

OPINION.

My Lords: As I made the motion for taking the opinion of the learned judges, and proposed the question your lordships have been pleased to put to them, it may be expected that I should make some further motion, in consequence of the opinions they have delivered.

In moving for the opinion of the judges, I had two views. The first was that the house might have the benefit of their assistance in forming a right judgment in this cause now before us, upon this writ of error. The next was that, the question being fully discussed, the grounds of our judgment, together with their exceptions, limitations, and restrictions, might be clearly and certainly known, as a rule to be followed hereafter in all future cases of the like nature; and this determined me as to the manner of wording the question, "How far the defendant might, in the present case, be allowed to plead his disability in bar of the action brought against him?"

The question thus worded shows the point upon which your

lordships thought this case turned; and the answer necessarily fixes a criterion under what circumstances, and by what persons, such a disability may be pleaded as an exemption from the penalty inflicted by this by-law upon those who decline taking upon them the office of sheriff.

In every view in which I have been able to consider this matter, I think this action cannot be supported.

1. If they rely on the corporation act, by the literal and express provision of that act no person can be elected who hath not within a year taken the sacrament in the Church of England. The defendant hath not taken the sacrament within a year; he is not, therefore, elected. Here they fail.

If they ground it on the general design of the legislature in passing the corporation act, the design was to exclude dissenters from office, and disable them from serving; for in those times, when a spirit of intolerance prevailed, and severe measures were pursued, the dissenters were reputed and treated as persons ill affected and dangerous to the government. The defendant, therefore, a dissenter, and in the eye of this law a person dangerous and ill affected, is excluded from office and disabled from serving. Here they fail.

If they ground the action on their own by-law, that by-law was professedly made to procure fit and able persons to serve the office; and the defendant is not fit and able, being expressly disabled by statute law. Here, too, they fail.

If they ground it on his disability's being owing to a neglect of taking the sacrament at church when he ought to have done it, the toleration act having freed the dissenters from all obligation to take the sacrament at church, the defendant is guilty of no neglect,—no criminal neglect. Here, therefore, they fail.

These points, my lords, will appear clear and plain.

2. The corporation act, pleaded by the defendant as rendering him ineligible to this office, and incapable of taking it upon him, was most certainly intended by the legislature to prohibit the persons therein described being elected to any corporation offices, and disable them from taking such offices upon them. The act had two parts: First, it appointed a commission for turning out all that were at that time in office who would not comply with what was required as the condition of their continuance therein, and even gave a power to turn them out though they should comply; and then it further enacted that, from the termination of that commission, no person hereafter who had not taken the sacrament according to the rites of the Church of England within one year

preceding the time of such election should be placed, chosen, or elected into any office of or belonging to the government of any corporation; and this was done, as it was expressly declared in the preamble to the act, in order to perpetuate the succession in corporations in the hands of persons well affected to government in church and state.

It was not their design (as hath been said) "to bring such persons into corporations by inducing them to take the sacrament in the Church of England"; the legislature did not mean to tempt persons who were ill affected to the government, occasionally to conform. It was not, I say, their design to bring them in. They could not trust them, lest they should use the power of their offices to distress and annoy the state. And the reason is alleged in the act itself. It was because there were "evil spirits" among them; and they were afraid of evil spirits, and determined to keep them out. They therefore put it out of the power of electors to choose such persons, and out of their power to serve, and accordingly prescribed a mark or character—laid down a description—whereby they should be known and distinguished by their conduct previous to such an election. Instead of appointing a condition of their serving the office, resulting from their future conduct or some consequent action to be performed by them, they declared such persons incapable of being chosen as had not taken the sacrament in the church within a year before such election; and without this mark of their affection to the church they could not be in office, and there could be no election. But as the law then stood, no man could have pleaded this disability, resulting from the corporation act, in bar of such an action as is now brought against the defendant, because this disability was owing to what was then, in the eye of the law, a crime, every man being required by the canon law (received and confirmed by the statute law) to take the sacrament in the church at least once a year. The law would not then permit a man to say that he had not taken the sacrament in the Church of England, and he could not be allowed to plead it in bar of any action brought against him.

3. But the case is quite altered since the act of toleration. It is now no crime for a man who is within the description of that act to say he is a dissenter, nor is it any crime for him not to take the sacrament according to the rites of the Church of England; nay, the crime is if he does it contrary to the dictates of his conscience.

If it is a crime not to take the sacrament at church, it must be a crime by some law, which must be either common or statute

law, the canon law enforcing it being dependent wholly upon the statute law. Now the statute law is repealed as to persons capable of pleading [under the toleration act] that they are so and so qualified, and therefore the canon law is repealed with regard to those persons.

If it is a crime by common law, it must be so either by usage or principle. But there is no usage or custom, independent of positive law, which makes nonconformity a crime. The eternal principles of natural religion are part of the common law. The essential principles of revealed religion are part of the common law; so that any person reviling, subverting, or ridiculing them may be prosecuted at common law. But it cannot be shown, from the principles of natural or revealed religion, that, independent of positive law, temporal punishments ought to be inflicted for mere opinions with respect to particular modes of worship.

Persecution for a sincere, though erroneous, conscience, is not to be deduced from reason or the fitness of things. It can only stand upon positive law.

4. It has been said (a) that "the toleration act only amounts to an exemption of the Protestant dissenters from the penalties of certain laws therein particularly mentioned, and to nothing more; that if it had been intended to bear and to have any operation upon the corporation act, the corporation act ought to have been mentioned therein; and there ought to have been some enacting clause exempting dissenters from prosecution in consequence of this act, and enabling them to plead their not having received the sacrament according to the rites of the Church of England in bar of such action." But this is much too limited and narrow a conception of the toleration act, which amounts consequentially to a great deal more than this; and it hath consequentially an inference and operation upon the corporation act in particular. The toleration act renders that which was illegal before, now legal. The dissenters' way of worship is permitted and allowed by this act. It is not only exempted from punishment, but rendered innocent and lawful. It is established; it is put under the protection, and is not merely under the connivance, of the law. In case those who are appointed by law to register dissenting places of worship refuse on any pretense to do it, we must, upon application, send a *mandamus* to compel them.

Now, there cannot be a plainer position than that the law protects nothing in that very respect in which it is, in the eye of the law, at the same time a crime. Dissenters, within the description of the toleration act, are restored to a legal consideration and ca-

pacity, and a hundred consequences will from thence follow which are not mentioned in the act. For instance, previous to the toleration act, it was unlawful to devise any legacy for the support of dissenting congregations, or for the benefit of dissenting ministers; for the law knew no such assemblies, and no such persons, and such a devise was absolutely void, being left to what the law called "superstitious purposes." But will it be said in any court in England that such a devise is not a good and valid one now? And yet there is nothing said of this in the toleration act. By this act the dissenters are freed, not only from the pains and penalties of the laws therein particularly specified, but from all ecclesiastical censures, and from all penalty and punishment whatsoever, on account of their nonconformity, which is allowed and protected by this act, and is, therefore, in the eye of the law, no longer a crime. Now, if the defendant may say he is a dissenter; if the law doth not stop his mouth; if he may declare that he hath not taken the sacrament according to the rites of the Church of England, without being considered as criminal; if, I say, his mouth is not stopped by the law,—he may then plead his not having taken the sacrament according to the rites of the Church of England in bar of this action. It is such a disability as doth not leave him liable to any action or to any penalty whatsoever.

(b) It is indeed said to be "a maxim in law that a man shall not be allowed to disable himself." But when this maxim is applied to the present case, it is laid down in too large a sense. When it is extended to comprehend a legal disability, it is taken in too great a latitude. What! Shall not a man be allowed to plead that he is not fit and able? These words are inserted in the by-law as the ground of making it, and in the plaintiff's declaration as the ground of his action against the defendant. It is alleged that the defendant was fit and able, and that he refused to serve, not having a reasonable excuse. It is certain, and it is hereby in effect admitted, that if he is not fit and able, and that if he hath a reasonable excuse, he may plead it in bar of this action. Surely he might plead that he was not worth fifteen thousand pounds, provided that was really the case, as a circumstance that would render him not fit and able. And if the law allows him to say that he hath not taken the sacrament according to the rites of the Church of England, being within the description of the toleration act, he may plead that likewise to show that he is not fit and able. It is a reasonable, it is a lawful, excuse.

My lords, the meaning of this maxim, "that a man shall not disable himself," is solely this: that a man shall not disable him-

self by his own willful crime; and such a disability the law will not allow him to plead. If a man contracts to sell an estate to any person upon certain terms at such a time, and in the meantime he sells it to another, he shall not be allowed to say, "Sir, I cannot fulfill my contract. It is out of my power. I have sold my estate to another." Such a plea would be no bar to an action, because the act of his selling it to another is the very breach of contract. So, likewise, a man who hath promised marriage to one lady, and afterward marries another, cannot plead in bar of a prosecution from the first lady that he is already married, because his marrying the second lady is the very breach of promise to the first. A man shall not be allowed to plead that he was drunk, in bar of a criminal prosecution, though perhaps he was at the time as incapable of the exercise of reason as if he had been insane, because his drunkenness was itself a crime. He shall not be allowed to excuse one crime by another. The Roman soldier who cut off his thumbs was not suffered to plead his disability for the service to procure his dismission with impunity, because his incapacity was designedly brought on him by his own willful fault. And I am glad to observe so good an agreement among the judges upon this point, who have stated it with great precision and clearness.

When it was said, therefore, that "a man cannot plead his crime in excuse for not doing what he is by law required to do," it only amounts to this: that he cannot plead in excuse what, when pleaded, is no excuse; but there is not in this the shadow of an objection to his pleading what is an excuse,—pleading a legal disqualification. If he is nominated to be a justice of the peace, he may say, "I cannot be a justice of the peace, for I have not a hundred pounds a year." In like manner, a dissenter may plead, "I have not qualified, and I cannot qualify, and am not obliged to qualify; and you have no right to fine me for not serving."

(c) It hath been said that "the king hath a right to the service of all his subjects." And this assertion is very true, provided it be properly qualified. But surely, against the operation of this general right in particular cases, a man may plead a natural or civil disability. May not a man plead that he was upon the high seas? May not idiocy or lunacy be pleaded, which are natural disabilities; or a judgment of a court of law, and much more a judgment of parliament, which are civil disabilities?

(d) It hath been said to be a maxim that no man can plead his being a lunatic to avoid a deed executed, or excuse an act done, at that time, because, it is said, "if he was a lunatic, he

could not remember any action he did during the period of his insanity"; and this doctrine was formerly laid down by some judges. But I am glad to find that of late it hath been generally exploded. For the reason assigned for it is, in my opinion, wholly insufficient to support it; because, though he could not remember what passed during his insanity, yet he might justly say, if he ever executed such a deed or did such an action, it must have been during his confinement or lunacy, for he did not do it either before or since that time.

As to the case in which a man's plea of insanity was actually set aside, it was nothing more than this: it was when they pleaded *ore tenus;* the man pleaded that he was at the time out of his senses. It was replied, "How do you know that you were out of your senses?" No man that is so, knows himself to be so. And accordingly his plea was, upon this quibble, set aside, not because it was not a valid one, if he was out of his senses, but because they concluded he was not out of his senses. If he had alleged that he was at that time confined, being apprehended to be out of his senses, no advantage could have been taken of his manner of expressing himself, and his plea must have been allowed to be good.

(e) As to Larwood's case, he was not allowed the benefit of the toleration act, because he did not plead it. If he had insisted on his right to the benefit of it in his plea, the judgment must have been different. His inserting it in his replication was not allowed, not because it was not an allegation that would have excused him if it had been originally taken notice of in his plea, but because its being not mentioned till afterward was a departure from his plea.

In the case of the Mayor of Guilford, the toleration act was pleaded. The plea was allowed good, the disability being esteemed a lawful one; and the judgment was right.

And here the defendant hath likewise insisted on his right to the benefit of the toleration act. In his plea he saith he is *bona fide* a dissenter, within the description of the toleration act; that he hath taken the oaths and subscribed the declaration required by that act, to show that he is not a popish recusant; that he hath never received the sacrament according to the rites of the Church of England, and that he cannot in conscience do it; and that for more than fifty years past he hath not been present at church at the celebration of the established worship, but hath constantly received the sacrament and attended divine service among the Protestant dissenters. These facts are not denied by the plaintiff,

though they might easily have been traversed; and it was incumbent upon them to have done it, if they had not known they should certainly fail in it. There can be no doubt, therefore, that the defendant is a dissenter,—an honest, conscientious dissenter; and no conscientious dissenter can take the sacrament at church. The defendant saith he cannot do it, and he is not obliged to do it. And as this is the case, as the law allows him to say this, as it hath not stopped his mouth, the plea which he makes is a lawful plea, his disability being through no crime or fault of his own. I say, he is disabled by act of parliament, without the concurrence or intervention of any fault or crime of his own, and therefore he may plead this disability in bar of the present action.

(f) The case of "atheists and infidels" is out of the present question; they come not within the description of the toleration act. And this is the sole point to be inquired into in all cases of the like nature with that of the defendant, who here pleads the toleration act. Is the man *bona fide* a dissenter, within the description of that act? If not, he cannot plead his disability in consequence of his not having taken the sacrament in the Church of England. If he is, he may lawfully and with effect plead it in bar of such an action; and the question on which this distinction is grounded must be tried by a jury.

(g) It hath been said that, "this being a matter between God and a man's own conscience, it cannot come under the cognizance of a jury." But certainly it may; and though God alone is the absolute judge of a man's religious profession and of his conscience, yet there are some marks even of sincerity, among which there is none more certain than consistency. Surely a man's sincerity may be judged of by overt acts. It is a just and excellent maxim, which will hold good in this as in all other cases, "By their fruits ye shall know them." Do they, I do not say go to meeting now and then, but do they frequent the meeting-house? Do they join generally and statedly in divine worship with dissenting congregations? Whether they do or not may be ascertained by their neighbors, and by those who frequent the same places of worship. In case a man hath occasionally conformed for the sake of places of trust and profit, in that case, I imagine, a jury would not hesitate in their verdict. If a man then alleges he is a dissenter, and claims the protection and the advantages of the toleration act, a jury may justly find that he is not a dissenter, within the description of the toleration act, so far as to render his disability a lawful one. If he takes the sacrament for his inter-

est, the jury may fairly conclude that this scruple of conscience is a false pretense when set up to avoid a burden.

The defendant in the present case pleads that he is a dissenter, within the description of the toleration act; that he hath not taken the sacrament in the Church of England within one year preceding the time of his supposed election, nor ever in his whole life; and that he cannot in conscience do it.

Conscience is not controllable by human laws, nor amenable to human tribunals. Persecution, or attempts to force conscience, will never produce conviction, and are only calculated to make hypocrites or martyrs.

5. My lords, there never was a single instance, from the Saxon times down to our own, in which a man was ever punished for erroneous opinions concerning rites or modes of worship but upon some positive law. The common law of England, which is only common reason or usage, knows of no prosecution for mere opinions. For atheism, blasphemy, and reviling the Christian religion, there have been instances of persons prosecuted and punished upon the common law. But bare nonconformity is no sin by the common law, and all positive laws inflicting any pains or penalties for nonconformity to the established rites and modes are repealed by the act of toleration, and dissenters are thereby exempted from all ecclesiastical censures.

What bloodshed and confusion have been occasioned, from the reign of Henry the Fourth, when the first penal statutes were enacted, down to the Revolution in this kingdom, by laws made to force conscience! There is nothing, certainly, more unreasonable, more inconsistent with the rights of human nature, more contrary to the spirit and precepts of the Christian religion, more iniquitous and unjust, more impolitic, than persecution. It is against natural religion, revealed religion, and sound policy.

Sad experience and a large mind taught that great man, the President De Thou, this doctrine. Let any man read the many admirable things which, though a papist, he hath dared to advance upon the subject, in the dedication of his History to Harry the Fourth of France,—which I never read without rapture,—and he will be fully convinced, not only how cruel, but how impolitic, it is to prosecute for religious opinions. I am sorry that of late his countrymen have begun to open their eyes, see their error, and adopt his sentiments. I should not have broken my heart (I hope I may say it without breach of Christian charity) if France had continued to cherish the Jesuits and to persecute the Huguenots.

There was no occasion to revoke the Edict of Nantes. The Jesuits needed only to have advised a plan similar to what is contended for in the present case,—make a law to render them incapable of office; make another to punish them for not serving. If they accept, punish them (for it is admitted on all hands that the defendant, in the cause before your lordships, is prosecutable for taking the office upon him)—if they accept, punish them; if they refuse, punish them. If they say yes, punish them; if they say no, punish them. My lords, this is a most exquisite dilemma, from which there is no escaping. It is a trap a man cannot get out of; it is as bad persecution as that of Procrustes. If they are too short, stretch them; if they are too long, lop them. Small would have been their consolation to have been gravely told: "The Edict of Nantes is kept inviolable. You have the full benefit of that act of toleration. You may take the sacrament in your own way with impunity. You are not compelled to go to mass." Were this case but told in the city of London as of a proceeding in France, how they would exclaim against the Jesuitical distinction! And yet, in truth, it comes from themselves. The Jesuits never thought of it. When they meant to persecute by their act of toleration, the Edict of Nantes was repealed.

This by-law, by which the dissenters are to be reduced to this wretched dilemma, is a by-law of the city, a local corporation, contrary to an act of parliament, which is the law of the land; a modern by-law of a very modern date, made long since the corporation act, long since the toleration act, in the face of them, for they knew these laws were in being. It was made in some year in the reign of the late king,—I forget which; but it was made about the time of building the mansion house! Now, if it could be supposed the city have a power of making such a by-law, it would entirely subvert the toleration act, the design of which was to exempt the dissenters from all penalties; for by such a by-law they have it in their power to make every dissenter pay a fine of six hundred pounds, or any sum they please, for it amounts to that.

The professed design of making this by-law was to get fit and able persons to serve the office; and the plaintiff sets forth in his declaration that, if the dissenters are excluded, they shall want fit and able persons to serve the office. But, were I to deliver my own suspicion, it would be that they did not so much wish for their services as their fines. Dissenters have been appointed to this office, one who was blind, another who was bed-ridden,—not,

I suppose, on account of their being fit and able to serve the office; no, they were disabled both by nature and by law.

We had a case, lately, in the courts below, of a person chosen mayor of a corporation while he was beyond seas with his majesty's troops in America, and they knew him to be so. Did they want him to serve the office? No; it was impossible. But they had a mind to continue the former mayor a year longer, and to have a pretense for setting aside him who was now chosen, on all future occasions, as having been elected before.

In the case before your lordships, the defendant was by law incapable at the time of his pretended election; and it is my firm persuasion that he was chosen because he was incapable. If he had been capable, he had not been chosen, for they did not want him to serve the office. They chose him because, without a breach of the law and a usurpation on the crown, he could not serve the office. They chose him that he might fall under the penalty of their by-law, made to serve a particular purpose; in opposition to which, and to avoid the fine thereby imposed, he hath pleaded a legal disability, grounded on two acts of parliament. As I am of opinion that his plea is good, I conclude with moving your lordships that the judgment be affirmed.

ANSWER TO THE PRUSSIAN MEMORIAL, 1753.[1]

STATEMENT.

During the maritime war between France and Spain, on one side, and Great Britain and Holland, on the other, which terminated in the Peace of Aix la Chapelle, 1748, a controversy arose between the British and Prussian governments respecting the rights of neutral navigation and commerce. By the treaties of Breslau and Berlin, 1742, in which the province of Silesia had been ceded by Austria to Prussia, Frederick II. assumed the payment of a loan which had been made by certain English merchants to Maria Theresa in 1735, which was secured by a mortgage upon the revenues of that province. During the French war a number of vessels sailing under the Prussian flag, and cargoes claimed by Prussian subjects, under other neutral flags, had been captured and condemned in British prize courts as contraband of war, or as enemy's property. The British government having refused to indemnify the owners of such property, a commission was instituted by Frederick II. in 1751 to examine these claims, in order that they might be satisfied out of the Silesian loan, payment of which had been withheld for that purpose. In the following year this commission assigned to the Prussian claimants the British mortgage upon the revenues of Silesia by way of indemnity for their losses. The reason given for this action was that British cruisers had no right to capture neutral vessels going to or returning from an enemy's port, under the pretext that the cargo, or any part thereof, belonged to the enemies of Great Britain; that the treaties between Great Britain and neutral powers, confirmed by the declaration of the British ministry to Prussian diplomatic agents, had exempted such property from capture; therefore, the British courts of admiralty had proceeded contrary to the law of nations, to treaties, and to this declaration in condemning the property in question. Hence the declaration of the intention to make reprisals.

This declaration by Frederick II. was accompanied by an *Exposition des Motifs,* in which it was stated that, at the beginning of the war, the king had received verbal assurance from the British secretary of state, Lord Carteret, that ships, timber, and naval stores were not considered as contraband, and that Prussian vessels would not be interrupted, provided they were not found carrying munitions of war to the enemy, or provisions to blockaded ports; and that in other respects commerce should remain on the same footing as in time of peace. Prussian commerce was accordingly uninterrupted until 1745, when their vessels carrying ship timber were detained, and subsequently other vessels laden with goods incontestably free were captured. Remonstrances having been made to Lord Chesterfield, the British secretary of state, by the Prussian secretary, resident at London, the latter received, in 1747, a written answer, to the effect that Prussia could not claim the benefit of the special treaties with other neutral powers, but that in other respects there should be no interruption to Prussian navigators carrying on their trade in a lawful manner, conformably to the ancient usage recognized by neutral powers. The *Exposition* then laid down certain propositions of law, which are cited and reviewed in the British answer.

[1] See Wheaton's History of the Law of Nations, 206-217.

This report of the Prussian commission having been communicated to the British government, the whole matter was referred by it to two doctors of the civil law, the attorney general and the solicitor general, of whom the latter, Sir William Murray, prepared the following report.

The controversy was finally adjusted by a declaration, annexed to the treaty of alliance between Great Britain and Prussia in 1756, by which the king of Prussia agreed to remove the sequestration laid upon the Silesian debt, and pay the amounts due to the British creditors, and the British government agreed to pay the sum of £20,000, in extinction of all claims by the Prussian government and its subjects against Great Britain. The latter sum was afterwards paid and distributed among Prussian subjects who had proved their losses under the commission. Great Britain therefore yielded the point in controversy as to reprisals. But the following opinion is a very able exposition of the law of maritime capture as then observed. The Prussian contention for free ship, free goods, was not realized until a century afterwards

OPINION.

To the King's Most Excellent Majesty:

In obedience to your majesty's commands, signified to us by his grace the Duke of Newcastle, we have taken the memorial, sentence of the Prussian commissioners, and lists marked "A" and "B," which were delivered to his grace by Monsieur Michell, the Prussian secretary here, on the 23d of November last; and also the printed *"Exposition des Motifs,"* etc., which was delivered to his grace on the 13th of December last, into our serious consideration. And we have directed the proper officer to search the registers of the court of admiralty, and inform us how the matter appeared from the proceedings there, in relation to the cases mentioned in the said lists A and B, which he has accordingly done. And your majesty having commanded us to report our opinion concerning the nature and regularity of the proceedings under the Prussian commission, mentioned in the said memorial, and of the claim or demand pretended to be founded thereupon, and how far the same are consistent with or contrary to the law of nations, and any treaties subsisting between your majesty and the King of Prussia, the established rules of admiralty jurisdiction, and the laws of this kingdom:

For the greater perspicuity, we beg leave to submit our thoughts upon the whole matter in the following method: First, to state the clear, established principles of law; secondly, to state fact; thirdly, to apply law to the fact; fourthly, to observe upon the questions, rules, and reasonings alleged in the said memorial, sentence of the Prussian commissioners, and *Exposition des Motifs*, etc., which carry the appearance of objections to what we shall advance upon the former heads.

First, as to the law: When two powers are at war, they have a right to make prizes of the ships, goods, and effects of each other upon the high seas. Whatever is the property of the enemy may be acquired by capture at sea; but the property of a friend cannot be taken, provided he observes his neutrality. Hence the law of nations has established that the goods of an enemy on board the ship of a friend may be taken; that the lawful goods of a friend on board the ship of an enemy ought to be restored; that the contraband goods going to the enemy, though the property of a friend, may be taken as prize, because supplying the enemy with what enables him to better carry on the war is a departure from neutrality.

By the maritime law of nations, universally and immemorially received, there is an established method of determination whether the capture be or be not lawful prize. Before the ship or goods can be disposed of by the captor, there must be a regular judicial proceeding, wherein both parties may be heard, and condemnation thereupon as prize, in a court of admiralty, judging by the law of nations and treaties. The proper and regular court for these condemnations is the court of that state to whom the captor belongs.

The evidence to acquit or condemn, with or without costs or damages, must, in the first instance, come merely from the ship taken, viz., the papers on board, and the examination on oath of the master and other principal officers; for which purpose, there are officers of admiralty, in all the considerable seaports of every maritime power at war, to examine the captains and other principal officers of every ship brought in as prize, upon general and impartial interrogatories. If there do not appear from thence ground to condemn as enemy's property or contraband goods going to the enemy, there must be an acquittal, unless, from the aforesaid evidence, the property shall appear so doubtful that it is reasonable to go into further proof thereof.

A claim of ship or goods must be supported by the oath of somebody; at least, as to belief. The law of nations requires good faith; therefore every ship must be provided with complete and genuine papers, and the master, at least, should be privy to the truth of the transaction. To enforce these rules, if there be false or colorable papers; if any papers be thrown overboard; if the master and officers examined *in praeparatorio* grossly prevaricate; if proper ship's papers are not on board; or if the master and crew cannot say whether the ship or cargo be the property of a friend or enemy,—the law of nations allows, according to the different degrees of misbehavior or suspicion arising from the fault of the

ship taken, and other circumstances of the case, costs to be paid or not to be received by the claimant in case of acquittal and restitution. On the other hand, if a seizure is made without probable cause, the captor is adjudged to pay costs and damages; for which purpose, all privateers are obliged to give security for their good behavior, and this is referred to and expressly stipulated by many treaties.[1]

Though, from the ship's papers and the preparatory examinations, the property do not sufficiently appear to be neutral, the claimant is often indulged with time to send over affidavits to supply that defect. If he will not show the property, by sufficient affidavits, to be neutral, it is presumed to belong to the enemy. Where the property appears from evidence not on board the ship, the captor is justified in bringing her in, and excused paying costs, because he is not in fault, or, according to the circumstances of the case, may be justly entitled to receive his costs.

If the sentence of the court of admiralty is thought to be erroneous, there is in every maritime country a superior court of review, consisting of the most considerable persons, to which the parties who think themselves aggrieved may appeal; and this superior court governs by the same rule which governs the court of admiralty, viz., the law of nations, and the treaties subsisting with that neutral power whose subject is a party before them. If no appeal is offered, it is an acknowledgment of the justice of the sentence by the parties themselves, and conclusive.

This manner of trial and adjudication is supported, alluded to, and enforced by many treaties.[2] In this method all captures at sea were tried, during the last war, by Great Britain, France, and Spain, and submitted to by the neutral powers. In this method, by courts of admiralty acting according to the laws of nations and particular treaties, all captures at sea have been immemorially adjudged of in every country of Europe. Any other method of trial would be manifestly unjust, absurd, and impracticable.

Though the law of nations be the general rule, yet it may, by mutual agreement between two powers, be varied or departed from; and where there is an alteration or exception introduced by particular treaties, that is the law between the parties to the treaty, and the law of nations only governs so far as it is not derogated from by the treaty. Thus, by the law of nations, where two powers are at war, all ships are liable to be stopped and examined to whom they belong, and whether they are carrying contraband to

[1] Referring to several treaties.

[2] Referring to several treaties and to Heineccius' Treatise de Navibus ob Vecturam Vetitarum Mercium Commissis, cap. 2, §§ 17, 18.

the enemy; but particular treaties have enjoined a less degree of search on the faith of producing solemn passports and formal evidences of property, duly attested. Particular treaties, too, have inverted the rule of the law of nations, and, by agreement, declared the goods of a friend on board the ship of an enemy to be free, as appears from the treaties already mentioned and many others. So, likewise, by particular treaties, some goods, reputed contraband by the law of nations, are declared to be free.

If a subject of the King of Prussia is injured by, or has a demand upon, any person here, he ought to apply to your majesty's courts of justice, which are equally open and indifferent to foreigner or native. So, *vice versa,* if a subject here is wronged by a person living in the dominions of his Prussian majesty, he ought to apply for redress in the King of Prussia's courts of justice. If the matter of complaint be a capture at sea during war, and the question relative to prize, he ought to apply to the judicatures established to try these questions.

The law of nations, founded upon justice, equity, convenience, and the reason of the thing, and confirmed by long usage, does not allow of reprisals, except in case of violent injuries, directed or supported by the state, and justice absolutely denied, *in re minime dubia,* by all the tribunals, and afterwards by the prince.[3] Where the judges are left free, and give sentence according to their conscience, though it should be erroneous, that would be no ground for reprisals. Upon doubtful questions different men think and judge differently; and all a friend can desire is that justice should be as impartially administered to him as it is to the subjects of that prince in whose courts the matter is tried.

Secondly, as to the fact: It appeared that as to list A, which contained eighteen ships and their cargoes, eight had been restored voluntarily or by sentence, and could not therefore be complained of. As to the four next, the goods must be admitted to have been rightly condemned, either as enemy's property or contraband, for they are not now mentioned in lists A or B. If contraband, the ship could have neither freight nor costs, and the sentences were favorable in restoring the ships upon presumption that the owners of the ships were not acquainted with the nature of the cargo, or owners thereof. If enemy's property, the ships could not be entitled to freight, because the bills of lading were false, and purported the property to belong to Prussians. The ships could not be entitled to costs, because the cargoes, or

[3] Grotius de Jure Belli ac Pacis, lib. 3, cap. 2, §§ 4, 5.

part of them, being lawful prize, the ships were rightly brought in. As the six remaining ships and cargoes were restored, the only question must be upon the paying or not receiving costs, which depends upon the circumstances of the capture, the fairness of the ship's documents, and the conduct of her crew; and neither the Prussian commissioners, the said memorial, nor said *Exposition des Motifs,* etc., alleges a single reason why, upon the particular circumstances of these cases, the sentences were wrong.

[As to list B, which contained thirty-three cases, of which nineteen had been restored:] Every ship on board which the subjects of Prussia claim to have had property was bound to or from a port of the enemy; and many of them appeared clearly to be in part laden with the goods of the enemy, either under their own or fictitious names. In every instance where it is suggested that any part of the cargo belonged to a Prussian subject, though his property did not appear from the ship's papers or preparatory examinations, which it ought to have done, sufficient time was indulged to that Prussian subject to make an affidavit that the property was *bona fide* in him; and the affidavit of the party himself has been received as proof of the property of the Prussian, so as to entitle him to restitution. Where the party will not swear at all, or swears evasively, it is plain he only lends his name to cover the enemy's property, as often came out to be the case beyond the possibility of a doubt. . . . . And so conscious were the claimants that the court of admiralty did right, that there is not an appeal in a single instance in list B, and but one in list A.

Thirdly, to apply the law to the fact: The sixth question in the said *Exposition des Motifs,* etc., states the right of reprisals to be, *"Puisqu'on leur a si long tems denie toute la justice, qu'ils etoient fonds de demander."* The said memorial founds the justice and propriety of his Prussian majesty's having recourse to reprisals, because his subjects *"n'ont pu obtenir jusqu'a present aucune justice des Tribunaux Anglois qu'ils ont reclames, ou du gouvernment auquel ils ont porte leurs plaintes."* And in anan other part of the memorial it is put, *"Apres avoir en vain demande des reparations de ceux qui seuls pouvoient les faire."* The contrary of all which is manifest from the statement and lists hereto annexed. In six of the cases specified, if such captures ever were made, the Prussian subjects were so well satisfied with the restitution made by the captors that they never complained in any court whatsoever of this kingdom. The rest were judged of by a court of admiralty,—the only proper court to decide of captures by sea, both with respect to the restitution and the damages and costs,—

acting according to the law of nations, the only proper rule to decide by. And justice has been done by the court of admiralty so impartially that all the ships alleged in list A to have been Prussian were restored; and all the cargoes mentioned in either list A or B were restored, excepting fifteen, one of which is still undetermined. And in all the cases in both lists, justice was done so entirely to the conviction of the private conscience of the Prussian claimants that they have acquiesced under the sentences, without appealing, except in one single instance, where the part of the sentence complained of was reversed.

Though the Prussian claimants must know that, by the law of nations, they ought not to complain to their own sovereign till injustice, *in re minime dubia,* was finally done them, past redress, and though they must know that this rule of the law of nations held more strongly upon this occasion, because the property of the prize was given to the captors, and ought therefore to be litigated with them, no appeal was taken from the court's determination. The Prussian who, by his own acquiescence, submits to the captors having the prize, cannot afterwards with justice make a demand upon the state. If the sentence was wrong, it is owing to the fault of the Prussian that it was not redressed. But it is not attempted to be shown, even now, that these sentences were unjust, in any part of them, according to the evidence and circumstances appearing before the court of admiralty; and that is the criterion. For, as to the Prussian commission to examine these cases *ex parte,* upon new suggestions, it was never attempted in any country in the world before. Prize or not prize must be determined by courts of admiralty belonging to the power whose subjects make the capture. Every foreign prince in amity has a right to demand that justice shall be done his subjects in those courts, according to the law of nations or particular treaties, where any are subsisting. If, *in re minime dubia,* these courts proceed on foundations directly opposite to the law of nations or subsisting treaties, the neutral state has a right to complain of such determination. But there never was, nor ever can be, any other equitable method of trial. All the maritime nations of Europe have, when at war, from the earliest times, uniformly proceeded in this way, with the approbation of all the powers at peace. Nay, the persons acting under this extraordinary and unheard-of commission from his Prussian majesty do not pretend to say that, in the four cases of goods condemned here, for which satisfaction is demanded in list A, the property really belonged to Prussian subjects. But they profess to proceed upon this prin-

ciple, evidently false: that though these cargoes belonged to the enemy, yet, being on board any neutral ship, they were not liable to inquiry, seizure, or condemnation.

Fourthly. From the questions, rules, reasonings, and matters alleged in the said memorial, sentence of the Prussian commissioners and *Exposition des Motifs,* etc., the following propositions may be drawn, as carrying the appearance of objections to what has above been laid down:

First Proposition. That by the law of nations the goods of an enemy cannot be taken on board the ship of a friend; and this the Prussian commissioners lay down as the basis of all they have pretended to do.

Answer. The contrary is too clear to admit of being disputed. It may be proved by the authority of every writer upon the law of nations; some of different countries are referred to.[4] It may be proved by the constant practice, ancient and modern; but the general rule cannot be more strongly proved than by the exceptions which particular treaties have made to it.[5]

Second Proposition. It is asserted that Lord Carteret, in 1744, by two verbal declarations, gave assurances, in your majesty's name, that nothing on board a Prussian ship should be seized except contraband; consequently, that all effects, not contraband, belonging to the enemy, should be free,—and that these assurances were afterwards confirmed in writing by Lord Chesterfield, the 5th of January, 1747.

Answer. The fact makes this question not very material, because there are but four instances in list A or B where any goods on board a Prussian ship have been condemned; and no satisfaction is pretended to be demanded for any of those four cargoes in lists A and B. However, it may be proper to show how groundless this pretense is.

Taking the words alleged to have been said by Lord Carteret as they are stated, they don't warrant the inferences endeavored to be drawn from them. They import no new stipulation different from the law of nations, but expressly profess to treat the Prussians upon the same foot with the subjects of other neutral powers under like circumstances, *i. e.,* with whom there was no particular treaty. For the reference to other neutral powers cannot be understood to communicate the terms of any particular treaty.

[4] Il Consolato del Mare, cap. 263. Grotius de Jure Belli ac Pacis, lib. 3, cap. 1, § 5, note; Loccenius de Jure Maritimo, lib. 2, cap. 4, § 12; Voet de Jure Militari, cap. 5, nu. 21; Heineccius de Navibus ôb Vecturam Vetitarum Mercium Commissis, cap. 2, § 9; Bynkershaeck Questiones Juris Publici, lib. 1. cap. 14, per totum.

[5] Referring to several treaties, and to Zouch de Judicio inter Gentes, par. 2, § 8, nu. 6.

It is not so said; the treaties with Holland, Sweden, Russia, Portugal, Denmark, etc., all differ. Who can say which was communicated? There would be no reciprocity. The King of Prussia don't agree to be bound by the clauses to which other powers have agreed. No Prussian goods on board an enemy's ship have ever been condemned here; and yet they ought, if the treaties with Holland were to be the rule between Great Britain and Prussia,—nay, if these treaties were to be the rule, all now contended for on the part of Prussia is clearly wrong, because, by the treaty, the Dutch, in the last resort, are to apply to the court of appeal here.[6]

Lord Carteret is said twice to have refused, in which Monsieur Andrie acquiesces, to give anything in writing, as not usual in England. Supposing the conversations to mean no more than a declaration, of course, that justice should be done to Prussians in like manner as to any other neutral power with whom there was no treaty, there was no occasion for instruments in writing, because in England the crown never interferes with the course of justice. No order or intimation is ever given to any judge. Lord Carteret therefore knew that it was the duty of the court of admiralty to do equal justice, and that they would, of themselves, do what he said to Monsieur Andrie. Had it been intended, by agreement, to introduce between Prussia and England any variation in any particular from the law of nations, and, consequently, a new rule for the court of admiralty to decide by, it could only be done by a solemn treaty in writing, properly authorized and authenticated. The memory of it could not otherwise be preserved; the parties interested and the court of admiralty could not otherwise take notice of it.

[Here follows Lord Chesterfield's letter to Monsieur Michell, which in express terms puts Prussia upon the same footing as other neutral powers with whom there was no treaty, and points out that the proper method of redress is by application to the court of admiralty. It is then proved, by reference to many authentic acts, that the subjects of Prussia never understood that any new right was communicated to them.]

Third Proposition. That Lord Carteret, in his said two conversations, specified in your majesty's name what goods should be deemed contraband.

Answer. The fact makes this question totally immaterial, because no goods condemned as contraband, or which were alleged to be so, are so much as now suggested to have been Prussian property in the said lists A and B; and therefore, whether as en-

[6] Citing article 2 of the treaty.

emy's property or contraband, they were either way rightly condemned, and, the bills of lading being false, the ships could not be entitled to freight. But if the question was material, the verbal declarations of a minister in conversation might show what he thought contraband by the law of nations, but never could be understood to be equivalent to a treaty derogating from that law. All the observations upon the other part of these verbal declarations hold equally as to this.

Fourth Proposition. That the British ministers have said that these questions were decided according to the laws of England.

Answer. They must have been misunderstood; for the law of England says that all captures at sea as prize, in time of war, must be judged of in a court of admiralty, according to the law of nations and particular treaties, where there are any. There never existed a case where a court, judging according to the laws of England only, ever took cognizance of prize. The property of prizes being given, during the last war, to the captors, your majesty could not arbitrarily release the capture, but left all cases to the decision of the proper courts, judging by the law of nations and treaties, where there were any; and it never was imagined that the property of a foreign subject, taken as a prize on the high seas, could be affected by laws peculiar to England.

Fifth Proposition. That your majesty could no more erect tribunals for trying these matters than the King of Prussia.

Answer. Each crown has, no doubt, an equal right to erect admiralty courts for the trial of prizes taken by their respective commissioners; but neither has a right to try the prizes taken by the other, or to reverse the sentences given by the other's tribunal. The only regular method of rectifying their errors is by appeal to the superior court. This is the clear law of nations, and by this method prizes have always been determined in every other maritime country of Europe as well as England.

Sixth Proposition. That the sea is free.

Answer. They who maintain that proposition in its utmost extent do not dispute but that, when two powers are at war, they may seize the effects of each other upon the high seas and on board the ships of friends; therefore that controversy is not in the least applicable upon the present occasion.[7]

Seventh Proposition. Great Britain issued reprisals against Spain on account of captures at sea.

[7] This appears from Grotius in the passages above cited, lib. 3, cap. 1, § 5, note, and lib. 3, cap. 6, § 6, note.

Answer. These captures were not made in time of war with any power. They were not judged of by the courts of admiralty according to the law of nations and treaties, but by rules, which were themselves complained of, in revenue courts. The damages were afterwards admitted, liquidated at a certain sum, and agreed to be paid by a convention, which was not performed. Therefore reprisals issued, but they were general. No debts due here to Spaniards were stopped; no Spanish effects were seized. Which leads me to one observation more:

The King of Prussia has engaged his royal word to pay the Silesia debt to private men. It is negotiable, and many parts may have been assigned to the subjects of other powers. It will not be easy to find an instance where a prince has thought fit to make reprisals upon a debt due from himself to private men. There is a confidence that this will not be done. A private man lends money to a prince upon the faith of an engagement of honor, because a prince cannot be compelled, like other men, in an adverse way, by a court of justice. So scrupulously did England, France, and Spain adhere to this public faith that even during the war they suffered no inquiry to be made whether any part of the public debts was due to the subjects of the enemy, though it is certain many English had money in the French funds, and many French had money in ours.

This loan to the late Emperor of Germany, Charles VI., in January, 1734-35, was not a state transaction, but a mere private contract with the lenders, who advanced their money upon the emperor's obliging himself, his heirs and posterity, to pay the principal with interest, at the rate, in the manner, and at the times in the contract mentioned, without any delay, demur, deduction, or abatement whatsoever; and, lest the words and instruments made use of should not be strong enough, he promises to secure the performance of his contract in and by such other instruments, method, manner, form, and words as should be most effectual and valid to bind the said emperor, his heirs, successors, and posterity, or as the lender should reasonably desire. As a specific real security, he mortgaged his revenues arising from the duchies of Upper and Lower Silesia for payment of principal and interest, and the whole debt, principal and interest, was to be discharged in the year 1745. If the money could not be paid out of the revenues of Silesia, the emperor, his heirs and posterity, still remained debtors, and were bound to pay. The eviction or destruction of the thing mortgaged does not extinguish the debt or discharge the debtor.

Therefore the empress-queen, without the consent of the defenders, made it a condition of her yielding the duchies of Silesia to his Prussian majesty, that he should stand in the place of the late emperor in respect of this debt. The seventh of the preliminary articles between the Queen of Hungary and the King of Prussia, signed at Breslau the 11th of June, 1742, is in these words: *"Sa majeste le Roi de Prusse se charge du seul payement de la somme hypotheque sur la Silesie, aux marchans Anglois, selon le contract signe a Londres, le 7me de Janvier, 1734-5."* This stipulation is confirmed by the ninth article of the treaty between their said majesties signed at Berlin the 28th of July, 1742; also renewed and confirmed by the second article of the treaty between their said majesties signed at Dresden the 25th of December, 1745.

In consideration of the empress-queen's cession, his Prussian majesty has engaged to her that he will pay this money *selon le contract,* and consequently has bound himself to stand in the place of the late emperor in respect of this money, to all intents and purposes. The late emperor could not have seized this money as reprisals, or even in case of open war between the two nations, because his faith was engaged to pay it without any delay, demur, deduction, or abatement whatsoever. If these words should not extend to all possible cases, he had plighted his honor to be bound by any other form of words more effectually to pay the money; and therefore he was liable at any time to be called upon to declare expressly that it should not be seized as reprisals, or in case of war, which is very commonly expressed when sovereign princes or states borrow money from foreigners. Therefore, supposing for a moment that his Prussian majesty's complaint was founded in justice and the law of nations, and that he had a right to make reprisals in general, he could not, consistent with his engagements to the empress-queen, seize this money as reprisals. Besides, this whole debt, according to the contract, ought to have been discharged in 1745. It should, in respect of the private creditors, in justice and equity be considered as if the contract had been performed; and the Prussian complaints do not begin till 1746, after the whole debt ought to have been paid.

Upon this principle of natural justice, French ships and effects wrongfully taken after the Spanish war, and before the French war, have, during the heat of the war with France, and since, been restored by sentence of your majesty's courts to the French owners. No such ships or effects were ever attempted to be confiscated as enemy's property here during the war, because, had

it not been for the wrong first done, these effects would not have been in your majesty's dominions. So, had not the contract been first broke by nonpayment of the whole loan in 1745, this money would not have been in his Prussian majesty's hands.

Your majesty's guaranty of these treaties is entire, and must therefore depend upon the same conditions upon which the cession was made by the empress-queen. But this reasoning is in some measure superfluous, because, if the making of any reprisals upon this occasion be unjustifiable,—which we apprehend we have shown,—then it is not disputed that the nonpayment of this money would be a breach of his Prussian majesty's engagements, and a renunciation, on his part, of those treaties.

THOMAS ERSKINE.

[Thomas Erskine, youngest son of Henry David, tenth Earl of Buchan, was born in Edinburgh, January 10, 1750. In 1762, the family, for economical reasons, moved to St. Andrews, where Thomas supplemented his mother's instruction by attendance at grammar school and intermittent studies at the university. In 1764 he left Scotland for the West Indies as midshipman on board the Tartar. The navy was never to his liking, however, and two years later he invested the slender patrimony accruing from the death of his father in a commission in the First Royal Regiment of Foot. In 1770 he married Frances Moore, accompanied by whom he then spent two years with his regiment in Minorca. In 1772 he went to London on a six-months leave. He readily obtained admission to society, where, according to Boswell, he "attracted particular attention by the vivacity, fluency, and precision of his conversation." The young soldier was now seized with a desire to enter the legal profession. Encouraged, probably, by his brother Henry's success in Scotland, Erskine entered forthwith as a student at Lincoln's Inn. In 1776 he matriculated as a gentleman commoner at Trinity College, where he won the college prize for English declamation, and received an honorary M. A. degree in 1778. He studied law, first in the chambers of Buller, and afterwards in those of Wood, with whom he remained until 1779. He was a diligent student, and a constant speaker at the debating societies. At length, after many privations, he was called to the bar July 3, 1778. Within a few months after his call, his effort in defense of Capt. Baillie brought him into prominence. He joined the home circuit, and received many retainers. In 1780 his great speech in defense of Lord Gordon placed him in the front rank at the bar. By 1783 he had surpassed all rivals, and had made £9,000, besides paying all his debts. His professional earnings are said to have reached a total of £150,000. In 1783, at Mansfield's suggestion, he received a silk gown; in the same year he was made attorney general to the Prince of Wales, with whom he was on terms of intimacy. On the formation of the coalition government, he entered parliament as the friend of Fox and Sheridan. His first speech in the house was a failure. It is said that, when Erskine rose to speak, Pitt sat, paper and pen in hand, ready to take notes for a reply, but, as the speech progressed, he appeared to lose interest, and finally threw away his pen. This by-play unnerved Erskine, whose fear of Pitt—from which he never recovered—was, as Fox said, "the flabby part of his character." His subsequent parliamentary efforts added nothing to his reputation; and after actually breaking down, in 1796, in attempting to answer Pitt's great speech on the rupture of the negotiations

with France, he seldom spoke. In 1790 he visited France, and imbibed enthusiasm for the French cause. In this year he was returned to parliament from Portsmouth, a seat which he retained until he became a peer. In the meantime, however, he had reached the height of professional popularity in advocacy of freedom of speech. Such was his strength that, in the exigencies of party politics on the death of Pitt, after the seals had been successively declined by Lord Ellenborough and Sir James Mansfield, they were offered to Erskine, and accepted. The appointment was a poor one, for Erskine's power was altogether forensic; besides, he had never practiced in chancery. But with his natural aptitude, and with the assistance of Hargrave, he made a fair chancellor. In the house of lords he was assisted in the hearing of appeals by Lord Eldon and Lord Redesdale, to whom he usually deferred. His chief judicial act was to preside at the trial of Lord Melville in 1806. The chancellorship was the turning point in Erskine's career. After the dissolution of parliament in 1807, he gradually dropped out of public view. He lived the life of an idler and man about town. Unfortunate investments in America and elsewhere exhausted his fortune. He frequented the scenes of his early triumphs at Westminster Hall, expressing regret that he had ever left the bar. He sought diversion in the composition of a political romance in imitation of More's Utopia. In parliament he gave some feeble assistance to Romilly's great reforms, and he took a popular part in behalf of Queen Caroline; but, estranged from the king, discredited by society, and in poverty, his race was nearly run. At various times he had been accused, apparently without foundation, of taking opium. At some time not ascertainable he married at Gretna Green a Miss Mary Buck. In the autumn of 1823 he started for Scotland to visit his brother, the Earl of Buchan, but was taken ill on the way, and died at the residence of his brother Henry's widow in Almondale, West Lothian, November 17, 1823.]

Erskine's reputation has been materially enhanced by the romance of his early life, and the historical significance of the great causes in which he displayed his highest powers. "I had scarcely a shilling in my pocket when I got my first retainer," he related many years afterwards. "It was sent to me by a Captain Baillie, of the navy, who held an office at the board of Greenwich Hospital; and I was to show cause in the Michaelmas term against a rule that had been obtained in the previous term calling upon him to show cause why a criminal information for a libel reflecting on Lord Sandwich's conduct as governor of that charity should not be filed against him. I had met this Captain Baillie, during the long vacation, at a friend's table, and after dinner I expressed myself with some warmth on the corruption of Lord Sandwich as first lord of the admiralty, and then adverted to the scandalous practices imputed to him with regard to Greenwich Hospital. Baillie nudged the person who sat next to him, and asked who I was. Being told that I had just been called to the bar, and had been formerly in the navy, Baillie exclaimed, with an oath, 'Then I'll have him for my counsel.' I trudged down to Westminster Hall when I got the brief, and being the junior of

five, who would be heard before me, never dreamed that the court would hear me at all. Bearcroft, Peckham, Murphy, and Hargrave were all heard at considerable length, and I was to follow. Hargrave was long-winded, and tired the court. It was a bad omen; but, as my good fortune would have it, he was afflicted with strangury, and was obliged to retire once or twice in the course of his argument. This protracted the cause so long that, when he had finished, Lord Mansfield said that the remaining counsel should be heard the next morning. This was exactly what I wished. I had the whole night to arrange, in my chambers, what I had to say the next morning; and I took the court with their faculties awake and freshened, succeeded quite to my own satisfaction (sometimes the surest proof that you have satisfied others), and as I marched along the hall, after the rising of the judges, the attorneys flocked around me with their retainers. I have since flourished, but I have always blessed God for the providential strangury of poor Hargrave." This very promising beginning, together with his still more extraordinary maiden effort before a jury, two years later, in defense of Lord Gordon, placed Erskine at once in the full tide of professional practice, and from this time until his elevation to the chancellorship in 1806 he was actively engaged in much of the important litigation of the time. His ablest efforts have been well preserved. The best editions of his works contain some two dozen well-reported arguments.

In any consideration of Erskine's work, attention is naturally directed, in the first place, to his efforts in the domain of public law. Two-thirds of his reported speeches deal with treason and libel; it is in these departments of the law that his eloquence attained results which exerted an influence beyond immediate questions of guilt or innocence. The French Revolutionary era naturally produced a ferment in English politics. Every successive measure of precaution or restriction on the part of the government moved the radicals to more outspoken sympathy or fiercer denunciation. The weapons available to the government for the suppression of this freedom of action and of speech were the old statute of treasons, passed in the reign of Edward III., and the law of criminal libel, as formulated by the Star Chamber. A short sketch of the development of the law of treason and libel will be found in the subsequent statements of the cases of Lord Gordon and the Dean of St. Asaph.

For a long time no occasion had arisen for the enforcement of the law of treason, either in imagining the death of the king or

by levying war against him, except in the obvious sense of those terms. The case of Lord Gordon, in 1780, was a sort of preliminary skirmish. Erskine did not take issue with the authorities, but defended on the ground that Lord Gordon had nothing to do with the riots. As, however, Lord Gordon could have been convicted only by means of a strained application of the treason statute with respect to levying war, his acquittal was popularly regarded as a blow at the obnoxious doctrine of constructive treason. The subsequent cases of Hardy and Horne Tooke, in 1794, turned upon another branch of the treason statute,—that of imagining the king's death. In Hardy's case, Erskine did not deny that an intent to depose the king was a fact from which the jury might infer that the death of the king was intended; but, holding to the literal sense of the words, he contended that, unless they did draw such an inference, they could not properly convict the prisoner, even if they thought he had, by an overt act, manifested an intention to depose the king. In the case of Horne Tooke, the doctrine of constructive treason was squarely raised by the instruction of Lord Kenyon that "a jury ought to find that he who means to depose the king compasses and imagines the death of the king." Of course, it is impossible to determine how far the verdict in these cases was due to the failure of the prosecution to establish anything more than a political agitation; but, for practical purposes, the doctrine of constructive treason had been completely discredited. The government took this view of the matter, for in the following year the constructive features of the law of treason were embodied in a supplementary act. Subsequently, by the treason felony act of 1848, all those acts which had been brought under the head of compassing the king's death, except such as were aimed at the person of the sovereign, were converted into felonies.

Erskine began his splendid exertions for free speech in the case of the Dean of St. Asaph, in 1784. In that case, however, Lord Mansfield's restricted views with respect to the province of juries in such cases were sustained. Five years later, Erskine secured the acquittal of Stockdale; and in 1792 his efforts bore fruit in Fox's libel act, by the terms of which the right of the jury to determine upon the guilt of the whole matter was secured. In the same year he hazarded his professional standing by undertaking the defense of Thomas Paine for publishing the Rights of Man. His argument in this case is an elaborate statement of his views of the nature and extent of the liberty of the press, and, although he was unsuccessful in the issue, the principles then maintained

by him have been adopted in our own day. In his view, the criminal intent was the root of the libel; hence one who publishes what he really believes to be true, from a desire to benefit mankind, does not act from a criminal motive, however erroneous and offensive his opinions may be. In other words, there is no guilt unless the publication directly tends to incite crime or attacks individual character. In the stormy times of the last decade of the eighteenth century, however, juries proved to be severe censors of the press, and convictions were as frequent as they had been before the libel act. In 1793, Frost was convicted, despite Erskine's efforts, for saying that he was "for equality and no king"; but in the same year he secured the acquittal of Lambert and Perry, the proprietors of the Morning Chronicle. In 1796, he successfully defended John Reeve, the author of the History of English Law, who was prosecuted for publishing a speculation upon the origin of parliament. In the following year he appeared, for the first time, as a prosecutor, in the case of Williams, the publisher of Thomas Paine's Age of Reason. In this case he developed his view of the limits of public discussion. There can be no doubt that the radical change in public sentiment which has at length rendered the law of political libel almost obsolete was greatly influenced by these arguments of Erskine. The progress in England, it is true, has been gradual. The prosecutions of Hunt and of Moxon, in the last reign, savored strongly of the past. But by a series of legislative enactments, from 1819 to Lord Campbell's act of 1843, the English law of libel has at length been put upon a modern basis.

The remainder of Erskine's speeches cover a wide range of topics. Besides some exhibitions of his well-recognized power in cases of criminal conversation, attention is called to his able effort in defense of Hadfield, in which he expounds with learning and eloquence the nature and limits of insanity as a defense to crime.

Erskine's advocacy won verdicts from juries; it won also, says Wraxall, "the admiration of the great luminaries of the law." His reputation as an advocate has never been surpassed at the English bar, and his greatest arguments continue to be read, with pleasure and profit, wherever English law is administered. Yet his power lay neither in scope and reach of intellect, nor in his store of legal learning, but in the possession, in rare combination, of the various qualities essential to successful advocacy before juries. "To describe Erskine at the bar," as Serjeant Taulford said, "is to ascertain the highest intellectual eminence to which a barrister, under the most favorable circumstances, may aspire.

He had no imaginative power, no great comprehension of intellect, to incumber his progress. Inimitable as pleadings, his corrected speeches supply nothing which, taken apart from its context and occasion, is worthy of a place in the memory. Their most brilliant passages are but commonplace,—exquisitely wrought, and curiously adapted to his design. Had his mind been pregnant with greater things, teeming with beautiful imagery, or, indeed, with wisdom, he would have been less fitted to shed luster on the ordinary feelings and transactions of life."

He was in no sense a learned lawyer. In what may be called his heaviest cause,—on the rule to show cause before the court of king's bench in the Dean of St. Asaph's Case,—he cites only a few obvious authorities; and his pretended historical sketch of trial by jury is given in ignorance of the fundamental fact that jurors were originally witnesses, and not judges at all. Nevertheless, his efforts in the state trials of the time undoubtedly promoted the enactment of new laws, and his twenty-years connection with the maritime and commercial litigation arising out of the French war must have contributed to the results attained by Lord Mansfield in that department of jurisprudence. His ascendancy over Lord Kenyon unquestionably effected an increase in the allowable compensation to injured defendants in cases of criminal conversation. In this class of litigation Erskine especially excelled. He was counsel—generally for the defense—in all the prominent cases of his time, and obtained verdicts for as much as £10,000. So far as he dealt with legal questions, his forte was the statement and argument of legal rules in terms that would appeal to the average juror. This does not always tend to make the argument entertaining reading. In the case of Hardy, where a considerable part of his address deals with the law relating to constructive treason, he does not rest with a clear statement of the law, but proceeds to drive it into the heads of the jurors with an amount of reiteration that makes the speech tiresome to the professional reader. His argument on the jurisdiction of the admiralty, in his defense of Easterby, which is almost wholly disconnected from questions of fact, is a good specimen of his powers; but the only technical argument that can compare with his speech in the Dean of St. Asaph's case, which Fox considered the finest argument in the language, is his defense of Hadfield. Among other good examples of his success in expounding legal principles to laymen, his defense of Cuthell deserves mention.

Erskine's style alone, although a vast improvement on that of his immediate predecessors and contemporaries, would not be suf-

ficient to rescue his work from oblivion. It owes its excellence, not to polish, beauty of diction, richness of ornament, or felicity of illustration,—though never lacking these qualities in some degree,—but rather to its strength, vigor, and fitness to the occasion. He enforces his arguments with an intentness, an earnestness, an energy, often with a vehemence, which seemed to compel conviction. In his longest speeches there is seldom any weakness or falling off; the same animated statement, pointed exposition, and lively argument continue throughout. He shows this skill to fine effect in his defense of Hardy, where the tedious reiteration required to enforce his view of the law is occasionally relieved by reference to collateral topics of lighter character "which obtruded themselves upon his mind from common reading," and by digressions in which he "must express himself as the current of his mind carried him." There is seldom any brilliancy of ornament. Such ornament as his work possesses is invariably that of sentiment, rather than diction; his whole style addresses itself to the reason and passions, rather than to the taste and imagination. In other words, his style is either naturally or consciously adapted to the level of the audience for which it is intended. The only metaphor often quoted from his works occurs in Lord Gordon's case, where, in speaking of malice in crime, he says: "Thus the law, which is made to correct and punish the wickedness of the heart, and not the unconscious deeds of the body, goes up to the fountain of human agency, and arraigns the lurking mischief of the soul, dragging it to light by the evidence of open acts." Still, his remarks on the undue restriction of the press, towards the close of his argument for Stockdale, form a noticeable exception to this characterization. Admirably suited to his purpose, the passage is also, in itself, a fine specimen of amplification.

Although Erskine was a very witty man, he seldom made use in his arguments of either wit or humor. His humorous description of the defendant in Morton v. Fenn,[1] and of the alleged implements of war in Walker's Case,[2] are probably the only attempts of this sort to be found in his works. Occasionally the simplicity of his illustrations produce a humorous effect. Thus, in his speech for Hardy, he was trying to trace the possible workings of the suggestion that a conspiracy to effect a reform in the house of commons by pamphlets and speeches might end in the death

[1] 4 Wks. 263. Reference is made to the four-volume edition of Erskine's speeches edited by James L. High, Esq., and published by Callaghan & Co., Chicago, Ill.
[2] 2 Wks. 301.

of the king, "which pamphlets and speeches might produce universal suffrage, which universal suffrage might eat out and destroy aristocracy, which destruction might lead to the fall of the monarchy, and, in the end, in the death of the king. Gentlemen, if the cause were not too serious, I should liken it to the play with which we amuse our children: This is the cow with the crumpledy horn, which gored the dog, that worried the cat, that ate the rat, etc., ending in the house that Jack built." Considering his audience, his illustrations are few; such as there are spring naturally out of the subject.[3] His celebrated illustration in Stockdale's case [4] is an effective appeal to sentiment. He habitually quoted from Burke,[5] to whom, in spite of unfriendly relations, he freely acknowledged his indebtedness.[6] His frequent references to the Bible and to Milton were always felicitous.[7]

Much of Erskine's strength lay in his combined logical and rhetorical powers. Reference is made to these qualities in combination, because he did not possess either in a superlative degree. If he displayed either in excess of the other, he would seem to have excelled in logical rather than in rhetorical skill. The whole tendency of his mind seems to have been in the direction of straightforward argument. There is comparatively little display in his work of that consummate skill in the selection of the point of view—tact in working along the line of least resistance—which characterizes the work of a really great rhetorician like Cardinal Newman. From Erskine's very first argument, in Captain Baillie's case, to his last great public cause, in behalf of Hadfield, he habitually meets the issue in the simplest and most direct way. Probably the best specimen of his reasoning powers is his clear, well-constructed, and forcible argument (which has been already adverted to) in the case of the Dean of St. Asaph. This argument is based upon five carefully prepared propositions, marshaled in logical sequence towards a fixed conclusion. This skillful arrangement of his materials with reference to fundamental principles constitutes, indeed, his chief merit as a rhetorician. In this respect he habitually displayed, in the most varied materials, truly consummate skill. His materials are always arranged with a primary view to clearness and force. Even in the case of Williams, where the opportunities for analysis were limited, he brings about the same artistic result by sedulous adherence to one fundamental principle, around which his argument revolves. With a faculty

[3] 2 Wks. 149.
[4] 2 Wks. 63.
[5] 2 Wks. 151, 233, 241, 487, 568, 588.
[6] 1 Wks. 498.
[7] 1 Wks. 528.

of such value in the handling of evidence, it is a matter of regret that his published work deals so little with questions of fact. In the cases of the Bishop of Bangor and of the Earl of Thanet, the facts are handled with much skill. The simple facts in the case of Howard v. Bingham are also marshaled with great cleverness. Erskine's masterpiece as a rhetorician, however, is unquestionably his speech for Lord Gordon. One hesitates which to admire most in this wonderful maiden effort before a jury,—the statement of the facts, or the argument of the law. The law is actually argued in three different forms, without the least semblance of conscious repetition,—first, in the abstract; then as applied to the general features of the case; and again, after a review of the evidence, as applied to the specific facts of the case. The method employed in this case may be compared to advantage with that observed in the case of Horne Tooke, where, the legal aspect being more serious, he dwelt upon the subject, as already stated, with somewhat tiresome reiteration. Attention may also be called to the clever arrangement of the preliminary matter in Stockdale's case. His preliminary statement of the case is usually plain and direct; but in the case of the Earl of Thanet he starts out with a persuasive argument on the probabilities before examining the facts of the case. Considering the subjects under discussion, there is surprisingly little emotional eloquence. There is probably more conscious effort at declamation in the cases of Stockdale and Williams than in all his other speeches combined. It is not the least of his merits that he always appears to be sincere; he strikes few false notes.

The marked personality of Erskine had a strong influence upon his work as an advocate. His perfect health, which never failed him for a day during his twenty-seven years' practice, contributed towards a pleasing presence. On the last day of Hardy's trial, although he spoke from 2 p. m. till 9 p. m., and his voice died away to a whisper, his spirits never flagged. Of medium height, his figure is said to have been erect, his movements rapid and graceful, his eye brilliant, and his voice sharp and clear. His habitual high spirits prompted the animation, vigor, and force which contributed so much to his success before juries. His vivacity and good humor were in marked contrast with the asperities of *nisi prius* practice before his time. His wit was proverbial. As often happens in such temperaments, he had, along with a morbid sensibility to expressions of adverse feeling, excessive vanity and inordinate self-esteem. He was caricatured as Counselor Ego, and Baron Ego of Eye. A strong illustration of this

characteristic appears in his absurd and egotistical peroration in the otherwise great argument for the dean of St. Asaph. His paraphrase of the doctrine that godliness is great riches is odd enough, but the whole allusion was rendered absurd by the fact that he had in his pocket two special retainers of three hundred guineas each. Of a similar nature was his constant expression of individual opinion. In Lord Gordon's case he undertakes to justify the habit.[8] In the case of Vint[9] he reprobates the practice, but a few moments later he proceeds to violate his canons. His complacent reference to his college discourse, in the case of Paine, is another illustration of this lack of taste. His *exordia* were often too personal.[10] This egotism seems to have been an invariable characteristic. Byron records in his journal, after dining with Erskine: "He would read his own verses, his own paragraphs, and tell his own stories, again and again; and then trial by jury! I almost wished it abolished, for I sat next him at dinner. As I had read his published speeches, there was no occasion to repeat them to me." It may well be believed that his self-complacency received a crushing blow when, in 1802, on being presented to Napoleon, the latter simply said, "*Etes-vous legiste?*"

Another characteristic is the frequent outburst of religious fervor.[11] This is particularly noticeable in the prosecution of Williams, and he is said to have valued this argument above all his speeches. As there is nothing in Erskine's personal history to indicate that he was by nature or by cultivation a devout Christian, this practice was probably merely an effective outlet for his emotional energies.

After all, it was the mixture of boldness and caution, keen sagacity and severe logic, which made him unrivaled before a jury. When he threw into an argument all his strength, his ardent feelings generally persuaded, where his vigorous reasoning failed to convince.

[8] 1 Wks. 104, 168, 213.
[9] 2 Wks. 365, 369.
[10] 2 Wks. 218; 3 Wks. 1.
[11] 2 Wks. 282, 405, 590; 3 Wks. 13.

ARGUMENT IN DEFENSE OF LORD GORDON, IN THE COURT OF KING'S BENCH, BEFORE LORD CHIEF JUSTICE MANSFIELD AND A SPECIAL JURY, 1781.

STATEMENT.

In Anglo-Saxon times, the king's person, like the king's peace, developed in importance with the growth of the royal power. Originally, the king, like the ordinary freeman, came within the schedule of tariffs by which the value of human life was then measured; the difference was one of degree only. The difference gradually became more marked, until at length offenses against the king's person were punished by death. This was the starting point of the law of treason. The forfeitures resulting from the application of the law offered sufficient inducement to extension, and in the case of Sir John Gerberge, in 1348, it was applied to a case of highway robbery. This vague and unsatisfactory state of the law was at length remedied, in 1352, by the statute of treasons of Edward III., which remained until far into the reign of Queen Victoria the fundamental statement of the English law of treason. This statute declared three things to be treason: (1) Forming and displaying by any overt act an intention to kill the king; (2) levying war against the king; (3) adhering to the king's enemies. A proviso was added that parliament might adjudge as treason any political misdeed not specified in the act, of which a future offender might be convicted. It will be observed that the statute protects nothing but the personal security of the king. No provision is made for acts of political conspiracy, short of open war, to depose the king; and, apart from plots for his assassination, it omits all reference to acts of violence towards the king's person which do not display an intention to take his life. Nothing is said about attempts to depose the king, or about disturbances, however violent, which do not reach the point of actually levying war. Sir James Stephen suggests, in explanation of this omission, that, as the statute was passed when Edward III. was at the height of his power, it enumerated only those crimes likely to be committed against a popular king, who had an undisputed title, and as to the limits of whose power there was no serious dispute.

The omission, however caused, was soon discovered to be fatal, and the defect was remedied in various ways: First, under the proviso of the statute, which, although it allowed parliament to create *ex post facto* treason, was soon superseded by bills of attainder. This was the method pursued against the favorites of Richard II., 1387-88. A second method was by additional legislation, most of which was designed to be only temporary. This was the great weapon of the Tudor kings. During the seventy-years struggle for sovereignty in England between the crown and the pope, this was the natural weapon of the crown to insure the obedience of its subjects. Under Henry VIII., parliament passed nine acts creating new treasons. Four upheld the king's title, as head of the church, against papal power, and the remainder dealt with the king's succession. Similar emergencies in subsequent reigns produced similar acts.

But the main resort for filling the gap in the treason statute was to judicial decisions. By a course of judicial opinion, in which the

words of Edward III.'s act were given wide scope, it was held that a conspiracy to levy war was an overt act of imagining the king's death. This interpretation seems to have been firmly established by the end of Elizabeth's reign, when, in the case of the Earl of Essex (1600), the judges advised the lords that "in every rebellion the law intendeth as a consequent the compassing the death and deprivation of the king." The same principle was applied to expressions of opinion. Thus, although spoken words could not be construed as an overt act, they were held to expound an overt act. But words committed to writing were held to be overt acts. Indeed, under the Stuarts, in the cases of Peacham (1615) and Algernon Sidney (1683), the judges actually placed unpublished writings in the same category. In short, as Sir James Stephen says, the imagining of the king's death was held to include an intention "of anything whatever which, under any circumstances, might possibly have a tendency, however remote, to expose the king to personal danger, or to the forcible deprivation of any part of the authority incidental to his office."

The levying of war against the king in his realm had been construed by the courts in a similar way. According to the wording of the clause, the extent of violence employed did not signify,—provided it was directed against the king, it was treason. The original object was perhaps to distinguish between insurrections and private wars; but when, under the Tudors, the latter ceased, all disturbances were held, of necessity, to be against the king's government. From such a sweeping interpretation, great lawyers like Coke and Hale tried to escape by making a distinction between mere riots and actual rebellion, founded on the object of the disturbance, but their example was not followed, and as late as 1668, in the case of Messenger, a riot of apprentices for the purpose of pulling down houses of bad repute was held to be treason; and in the case of Dammaree, in 1710, the judges treated in a similar manner a charge of destroying dissenting meeting houses in the riots connected with the trial of Dr. Sacheverell.

This far-fetched interpretation, described as constructive treason, was finally brought to a test in the cases of Lord Gordon, Hardy, and Horne Tooke.

The occasion which led to the prosecution of Lord Gordon will be familiar to readers of Dickens' Barnaby Rudge. Lord Gordon, an enthusiastic young Scottish nobleman, had been chosen president of the Protestant Association, whose object was to procure the repeal of Sir George Saville's act in favor of the Catholics. This statute, which simply relieved the Roman Catholic subjects of England from some of the penalties to which they had long been subject, did not apply to Scotland. The winter following its passage, a movement was begun to extend its provisions to Scotland. This produced tumult in Edinburgh, in which some popish chapels and mass houses were destroyed, and further efforts in this direction were abandoned. A great number of Protestant societies were soon formed in Scotland and in England for the purpose of petitioning parliament to repeal Sir George Saville's act, which was represented at their meetings, and branded in their publications, as fraught with danger to the constitution. Their resolutions and petitions were publicly printed and distributed for several months, with a view to influencing parliament. At length, as president of the London Association, Lord Gordon directed the members to meet him in St. George's Fields, and proceed thence to the parliament house with a petition for the repeal of the bill. Accordingly, on the second of June, 1780, about

forty thousand persons, composed mostly of the middle classes, assembled and blocked up all the avenues to the house of commons. They were not armed, and most of them were orderly in their conduct, though individuals among them insulted some members of parliament who were passing into the building, requiring them to put blue cockades on their hats, and to cry, "No popery." Lord Gordon presented the petition, but the house refused, by a vote of 192 to 6, to consider it at that time. The multitude then became disorderly, and the whole affair took a serious turn. Bodies of men proceeded to demolish the Catholic chapels at the residences of the foreign ministers. Desperate men took the lead; the London prisons were broken open and destroyed; thirty-six fires were started at various points during the night; Lord Mansfield's house was destroyed; breweries and distilleries were broken open, and the mob became infuriated with liquor. The government was taken by surprise, and for several days the city was completely in the power of the mob. The militia were at last called in from the country, and the riot put down; not, however, until nearly five hundred persons had been killed or wounded, exclusive of those who perished from the effects of intoxication.

Lord Gordon was promptly arraigned for high treason. The trial came on before Chief Justice Mansfield and a special jury in the court of king's bench. The attorney general appeared for the crown. Lloyd Kenyon (afterwards chief justice) and Thomas Erskine represented the defendant. The prosecution contended that the prisoner, in assembling the multitude round the houses of parliament, if he did so with a view to overawe and intimidate the legislature, and enforce his purposes by numbers and violence, was guilty of treason in levying war against the king in his realm, within the statute of treasons of Edward III.,—a doctrine which was fully confirmed by the court. It was contended, moreover, that the overt acts proved might fairly be construed into such a design, being, in fact, the only evidence by which a traitorous design, in such a case, could be shown. After Kenyon had opened the case for the prisoner, Erskine having claimed the privilege of speaking to the whole evidence, the witnesses for the defense were called. The Rev. Mr. Middleton, a member of the Protestant Association, testified to the prisoner's loyalty to the king and attachment to the constitution; that his speeches at the meetings of the association never contained an expression tending directly or indirectly to a repeal of the bill by force; that he desired the people not even to carry sticks in the procession, and begged that riotous persons might be delivered to the constable. Dr. Evans, an eminent surgeon, declared that he saw the prisoner in St. George's Fields, and that his conduct and expressions indicated that he wished and endeavored to prevent all disorder. This was confirmed by others; and it was proved that the bulk of the people around the parliament house and in the lobby were not members of the association, but idlers, vagabonds, and pickpockets, who had thrust themselves in, so that the persons who had insulted the members were of a totally different class from those who formed the original gathering. The Earl of Lonsdale, who took the prisoner home from the house in his carriage, swore that Lord Gordon, in reply to inquiries from the great multitudes surrounding him as to the fate of the petition, answered that it was uncertain, and earnestly entreated them to retire to their homes and be quiet. It was past midnight when the evidence was all in. Erskine then addressed the jury in the following speech. It will be observed that Erskine did not take issue with the authorities as to

what constituted treason. "If it had been proved," he said, "that the same multitude, under the direction of Lord George Gordon, had afterwards attacked the bank, broke open the prisons, and set London in a conflagration, I should not now be addressing you." In other words, such acts would have been treason by levying war, and actually were so in the case of those who committed them. The defense was that Lord Gordon had nothing to do with the riots, which were, so far as he was concerned, the unintended and unexpected consequences of his imprudent conduct in putting himself at the head of a mob for the purpose of tumultuous petitioning. And Chief Justice Mansfield charged the jury that, "if this multitude assembled with intent, by acts of force and violence, to compel the legislature to repeal the law, it is high treason." The jury withdrew at three o'clock in the morning, and promptly returned with a verdict of not guilty.[1]

Two notable discussions of the doctrine of constructive treason in the United States will be found in the cases of Aaron Burr and Bollman.[2]

ARGUMENT.

Gentlemen of the Jury: Mr. Kenyon having informed the court that we propose to call no other witnesses, it is now my duty to address myself to you as counsel for the noble prisoner at the bar, the whole evidence being closed. I use the word "closed" because it certainly is not finished, since I have been obliged to leave the seat in which I sat to disentangle myself from the volumes of men's names which lay there under my feet, whose testimony, had it been necessary for the defense, would have confirmed all the facts that are already in evidence before you.

Gentlemen, I feel myself entitled to expect, both from you and from the court, the greatest indulgence and attention. I am, indeed, a greater object of your compassion than even my noble friend whom I am defending. He rests secure in conscious innocence, and in the well-placed assurance that it can suffer no stain in your hands. Not so with me. I stand before you a troubled, I am afraid a guilty, man, in having presumed to accept of the awful task which I am now called upon to perform,—a task which my learned friend who spoke before me, though he has justly risen, by extraordinary capacity and experience, to the highest rank in his profession, has spoken of with that distrust and diffidence which becomes every Christian in a cause of blood. If Mr. Kenyon has such feelings, think what mine must be! Alas! gentlemen, who am I? A young man of little experience, unused to the bar of criminal courts, and sinking under the dreadful consciousness of my defects. I have, however, this consolation: that no ignorance nor inattention on my part can possibly prevent you from seeing, under the direction of the judges, that the crowr has established no case of treason.

[1] 21 Howell, St. Tr. 485. [2] 4 Cranch, 75.

Gentlemen, I did expect that the attorney general, in opening a great and solemn state prosecution, would have at least indulged the advocates for the prisoner with his notions on the law, as applied to the case before you, in less general terms. It is very common, indeed, in little civil actions, to make such obscure introductions by way of trap; but in criminal cases it is unusual and unbecoming, because the right of the crown to reply, even where no witnesses are called by the prisoner, gives it thereby the advantage of replying, without having given scope for observations on the principles of the opening, with which the reply must be consistent.

One observation he has, however, made on the subject, in the truth of which I heartily concur, *viz.*, that the crime of which the noble person at your bar stands accused is the very highest and most atrocious that a member of civil life can possibly commit, because it is not, like all other crimes, merely an injury to society from the breach of some of its reciprocal relations, but is an attempt utterly to dissolve and destroy society altogether.

In nothing, therefore, is the wisdom and justice of our laws so strongly and eminently manifested as in the rigid, accurate, cautious, explicit, unequivocal definition of what shall constitute this high offense. For, high treason consisting in the breach and dissolution of that allegiance which binds society together, if it were left ambiguous, uncertain, or undefined, all the other laws established for the personal security of the subject would be utterly useless, since this offense, which, from its nature, is so capable of being created and judged of by the rules of political expediency on the spur of the occasion, would be a rod at will to bruise the most virtuous members of the community whenever virtue might become troublesome or obnoxious to a bad government.

Injuries to the persons and properties of our neighbors, considered as individuals, which are the subjects of all other criminal prosecutions, are not only capable of greater precision, but the powers of the state can be but rarely interested in straining them beyond their legal interpretation. But if treason, where the government is directly offended, were left to the judgment of its ministers, without any boundaries,—nay, without the most broad, distinct, and inviolable boundaries marked out by the law,—there could be no public freedom. The condition of an Englishman would be no better than a slave's at the foot of a sultan, since there is little difference whether a man dies by the stroke of a saber, without the forms of a trial, or by the most pompous ceremonies of justice, if the crime could be made at pleasure by the state to

fit the fact that was to be tried. Would to God, gentlemen of the jury, that this were an observation of theory alone, and that the page of our history was not blotted with so many melancholy, disgraceful proofs of its truth! But these proofs, melancholy and disgraceful as they are, have become glorious monuments of the wisdom of our fathers, and ought to be a theme of rejoicing and emulation to us. For, from the mischiefs constantly arising to the state from every extension of the ancient law of treason, the ancient law of treason has been always restored, and the constitution at different periods washed clean, though, unhappily, with the blood of oppressed and innocent men.

When I speak of the ancient law of treason, I mean the venerable statute of King Edward the Third, on which the indictment you are now trying is framed,—a statute made, as its preamble sets forth, for the more precise definition of this crime, which has not, by the common law, been sufficiently explained,—and consisting of different and distinct members, the plain unextended letter of which was thought to be a sufficient protection to the person and honor of the sovereign, and an adequate security to the laws committed to his execution. I shall mention only two of the number, the others not being in the remotest degree applicable to the present accusation.

First, to compass or imagine the death of the king; such imagination or purpose of the mind (visible only to its great Author) being manifested by some open act; an institution obviously directed, not only to the security of his natural person, but to the stability of the government, since the life of the prince is so interwoven with the constitution of the state that an attempt to destroy the one is justly held to be rebellious conspiracy against the other.

Second (which is the crime charged in the indictment), to levy war against him in his realm,—a term that one would think could require no explanation, nor admit of any ambiguous construction, among men who are willing to read laws according to the plain signification of the language in which they are written, but which has, nevertheless, been an abundant source of that constructive cavil which this sacred and valuable act was made expressly to prevent. The real meaning of this branch of it, as it is bottomed in policy, reason, and justice; as it is ordained in plain, unambiguous words; as it is confirmed by the precedents of justice, and illustrated by the writings of the great lights of the law in different ages of our history,—I shall, before I sit down, impress upon your minds as a safe, unerring standard by which to measure the evidence you have heard. At present I shall only say that, far and

wide as judicial decisions have strained the construction of levying war beyond the warrant of the statute, to the discontent of some of the greatest ornaments of the profession, they hurt not me. As a citizen I may disapprove of them, but as advocate for the noble person at your bar I need not impeach their authority. For none of them have said more than this: "That war may be levied against the king in his realm, not only by an insurrection to change or to destroy the fundamental constitution of the government itself by rebellious war, but, by the same war, to endeavor to suppress the execution of the laws it has enacted, or to violate and overbear the protection they afford, not to individuals (which is a private wrong), but to any general class or description of the community, by premeditated, open acts of violence, hostility, and force."

Gentlemen, I repeat these words, and call solemnly on the judges to attend to what I say, and to contradict me if I mistake the law: "By premeditated, open acts of violence, hostility, and force,"—nothing equivocal, nothing ambiguous, no intimidations or overawings, which signify nothing precise or certain (because what frightens one man or set of men may have no effect upon another), but that which compels and coerces,—open violence and force.

Gentlemen, this is not only the whole text, but, I submit it to the learned judges, under whose correction I am happy to speak, an accurate explanation of the statute of treason, as far as it relates to the present subject, taken in its utmost extent of judicial construction, and which you cannot but see, not only in its letter, but in its most strained signification, is confined to acts which immediately, openly, and unambiguously strike at the very root and being of government, and not to any other offenses, however injurious to its peace.

Such were the boundaries of high treason marked out in the reign of Edward the Third; and as often as the vices of bad princes, assisted by weak, submissive parliaments, extended state offenses beyond the strict letter of that act, so often the virtue of better princes and wiser parliaments brought them back again. A long list of new treasons, accumulated in the wretched reign of Richard the Second, from which (to use the language of the act that repealed them) "no man knew what to do or say for doubt of the pains of death," were swept away in the first year of Henry the Fourth, his successor; and many more, which had again sprung up in the following distracted arbitrary reigns, putting tumults and riots on a footing with armed rebellion, were again leveled in the first year of Queen Mary, and the statute of Edward made

once more the standard of treasons. The acts, indeed, for securing his present majesty's illustrious house from the machinations of those very papists who are now so highly in favor, have, since that time, been added to the list. But these not being applicable to the present case, the ancient statute is still our only guide, which is so plain and simple in its object—so explicit and correct in its terms—as to leave no room for intrinsic error; and the wisdom of its authors has shut the door against all extension of its plain letter, declaring, in the very body of the act itself, that nothing out of that plain letter should be brought within the pale of treason by inference or construction, but that, if any such cases happened, they should be referred to the parliament.

This wise restriction has been the subject of much just eulogium by all the most celebrated writers on the criminal law of England. Lord Coke says the parliament that made it was on that account called "benedictum," or "blessed"; and the learned and virtuous Judge Hale, a bitter enemy and opposer of constructive treason, speaks of this sacred institution with that enthusiasm which it cannot but inspire in the breast of every lover of the just privileges of mankind.

Gentlemen, in these mild days, when juries are so free and judges so independent, perhaps all these observations might have been spared as unnecessary; but they can do no harm, and this history of treason, so honorable to England, cannot (even imperfectly as I have given it) be unpleasant to Englishmen. At all events, it cannot be thought an inapplicable introduction to saying that Lord George Gordon, who stands before you indicted for that crime, is not—cannot be—guilty of it, unless he has levied war against the king in his realm, contrary to the plain letter, spirit, and intention of the act of the twenty-fifth of Edward the Third, —to be extended by no new or occasional construction, to be strained by no fancied analogies, to be measured by no rules of political expediency, to be judged of by no theory, to be determined by the wisdom of no individual, however wise, but to be expounded by the simple, genuine letter of the law.

Gentlemen, the only overt act charged in the indictment is the assembling the multitude, which we all of us remember went up with the petition of the Associated Protestants on the second day of last June. In addressing myself to a humane and sensible jury of Englishmen, sitting in judgment on the life of a fellow citizen, more especially under the direction of a court so filled as this is, I trust I need not remind you that the purposes of that multitude, as originally assembled on that day, and the purposes and acts of

him who assembled them, are the sole objects of investigation. All the dismal consequences which followed, and which naturally link themselves with this subject in the firmest minds, must be altogether cut off, and abstracted from your attention, further than the evidence warrants their admission. If the evidence had been coextensive with these consequences—if it had been proved that the same multitude, under the direction of Lord George Gordon, had afterwards attacked the bank, broke open the prisons, and set London in a conflagration,—I should not now be addressing you. Do me the justice to believe that I am neither so foolish as to imagine I could have defended him, nor so profligate to wish it if I could. But when it has appeared, not only by the evidence in the cause, but by the evidence of the thing itself,—by the issues of life, which may be called the evidence of Heaven,—that these dreadful events were either entirely unconnected with the assembling of that multitude to attend the petition of the Protestants, or, at the very worst, the unforeseen, undesigned, unabetted, and deeply-regretted consequences of it, I confess the seriousness and solemnity of this trial sink and dwindle away. Only abstract from your minds all that misfortune, accident, and the wickedness of others have brought upon the scene, and the cause requires no advocate. When I say that it requires no advocate, I mean that it requires no argument to screen it from the guilt of treason. For though I am perfectly convinced of the purity of my noble friend's intentions, yet I am not bound to defend his prudence, nor to set it up as a pattern for imitation, since you are not trying him for imprudence, for indiscrete zeal, or for want of foresight and precaution, but for a deliberate and malicious predetermination to overpower the laws and government of his country by hostile, rebellious force.

The indictment, therefore, first charges that the multitude assembled on the second of June "were armed and arrayed in a warlike manner," which, indeed, if it had omitted to charge, we should not have troubled you with any defense at all, because no judgment could have been given on so defective an indictment; for the statute never meant to put an unarmed assembly of citizens on a footing with armed rebellion, and the crime, whatever it is, must always appear on the record to warrant the judgment of the court.

It is certainly true that it has been held to be matter of evidence, and dependent on circumstances, what numbers, or species of equipment and order, though not the regular equipment and order of soldiers, shall constitute an army, so as to maintain the

averment in the indictment of a warlike array; and, likewise, what kind of violence, though not pointed at the king's person, or the existence of the government, shall be construed to be war against the king. But as it has never yet been maintained in argument, in any court of the kingdom, or even speculated upon in theory, that a multitude, without either weapons, offensive or defensive, of any sort or kind, and yet not supplying the want of them by such acts of violence as multitudes sufficiently great can achieve without them, was a hostile army, within the statute; as it has never been asserted by the wildest adventurer in constructive treason that a multitude, armed with nothing, threatening nothing, and doing nothing, was an army levying war,—I am entitled to say that the evidence does not support the first charge in the indictment, but that, on the contrary, it is manifestly false,—false in the knowledge of the crown, which prosecutes it; false in the knowledge of every man in London who was not bedridden on Friday, the 2d of June, and who saw the peaceable demeanor of the Associated Protestants.

But you will hear, no doubt, from the solicitor general (for they have saved all their intelligence for the reply), that fury supplies arms,—*Furor arma ministrat,*—and the case of Damaree[1] will, I suppose, be referred to, where the people assembled had no banners or arms, but only clubs and bludgeons, yet the ringleader, who led them on to mischief, was adjudged to be guilty of high treason for levying war. This judgment it is not my purpose to impeach, for I have no time for digression to points that do not press upon me. In the case of Damaree, the mob, though not regularly armed, were provided with such weapons as best suited their mischievous designs. Their designs were, besides, open and avowed, and all the mischief was done that could have been accomplished if they had been in the completest armor. They burned dissenting meeting-houses protected by law, and Damaree was taken at their head, *in flagrante delicto,* with a torch in his hand, not only in the very act of destroying one of them, but leading on his followers, in person, to the avowed destruction of all the rest. There could, therefore, be no doubt of his purpose and intention, nor any great doubt that the perpetration of such purpose was, from its generality, high treason, if perpetrated by such a force as distinguishes a felonious riot from a treasonable levying of war. The principal doubt, therefore, in

[1] A mob assembled for the purpose of destroying all the Protestant dissenting meeting houses, and actually pulled down two. 8 State Trials, 218.

that case, was whether such an unarmed, riotous force was war, within the meaning of the statute, and on that point very learned men have differed; nor shall I attempt to decide between them, because in this one point they all agree. Gentlemen, I beseech you to attend to me here. I say on this point they all agree: that it is the intention of assembling them which forms the guilt of treason. I will give you the words of high authority, the learned Foster, whose private opinions will, no doubt, be pressed upon you as a doctrine and law, and which, if taken together, as all opinions ought to be, and not extracted in smuggled sentences to serve a shallow trick, I am contented to consider as authority.

That great judge, immediately after supporting the case of Damaree as a levying war, within the statute, against the opinion of Hale in a similar case, namely, the destruction of bawdy houses, which happened in his time, says: "The true criterion, therefore, seems to be, *quo animo* did the parties assemble?—with what intention did they meet?" On that issue, then, in which I am supported by the whole body of the criminal law of England, concerning which there are no practical precedents of the courts that clash, nor even abstract opinions of the closet that differ, I come forth with boldness to meet the crown. For, even supposing that peaceable multitude, though not hostilely arrayed; though without one species of weapon among them; though assembled without plot or disguise by a public advertisement, exhorting, nay, commanding, peace, and inviting the magistrates to be present to restore it, if broken; though composed of thousands who are now standing around you, unimpeached and unreproved, yet who are all principals in treason, if such assembly was treason,—supposing, I say, this multitude to be, nevertheless, an army, within the statute, still the great question would remain behind, on which the guilt or innocence of the accused must singly depend, and which it is your exclusive province to determine, namely, whether they were assembled by my noble client for the traitorous purpose charged in the indictment. For war must not only be levied, but it must be levied against the king in his realm, *i. e.*, either directly against his person to alter the constitution of the government, of which he is the head, or to suppress the laws committed to his execution by rebellious force. You must find that Lord George Gordon assembled these men with that traitorous intention. You must find not merely a riotous, illegal petitioning; not a tumultuous, indecent importunity to influence parliament; not the compulsion of motive from seeing so great a body of people united

equivocal compulsion of force, from the hostile acts of numbers united in rebellious conspiracy and arms.

This is the issue you are to try, for crimes of all denominations consist wholly in the purpose of the human will producing the act. "*Actus non facit reum nisi mens sit rea,*"—the act does not constitute guilt unless the mind be guilty. This is the great text from which the whole moral of penal justice is deduced. It stands at the top of the criminal page throughout all the volumes of our humane and sensible laws, and Lord Chief Justice Coke, whose chapter on this crime is the most authoritative and masterly of all his valuable works, ends almost every sentence with an emphatical repetition of it.

The indictment must charge an open act, because the purpose of the mind, which is the object of trial, can only be known by actions. Or, again to use the words of Foster, who has ably and accurately expressed it: "The traitorous purpose is the treason; the overt act, the means made use of to effectuate the intentions of the heart." But why should I borrow the language of Foster, or of any other man, when the language of the indictment itself is lying before our eyes? What does it say? Does it directly charge the overt act as in itself constituting the crime? No; it charges that the prisoner "maliciously and traitorously did compass, imagine, and intend to raise and levy war and rebellion against the king,"—this is the malice prepense of treason,—and that, to fulfill and bring to effect such traitorous compassings and intentions, he did, on the day mentioned in the indictment, actually assemble them, and levy war and rebellion against the king. Thus the law, which is made to correct and punish the wickedness of the heart, and not the unconscious deeds of the body, goes up to the fountain of human agency, and arraigns the lurking mischief of the soul, dragging it to light by the evidence of open acts. The hostile mind is the crime; and therefore, unless the matters that are in evidence before you do, beyond all doubt or possibility of error, convince you that the prisoner is a determined traitor in his heart, he is not guilty.

It is the same principle which creates all the various degrees of homicide, from that which is excusable to the malignant guilt of murder. The fact is the same in all. The death of the man is the imputed crime; but the intention makes all the difference, and he who killed him is pronounced a murderer—a simple felon—or only an unfortunate man, as the circumstances, by which his mind has been deciphered to the jury, show it to have been cankered by deliberate wickedness, or stirred up by sudden passions.

Here an immense multitude was, beyond all doubt, assembled on the second of June. But whether he that assembled them be guilty of high treason, of a high misdemeanor, or only of a breach of the act of King Charles the Second against tumultuous petitioning (if such an act still exists), depends wholly upon the evidence of his purpose in assembling them, to be gathered by you, and by you alone, from the whole tenor of his conduct; and to be gathered, not by inference or probability or reasonable presumption, but, in the words of the act, provably,—that is, in the full, unerring force of demonstration. You are called, upon your oaths, to say, not whether Lord George Gordon assembled the multitudes in the place charged in the indictment, for that is not denied, but whether it appears, by the facts produced in evidence for the crown when confronted with the proofs which we have laid before you, that he assembled them in hostile array and with a hostile mind, to take the laws into his own hands by main force, and to dissolve the constitution of the government unless his petition should be listened to by parliament. That is your exclusive province to determine. The court can only tell you what acts the law, in its general theory, holds to be high treason, on the general assumption that such acts proceed from traitorous purposes; but they must leave it to your decision, and to yours alone, whether the acts proved appear, in the present instance, under all the circumstances, to have arisen from the causes which form the essence of this high crime.

Gentlemen, you have now heard the law of treason,—first, in the abstract, and, secondly, as it applies to the general features of the case,—and you have heard it with as much sincerity as if I had addressed you upon my oath from the bench where the judges sit. I declare to you solemnly, in the presence of that great Being at whose bar we must all hereafter appear, that I have used no one art of an advocate, but have acted the plain, unaffected part of a Christian man, instructing the consciences of his fellow citizens to do justice. If I have deceived you on this subject, I am myself deceived; and if I am misled through ignorance, my ignorance is incurable, for I have spared no pains to understand it. I am not stiff in opinions, but, before I change any of those that I have given you to-day, I must see some direct monument of justice that contradicts them; for the law of England pays no respect to theories, however ingenious, or to authors, however wise, and therefore, unless you hear me refuted by a series of direct precedents, and not by vague doctrine, if you wish to sleep in peace, follow me.

And now the most important part of our task begins, namely, the application of the evidence to the doctrines I have laid down; for trial is nothing more than the reference of facts to a certain rule of action, and a long recapitulation of them only serves to distract and perplex the memory, without enlightening the judgment, unless the great standard principle by which they are to be measured is fixed and rooted in the mind. When that is done (which I am confident has been done by you) everything worthy of observation falls naturally into its place, and the result is safe and certain.

Gentlemen, it is already in proof before you (indeed, it is now a matter of history) that an act of parliament passed in the session of 1778 for the repeal of certain restrictions which the policy of our ancestors had imposed upon the Roman Catholic religion to prevents its extension, and to render its limited toleration harmless,—restrictions imposed, not because our ancestors took upon them to pronounce that faith to be offensive to God, but because it was incompatible with good faith to man, being utterly inconsistent with allegiance to a Protestant government, from their oaths and obligations, to which it gave them not only a release, but a crown of glory, as the reward of treachery and treason.

It was, indeed, with astonishment that I heard the attorney general stigmatize those wise regulations of our patriot ancestors with the title of "factious and cruel impositions on the consciences and liberties of their fellow citizens." Gentlemen, they were, at the time, wise and salutary regulations; regulations to which this country owes its freedom, and his majesty his crown,—a crown which he wears under the strict entail of professing and protecting that religion which they were made to repress, and which I know my noble friend at the bar joins with me, and with all good men, in wishing that he and his posterity may wear forever.

It is not my purpose to recall to your minds the fatal effects which bigotry has, in former days, produced in this island. I will not follow the example the crown has set me, by making an attack upon your passions on subjects foreign to the object before you. I will not call your attention from those flames, kindled by a villainous banditti (which they have thought fit, in defiance of evidence, to introduce), by bringing before your eyes the more cruel flames in which the bodies of our expiring, meek, patient, Christian fathers were, little more than a century ago, consuming in Smithfield. I will not call up from the graves of martyrs all the precious, holy blood that has been spilled in this land to save its established government and its reformed religion from the

secret villainy and the open force of papists. The cause does not stand in need even of such honest arts; and I feel my heart too big voluntarily to recite such scenes, when I reflect that some of my own, and my best and dearest, progenitors, from whom I glory to be descended, ended their innocent lives in prisons and in exile, only because they were Protestants.

Gentlemen, whether the great lights of science and of commerce, which, since those disgraceful times, have illuminated Europe, may, by dispelling these shocking prejudices, have rendered the papists of this day as safe and trusty subjects as those who conform to the national religion established by law, I shall not take upon me to determine. It is wholly unconnected with the present inquiry. We are not trying a question either of divinity or civil policy, and I shall therefore not enter at all into the motives or merits of the act that produced the Protestant petition to parliament. It was certainly introduced by persons who cannot be named by any good citizen without affection and respect. But this I will say, without fear of contradiction, that it was sudden and unexpected; that it passed with uncommon precipitation, considering the magnitude of the object; that it underwent no discussion; and that the heads of the church—the constitutional guardians of the national religion—were never consulted upon it. Under such circumstances, it is no wonder that many sincere Protestants were alarmed; and they had a right to spread their apprehensions. It is the privilege and the duty of all the subjects of England to watch over their religious and civil liberties, and to approach either their representatives or the throne with their fears and their complaints,—a privilege which has been bought with the dearest blood of our ancestors, and which is confirmed to us by law, as our ancient birthright and inheritance.

Soon after the repeal of the act, the Protestant Association began, and, from small beginnings, extended over England and Scotland. A deed of association was signed, by all legal means to oppose the growth of popery; and which of the advocates for the crown will stand up and say that such a union was illegal? Their union was perfectly constitutional; there was no obligation of secrecy; their transactions were all public; a committee was appointed for regularity and correspondence; and circular letters were sent to all the dignitaries of the church, inviting them to join with them in the protection of the national religion.

All this happened before Lord George Gordon was a member of, or the most distantly connected with, it, for it was not till November, 1779, that the London Association made him an offer

of their chair, by a unanimous resolution, communicated to him, unsought and unexpected, in a public letter, signed by the secretary in the name of the whole body; and from that day to the day he was committed to the Tower I will lead him by the hand in your view, that you may see there is no blame in him. Though all his behavior was unreserved and public, and though watched by wicked men for purposes of vengeance, the crown has totally failed in giving it such a context as can justify, in the mind of any reasonable man, the conclusion it seeks to establish.

This will fully appear hereafter; but let us first attend to the evidence on the part of the crown.

The first witness to support this prosecution is William Hay,—a bankrupt in fortune he acknowledges himself to be, and I am afraid he is a bankrupt in conscience. Such a scene of impudent, ridiculous inconsistency would have utterly destroyed his credibility in the most trifling civil suit, and I am therefore almost ashamed to remind you of his evidence, when I reflect that you will never suffer it to glance across your minds on this solemn occasion.

This man, whom I may now, without offense or slander, point out to you as a dark, popish spy, who attended the meetings of the London Association to pervert their harmless purposes, conscious that the discovery of his character would invalidate all his testimony, endeavored at first to conceal the activity of his zeal by denying that he had seen any of the destructive scenes imputed to the Protestants. Yet, almost in the same breath, it came out, by his own confession, that there was hardly a place, public or private, where riot had erected her standard, in which he had not been; nor a house, prison, or chapel that was destroyed, to the demolition of which he had not been a witness. He was at Newgate, the Fleet, at Langdale's, and at Coleman street; at the Sardinian embassador's, and in Great Queen street, Lincoln's Inn Fields. What took him to Coachmakers' Hall? He went there, as he told us, to watch their proceedings, because he expected no good from them; and to justify his prophecy of evil, he said, on his examination by the crown, that, as early as December, he had heard some alarming republican language. What language did he remember? "Why, that the lord advocate of Scotland was called only Harry Dundas!" Finding this too ridiculous for so grave an occasion, he endeavored to put some words about the breach of the king's coronation oath into the prisoner's mouth, as proceeding from himself, which it is notorious he read out of an

old Scotch book, published near a century ago, on the abdication of King James the Second.

Attend to his cross-examination. He was sure he had seen Lord George Gordon at Greenwood's room in January; but when Mr. Kenyon, who knew Lord George had never been there, advised him to recollect himself, he desired to consult his notes. First, he is positively sure, from his memory, that he had seen him there; then he says he cannot trust his memory without referring to his papers. On looking at them, they contradict him, and he then confesses that he never saw Lord George Gordon at Greenwood's room in January, when his note was taken, nor at any other time. But why did he take notes? He said it was because he foresaw what would happen. How fortunate the crown is, gentlemen, to have such friends to collect evidence by anticipation! When did he begin to take notes? He said on the 21st of February, which was the first time he had been alarmed at what he had seen and heard, although, not a minute before, he had been reading a note taken at Greenwood's room in January, and had sworn that he had attended their meetings, from apprehensions of consequences, as early as December.

Mr. Kenyon, who now saw him bewildered in a maze of falsehood, and suspecting his notes to have been a villainous fabrication to give the show of correctness to his evidence, attacked him with a shrewdness for which he was wholly unprepared. You remember the witness had said that he always took notes when he attended any meetings where he expected their deliberations might be attended with dangerous consequences. "Give me one instance," says Mr. Kenyon, "in the whole course of your life, where you ever took notes before." Poor Mr. Hay was thunderstruck; the sweat ran down his face, and his countenance bespoke despair, not recollection. "Sir, I must have an instance; tell me when and where?" Gentlemen, it was now too late. Some instance he was obliged to give, and, as it was evident to everybody that he had one still to choose, I think he might have chosen a better. "He had taken notes at the general assembly of the Church of Scotland, six-and-twenty years before!" What! did he apprehend dangerous consequences from the deliberations of the grave elders of the kirk? Were they levying war against the king? At last, when he is called upon to say to whom he communicated the intelligence he had collected, the spy stood confessed indeed. At first he refused to tell, saying he was his friend, and that he was not obliged to give him up; and when forced at last to speak, it came out to be Mr. Butler, a gentleman universally known, and

who, from what I know of him, I may be sure never employed him, or any other spy, because he is a man every way respectable, but who certainly is not only a papist, but the person who was employed in all their proceedings, to obtain the late indulgences from parliament.[2] He said Mr. Butler was his particular friend, yet professed himself ignorant of his religion. I am sure he could not be desired to conceal it. Mr. Butler makes no secret of his religion. It is no reproach to any man who lives the life he does. But Mr. Hay thought it of moment to his own credit in the cause that he himself might be thought a Protestant, unconnected with papists, and not a popish spy.

So ambitious, indeed, was the miscreant of being useful in this odious character, through every stage of the cause, that, after staying a little in St. George's Fields, he ran home to his own house in St. Dunstan's Churchyard, and got upon the leads, where he swore he saw the very same man carrying the very same flag he had seen in the Fields. Gentlemen, whether the petitioners employed the same standard man through the whole course of their peaceable procession is certainly totally immaterial to the cause, but the circumstance is material to show the wickedness of the man. "How," says Mr. Kenyon, "do you know that it was the same person you saw in the Fields? Were you acquainted with him?" "No." "How then?" "Why, he looked like a brewer's servant." Like a brewer's servant! "What, were they not all in their Sunday's clothes?" "Oh, yes; they were all in their Sunday's clothes." "Was the man with the flag then alone in the dress of his trade?" "No." "Then how do you know he was a brewer's servant?" Poor Mr. Hay! Nothing but sweat and confusion again! At last, after a hesitation, which everybody thought would have ended in his running out of court, he said "he knew him to be a brewer's servant, because there was something particular in the cut of his coat, the cut of his breeches, and the cut of his stockings!"

You see, gentlemen, by what strange means villainy is detected. Perhaps he might have escaped from me, but he sank under that shrewdness and sagacity which ability, without long habits, does not provide. Gentlemen, you will not, I am sure, forget, whenever you see a man about whose apparel there is anything particular, to set him down for a brewer's servant.

Mr. Hay afterwards went to the lobby of the house of commons. What took him there? He thought himself in danger; and there-

[2] Mr. Charles Butler, author of the Reminiscences.

fore, says Mr. Kenyon, "you thrust yourself voluntarily into the very center of danger." That would not do. Then he had a particular friend, whom he knew to be in the lobby, and whom he apprehended to be in danger. "Sir, who was that particular friend? Out with it! Give us his name instantly!" All in confusion again. Not a word to say for himself; and the name of this person who had the honor of Mr. Hay's friendship will probably remain a secret forever.

It may be asked, Are these circumstances material? and the answer is obvious: They are material, because, when you see a witness running into every hole and corner of falsehood, and, as fast as he is made to bolt out of one, taking cover in another, you will never give credit to what that man relates as to any possible matter which is to affect the life or reputation of a fellow citizen accused before you. God forbid that you should! I might, therefore, get rid of this wretch altogether without making a single remark on that part of his testimony which bears upon the issue you are trying; but the crown shall have the full benefit of it all. I will defraud it of nothing he has said. Notwithstanding all his folly and wickedness, let us for the present take it to be true, and see what it amounts to. What is it he states to have passed at Coachmakers' Hall? That Lord George Gordon desired the multitude to behave with unanimity and firmness, as the Scotch had done. Gentlemen, there is no manner of doubt that the Scotch behaved with unanimity and firmness in resisting the relaxation of the penal laws against papists, and that by that unanimity and firmness they succeeded; but it was by the constitutional unanimity and firmness of the great body of the people of Scotland whose example Lord George Gordon recommended, and not by the riots and burning which they attempted to prove had been committed in Edinburgh in 1778.

I will tell you myself, gentlemen, as one of the people of Scotland, that there then existed, and still exists, eighty-five societies of Protestants, who have been, and still are, uniformly firm in opposing every change in that system of laws established to secure the Revolution; and parliament gave way in Scotland to their united voice, and not to the firebrands of the rabble. It is the duty of parliament to listen to the voice of the people, for they are the servants of the people; and when the constitution of church or state is believed, whether truly or falsely, to be in danger, I hope there never will be wanting men (notwithstanding the proceedings of to-day) to desire the people to persevere and be firm. Gentlemen, has the crown proved that the Protestant brethren of the

London Association fired the mass houses in Scotland, or acted in rebellious opposition to law, so as to entitle it to wrest the prisoner's expressions into an excitation of rebellion against the state, or of violence against the properties of English papists, by setting up their firmness as an example? Certainly not. They have not even proved the naked fact of such violences, though such proof would have called for no resistance, since, to make it bear as rebellious advice to the Protestant Association of London, it must have been first shown that such acts had been perpetrated or encouraged by the Protestant societies in the North.

Who has dared to say this? No man. The rabble in Scotland certainly did that which has since been done by the rabble in England, to the disgrace and reproach of both countries; but in neither country was there found one man of character or condition, of any description, who abetted such enormities, nor any man, high or low, of any of the Associated Protestants, here or there, who were either convicted, tried, or taken on suspicion.

As to what this man heard on the 29th of May, it was nothing more than the proposition of going up in a body to St. George's Fields to consider how the petition should be presented, with the same exhortations to firmness as before. The resolution made on the motion has been read, and, when I come to state the evidence on the part of my noble friend, I will show you the impossibility of supporting any criminal inference from what Mr. Hay afterwards puts in his mouth in the lobby, even taking it to be true. I wish here to be accurate [looking on a card on which he had taken down his words]. He says: "Lord George desired them to continue steadfastly to adhere to so good a cause as theirs was; promised to persevere in it himself; and hoped, though there was little expectation at present from the house of commons, that they would meet with redress from their mild and gracious sovereign, who, no doubt, would recommend it to his ministers to repeal it." This was all he heard, and I will show you how this wicked man himself (if any belief is to be given to him) entirely overturns and brings to the ground the evidence of Mr. Bowen,[8] on which the crown rests singly for the proof of words which are more difficult to explain. Gentlemen, was this the language of rebellion? If a multitude were at the gates of the house of commons to command and insist on a repeal of this law, why encourage their hopes by reminding them that they had a mild and gracious sovereign? If war was levying against him, there was no occasion for his mildness and graciousness. If he had said, "Be firm and persevere; we shall meet with redress from the pru-

[8] The chaplain of the house of commons.

dence of the sovereign," it might have borne a different construction; because, whether he was gracious or severe, his prudence might lead him to submit to the necessity of the times. The words sworn to were therefore perfectly clear and unambiguous: "Persevere in your zeal and supplications, and you will meet with redress from a mild and gracious king, who will recommend it to his ministers to repeal it." Good God! if they were to wait till the king, whether from benevolence or fear, should direct his minister to influence the proceedings of parliament, how does it square with the charge of instant coercion or intimidation of the house of commons? If the multitude were assembled with the premeditated design of producing immediate repeal by terror or arms, is it possible to suppose that their leader would desire them to be quiet, and refer them to those qualities of the prince, which, however eminently they might belong to him, never could be exerted on subjects in rebellion to his authority? In what a labyrinth of nonsense and contradiction do men involve themselves when, forsaking the rules of evidence, they would draw conclusions from words in contradiction to language, and in defiance of common sense!

The next witness that is called to you by the crown is Mr. Metcalf. He was not in the lobby, but speaks only to the meeting in Coachmakers' Hall on the 29th of May, and in St. George's Fields. He says that, at the former, Lord George reminded them that the Scotch had succeeded by their unanimity, and hoped that no one who had signed the petition would be ashamed or afraid to show himself in the cause; that he was ready to go to the gallows for it; that he would not present the petition of a lukewarm people; that he desired them to come to St. George's Fields, distinguished with blue cockades, and that they should be marshaled in four divisions. Then he speaks to having seen them in the Fields in the order which has been described; and Lord George Gordon in a coach surrounded by a vast concourse of people, with blue ribbons, forming like soldiers, but was not near enough to hear whether the prisoner spoke to them or not. Such is Mr. Metcalf's evidence; and after the attention you have honored me with, and which I shall have occasion so often to ask again on the same subject, I shall trouble you with but one observation, namely, that it cannot, without absurdity, be supposed that, if the assembly at Coachmakers' Hall had been such conspirators as they are represented, their doors would have been open to strangers, like this witness, to come in to report their proceedings.

The next witness is Mr. Anstruther,[4] who speaks to the language and deportment of the noble prisoner, both at Coachmakers' Hall on the 29th of May, and afterwards on the 2d of June in the lobby of the house of commons. It will be granted to me, I am sure, even by the advocates of the crown, that this gentleman, not only from the clearness and consistency of his testimony, but from his rank and character in the world, is infinitely more worthy of credit than Mr. Hay, who went before him. And from the circumstances of irritation and confusion under which the Rev. Mr. Bowen confessed himself to have heard and seen what he told you he heard and saw, I may likewise assert, without any offense to the reverend gentleman, and without drawing any parallel between their credits, that, where their accounts of this transaction differ, the preference is due to the former. Mr. Anstruther very properly prefaced his evidence with this declaration: "I do not mean to speak accurately to words. It is impossible to recollect them at this distance of time." I believe I have used his very expression, and such expression it well became him to use in a case of blood. But words, even if they could be accurately remembered, are to be admitted with great reserve and caution, when the purpose of the speaker is to be measured by them. They are transient and fleeting; frequently the effect of a sudden transport, easily misunderstood, and often unconsciously misrepresented. It may be the fate of the most innocent language to appear ambiguous, or even malignant, when related in mutilated, detached passages, by people to whom it is not addressed, and who know nothing of the previous design either of the speaker or of those to whom he spoke. Mr. Anstruther says that he heard Lord George Gordon desire the petitioners to meet him on the Friday following in St. George's Fields, and that, if there were fewer than twenty thousand people, he would not present the petition, as it would not be of consequence enough, and that he recommended to them the example of the Scotch, who, by their firmness, had carried their point.

Gentlemen, I have already admitted that they did by firmness carry it. But has Mr. Anstruther attempted to state any one expression that fell from the prisoner to justify the positive, unerring conclusion, or even the presumption, that the firmness of the Scotch Protestants, by which the point was carried in Scotland, was the resistance and riots of the rabble? No, gentlemen, he singly states the words, as he heard them in the hall on the

[4] A member of parliament.

29th, and all that he afterwards speaks to in the lobby repels so harsh and dangerous a construction. The words sworn to at Coachmakers' Hall are "that he recommended temperance and firmness." Gentlemen, if his motives are to be judged by words, for Heaven's sake let these words carry their popular meaning in language. Is it to be presumed, without proof, that a man means one thing because he says another? Does the exhortation to temperance and firmness apply most naturally to the constitutional resistance of the Protestants of Scotland, or to the outrages of ruffians who pulled down the houses of their neighbors? Is it possible, with decency, to say in a court of justice that the recommendation of temperance is the excitation to villainy and frenzy? But the words, it seems, are to be construed, not from their own signification, but from that which follows them, *viz.:* "By that the Scotch carried their point." Gentlemen, is it in evidence before you that by rebellion the Scotch carried their point? or that the indulgences to papists were not extended to Scotland because the rabble had opposed their extension? Has the crown authorized either the court or its law servants to tell you so? Or can it be decently maintained that parliament was so weak or infamous as to yield to a wretched mob of vagabonds at Edinburgh what it has since refused to the earnest prayers of a hundred thousand Protestants of London? No, gentlemen of the jury, parliament was not, I hope, so abandoned. But the ministers knew that the Protestants of Scotland were to a man abhorrent of that law; and though they never held out resistance, if government should be disposed to cram it down their throats by force, yet such violence to the united sentiments of a whole people appeared to be a measure so obnoxious, so dangerous, and withal so unreasonable, that it was wisely and judiciously dropped, to satisfy the general wishes of the nation, and not to avert the vengeance of those low incendiaries whose misdeeds have rather been talked of than proved.

Thus, gentlemen, the exculpation of Lord George's conduct on the 29th of May is sufficiently established by the very evidence on which the crown asks you to convict him; for, in recommending temperance and firmness, after the example of Scotland, you cannot be justified in pronouncing that he meant more than the firmness of the grave and respectable people in that country, to whose constitutional firmness the legislature had before acceded, instead of branding it with the title of rebellion, and who, in my mind, deserve thanks from the king for temperately and firmly resisting every innovation which they conceived to be dangerous to the national religion, independently of which his majesty (with-

out a new limitation by parliament) has no more title to the crown than I have.

Such, gentlemen, is the whole amount of all my noble friend's previous communication with the petitioners, whom he afterwards assembled to consider how their petition should be presented. This is all, not only that men of credit can tell you on the part of the prosecution, but all that even the worst vagabond who ever appeared in a court—the very scum of the earth—thought himself safe in saying, upon oath, on the present occasion. Indeed, gentlemen, when I consider my noble friend's situation, his open, unreserved temper, and his warm and animated zeal for a cause which rendered him obnoxious to so many wicked men,—speaking daily and publicly to mixed multitudes of friends and foes on a subject which affected his passions,—I confess I am astonished that no other expressions than those in evidence before you have found their way into this court. That they have not found their way is surely a most satisfactory proof that there was nothing in his heart which even youthful zeal could magnify into guilt, or that want of caution could betray.

Gentlemen, Mr. Anstruther's evidence, when he speaks of the lobby of the house of commons, is very much to be attended to. He says, "I saw Lord George leaning over the gallery," which position, joined with what he mentioned of his talking with the chaplain, marks the time, and casts a strong doubt on Bowen's testimony, which you will find stands, in this only material part of it, single and unsupported. "I then heard him," continues Mr. Anstruther, "tell them they had been called a mob in the house, and that peace officers had been sent to disperse them (peaceable petitioners), but that, by steadiness and firmness, they might carry their point, as he had no doubt his majesty, who was a gracious prince, would send to his ministers to repeal the act, when he heard his subjects were coming up for miles round, and wishing its repeal." How coming up? In rebellion and arms to compel it? No! All is still put on the graciousness of the sovereign, in listening to the unanimous wishes of his people. If the multitude then assembled had been brought together to intimidate the house by their firmness, or to coerce it by their numbers, it was ridiculous to look forward to the king's influence over it, when the collection of future multitudes should induce him to employ it. The expressions were therefore quite unambiguous; nor could malice itself have suggested another construction of them, were it not for the fact that the house was at that time surrounded, not by the petitioners, whom the noble prisoner had assembled, but by

a mob who had mixed with them, and who, therefore, when addressed by him, were instantly set down as his followers. He thought he was addressing the sober members of the association, who, by steadiness and perseverance, could understand nothing more than perseverance in that conduct he had antecedently prescribed, as steadiness signifies a uniformity, not a change of conduct; and I defy the crown to find out a single expression, from the day he took the chair at the association to the day I am speaking of, that justifies any other construction of steadiness and firmness than that which I put upon it before.

What would be the feelings of our venerable ancestors, who framed the statute of treasons to prevent their children being drawn into the snares of death, unless provably convicted by overt acts, if they could hear us disputing whether it was treason to desire harmless, unarmed men to be firm and of good heart, and to trust to the graciousness of their king?

Here Mr. Anstruther closes his evidence, which leads me to Mr. Bowen, who is the only man,—I beseech you, gentlemen of the jury, to attend to this circumstance,—Mr. Bowen is the only man who has attempted, directly or indirectly, to say that Lord George Gordon uttered a syllable to the multitude in the lobby concerning the destruction of the mass houses in Scotland. Not one of the crown's witnesses—not even the wretched, abandoned Hay, who was kept, as he said, in the lobby the whole afternoon, from anxiety for his pretended friend—has ever glanced at any expression resembling it. They all finish with the expectation which he held out, from a mild and gracious sovereign. Mr. Bowen alone goes on further, and speaks of the successful riots of the Scotch; but he speaks of them in such a manner as, so far from conveying the hostile idea, which he seemed sufficiently desirous to convey, tends directly to wipe off the dark hints and insinuations which have been made to supply the place of proof upon that subject,—a subject which should not have been touched on without the fullest support of evidence, and where nothing but the most unequivocal evidence ought to have been received. He says "his lordship began by bidding them be quiet, peaceable, and steady,"—not "steady" alone, though, if that had been the expression, singly by itself, I should not be afraid to meet it, but, "be quiet, peaceable, and steady." Gentlemen, I am indifferent what other expressions of dubious interpretation are mixed with these, for you are trying whether my noble friend came to the house of commons with a decidedly hostile mind; and as I shall, on the recapitulation of our own evidence, trace him in your view,

without spot or stain, down to the very moment when the imputed words were spoken, you will hardly forsake the whole innocent context of his behavior, and torture your inventions to collect the blackest system of guilt, starting up in a moment, without being previously concerted, or afterwards carried into execution.

First, what are the words by which you are to be convinced that the legislature was to be frightened into compliance, and to be coerced if terror should fail? "Be quiet, peaceable, and steady; you are a good people; yours is a good cause. His majesty is a gracious monarch, and when he hears that all his people, ten miles round, are collecting, he will send to his ministers to repeal the act." By what rules of construction can such an address to unarmed, defenseless men be tortured into treasonable guilt? It is impossible to do it without pronouncing, even in the total absence of all proof of fraud or deceit in the speaker, that "quiet" signifies tumult and uproar, and that "peace" signifies war and rebellion.

I have before observed that it was most important for you to remember that, with this exhortation to quiet and confidence in the king, the evidence of all the other witnesses closed. Even Mr. Anstruther, who was a long time afterwards in the lobby, heard nothing further; so that, if Mr. Bowen had been out of the case altogether, what would the amount have been? Why, simply that Lord George Gordon, having assembled an unarmed, inoffensive multitude in St. George's Fields to present a petition to parliament, and finding them becoming tumultuous, to the discontent of parliament and the discredit of the cause, desired them not to give it up, but to continue to show their zeal for the legal object in which they were engaged; to manifest that zeal quietly and peaceably, and not to despair of success, since, though the house was not disposed to listen to it, they had a gracious sovereign, who would second the wishes of his people. This is the sum and substance of the whole. They were not, even by any one ambiguous expression, encouraged to trust to their numbers, as sufficient to overawe the house, or to their strength to compel it, or to the prudence of the state in yielding to necessity, but to the indulgence of the king, in compliance with the wishes of his people. Mr. Bowen, however, thinks proper to proceed, and I beg that you will attend to the sequel of his evidence. He stands single in all the rest that he says, which might entitle me to ask you absolutely to reject it; but I have no objection to your believing every word of it, if you can, because, if inconsistencies prove anything, they prove that there was nothing of that deliberation in the prisoner's expressions which can justify the inference of guilt. I mean to be correct as

to his words [looking at his words which he had noted down]. He says "that Lord George told the people that an attempt had been made to introduce the bill into Scotland, and that they had no redress till the mass houses were pulled down. That Lord Weymouth[5] then sent official assurances that it should not be extended to them." Gentlemen, why is Mr. Bowen called by the crown to tell you this? The reason is plain: because the crown, conscious that it could make no case of treason from the rest of the evidence, in sober judgment of law; aware that it had proved no purpose or act of force against the house of commons, to give countenance to the accusation, much less to warrant a conviction,—found it necessary to hold up the noble prisoner as the wicked and cruel author of all those calamities in which every man's passions might be supposed to come in to assist his judgment to decide. They therefore made him speak in enigmas to the multitude; not telling them to do mischief in order to succeed, but that by mischief in Scotland success had been obtained.

But were the mischiefs themselves that did happen here of a sort to support such a conclusion? Can any man living, for instance, believe that Lord George Gordon could possibly have excited the mob to destroy the house of that great and venerable magistrate who has presided so long in this high tribunal that the oldest of us do not remember him with any other impression than the awful form and figure of justice,—a magistrate who had always been the friend of the Protestant dissenters against the ill-timed jealousies of the establishment—his countryman, too—and, without adverting to the partiality not unjustly imputed to men of that country, a man of whom any country might be proud? No, gentlemen, it is not credible that a man of noble birth and liberal education (unless agitated by the most implacable personal resentment, which is not imputed to the prisoner) could possibly consent to the burning of the house of Lord Mansfield.

If Mr. Bowen, therefore, had ended here, I can hardly conceive such a construction could be decently hazarded consistent with the testimony of the witnesses we have called. How much less when, after the dark insinuations which such expressions might otherwise have been argued to convey, the very same person, on whose veracity or memory they are only to be believed, and who must be credited or discredited *in toto*, takes out the sting himself by giving them such an immediate context and conclusion as renders the proposition ridiculous which his evidence is brought forward

[5] Secretary for the southern department.

to establish; for he says that Lord George Gordon instantly afterwards addressed himself thus: "Beware of evil-minded persons who may mix among you and do mischief, the blame of which will be imputed to you."

Gentlemen, if you reflect on the slander which I told you fell upon the Protestants in Scotland by the acts of the rabble there, I am sure you will see the words are capable of an easy explanation. But as Mr. Bowen concluded with telling you that he heard them in the midst of noise and confusion, and as I can only take them from him, I shall not make an attempt to collect them into one consistent discourse, so as to give them a decided meaning in favor of my client, because I have repeatedly told you that words imperfectly heard and partially related cannot be so reconciled. But this I will say: that he must be a ruffian, and not a lawyer, who would dare to tell an English jury that such ambiguous words, hemmed closely in between others not only innocent, but meritorious, are to be adopted to constitute guilt by rejecting both introduction and sequel, with which they are absolutely irreconcilable and inconsistent; for if ambiguous words, when coupled with actions, decipher the mind of the actor, so as to establish the presumption of guilt, will not such as are plainly innocent and unambiguous go as far to repel such presumption? Is innocence more difficult of proof than the most malignant wickedness? Gentlemen, I see your minds revolt at such shocking propositions. I beseech you to forgive me. I am afraid that my zeal has led me to offer observations which I ought in justice to have believed every honest mind would suggest to itself with pain and abhorrence without being illustrated and enforced.

I now come more minutely to the evidence on the part of the prisoner. I before told you that it was not till November, 1779, when the Protestant Association was already fully established, that Lord George Gordon was elected president by the unanimous voice of the whole body, unlooked for and unsolicited. It is surely not an immaterial circumstance that at the very first meeting where his lordship presided a dutiful and respectful petition, the same which was afterwards presented to parliament, was read and approved of; a petition which, so far from containing anything threatening or offensive, conveyed not a very oblique reflection upon the behavior of the people in Scotland. It states that, as England and that country were now one, and as official assurances had been given that the law should not pass there, they hoped the peaceable and constitutional deportment of the English Protestants would entitle them to the approbation of parliament.

It appears by the evidence of Mr. Erasmus Middleton, a very respectable clergyman, and one of the committee of the association, that a meeting had been held on the 4th of May, at which Lord George was not present; that at that meeting a motion had been made for going up with the petition in a body, but which not being regularly put from the chair, no resolution was come to upon it; and that it was likewise agreed on, but in the same irregular manner, that there should be no other public meeting previous to the presenting the petition; that this last resolution occasioned great discontent, and that Lord George was applied to by a large and respectable number of the association to call another meeting, to consider of the most prudent and respectful method of presenting their petition; but it appears that, before he complied with their request, he consulted with the committee on the propriety of compliance, who all agreeing to it except the secretary, his lordship advertised the meeting which was afterwards held on the 29th of May. The meeting was, therefore, the act of the whole association. As to the original difference between my noble friend and the committee on the expediency of the measure, it is totally immaterial, since Mr. Middleton, who was one of the number who differed from him on that subject (and whose evidence is, therefore, infinitely more to be relied on), told you that his whole deportment was so clear and unequivocal as to entitle him to assure you on his most solemn oath that he in his conscience believed his views were perfectly constitutional and pure. This most respectable clergyman further swears that he attended all the previous meetings of the society, from the day the prisoner became president to the day in question, and that, knowing they were objects of much jealousy and malice, he watched his behavior with anxiety, lest his zeal should furnish matter for misrepresentation, but that he never heard an expression escape him which marked a disposition to violate the duty and subordination of a subject, or which could lead any man to believe that his objects were different from the avowed and legal objects of the association. We could have examined thousands to the same fact, for, as I told you when I began to speak, I was obliged to leave my place to disincumber myself from their names.

This evidence of Mr. Middleton's as to the 29th of May must, I should think, convince every man how dangerous and unjust it is in witnesses, however perfect their memories, or however great their veracity, to come into a criminal court where a man is standing for his life or death, retailing scraps of sentences which they had heard by thrusting themselves, from curiosity, into places

where their business did not lead them; ignorant of the views and tempers of both speakers and hearers; attending only to a part, and, perhaps innocently, misrepresenting that part, from not having heard the whole.

The witnesses for the crown all tell you that Lord George said he would not go up with the petition unless he was attended by twenty thousand people who had signed it. There they think proper to stop, as if he had said nothing further, leaving you to say to yourselves: What possible purpose could he have in assembling such a multitude on the very day the house was to receive the petition? Why should he urge it, when the committee had before thought it inexpedient? And why should he refuse to present it unless so attended? Hear what Mr. Middleton says. He tells you that my noble friend informed the petitioners that, if it was decided they were not to attend to consider how their petition should be presented, he would with the greatest pleasure go up with it alone, but that, if it was resolved they should attend it in person, he expected twenty thousand at the least should meet him in St. George's Fields, for that otherwise the petition would be considered as a forgery, it having been thrown out in the house and elsewhere that the repeal of the bill was not the serious wish of the people at large, and that the petition was a mere list of names on parchment, and not of men in sentiment. Mr. Middleton added that Lord George adverted to the same objections having been made to many other petitions, and he therefore expressed an anxiety to show parliament how many were actually interested in its success, which he reasonably thought would be a strong inducement to the house to listen to it. The language imputed to him falls in most naturally with this purpose: "I wish parliament to see who and what you are; dress yourselves in your best clothes,"—which Mr. Hay (who, I suppose, had been reading the indictment) thought it would be better to call "array yourselves." He desired that not a stick should be seen among them, and that, if any man insulted another, or was guilty of any breach of the peace, he was to be given up to the magistrates. Mr. Attorney General, to persuade you that this was all color and deceit, says: "How was a magistrate to face forty thousand men? How were offenders in such a multitude to be amenable to the civil power?" What a shameful perversion of a plain, peaceable purpose! To be sure, if the multitude had been assembled to resist the magistrate, offenders could not be secured; but they themselves were ordered to apprehend all offenders among them, and to deliver

them up to justice. They themselves were to surrender their fellows to civil authority if they offended.

But it seems that Lord George ought to have foreseen that so great a multitude could not be collected without mischief. Gentlemen, we are not trying whether he might or ought to have foreseen mischief, but whether he wickedly and traitorously preconcerted and designed it. But if he be an object of censure for not foreseeing it, what shall we say to government, that took no step to prevent it; that issued no proclamation warning the people of the danger and illegality of such an assembly? If a peaceable multitude, with a petition in their hands, be an army, and if the noise and confusion inseparable from numbers, though without violence or the purpose of violence, constitute war, what shall be said of that government which remained from Tuesday to Friday, knowing that an army was collecting to levy war by public advertisement, yet had not a single soldier—no, nor even a constable —to protect the state?

Gentlemen, I come forth to do that for government which its own servant, the attorney general, has not done. I come forth to rescue it from the eternal infamy which would fall upon its head if the language of its own advocate were to be believed. But government has an unanswerable defense. It neither did nor could possibly enter into the head of any man in authority to prophesy, human wisdom could not divine, that wicked and desperate men, taking advantage of the occasion which, perhaps, an imprudent zeal for religion had produced, would dishonor the cause of all religions by the disgraceful acts which followed.

Why, then, is it to be said that Lord George Gordon is a traitor, who, without proof of any hostile purpose to the government of his country, only did not foresee what nobody else foresaw,— what those people whose business it is to foresee every danger that threatens the state, and to avert it by the interference of magistracy, though they could not but read the advertisement, neither did nor could possibly apprehend?

How are these observations attempted to be answered? Only by asserting, without evidence or even reasonable argument, that all this was color and deceit. Gentlemen, I again say that it is scandalous and reproachful, and not to be justified by any duty which can possibly belong to an advocate at the bar of an English court of justice, to declare, without any proof or attempt at proof, that all a man's expressions, however peaceable, however quiet, however constitutional, however loyal, are all fraud and villainy. Look, gentlemen, to the issues of life, which I before called the

evidence of Heaven. I call them so still. Truly may I call them so when, out of a book compiled by the crown from the petition in the house of commons, and containing the names of all who signed it, and which was printed in order to prevent any of that number being summoned upon the jury to try this indictment, not one criminal, or even a suspected name, is to be found among this defamed host of petitioners!

After this, gentlemen, I think the crown ought, in decency, to be silent. I see the effect this circumstance has upon you, and I know I am warranted in my assertion of the fact. If I am not, why did not the attorney general produce the record of some convictions, and compare it with the list? I thank them, therefore, for the precious compilation, which, though they did not produce, they cannot stand up and deny.

Solomon says: "Oh that mine adversary had written a book!" My adversary has written a book, and out of it I am entitled to pronounce that it cannot again be decently asserted that Lord George Gordon, in exhorting an innocent and unimpeached multitude to be peaceable and quiet, was exciting them to violence against the state.

What is the evidence, then, on which this connection with the mob is to be proved? Only that they had blue cockades![6] Are you or am I answerable for every man who wears a blue cockade? If a man commits murder in my livery or in yours, without command, counsel, or consent, is the murder ours? In all cumulative, constructive treasons, you are to judge from the tenor of a man's behavior, not from crooked and disjointed parts of it. "*Nemo repente fuit turpissimus.*" No man can possibly be guilty of this crime by a sudden impulse of the mind, as he may of some others; and certainly Lord George Gordon stands upon the evidence at Coachmakers' Hall as pure and white as snow. He stands so upon the evidence of a man who had differed with him as to the expediency of his conduct, yet who swears that from the time he took the chair till the period which is the subject of inquiry there was no blame in him.

You therefore are bound, as Christian men, to believe that, when he came to St. George's Fields that morning, he did not come there with the hostile purpose of repealing a law by rebellion.

But still it seems all his behavior at Coachmakers' Hall was color and deceit. Let us see, therefore, whether this body of men, when assembled, answered the description of that which I have

[6] The members of the association, at the meeting of St. George's Fields, were distinguished by wearing cockades, on which was inscribed the words, "No popery."

stated to be the purpose of him who assembled them. Were they a multitude arrayed for terror or force? On the contrary, you have heard, upon the evidence of men whose veracity is not to be impeached, that they were sober, decent, quiet, peaceable tradesmen; that they were all of the better sort; all well dressed and well behaved; and that there was not a man among them who had any one weapon, offensive or defensive. Sir Philip Jennings Clerke tells you he went into the Fields; that he drove through them, talked to many individuals among them, who all told him that it was not their wish to persecute the papists, but that they were alarmed at the progress of their religion from their schools. Sir Philip further told you that he never saw a more peaceable multitude in his life; and it appears upon the oaths of all who were present that Lord George Gordon went round among them desiring peace and quietness.

Mark his conduct when he heard from Mr. Evans that a low, riotous set of people were assembled in Palace Yard. Mr. Evans, being a member of the Protestant Association, and being desirous that nothing bad might happen from the assembly, went in his carriage with Mr. Spinage to St. George's Fields to inform Lord George that there were such people assembled (probably papists), who were determined to do mischief. The moment he told him of what he heard, whatever his original plan might have been, he instantly changed it on seeing the impropriety of it. "Do you intend," said Mr. Evans, "to carry up all these men with the petition to the house of commons?" "Oh no! no! not by any means; I do not mean to carry them all up." "Will you give me leave," said Mr. Evans, "to go round to the different divisions and tell the people it is not your lordship's purpose?" He answered, "By all means." And Mr. Evans accordingly went; but it was impossible to guide such a number of people, peaceable as they were. They were all desirous to go forward; and Lord George was at last obliged to leave the Fields, exhausted with heat and fatigue, beseeching them to be peaceable and quiet. Mrs. Whitingham set him down at the house of commons; and at the very time that he thus left them in perfect harmony and good order, it appears, by the evidence of Sir Philip Jennings Clerke, that Palace Yard was in an uproar, filled with mischievous boys and the lowest dregs of the people.

Gentlemen, I have all along told you that the crown was aware that it had no case of treason without connecting the noble prisoner with consequences which it was in some luck to find advocates to state, without proof to support it. I can only speak for

myself that, small as my chance is (as times go) of ever arriving at high office, I would not accept of it on the terms of being obliged to produce against a fellow citizen that which I have been witness to this day. For Mr. Attorney General perfectly well knew the innocent and laudable motive with which the protection was given that he exhibited as an evidence of guilt;[7] yet it was produced to insinuate that Lord George Gordon, knowing himself to be the ruler of those villains, set himself up as a savior from their fury. We called Lord Stormont to explain this matter to you, who told you that Lord George Gordon came to Buckingham House, and begged to see the king, saying he might be of great use in quelling the riots; and can there be on earth a greater proof of conscious innocence? For if he had been the wicked mover of them, would he have gone to the king to have confessed it, by offering to recall his followers from the mischiefs he had provoked? No! But since, notwithstanding a public protest issued by himself and the association, reviling the authors of mischief, the Protestant cause was still made the pretext, he thought his public exertions might be useful, as they might tend to remove the prejudices which wicked men had diffused. The king thought so likewise, and therefore (as appears by Lord Stormont) refused to see Lord George till he had given the test of his loyalty by such exertions. But sure I am, our gracious sovereign meant no trap for innocence, nor ever recommended it as such to his servants.

Lord George's language was simply this: "The multitude pretend to be perpetrating these acts under the authority of the Protestant petition. I assure your majesty they are not the Protestant Association, and I shall be glad to be of any service in suppressing them." I say, by God, that man is a ruffian who shall, after this, presume to build upon such honest, artless conduct as an evidence of guilt. Gentlemen, if Lord George Gordon had been guilty of high treason (as is assumed to-day) in the face of the whole parliament, how are all its members to defend themselves from the misprision of suffering such a person to go at large and to approach his sovereign? The man who conceals the perpetration of treason is himself a traitor; but they are all perfectly safe, for nobody thought of treason till fears arising from another quarter bewildered their senses. The king, therefore, and his servants, very wisely accepted his promise of assistance, and he flew with

[7] A witness, of the name of Richard Pond, called in support of the prosecution, had sworn that, hearing his house was about to be pulled down, he applied to the prisoner for protection, and in consequence received the following document, signed by him: "All true friends to Protestants, I hope, will be particular, and do no injury to the property of any true Protestant, as I am well assured the proprietor of this house is a staunch and worthy friend of the cause. G. Gordon."

honest zeal to fulfill it. Sir Philip Jennings Clerke tells you that he made use of every expression which it was possible for a man in such circumstances to employ. He begged them, for God's sake, to disperse and go home; declared his hope that the petition would be granted, but that rioting was not the way to effect it. Sir Philip said he felt himself bound, without being particularly asked, to say everything he could in protection of an injured and innocent man, and repeated again that there was not an art which the prisoner could possibly make use of that he did not zealously employ, but that it was all in vain. "I began," says he, "to tremble for myself when Lord George read the resolution of the house, which was hostile to them, and said their petition would not be taken into consideration till they were quiet." But did he say, "Therefore go on to burn and destroy"? On the contrary, he helped to pen that motion, and read it to the multitude, as one which he himself had approved. After this he went into the coach with Sheriff Pugh, in the city, and there it was, in the presence of the very magistrate whom he was assisting to keep the peace, that he publicly signed the protection which has been read in evidence against him; although Mr. Fisher, who now stands in my presence, confessed in the privy council that he himself had granted similar protections to various people, yet he was dismissed, as having done nothing but his duty.

This is the plain and simple truth; and for this just obedience to his majesty's request, do the king's servants come to-day into his court, where he is supposed in person to sit, to turn that obedience into the crime of high treason, and to ask you to put him to death for it.

Gentlemen, you have now heard, upon the solemn oaths of honest, disinterested men, a faithful history of the conduct of Lord George Gordon from the day that he became a member of the Protestant Association to the day that he was committed a prisoner to the Tower; and I have no doubt, from the attention with which I have been honored from the beginning, that you have still kept in your minds the principles to which I entreated you would apply it, and that you have measured it by that standard. You have, therefore, only to look back to the whole of it together; to reflect on all you have heard concerning him; to trace him in your recollection through every part of the transaction; and, considering it with one manly, liberal view, to ask your own honest hearts whether you can say that this noble and unfortunate youth is a wicked and deliberate traitor, who deserves by your verdict

to suffer a shameful and ignominious death, which will stain the ancient honors of his house forever.

The crime which the crown would have fixed upon him is that he assembled the Protestant Association round the house of commons, not merely to influence and persuade parliament by the earnestness of their supplications, but actually to coerce it by hostile, rebellious force; that, finding himself disappointed in the success of that coercion, he afterwards incited his followers to abolish the legal indulgences to papists, which the object of the petition was to repeal, by the burning of their houses of worship, and the destruction of their property, which ended, at last, in a general attack on the property of all orders of men, religious and civil, on the public treasures of the nation, and on the very being of the government.

To support a charge of so atrocious and unnatural a complexion, the laws of the most arbitrary nations would require the most incontrovertible proof. Either the villain must have been taken in the overt act of wickedness, or, if he worked in secret upon others, his guilt must have been brought out by the discovery of a conspiracy, or by the consistent tenor of criminality. The very worst inquisitor that ever dealt in blood would vindicate the torture by plausibility at least, and by the semblance of truth.

What evidence, then, will a jury of Englishmen expect from the servants of the crown of England before they deliver up a brother accused before them to ignominy and death? What proof will their consciences require? What will their plain and manly understandings accept of? What does the immemorial custom of their fathers, and the written law of this land, warrant them in demanding? Nothing less, in any case of blood, than the clearest and most unequivocal conviction of guilt. But in this case the act has not even trusted to the humanity and justice of our general law, but has said, in plain, rough, expressive terms, "provably"; that is, says Lord Coke, "not upon conjectural presumptions, or inferences, or strains of wit, but upon direct and plain proof." "For the king, lords, and commons," continues that great lawyer, "did not use the word 'probably,' for then a common argument might have served, but 'provably,' which signifies the highest force of demonstration." And what evidence, gentlemen of the jury, does the crown offer to you in compliance with these sound and sacred doctrines of justice? A few broken, interrupted, disjointed words, without context or connection; uttered by the speaker in agitation and heat; heard, by those who relate them to you, in the midst of tumult and confusion,—and even those words, muti-

lated as they are, in direct opposition to and inconsistent with repeated and earnest declarations delivered at the very same time and on the very same occasion, related to you by a much greater number of persons, and absolutely incompatible with the whole tenor of his conduct. Which of us all, gentlemen, would be safe, standing at the bar of God or man, if we were not to be judged by the regular current of our lives and conversations, but by detached and unguarded expressions, picked out by malice, and recorded, without context or circumstances, against us? Yet such is the only evidence on which the crown asks you to dip your hands and to stain your consciences in the innocent blood of the noble and unfortunate youth who stands before you,—on the single evidence of the words you have heard from their witnesses (for of what but words have you heard?), which, even if they had stood uncontroverted by the proofs that have swallowed them up, or unexplained by circumstances which destroy their malignity, could not, at the very worst, amount in law to more than a breach of the act against tumultuous petitioning (if such an act still exists), since the worst malice of his enemies has not been able to bring up one single witness to say that he ever directed, countenanced, or approved rebellious force against the legislature of this country. It is therefore a matter of astonishment to me that men can keep the natural color in their cheeks when they ask for human life, even on the crown's original case, though the prisoner had made no defense.

But will they still continue to ask for it after what they have heard? I will just remind the solicitor general, before he begins his reply, what matter he has to encounter. He has to encounter this: That the going up in a body was not even originated by Lord George, but by others in his absence; that when proposed by him officially as chairman, it was adopted by the whole association, and consequently was their act as much as his; that it was adopted, not in a conclave, but with open doors, and the resolution published to all the world; that it was known, of course, to the ministers and magistrates of the country, who did not even signify to him, or to anybody else, its illegality or danger; that decency and peace were enjoined and commanded; that the regularity of the procession, and those badges of distinction which are now cruelly turned into the charge of a hostile array against him, were expressly and publicly directed for the preservation of peace and the prevention of tumult; that, while the house was deliberating, he repeatedly entreated them to behave with decency and peace, and to retire to their houses, though he knew not that he was speaking to the

enemies of his cause; that, when they at last dispersed, no man thought or imagined that treason had been committed; that he retired to bed, where he lay unconscious that ruffians were ruining him by their disorders in the night; that on Monday he published an advertisement reviling the authors of the riots, and, as the Protestant cause had been wickedly made the pretext for them, solemnly enjoined all who wished well to it to be obedient to the laws (nor has the crown ever attempted to prove that he had either given, or that he afterwards gave, secret instructions in opposition to that public admonition); that he afterwards begged an audience to receive the king's commands; that he waited on the ministers; that he attended his duty in parliament; and when the multitude (among whom there was not a man of the Associated Protestants) again assembled on the Tuesday, under pretense of the Protestant cause, he offered his services, and read a resolution of the house to them, accompanied with every expostulation which a zeal for peace could possibly inspire; that he afterwards, in pursuance of the king's direction, attended the magistrates in their duty, honestly and honorably exerting all his powers to quell the fury of the multitude,—a conduct which, to the dishonor of the crown, has been scandalously turned against him by criminating him with protections granted publicly in the coach of the sheriff of London, whom he was assisting in his office of magistracy, although protections of a similar nature were, to the knowledge of the whole privy council, granted by Mr. Fisher himself, who now stands in my presence unaccused and unreproved, but who, if the crown that summoned him durst have called him, would have dispersed to their confusion the slightest imputation of guilt.

What, then, has produced this trial for high treason, or given it, when produced, the seriousness and solemnity it wears? What but the inversion of all justice, by judging from consequences, instead of causes and designs? What but the artful manner in which the crown has endeavored to blend the petitioning in a body, and the zeal with which an animated disposition conducted it, with the melancholy crimes that followed,—crimes which the shameful indolence of our magistrates, which the total extinction of all police and government suffered to be committed in broad day, and in the delirium of drunkenness, by an unarmed banditti, without a head, without plan or object, and without a refuge from the instant gripe of justice; a banditti with whom the Associated Protestants and their president had no manner of connection, and whose cause they overturned, dishonored, and ruined.

How un-Christian, then, is it to attempt, without evidence, to infect the imaginations of men who are sworn, dispassionately and disinterestedly, to try the trivial offense of assembling a multitude with a petition to repeal a law (which has happened so often in all our memories), by blending it with the fatal catastrophe, on which every man's mind may be supposed to retain some degree of irritation! O fie! O fie! Is the intellectual seat of justice to be thus impiously shaken? Are your benevolent propensities to be thus disappointed and abused? Do they wish you, while you are listening to the evidence, to connect it with unforeseen consequences, in spite of reason and truth? Is it their object to hang the millstone of prejudice around his innocent neck to sink him? If there be such men, may Heaven forgive them for the attempt, and inspire you with fortitude and wisdom to discharge your duty with calm, steady, and reflecting minds!

Gentlemen, I have no manner of doubt that you will. I am sure you cannot but see, notwithstanding my great inability, increased by a perturbation of mind (arising, thank God! from no dishonest cause), that there has been not only no evidence on the part of the crown to fix the guilt of the late commotions upon the prisoner, but that, on the contrary, we have been able to resist the probability—I might almost say the possibility—of the charge, not only by living witnesses, whom we only ceased to call because the trial would never have ended, but by the evidence of all the blood that has paid the forfeit of that guilt already,—an evidence that I will take upon me to say is the strongest and most unanswerable which the combination of natural events ever brought together since the beginning of the world for the deliverance of the oppressed; since, in the late numerous trials for acts of violence and depredation, though conducted by the ablest servants of the crown, with a laudable eye to the investigation of the subject which now engages us, no one fact appeared which showed any plan, any object, any leader; since, out of forty-four thousand persons who signed the petition of the Protestants, not one was to be found among those who were convicted, tried, or even apprehended on suspicion; and since, out of all the felons who were let loose from prisons, and who assisted in the destruction of our property, not a single wretch was to be found who could even attempt to save his own life by the plausible promise of giving evidence to-day.

What can overturn such a proof as this? Surely a good man might, without superstition, believe that such a union of events was something more than natural, and that a Divine Providence was watchful for the protection of innocence and truth.

I may now, therefore, relieve you from the pain of hearing me any longer, and be myself relieved from speaking on a subject which agitates and distresses me. Since Lord George Gordon stands clear of every hostile act or purpose against the legislature of his country, or the properties of his fellow subjects,—since the whole tenor of his conduct repels the belief of the traitorous intention charged by the indictment,—my task is finished. I shall make no address to your passions. I will not remind you of the long and rigorous imprisonment he has suffered. I will not speak to you of his great youth, of his illustrious birth, and of his uniformly animated and generous zeal in parliament for the constitution of his country. Such topics might be useful in the balance of a doubtful case; yet, even then, I should have trusted to the honest hearts of Englishmen to have felt them without excitation. At present, the plain and rigid rules of justice and truth are sufficient to entitle me to your verdict.

ARGUMENT IN SUPPORT OF THE RULE FOR A NEW TRIAL IN THE CASE OF THE KING AGAINST WILLIAM D. SHIPLEY, DEAN OF ST. ASAPH, IN THE COURT OF KING'S BENCH, 1784.

STATEMENT.

The cases of the Dean of St. Asaph and of Stockdale are landmarks in the great struggle for free speech. The law relating to libel may be traced back to the time of the Plantagenets. Its real importance, however, begins with the invention of printing. Even after that event, the authors of objectionable political writings were for a long time punished for treason, and, until the Reformation, religious writings came under the jurisdiction of the ecclesiastical courts. Under the Tudors, hostile discussion was uniformly punished under special statutes respecting treason. Then, too, the early system of licensed printing obviously rendered discussion of the legal limits of free speech quite unnecessary. But the law, such as it was, was administered by the Star Chamber, which decided the facts as well as the law. Under William III. and Anne, when party feeling ran so high that every sentiment adverse to the government was considered a libel, the court of king's bench adopted the interpretation of the law which had been promulgated by the Star Chamber. In this court, however, a jury had to be dealt with, and a controversy at once arose as to the respective province of court and jury. The most objectionable feature of the interpretation inherited from the Star Chamber was the doctrine that the court was the sole judge of the criminality of the libel, which left to the jury merely the determination of the comparatively unimportant fact of publication. Lord Mansfield gives an historical sketch of this doctrine in his opinion overruling the motion for a new trial in the Dean of St. Asaph's case. This view was accepted by all the judges except Camden. But juries soon began to assert a larger prerogative. It is an interesting fact that the American case of Zenger was the first to bring directly in issue the right of a jury to return a general verdict of not guilty. The speech of Zenger's counsel, Andrew Hamilton, is described by Sir James Stephen as "singularly able, bold, and powerful." And it will be remembered that Alexander Hamilton's greatest forensic effort was in the case of Croswell, involving the same issue. The first English case in which a jury insisted on returning a general verdict against the instructions of the judge was that of Owen.[1] The controversy became acute in Lord Mansfield's time. In Woodfall's case the jury, in the face of Mansfield's direction, returned a verdict of "Guilty of printing and publishing only"; and the doctrine was again challenged in the contemporaneous case of Miller by a general verdict of "Not guilty." For his conduct in these trials, Mansfield was vigorously attacked in parliament by Camden, who framed a series of questions with respect to the law of libel, which Mansfield declined to answer. Such, in brief, was the state of the law when the Dean of St. Asaph was brought to trial before Justice Buller and a jury.

[1] 18 Howell, St. Tr. 1203.

The dean was prosecuted for publishing a pamphlet entitled, "The principles of government, in a dialogue between a gentleman and a farmer," which had been written by Sir Wm. Jones, the dean's brother-in-law. In view of the public agitation for a change in the representative system, this dialogue was designed to make plain the fundamental principles of government. The Dean of St. Asaph had recommended the dialogue to one of the reform associations, by whom it had been approved. This expression of approval having drawn forth a violent attack from the Tories, the dean published the dialogue, together with a preface, in which he stated that he conceived "the sure way to vindicate the tract from so unjust a character would be to print it." "If the doctrines which it slightly touches in a manner suited to the nature of a dialogue be 'seditious, treasonable, and diabolical,'" continued the dean, "Lord Somers was an incendiary, Locke a traitor, and the convention parliament a pandemonium. But if those names are the glory and boast of England, and if that convention secured our liberty and happiness, then the doctrines in question are not only just and rational, but constitutional and salutary, and the reproachful epithets belong wholly to the system of those who so grossly misapplied it."

The prosecution was apparently based upon the language used with respect to the bearing of arms, which was as follows:

"Gentleman: But what if a few great lords or wealthy men were to keep the king himself in subjection, yet exert his force, lavish his treasure, and misuse his name, so as to domineer over the people and manage the parliament?

"Farmer: We must fight for the king and ourselves.

"G.: You talk of fighting as if you were speaking of some rustic engagement at a wake; but your quarterstaffs would avail you little against bayonets.

"F.: We might easily provide ourselves with better arms.

"G.: Not so easily. When the moment of resistance came, you would be deprived of all arms; and those who should furnish you with them, or exhort you to take them up, would be called traitors, and probably put to death.

"F.: We ought always, therefore, to be ready, and keep each of us a strong firelock in the corner of his bedroom.

"G.: That would be legal as well as rational. Are you, my honest friend, provided with a musket?

"F.: I will contribute no more to the club, and purchase a firelock with my savings.

"G.: It is not necessary. I have two, and will make you a present of one, with complete accoutrements.

"F.: I accept it thankfully, and will converse with you at your leisure on other subjects of this kind.

"G.: In the meanwhile, spend an hour every morning in the next fortnight in learning to prime and load expeditiously, and to fire and charge with bayonet firmly and regularly. I say every morning, because, if you exercise too late in the evening, you may fall into some of the legal snares which have been spread for you by those gentlemen who would rather secure game for their table than liberty for their nation.

"F.: Some of my neighbors, who have served in the militia, will readily teach me; and perhaps the whole village may be persuaded to procure arms, and learn their exercise.

"G.: It cannot be expected that the villagers should purchase arms;

but they might easily be supplied, if the gentry of the nation would spare a little from their vices and luxury."

Erskine defended on the ground that the publication was innocent; and he insisted that it was the province of the jury to determine this fact. Justice Buller charged the jury, however, in accordance with the rules laid down by his predecessors, that the only questions for them to determine were the fact of publication and the meaning of the innuendoes; that, if they found a verdict of guilty, the defendant might still move in arrest of judgment on the ground that there was no criminality in the paper. The jury, after a short consideration, returned a verdict of "Guilty of publishing only." Thereupon a long discussion ensued between court, counsel, and jury. Justice Buller told the jury that their verdict was not correct. If they added the word "only," it would negative the innuendoes, which they stated that they did not mean to negative. Erskine insisted that the verdict was similar to that given in Woodfall's case, and should be recorded.

"Justice Buller: You say he is guilty of publishing the pamphlet, and that the meaning of the innuendoes is as stated in the indictment?

"A Juror: Certainly.

"Erskine: Is the word 'only' to stand as part of your verdict?

"A Juror: Certainly.

"Erskine: Then I insist it shall be recorded.

"Justice Buller: Then the verdict must be misunderstood. Let me understand the jury.

"Erskine: The jury do understand their verdict.

"Justice Buller: Sir, I will not be interrupted!

"Erskine: I stand here as an advocate for a brother citizen, and I desire that the word 'only' may be recorded.

"Justice Buller: Sit down, sir! Remember your duty, or I shall be obliged to proceed in another manner.

"Erskine: Your lordship may proceed in what manner you think fit. I know my duty as well as your lordship knows yours. I shall not alter my conduct.

"Justice Buller: If you say nothing more, but find him guilty of publishing, and leave out the word 'only,' the question of law is open upon the record, and they may apply to the court of king's bench, and move in arrest of judgment there; but if you add the word 'only,' you do not find all the facts,—you do not find, in fact, that the letter 'G' means gentleman; that 'F' means farmer; 'the king,' the king of Great Britain; and 'parliament,' the parliament of Great Britain.

"A Juror: We admit that.

"Justice Buller: Then you must leave out the word 'only.'

"Erskine: I beg to ask your lordship this question: Whether, if the jury find him guilty of publishing, leaving out the word 'only,' and if the judgment is not arrested by the court of king's bench, the sedition does not stand recorded.

"Justice Buller: No, it does not unless the pamphlet be a libel in point of law.

"Erskine: True; but can I say that the defendant did not publish it seditiously, if judgment is not arrested, but entered in the record?

"Justice Buller: I say it will not stand as proving the sedition. Gentlemen, I tell it you as law; and this is my particular satisfaction, as I told you when summing up the case: if, in what I now say to you, I am wrong in any instance, they have a right to move for a new trial. The law is this: if you find him guilty of publishing, without saying

more, the question whether libel or not is open for the consideration of the court."

After some further discussion Justice Buller said:

"You say 'guilty of publishing,' but whether a libel or not you do not find. Is that your meaning?

"A Juror: That is our meaning.

"One of the Counsel: Do you leave the intention to the court?

"A Juror: Certainly.

"Mr. Cowper: The intention arises out of the record.

"Justice Buller: And unless it is clear upon the record there can be no judgment upon it.

"Mr. Bearcroft: You mean to leave the law where it is?

"A Juror: Certainly.

"Justice Buller: The first verdict was as clear as could be. They only wanted it to be confounded."

In the end, therefore, the jury accepted Justice Buller's statement of their verdict. At the following term, Erskine moved for a new trial, and, upon the rule then granted, he delivered the following argument before the court of king's bench. A new trial was refused. Chief Justice Mansfield, who delivered the opinion of the court, held that Justice Buller had simply followed the practice of his predecessors. He said, moreover, that such uniform practice was "not to be shaken by arguments of general theory or popular declamation." Erskine afterwards moved in arrest of judgment on the ground that the matter set forth in the indictment was not libelous, and to this the court assented. Judgment was accordingly arrested.[2]

ARGUMENT.

I am now to have the honor to address myself to your lordships in support of the rule granted to me by the court upon Monday last; which, as Mr. Bearcroft has truly said, and seemed to mark the observation with peculiar emphasis, is a rule for a new trial. Much of my argument, according to his notion, points another way. Whether its direction be true, or its force adequate to the object, it is now my business to show.

In rising to speak at this time, I feel all the advantage conferred by the reply over those whose arguments are to be answered; but I feel a disadvantage, likewise, which must suggest itself to every intelligent mind. In following the objections of so many learned persons, offered under different arrangements, upon a subject so complicated and comprehensive, there is much danger of being drawn from that method and order which can alone fasten conviction upon unwilling minds, or drive them from the shelter which ingenuity never fails to find in the labyrinth of a desultory discourse. The sense of that danger, and my own inability to struggle against it, led me originally to deliver up to the court certain written and maturely considered propositions,

[2] Howell, St. Tr. 847.

from the establishment of which I resolved not to depart, nor to be removed, either in substance or in order, in any stage of the proceedings, and by which I must therefore this day unquestionably stand or fall.

Pursuing this system, I am vulnerable two ways, and in two ways only: Either it must be shown that my propositions are not valid in law, or, admitting their validity, that the learned judge's charge to the jury at Shrewsbury was not repugnant to them. There can be no other possible objections to my application for a new trial. My duty to-day is therefore obvious and simple. It is, first, to re-maintain those propositions, and then to show that the charge delivered to the jury at Shrewsbury was founded upon the absolute denial and reprobation of them.

(1) I begin, therefore, by saying again, in my own original words, that when a bill of indictment is found, or an information filed, charging any crime or misdemeanor known to the law of England, and the party accused puts himself upon the country by pleading the general issue,—"not guilty,"—the jury are generally charged with his deliverance from that crime, and not specially from the fact or facts in the commission of which the indictment or information charges the crime to consist; much less from any single fact, to the exclusion of others charged upon the same record.

(2) That no act which the law in its general theory holds to be criminal constitutes in itself a crime, abstracted from the mischievous intention of the actor, and that the intention (even where it becomes a simple inference of legal reasons from a fact or facts established) may and ought to be collected by the jury, with the judge's assistance; because the act charged, though established as a fact in a trial on the general issue, does not necessarily and unavoidably establish the criminal intention by any abstract conclusion of the law, the establishment of the fact being still no more than full evidence of the crime, but not the crime itself, unless the jury render it so themselves by referring it voluntarily to the court by special verdict.

These two propositions, though worded with cautious precision, and in technical language, to prevent the subtlety of legal disputation in opposition to the plain understanding of the world, neither do nor were intended to convey any other sentiment than this, namely: that in all cases where the law either directs or permits a person accused of a crime to throw himself upon a jury for deliverance, by pleading generally that he is not guilty, the jury, thus legally appealed to, may deliver him from the accu-

sation by a general verdict of acquittal, founded (as in common sense it evidently must be) upon an investigation as general and comprehensive as the charge itself from which it is a general deliverance.

Having said this, I freely confess to the court that I am much at a loss for any further illustration of my subject, because I cannot find any matter by which it might be further illustrated, so clear or so indisputable, either in fact or in law, as the very proposition itself upon which this trial has been brought into question. Looking back upon the ancient constitution, and examining with painful research the original jurisdictions of the country, I am utterly at a loss to imagine from what sources these novel limitations of the rights of juries are derived. Even the bar is not yet trained to the discipline of maintaining them. My learned friend Mr. Bearcroft solemnly abjures them. He repeats to-day what he avowed at the trial, and is even jealous of the imputation of having meant less than he expressed. For, when speaking this morning of the right of the jury to judge of the whole charge, your lordship corrected his expression by telling him he meant the power, and not the right. He caught instantly at your words, disavowed your explanation, and, with a consistency which does him honor, declared his adherence to his original admission in its full and obvious extent. "I did not mean," said he, "merely to acknowledge that the jury have the power, for their power nobody ever doubted. If a judge was to tell them they had it not, they would only have to laugh at him, and convince him of his error, by finding a general verdict, which must be recorded. I meant, therefore, to consider it as a right, as an important privilege, and of great value to the constitution." Thus Mr. Bearcroft and I are perfectly agreed. I never contended for more than he has voluntarily conceded. I have now his express authority for repeating, in my own former words, that the jury have not merely the power to acquit, upon a view of the whole charge, without control or punishment, and without the possibility of their acquittal being annulled by any other authority, but that they have a constitutional, legal right to do it,—a right fit to be exercised,—and intended, by the wise founders of the government, to be a protection to the lives and liberties of Englishmen against the encroachments and perversions of authority in the hands of fixed magistrates.

But this candid admission on the part of Mr. Bearcroft, though very honorable to himself, is of no importance to me, since, from what has already fallen from your lordship, I am not to expect a

ratification of it from the court. It is therefore my duty to establish it. I feel all the importance of my subject, and nothing shall lead me to-day to go out of it. I claim all the attention of the court, and the right to state every authority which applies, in my judgment, to the argument, without being supposed to introduce them for other purposes than my duty to my client and the constitution of my country warrants and approves.

It is not very usual, in an English court of justice, to be driven back to the earliest history and original elements of the constitution, in order to establish the first principles which mark and distinguish English law. They are always assumed, and, like axioms in science, are made the foundations of reasoning without being proved. Of this sort our ancestors, for many centuries, must have conceived the right of an English jury to decide upon every question which the forms of the law submitted to their final decision, since, though they have immemorially exercised that supreme jurisdiction, we find no trace in any of the ancient books of its ever being brought into question. It is but as yesterday, when compared with the age of the law itself, that judges, unwarranted by any former judgments of their predecessors, without any new commission from the crown, or enlargement of judicial authority from the legislature, have sought to fasten a limitation upon the rights and privileges of jurors, totally unknown in ancient times, and palpably destructive of the very end and object of their institution. No fact, my lord, is of more easy demonstration; for the history and laws of a free country lie open, even to vulgar inspection.

During the whole Saxon era, and even long after the establishment of the Norman government, the whole administration of justice, criminal and civil, was in the hands of the people, without the control or intervention of any judicial authority, delegated to fixed magistrates by the crown. The tenants of every manor administered civil justice to one another in the court baron of their lord; and their crimes were judged of in the leet, every suitor of the manor giving his voice as a juror, and the steward being only the registrar, and not the judge.

On appeals from these domestic jurisdictions to the county court, and to the tourn (circuit) of the sheriff, or in suits and prosecutions originally commenced in either of them, the sheriff's authority extended no further than to summon the jurors, to compel their attendance, ministerially to regulate their proceedings, and to enforce their decisions. And even where he was specially empowered by the king's writ of justicies to proceed in causes of

superior value, no judicial authority was thereby conferred upon himself, but only a more enlarged jurisdiction on the jurors, who were to try the cause mentioned in the writ. It is true that the sheriff cannot now intermeddle in pleas of the crown; but with this exception, which brings no restrictions on juries, these jurisdictions remain untouched at this day; intricacies of property have introduced other forms of proceeding, but the constitution is the same.

This popular judicature was not confined to particular districts, or to inferior suits and misdemeanors, but pervaded the whole legal constitution. For, when the Conqueror, to increase the influence of his crown, erected that great superintending court of justice in his own palace to receive appeals, criminal and civil, from every court in the kingdom, and placed at the head of it the *capitalis justiciarius totius Angliae,* of whose original authority the chief justice of this court is but a partial and feeble emanation, —even that great magistrate was in the *aula regis* merely ministerial,—every one of the king's tenants, who owed him service in right of a barony, had a seat and a voice in that high tribunal, and the office of justiciar was but to record and to enforce their judgments.

In the reign of King Edward the First, when this great office was abolished, and the present courts at Westminster established by a distribution of its powers, the barons preserved that supreme superintending jurisdiction which never belonged to the justiciar, but to themselves only as the jurors in the king's court,—a jurisdiction which, when nobility, from being territorial and feudal, became personal and honorary, was assumed and exercised by the peers of England, who, without any delegation of judicial authority from the crown, form to this day the supreme and final court of English law, judging in the last resort for the whole kingdom, and sitting upon the lives of the peerage, in their ancient and genuine character, as the *pares* of one another.

When the courts at Westminster were established in their present forms, and when the civilization and commerce of the nation had introduced more intricate questions of justice, the judicial authority in civil cases could not but enlarge its bounds. The rules of property in a cultivated state of society became by degrees beyond the compass of the unlettered multitude, and, with certain well-known restrictions, undoubtedly fell to the judges; yet more, perhaps, from necessity than by consent, as all judicial proceedings were artfully held in the Norman language, to which the people were strangers. Of these changes in judicature, imme-

morial custom and the acquiescence of the legislature are the evidence which establish the jurisdiction of the courts on the true principle of English law, and measure the extent of it by their ancient practice. But no such evidence is to be found of the least relinquishment or abridgment of popular judicature in cases of crimes. On the contrary, every page of our history is filled with the struggles of our ancestors for its preservation.

The law of property changes with new objects, and becomes intricate as it extends its dominion; but crimes must ever be of the same easy investigation. They consist wholly in intention; and the more they are multiplied by the policy of those who govern, the more absolutely the public freedom depends upon the people's preserving the entire administration of criminal justice to themselves. In a question of property between two private individuals, the crown can have no possible interest in preferring the one to the other; but it may have an interest in crushing both of them together, in defiance of every principle of humanity and justice, if they should put themselves forward in a contention for public liberty, against a government seeking to emancipate itself from the dominion of the laws. No man in the least acquainted with the history of nations or of his own country can refuse to acknowledge that, if the administration of criminal justice were left in the hands of the crown or its deputies, no greater freedom could possibly exist than government might choose to tolerate from the convenience or policy of the day.

My lord, this important truth is no discovery or assertion of mine, but is to be found in every book of the law. Whether we go up to the most ancient authorities, or appeal to the writings of men of our own times, we meet with it alike in the most emphatical language. Mr. Justice Blackstone, by no means biased towards democratical government, having, in the third volume of his Commentaries, explained the excellence of the trial by jury in civil cases, expresses himself thus (volume 4, p. 349): "But it holds much stronger in criminal cases, since, in times of difficulty and danger, more is to be apprehended from the violence and partiality of judges appointed by the crown, in suits between the king and the subject, than in disputes between one individual and another to settle the boundaries of private property. Our law has therefore wisely placed this strong and twofold barrier of a presentment and trial by jury between the liberties of the people and the prerogative of the crown. Without this barrier, justices of oyer and terminer named by the crown might, as in France or in Turkey, imprison, dispatch, or exile any man that was obnoxious

to government, by an instant declaration that such was their will and pleasure; so that the liberties of England cannot but subsist so long as this palladium remains sacred and inviolate, not only from all open attacks, which none will be so hardy as to make, but also from all secret machinations which may sap and undermine it." But this remark, though it derives new force in being adopted by so great an authority, was no more an original in Mr. Justice Blackstone than in me. The institution and authority of juries is to be found in Bracton, who wrote about five hundred years before him. "The *curia* and the *pares*," says he, "were necessarily the judges in all cases of life, limb, crime, and disherison of the heir *in capite*. The king could not decide, for then he would have been both prosecutor and judge. Neither could his justices, for they represent him."

Notwithstanding all this, the learned judge was pleased to say at the trial that there was no difference between civil and criminal cases. I say, on the contrary, independent of these authorities, that there is not, even to vulgar observation, the remotest similitude between them.

There are four capital distinctions between prosecutions for crimes and civil actions, every one of which deserves consideration: First, in the jurisdiction necessary to found the charge; secondly, in the manner of the defendant's pleading it; thirdly, in the authority of the verdict which discharges him; fourthly, in the independence and security of the jury from all the consequences in giving it.

(1) As to the first, it is unnecessary to remind your lordships that, in a civil case, the party who conceives himself aggrieved states his complaint to the court; avails himself, at his own pleasure, of its process; compels an answer from the defendant by its authority; or, taking the charge *pro confesso* against him on his default, is entitled to final judgment and execution for his debt, without any interposition of a jury. But in criminal cases it is otherwise. The court has no cognizance of them, without leave from the people forming a grand inquest. If a man were to commit a capital offense in the face of all the judges of England, their united authority could not put him upon his trial. They could file no complaint against him, even upon the records of the supreme criminal court, but could only commit him for safe custody, which is equally competent to every common justice of the peace. The grand jury alone could arraign him, and, in their discretion, might likewise finally discharge him, by throwing out the bill,—the names of all your lordships as witnesses on

the back of it. If it shall be said that this exclusive power of the grand jury does not extend to lesser misdemeanors, which may be prosecuted by information, I answer that, for that very reason, it becomes doubly necessary to preserve the power of the other jury which is left. In the rules of pleading there is no distinction between capital and lesser offenses; and the defendant's plea of not guilty (which universally prevails as the legal answer to every information or indictment, as opposed to special pleas to the court in civil actions), and the necessity imposed upon the crown to join the general issue, are absolutely decisive of the present question.

(2) Every lawyer must admit that the rules of pleading were originally established to mark and to preserve the distinct jurisdictions of the court and the jury, by a separation of the law from the fact, wherever they were intended to be separated. A person charged with owing a debt, or having committed a trespass, etc., if he could not deny the facts on which the actions were founded, was obliged to submit his justification for matter of law by a special plea to the court upon the record, to which plea the plaintiff might demur, and submit the legal merits to the judges. By this arrangement, no power was ever given to the jury by an issue joined before them, but when a right of decision, as comprehensive as the issue, went along with it. If a defendant in such civil actions pleaded the general issue instead of a special plea, aiming at a general deliverance from the charge, by showing his justification to the jury at the trial, the court protected its own jurisdiction by refusing all evidence of the facts on which such justification was founded. The extension of the general issue beyond its ancient limits, and in deviation from its true principle, has, indeed, introduced some confusion into this simple and harmonious system; but the law is substantially the same. No man at this day, in any of those actions where the ancient forms of our jurisprudence are still wisely preserved, can possibly get at the opinion of a jury upon any question not intended by the constitution for their decision. In actions of debt, detinue, breach of covenant, trespass, or replevin the defendant can only submit the mere fact to the jury,—the law must be pleaded to the court. If, dreading the opinion of the judges, he conceals his justification under the cover of a general plea, in hopes of a more favorable construction of his defense at the trial, its very existence can never even come within the knowledge of the jurors. Every legal defense must arise out of the facts; and the authority of the judge is interposed

to prevent their appearing before a tribunal which, in such cases, has no competent jurisdiction over them.

By imposing this necessity of pleading every legal justification to the court, and by this exclusion of all evidence on the trial beyond the negation of the fact, the courts indisputably intended to establish, and did in fact effectually secure, the judicial authority over legal questions from all encroachment or violation; and it is impossible to find a reason in law or in common sense why the same boundaries between the fact and the law should not have been at the same time extended to criminal cases by the same rules of pleading, if the jurisdiction of the jury had been designed to be limited to the fact, as in civil actions. But no such boundary was ever made or attempted. On the contrary, every person charged with any crime by an indictment or information has been in all times, from the Norman Conquest to this hour, not only permitted, but even bound, to throw himself upon his country for deliverance, by the general plea of not guilty, and may submit his whole defense to the jury, whether it be a negation of the fact or a justification of it in law. The judge has no authority, as in a civil case, to refuse such evidence at the trial as out of the issue, and as *coram non judice*,—an authority which, in common sense, he certainly would have if the jury had no higher jurisdiction in the one case than in the other. The general plea thus sanctioned by immemorial custom so blends the law and the fact together as to be inseparable but by the voluntary act of the jury in finding a special verdict. The general investigation of the whole charge is therefore before them; and although the defendant admits the fact laid in the information or indictment, he nevertheless, under his general plea, gives evidence of others which are collateral, referring them to the judgment of the jury as a legal excuse or justification, and receives from their verdict a complete, general, and conclusive deliverance. Mr. Justice Blackstone, in the fourth volume of his Commentaries (page 339), says: "The traitorous or felonious intent are the points and very gist of the indictment, and must be answered directly by the general negative, 'not guilty'; and the jury will take notice of any defensive matter, and give their verdict accordingly, as effectually as if it were specially pleaded." This, therefore, says Sir Matthew Hale, in his Pleas of the Crown (page 258), is upon all accounts, the most advantageous plea for the defendant: "It would be a most unhappy case for the judge himself if the prisoner's fate depended upon his directions,—unhappy also for the

prisoner, for, if the judge's opinion must rule the verdict, the trial by jury would be useless."

(3, 4) My lord, the conclusive operation of the verdict when given [in a criminal case], and the security of the jury from all consequences in giving it, render the contrast between criminal and civil cases striking and complete. No new trial can be granted, as in a civil action. Your lordships, however you may disapprove of the acquittal, have no authority to award one, for there is no precedent of any such upon record, and the discretion of the court is circumscribed by the law. Neither can the jurors be attainted by the crown. In Bushel's case (Vaughan's Reports, p. 146) that learned and excellent judge expressed himself thus: "There is no case in all the law of an attaint for the king, nor any opinion but that of Thyrning's (10 Hen. IV., tit. 'Attaint,' 60, 64), for which there is no warrant in law, though there be other specious authority against it, touched by none that have argued this case."

LORD MANSFIELD: To be sure it is so.

MR. ERSKINE: Since that is clear, my lord, I shall not trouble the court further upon it. Indeed, I have not been able to find any one authority for such an attaint but a dictum in Fitzherbert's Natura Brevium (page 107); and, on the other hand, the doctrine of Bushel's case is expressly agreed to in very modern times (*vide* 1 Ld. Raym. p. 469).

If, then, your lordships reflect but for a moment upon this comparative view of criminal and civil cases which I have laid before you, how can it be seriously contended, not merely that there is no difference, but that there is any—the remotest—similarity between them? In the one case the power of accusation begins from the court; in the other, from the people only, forming a grand jury. In the one the defendant must plead a special justification, the merits of which can only be decided by the judges; in the other he may throw himself for general deliverance upon his country. In the first the court may award a new trial, if the verdict for the defendant be contrary to the evidence or the law; in the last it is conclusive and unalterable. And, to crown the whole, the king never had that process of attaint which belonged to the meanest of his subjects.

When these things are attentively considered, I might ask those who are still disposed to deny the right of the jury to investigate the whole charge, whether such a solecism can be conceived to exist in any human government, much less in the most refined and exalted in the world, as that a power of supreme judicature should

be conferred [on the jury] at random by the blind forms of the law, where no right was intended to pass with it, and which was upon no occasion and under no circumstance to be exercised; which, though exerted notwithstanding in every age and in a thousand instances, to the confusion and discomfiture of fixed magistracy, should never be checked by authority, but should continue on, from century to century, the revered guardian of liberty and of life, arresting the arm of the most headstrong government in the worst of times, without any power in the crown or its judges to touch, without its consent, the meanest wretch in the kingdom, or even to ask the reason and principle of the verdict which acquits him. That such a system should prevail in a country like England, without either the original institution or the acquiescing sanction of the legislature, is impossible. Believe me, my lord, no talents can reconcile, no authority can sanction, such an absurdity. The common sense of the world revolts at it.

Having established this important right in the jury beyond all possibility of cavil or controversy, I will now show your lordships that its existence is not merely consistent with the theory of the law, but is illustrated and confirmed by the universal practice of all judges; not even excepting Mr. Justice Foster himself, whose writings have been cited in support of the contrary opinion. How a man expresses his abstract ideas is of but little importance when an appeal can be made to his plain directions to others, and to his own particular conduct; but even none of his expressions, when properly considered and understood, militate against my position.

In his justly celebrated book on the Criminal Law (page 256) he expresses himself thus: "The construction which the law putteth upon fact stated and agreed or found by a jury is in all cases undoubtedly the proper province of the court." Now, if the adversary is disposed to stop here, though the author never intended he should, as is evident from the rest of the sentence, yet I am willing to stop with him, and to take it as a substantive proposition, for the slightest attention must discover that it is not repugnant to anything which I have said. Facts stated and agreed, or facts found by a jury (which amount to the same thing), constitute a special verdict; and who ever supposed that the law upon a special verdict was not the province of the court? Where, in a trial upon a general issue, the parties choose to agree upon facts and to state them, or the jury choose voluntarily to find them without drawing the legal conclusion themselves, who ever denied that in such instances the court is to draw it? That Foster meant nothing more than that the court was to judge of

the law when the jury thus voluntarily prays its assistance by special verdict is evident from his words which follow, for he immediately goes on to say: "In cases of doubt and real difficulty, it is therefore commonly recommended to the jury to state facts and circumstances in a special verdict." But neither here, nor in any other part of his works, is it said or insinuated that they are bound to do so, but at their own free discretion. Indeed, the very term "recommended" admits the contrary, and requires no commentary. I am sure I shall never dispute the wisdom or expediency of such a recommendation in those cases of doubt, because, the more I am contending for the existence of such an important right, the less it would become me to be the advocate of rashness and precipitation in the exercise of it. It is no denial of jurisdiction to tell the greatest magistrate upon earth to take good counsel in cases of real doubt and difficulty. Judges upon trials, whose authority to state the law is indisputable, often refer it to be more solemnly argued before the court; and this court itself often holds a meeting of the twelve judges before it decides on a point upon its own records, of which the others have confessed no cognizance till it comes before them by the writ of error of one of the parties. These instances are monuments of wisdom, integrity, and discretion; but they do not bear, in the remotest degree, upon jurisdiction. The sphere of jurisdiction is measured by what may or may not be decided by any given tribunal with legal effect; not by the rectitude or error of the decision. If the jury, according to these authorities, may determine the whole matter by their verdict, and if the verdict, when given, is not only final and unalterable, but must be enforced by the authority of the judges, and executed, if resisted, by the whole power of the state, upon what principle of government or reason can it be argued not to be law? That the jury are in this exact predicament is confessed by Foster, for he concludes with saying that, when the law is clear, the jury, under the direction of the court, in point of law may, and, if they are well advised, will, always find a general verdict conformably to such directions.

This is likewise consistent with my position. If the law be clear, we may presume that the judge states it clearly to the jury, and, if he does, undoubtedly the jury, if they are well advised, will find according to such directions, for they have not a capricious discretion to make law at their pleasure, but are bound in conscience, as well as judges are, to find it truly, and, generally speaking, the learning of the judge who presides at the trial affords them a safe support and direction.

The same practice of judges in stating the law to the jury, as applied to the particular case before them, appears likewise in the case of The King v. Oneby (2 Ld. Raym. p. 1494): "On the trial the judge directs the jury thus: 'If you believe such and such witnesses who have sworn to such and such facts, the killing of the deceased appears to be with malice prepense; but if you do not believe them, then you ought to find him guilty of manslaughter, and the jury may, if they think proper, give a general verdict of murder or manslaughter; but if they decline giving a general verdict, and will find the facts specially, the court is then to form their judgment from the facts found, whether the defendant be guilty or not guilty,—that is, whether the act was done with malice and deliberation or not.'" Surely language can express nothing more plainly or unequivocally than that, where "the general issue" is pleaded to an indictment, the law and the fact are both before the jury, and that the former can never be separated from the latter for the judgment of the court, unless by their own spontaneous act. For the words are: "If they decline giving a general verdict, and will find the facts specially, the court is then to form their judgment from the facts found." So that, after a general issue joined, the authority of the court only commences when the jury chooses to decline the decision of the law by a general verdict,—the right of declining which legal determination is a privilege conferred on them by the statute of Westminster II., and by no means a restriction of their powers.

But another very important view of the subject remains behind. Supposing I had failed in establishing that contrast between criminal and civil cases which is now too clear not only to require, but even to justify, another observation, the argument would lose nothing by the failure. The similarity between criminal and civil cases derives all its application to the argument from the learned judge's supposition that the jurisdiction of the jury over the law was never contended for in the latter, and consequently, on a principle of equality, could not be supported in the former; whereas I do contend for it, and can incontestably establish it, in both. This application of the argument is plain from the words of the charge: "If the jury could find the law, it would undoubtedly hold in civil cases as well as criminal. But was it ever supposed that a jury was competent to say the operation of a fine, or a recovery, or a warranty, which are mere questions of law?" To this question I answer that the competency of the jury in such cases is contended for to the full extent of my principle, both by Lyttleton and by Coke. They cannot, indeed,

decide upon them *de plano,* which, as Vaughan truly says, is unintelligible, because an unmixed question of law can by no possibility come before them for decision. But whenever the operation of a fine, a recovery, a warranty, or any other record or conveyance known to the law of England comes forward, mixed with the fact on the general issue, the jury have then most unquestionably a right to determine it; and what is more, no other authority possibly can, because, when the general issue is permitted by law, these questions cannot appear on the record for the judgment of the court, and, although it can grant a new trial, yet the same question must ultimately be determined by another jury. This is not only self-evident to every lawyer, but, as I said, is expressly laid down by Lyttleton in the 368th section: "Also, in such case where the inquest may give their verdict at large, if they will take upon them the knowledge of the law upon the matter, they may give their verdict generally as it is put in their charge; as, in the case aforesaid, they may well say that the lessor did not disseise the lessee, if they will." Coke, in his commentary on this action, confirms Lyttleton, saying that in doubtful cases they should find specially, for fear of an attaint. And it is plain that the statute of Westminster II. was made either to give or to confirm the right of the jury to find the matter specially, leaving their jurisdiction over the law as it stood by the common law. The words of the statute of Westminster II. (chapter 30) are: *"Ordinatum est quod justitiarii ad assisas capiendas assignati, non compellant juratores dicere precise si sit disseisina vel non; dummodo voluerint dicere veritatem facti et petere auxilium justitiariorum."* From these words it should appear that the jurisdiction of the jury over the law, when it came before them on the general issue, was so vested in them by the constitution that the exercise of it in all cases had been considered to be compulsory upon them, and that this was a legislative relief from that compulsion in the case of an assize of disseisin. It is equally plain, from the remaining words of the act, that their jurisdiction remained as before: *"Sed si sponte velint dicere quod disseisina est vel non, admittatur eorum veredictum sub suo periculo"*

But the most material observation upon this statute, as applicable to the present subject, is that, the terror of the attaint from which it was passed to relieve them having (as has been shown) no existence in cases of crime, the act only extended to relieve the jury, at their discretion, from finding the law in civil actions. Consequently, it is only from custom, and not from positive law,

that they are not even compellable to give a general verdict involving a judgment of law on every criminal trial.

These principles and authorities certainly establish that it is the duty of the judge, on every trial where the general issue is pleaded, to give to the jury his opinion on the law as applied to the case before them, and that they must find a general verdict, comprehending a judgment of law, unless they choose to refer it specially to the court. But we are here in a case where it is contended that the duty of the judge is the direct contrary of this; that he is to give no opinion at all to the jury upon the law as applied to the case before them; that they likewise are to refrain from all consideration of it, and yet that the very same general verdict, comprehending both fact and law, is to be given by them as if the whole legal matter had been summed up by the one, and found by the other.

I confess I have no organs to comprehend the principle on which such a practice proceeds. I contended for nothing more at the trial than the very practice recommended by Foster and Lord Raymond. I addressed myself to the jury upon the law with all possible respect and deference, and, indeed, with very marked personal attention to the learned judge. So far from urging the jury dogmatically to think for themselves without his constitutional assistance, I called for his opinion on the question of libel. I said that, if he should tell them distinctly the paper indicted was libelous, though I should not admit that they were bound at all events to give effect to it if they felt it to be innocent, yet I was ready to agree that they ought not to go against the charge without great consideration; but that, if he should shut himself up in silence, giving no opinion at all upon the criminality of the paper, from which alone any guilt could be fastened on the publisher, and should narrow their consideration to the publication, I entered my protest against their finding a verdict affixing the epithet of "guilty" to the mere fact of publishing a paper, the guilt of which had not been investigated. If, after this address to the jury, the learned judge had told them that, in his opinion, the paper was a libel, but still, leaving it to their judgments, and likewise the defendant's evidence to their consideration, had further told them that he thought it did not exculpate the publication, and if, in consequence of such directions, the jury had found a verdict for the crown, I should never have made my present motion for a new trial, because I should have considered such a verdict of "guilty" as founded upon the opinion of the jury on the whole matter as left to their consideration, and must

have sought my remedy by arrest of judgment on the record. But the learned judge took a directly contrary course. He gave no opinion at all on the guilt or innocence of the paper. He took no notice of the defendant's evidence of intention. He told the jury, in the most explicit terms, that neither the one nor the other was within their jurisdiction. Upon the mere fact of publication, he directed a general verdict comprehending the epithet of "guilty," after having expressly withdrawn from the jury every consideration of the merits of the paper published, or the intention of the publisher, from which it is admitted on all hands the guilt of publication could alone have any existence.

My motion is therefore founded upon this obvious and simple principle: that the defendant has had, in fact, no trial, having been found guilty without any investigation of his guilt, and without any power left to the jury to take cognizance of his innocence. I undertake to show that the jury could not possibly conceive or believe, from the judge's charge, that they had any jurisdiction to acquit him, however they might have been impressed even with the merit of the publication, or convinced of his meritorious intention in publishing it. Nay, what is worse, while the learned judge totally deprived them of their whole jurisdiction over the question of libel and the defendant's seditious intention, he, at the same time, directed a general verdict of guilty, which comprehended a judgment upon both!

When I put this construction on the learned judge's direction, I found myself wholly on the language in which it was communicated; and it will be no answer to such construction that no such restraint was meant to be conveyed by it. If the learned judge's intentions were even the direct contrary of his expressions, yet if, in consequence of that which was expressed, though not intended, the jury were abridged of a jurisdiction which belonged to them by law, and in the exercise of which the defendant had an interest, he is equally a sufferer, and the verdict given under such misconception of authority is equally void. My application ought, therefore, to stand or fall by the charge itself, upon which I disclaim all disingenuous caviling. I am certainly bound to show that, from the general result of it, fairly and liberally interpreted, the jury could not conceive that they had any right to extend their consideration beyond the bare fact of publication, so as to acquit the defendant by a judgment on the legality of the Dialogue, or the honesty of the intention in publishing it.

In order to understand the learned judge's direction, it must be recollected that it was addressed to them in answer to me, who

had contended for nothing more than that these two considerations ought to rule the verdict; and it will be seen that the charge, on the contrary, not only excluded both of them by general inference, but by expressions, arguments, and illustrations the most studiously selected to convey that exclusion, and to render it binding on the consciences of the jury. After telling them, in the very beginning of his charge, that the single question for their decision was whether the defendant had published the pamphlet, he declared to them that it was not even allowed to him, as the judge trying the cause, to say whether it was or was not a libel; for that, if he should say it was no libel, and they, following his direction, should acquit the defendant, they would thereby deprive the prosecutor of his writ of error upon the record, which was one of his dearest birthrights. The law, he said, was equal between the prosecutor and the defendant; that a verdict of acquittal would close the matter forever, depriving him of his appeal; and that whatever, therefore, was upon the record, was not for their decision, but might be carried, at the pleasure of either party, to the house of lords. Surely, language could not convey a limitation upon the right of the jury over the question of libel, or the intention of the publisher, more positive or more universal. It was positive, inasmuch as it held out to them that such a jurisdiction could not be entertained without injustice. It was universal, because the principle had no special application to the particular circumstances of that trial, but subjected every defendant, upon every prosecution for a libel, to an inevitable conviction on the mere proof of publishing anything, though both judge and jury might be convinced that the thing published was innocent, and even meritorious.

My lord, I make this commentary without the hazard of contradiction from any man whose reason is not disordered; for if the prosecutor in every case has a birthright by law to have the question of libel left open upon the record, which it can only be by a verdict of conviction on the single fact of publishing, no legal right can at the same time exist in the jury to shut out that question by a verdict of acquittal founded upon the merits of the publication or the innocent mind of the publisher. Rights that are repugnant and contradictory cannot be coexistent. The jury can never have a constitutional right to do an act beneficial to the defendant which, when done, deprives the prosecutor of a right which the same constitution has vested in him. No right can belong to one person, the exercise of which, in every instance, must necessarily work a wrong to another. If the prosecutor of

a libel has, in every instance, the privilege to try the merits of his prosecution before the judges, the jury can have no right, in any instance, to preclude his appeal to them, by a general verdict for the defendant.

The jury, therefore, from this part of the charge, must necessarily have felt themselves absolutely limited (I might say even in their powers) to the fact of publication, because the highest restraint upon good men is to convince them that they cannot break loose from it without injustice; and the power of a good subject is never more effectually destroyed than when he is made to believe that the exercise of it will be a breach of his duty to the public, and a violation of the laws of his country. But since equal justice between the prosecutor and the defendant is the pretense for this abridgment of jurisdiction, let us examine a little how it is affected by it. Do the prosecutor and the defendant really stand upon an equal footing by this mode of proceeding? With what decency this can be alleged I leave those to answer who know that it is only by the indulgence of Mr. Bearcroft, of counsel for the prosecution, that my reverend client is not at this moment in prison, while we are discussing this notable equality! Besides, my lord, the judgment of this court, though not final in the constitution, and therefore not binding on the prosecutor, is absolutely conclusive on the defendant. If your lordships pronounce the record to contain no libel, and arrest the judgment on the verdict, the prosecutor may carry it to the house of lords, and, pending his writ of error, it remains untouched by your lordship's decision. But if judgment be against the defendant, it is only at the discretion of the crown (as it is said), and not of right, that he can prosecute any writ of error at all; and even if he finds no obstruction in that quarter, it is but, at the best, an appeal for the benefit of public liberty, from which he himself can have no personal benefit, for, the writ of error being no supersedeas, the punishment is inflicted on him in the meantime. In the case of Mr. Horne, this court imprisoned him for publishing a libel upon its own judgment, pending his appeal from its justice; and he had suffered the utmost rigor which the law imposed upon him as a criminal at the time that the house of lords, with the assistance of the twelve judges of England, were gravely assembled to determine whether he had been guilty of any crime. I do not mention this case as hard or rigorous on Mr. Horne as an individual,—it is the general course of practice; but surely that practice ought to put an end to this argument of equality between prosecutor and prisoner! It is adding insult to injury to

tell an innocent man, who is in a dungeon pending his writ of error, and of whose innocence both judge and jury were convinced at the trial, that he is in equal scales with his prosecutor, who is at large, because he has an opportunity of deciding, after the expiration of his punishment, that the prosecution had been unfounded, and his sufferings unjust. By parity of reasoning, a prisoner in a capital case might be hanged in the meantime, for the benefit of equal justice, leaving his executors to fight the battle out with his prosecutor upon the record, through every court in the kingdom, by which, at last, his attainder might be reversed, and the blood of his posterity remain uncorrupted. What justice can be more impartial or equal!

So much for this right of the prosecutor of a libel to compel a jury in every case generally to convict a defendant on the fact of publication, or to find a special verdict,—a right unheard of before, since the birth of the constitution,—not even founded upon any equality in fact, even if such a shocking parity could exist in law, and not even contended to exist in any other case, where private men become the prosecutors of crimes for the ends of public justice. It can have, generally speaking, no existence in any prosecution for felony, because the general description of the crime in such indictments, for the most part, shuts out the legal question in the particular instance from appearing on the record. For the same reason, it can have no place even in appeals of death, etc., the only cases where prosecutors appear as the revengers of their own private wrongs, and not as the representatives of the crown.

The learned judge proceeded next to establish the same universal limitation upon the power of the jury, from the history of different trials, and the practice of former judges who presided at them; and while I am complaining of what I conceive to be injustice, I must take care not to be unjust myself. I certainly do not, nor ever did, consider the learned judge's misdirection in his charge to be peculiar to himself. It was only the resistance of the defendant's evidence, and what passed after the jury returned into court with the verdict, that I ever considered to be a departure from all precedents. The rest had undoubtedly the sanction of several modern cases; and I wish, therefore, to be distinctly understood that I partly found my motion for a new trial in opposition to these decisions. It is my duty to speak with deference of all the judgments of this court, and I feel an additional respect for some of those I am about to combat, because they are your lordship's; but, comparing them with the

judgments of your predecessors for ages, which is the highest evidence of English law, I must be forgiven if I presume to question their authority.

My lord, it is necessary that I should take notice of some of them as they occur in the learned judge's charge. For, although he is not responsible for the rectitude of those precedents which he only cited in support of it, yet the defendant is unquestionably entitled to a new trial if their principles are not ratified by the court; for, whenever the learned judge cited precedents to warrant the limitation on the province of the jury imposed by his own authority, it was such an adoption of the doctrines they contained as made them a rule to the jury in their decision.

First, then, the learned judge, to overturn my argument with the jury for their jurisdiction over the whole charge, opposed your lordship's established practice for eight and twenty years; and the weight of this great authority was increased by the general manner in which it was stated, for I find no expressions of your lordship's, in any of the reported cases, which go the length contended for. I find the practice, indeed, fully warranted by them, but I do not meet with the principle, which can alone vindicate that practice, fairly and distinctly avowed.

The learned judge then referred to the charge of Chief Justice Raymond, in the case of the king and Franklin, in which the universal limitation contended for is, indeed, laid down, not only in the most unequivocal expressions, but the ancient jurisdiction of juries, resting upon all the authorities I have cited, treated as a ridiculous notion, which had been just taken up, a little before the year 1731, and which no man living had ever dreamed of before. The learned judge observed that Lord Raymond stated to the jury on Franklin's trial that there were three questions. The first was the fact of publishing the "Craftsman"; secondly, whether the averments in the information were true; but that the third, *viz.*, whether it was a libel, was merely a question of law, with which the jury had nothing to do, as had been then of late thought by some people who ought to have known better. This direction of Lord Raymond's was fully ratified and adopted in all its extent, and given to the jury on the present trial, with several others of the same import, as an unerring guide for their conduct; and surely human ingenuity could not frame a more abstract and universal limitation upon their right to acquit the defendant by a general verdict, for Lord Raymond's expressions amount to an absolute denial of the right of the jury to find the defendant not guilty, if the publication and innuendos are proved.

"Libel or no libel is a question of law, with which you, the jury, have nothing to do." How, then, can they have any right to give a general verdict consistently with this declaration? Can any man in his senses collect that he has a right to decide on that with which he has nothing to do? But it is needless to comment on these expressions, for the jury were likewise told by the learned judge himself that, if they believed the fact of publication, they were bound to find the defendant guilty; and it will hardly be contended that a man has a right to refrain from doing that which he is bound to do.

Mr. Cowper, as counsel for the prosecution [against the Dean of St. Asaph], took upon him to explain what was meant by this expression, and I seek for no other construction. "The learned judge," said he, "did not mean to deny the right of the jury, but only to convey that there was a religious and moral obligation upon them to refrain from the exercise of it." Now, if the principle which imposed that obligation had been alleged to be special, applying only to the particular case of the Dean of St. Asaph, and consequently consistent with the right of the jury to a more enlarged jurisdiction in other instances, telling the jury that they were bound to convict, on proof of publication, might be plausibly construed into a recommendation to refrain from the exercise of their right in that case, and not to a general denial of its existence; but the moment it is recollected that the principle which bound them was not particular to the instance, but abstract and universal, binding alike in every prosecution for a libel, it requires no logic to pronounce the expression to be an absolute, unequivocal, and universal denial of the right. Common sense tells every man that to speak of a person's right to do a thing, which yet, in every possible instance where it might be exerted, he is religiously and morally bound not to exert, is not even sophistry, but downright vulgar nonsense. But the jury were not only limited by these modern precedents, which certainly have an existence, but were, in my mind, limited with still greater effect by the learned judge's declaration that some of those ancient authorities on which I had principally relied for the establishment of their jurisdiction had not merely been overruled, but were altogether inapplicable. I particularly observed how much ground I lost with the jury when they were told from the bench that even in Bushel's case, on which I had so greatly depended, the very reverse of my doctrine had been expressly established; the court having said unanimously in that case, according to the learned judge's statement, that, if the jury be asked what the

law is, they cannot say, and having likewise ratified in express terms the maxim, *Ad quaestionem legis non respondent juratores.*

My lord, this declaration from the bench, which I confess not a little staggered and surprised me, rendered it my duty to look again into Vaughan, where Bushel's case is reported. I have performed that duty, and now take upon me positively to say that the words of Lord Chief Justice Vaughan, which the learned judge considered as a judgment of the court, denying the jurisdiction of the jury over the law, where a general issue is joined before them, were, on the contrary, made use of by that learned and excellent person to expose the fallacy of such a misapplication of the maxim alluded to by the counsel against Bushel; declaring that it had no reference to any case where the law and the fact were incorporated by the plea of not guilty, and confirming the right of the jury to find the law upon every such issue, in terms the most emphatical and expressive. This is manifest from the whole report.

Bushel, one of the jurors on the trial of Penn and Mead, had been committed by the court for finding the defendant not guilty, against the direction of the court in matter of law, and, being brought before the court of common pleas by *habeas corpus,* this cause of commitment appeared upon the face of the return to the writ. It was contended by the counsel against Bushel, upon the authority of this maxim, that the commitment was legal, since it appeared by the return that Bushel had taken upon him to find the law against the direction of the judge, and had been, therefore, legally imprisoned for that contempt. It was upon that occasion that Chief Justice Vaughan, with the concurrence of the whole court, repeated the maxim, *Ad quaestionem legis non respondent juratores,* as cited by the counsel for the crown, but denied the application of it to impose any restraint upon jurors trying any crime upon the general issue. His language is too remarkable to be forgotten, and too plain to be misunderstood. Taking the words of the return to the *habeas corpus, viz.,* "That the jury did acquit against the direction of the court in matter of law," "These words," said this great lawyer, "taken literally and *de plano,* are insignificant and unintelligible; for no issue can be joined of matter of law; no jury can be charged with the trial of matter of law barely. No evidence ever was or can be given to a jury of what is law or not; nor any oath given to a jury to try matter of law alone; nor can any attaint lie for such a false oath. Therefore we must take off this veil and color of words, which make a show of being something, but are in fact

nothing; for, if the meaning of these words, 'Finding against the direction of the court in matter of law,' be that, if the judge, having heard the evidence given in court (for he knows no other), shall tell the jury, upon this evidence, that the law is for the plaintiff or the defendant, and they, under the pain of fine and imprisonment, are to find accordingly, every one sees that the jury is but a troublesome delay, great charge, and of no use in determining right and wrong, which were a strange and new-found conclusion, after a trial so celebrated for many hundreds of years in this country."

Lord Chief Justice Vaughan's argument is therefore plainly this: Adverting to the arguments of the counsel, he says: "You talk of the maxim, *Ad quaestionem legis non respondent juratores,* but it has no sort of application to your subject. The words of your return, *viz.,* that Bushel did acquit against the direction of the court in matter of law, are unintelligible, and, as applied to the case, impossible. The jury could not be asked, in the abstract, what was the law. They could not have an issue of the law joined before them. They could not be sworn to try it. *Ad quaestionem legis non respondent juratores.* Therefore, to say literally and *de plano* that the jury found the law against the judge's direction is absurd. They could not be in a situation to find it; an unmixed question of law could not be before them; the judge could not give any positive directions of law upon the trial, for the law can only arise out of facts, and the judge cannot know what the facts are till the jury have given their verdict. Therefore," continued the Chief Justice, "let us take off this veil and color of words, which make a show of being something, but are in fact nothing. Let us get rid of the fallacy of applying a maxim which truly describes the jurisdiction of the courts over issues of law to destroy the jurisdiction of jurors in cases where law and fact are blended together upon a trial; since, if the jury at the trial are bound to receive the law from the judge, every one sees that it is a mere mockery, and of no use in determining right and wrong."

This is the plain common sense of the argument; and it is impossible to suggest a distinction between its application to Bushel's case and to the present, except that the right of imprisoning the jurors was there contended for, in order to enforce obedience to the directions of the judge. But this distinction, if it deserves the name, though held up by Mr. Bearcroft as very important, is a distinction without a difference. For if, according to Vaughan, the free agency of the jury over the whole charge,

uncontrolled by the judge's direction, constitutes the whole of that ancient mode of trial, it signifies nothing by what means that free agency is destroyed,—whether by the imprisonment of conscience or of body; by the operation of their virtues or of their fears. Whether they decline exerting their jurisdiction from being told that the exertion of it is a contempt of religious and moral order, or a contempt of the court punishable by imprisonment, their jurisdiction is equally taken away.

My lord, I should be very sorry improperly to waste the time of the court, but I cannot help repeating once again that if, in consequence of the learned judge's directions, the jury, from a just deference to learning and authority,—from a nice and modest sense of duty,—felt themselves not at liberty to deliver the defendant from the whole indictment, he has not been tried. Because, though he was entitled by law to plead generally that he was not guilty, though he did, in fact, plead it accordingly, and went down to trial upon it, the jury have not been permitted to try that issue, but have been directed to find, at all events, a general verdict of "Guilty," with a positive injunction not to investigate the guilt, or even to listen to any evidence of innocence.

My lord, I cannot help contrasting this trial with that of Colonel Gordon's, but a few sessions past in London. I had in my hand but this moment an accurate note of Mr. Baron Eyre's charge to the jury on that occasion; but I will not detain the court by looking for it among my papers, because I believe I can correctly repeat the substance of it.

LORD MANSFIELD: The case of the king against Cosmo Gordon?

MR. ERSKINE: Yes, my lord. Colonel Gordon was indicted for the murder of General Thomas, whom he had killed in a duel, and the question was whether, if the jury were satisfied of that fact, the prisoner was to be convicted of murder. That was, according to Foster, as much a question of law as libel or no libel, but Mr. Baron Eyre did not, therefore, feel himself at liberty to withdraw it from the jury. After stating (greatly to his honor) the hard condition of the prisoner, who was brought to trial for life in a case where the positive law and the prevailing manners of the times were so strongly in opposition to one another that he was afraid the punishment of individuals would never be able to beat down an offense so sanctioned, he addressed the jury nearly in these words: "Nevertheless, gentlemen, I am bound to declare to you what the law is as applied to this case, in all the different views in which it can be considered by you upon the

evidence. Of this law and of the facts as you shall find them your verdict must be compounded; and I persuade myself that it will be such an one as to give satisfaction to your own consciences."

Now, if Mr. Baron Eyre, instead of telling the jury that a duel, however fair and honorably fought, was murder by the law of England, and, leaving them to find a general verdict under that direction, had said to them that whether such a duel was murder or manslaughter was a question with which neither he nor they had anything to do, and on which he should, therefore, deliver no opinion, and had directed them to find that the prisoner was guilty of killing the deceased in a deliberate duel, telling them that the court would settle the rest, that would have been directly consonant to the case of the Dean of St. Asaph. By this direction the prisoner would have been in the hands of the court, and the judges, not the jury, would have decided upon the life of Colonel Gordon. But the two learned judges differ most essentially indeed. Mr. Baron Eyre conceives himself bound in duty to state the law as applied to the particular facts, and to leave it to the jury. Mr. Justice Buller says he is not bound, nor even allowed, so to state or apply it, and withdraws it entirely from their consideration. Mr. Baron Eyre tells the jury that their verdict is to be compounded of the fact and the law; Mr. Justice Buller, on the contrary, that it is to be confined to the fact only, the law being the exclusive province of the court. My lord, it is not for me to settle differences of opinion between the judges of England, nor to pronounce which of them is wrong; but since they are contradictory and inconsistent, I may hazard the assertion that they cannot both be right. The authorities which I have cited, and the general sense of mankind which settles everything else, must determine the rest.

My lord, I come now to a very important part of the case, untouched, I believe, before in any of the arguments on this occasion.

I mean to contend that the learned judge's charge to the jury cannot be supported even upon its own principles. For, supposing the court to be of opinion that all I have said in opposition to these principles is inconclusive, and that the question of libel and the intention of the publisher were properly withdrawn from the consideration of the jury, still I think I can make it appear that such a judgment would only render the misdirection more palpable and striking.

I may safely assume that the learned judge must have meant

to direct the jury either to find a general or a special verdict, or, to speak more generally, that one of these two verdicts must be the object of every charge, because I venture to affirm that neither the records of the courts, the reports of their proceedings, nor the writings of lawyers furnish any account of a third. There can be no middle verdict between both. The jury must either try the whole issue generally, or find the facts specially, referring the legal conclusion to the court.

I may affirm with certainty that the general verdict *ex vi termini* is universally as comprehensive as the issue, and that, consequently, such a verdict on an indictment, upon the general issue "not guilty," universally and unavoidably involves a judgment of law as well as fact, because the charge comprehends both, and the verdict, as has been said, is coextensive with it. Both Coke and Lyttleton give this precise definition of a general verdict; for they both say that, if the jury will find the law, they may do it by a general verdict, which is ever as large as the issue. If this be so, it follows by necessary consequence that, if the judge means to direct the jury to find generally against a defendant, he must leave to their consideration everything which goes to the constitution of such a general verdict, and is therefore bound to permit them to come to, and to direct them how to form, that general conclusion from the law and the fact which is involved in the term "guilty." For it is ridiculous to say that guilty is a fact. It is a conclusion of law from a fact, and therefore can have no place in a special verdict, where the legal conclusion is by the court.

In this case the defendant is charged, not with having published this pamphlet, but with having published a certain false, scandalous, and wicked libel, with a seditious and libelous intention. He pleads that he is not guilty in manner and form as he is accused; which plea is admitted on all hands to be a denial of the whole charge, and consequently does not merely put in issue the fact of publishing the pamphlet, but the truth of the whole indictment,—that is, the publication of the libel set forth in it, with the intention charged by it. When this issue comes down for trial, the jury must either find the whole charge or a part of it; and admitting, for argument's sake, that the judge has a right to dictate either of these two courses, he is undoubtedly bound in law to make his direction to the jury conformable to the one or the other. If he means to confine the jury to the fact of publishing, considering the guilt of the defendant to be a legal conclusion for the court to draw from that fact,

specially found on the record, he ought to direct the jury to find that fact without affixing the epithet of "guilty" to the finding. But if he will have a general verdict of "guilty," which involves a judgment of law as well as fact, he must leave the law to the consideration of the jury. For when the word "guilty" is pronounced by them, it is so well understood to comprehend everything charged by the indictment that the associate or his clerk instantly records that the defendant is guilty "in manner and form as he is accused,"—that is, not simply that he has published the pamphlet contained in the indictment, but that he is guilty of publishing the libel with the wicked intentions charged on him by the record.

Now, if this effect of a general verdict of "guilty" is reflected on for a moment, the illegality of directing one upon the bare fact of publishing will appear in the most glaring colors. The learned judge says to the jury: "Whether this be a libel is not for your consideration. I can give no opinion on that subject without injustice to the prosecutor; and as to what Mr. Jones swore[1] concerning the defendant's motives for the publication, that is likewise not before you, for, if you are satisfied in point of fact that the defendant published this pamphlet, you are bound to find him guilty." Why guilty, my lord, when the consideration of guilt is withdrawn? He confines the jury to the finding of a fact, and enjoins them to leave the legal conclusion from it to the court. Yet, instead of directing them to make that fact the subject of a special verdict, he desires them in the same breath to find a general one,—to draw the conclusion without any attention to the premises; to pronounce a verdict which, upon the face of the record, includes a judgment upon their oaths that the paper is a libel, and that the publisher's intentions in publishing it were wicked and seditious, although neither the one nor the other made any part of their consideration! My lord, such a verdict is a monster in law, without precedent in former times, or root in the constitution. If it be true, on the principle of the charge itself, that the fact of publication was all that the jury were to find, and all that was necessary to establish the defendant's guilt, —if the thing published be a libel,—why was not that fact found, like all other facts, upon special verdicts? Why was an epithet, which is a legal conclusion from the fact, extorted from a jury who were restrained from forming it themselves? The verdict

[1] Mr. Edward Jones stated that it was not till after the Dialogue had been spoken of in very opprobrious terms, and the dean's character reflected on, that the dean stated he felt bound to show that it was not seditious, and therefore determined to publish it.

must be taken to be general or special. If general, it has found the whole issue without a coextensive examination. If special, the word "guilty," which is a conclusion from facts, can have no place in it. Either this word "guilty" is operative or unessential; an epithet of substance or of form. It is impossible to controvert that proposition, and I give the gentlemen their choice of the alternative. If they admit it to be operative and of real substance, or, to speak more plainly, that the fact of publication found specially, without the epithet of "guilty," would have been an imperfect verdict, inconclusive of the defendant's guilt, and on which no judgment could have followed, then it is impossible to deny that the defendant has suffered injustice; for such an admission confesses that a criminal conclusion from a fact has been obtained from the jury, without permitting them to exercise that judgment which might have led them to a conclusion of innocence, and that the word "guilty" has been obtained from them at the trial as a mere matter of form, although the verdict without it, stating only the fact of publication, which they were directed to find, to which they thought the finding alone enlarged, and beyond which they had never enlarged their inquiry, would have been an absolute verdict of acquittal. If, on the other hand, to avoid this insuperable objection to the charge, the word "guilty" is to be reduced to a mere word of form, and it is to be contended that the fact of publication, found specially, would have been tantamount, be it so. Let the verdict be so recorded. Let the word "guilty" be expunged from it, and I instantly sit down. I trouble your lordships no further. I withdraw my motion for a new trial, and I will maintain, in arrest of judgment, that the dean is not convicted. But if this is not conceded to me, and the word "guilty," though argued to be but form, and though, as such, obtained from the jury, is still preserved upon the record, and made use of against the defendant as substance, it will then become us (independently of all considerations as lawyers) to consider a little how that argument is to be made consistent with the honor of gentlemen, or that fairness of dealing which cannot but have place wherever justice is administered.

But in order to establish that the word "guilty" is a word of essential substance, that the verdict would have been imperfect without it, and that, therefore, the defendant suffers by its insertion, I undertake to show your lordship, upon every principle and authority of law, that, if the fact of publication (which is all that was left to the jury) had been found by special verdict, no judgment could have been given on it. My lord, I will try this by

taking the fullest finding which the facts in evidence could possibly have warranted. Supposing, then, for instance, that the jury had found that the defendant published the paper according to the tenor of the indictment; that it was written of and concerning the king and his government; and that the innuendoes were likewise as averred,—"K" meaning the present king, and "P" the present parliament of Great Britain,—on such a finding, no judgment could have been given by the court, even if the record had contained a complete charge of a libel. No principle is more unquestionable than that, to warrant any judgment upon a special verdict, the court, which can presume nothing that is not visible on the record, must see sufficient matter upon the face of it which, if taken to be true, is conclusive of the defendant's guilt. They must be able to say: "If this record be true, the defendant cannot be innocent of the crime which it charges on him." But from the facts of such a verdict the court could arrive at no such legitimate conclusion; for it is admitted on all hands, and, indeed, expressly laid down by your lordship in the case of The King v. Woodfall, that the publication even of a libel is not conclusive evidence of guilt; for that the defendant may give evidence of an innocent publication.[2]

Looking, therefore, upon a record containing a good indictment of a libel, and a verdict finding that the defendant published it, but without the epithet of "guilty," the court could not pronounce that he published it with malicious intention, which is the essence of the crime. They could not say what might have passed at the trial. For anything that appeared to them, he might have given such evidence of innocent motive, necessity, or mistake as might have amounted to excuse or justification. They would say that the facts stated upon the verdict would have been fully sufficient, in the absence of a legal defense, to have warranted the judge to have directed, and the jury to have given, a general verdict of guilty, comprehending the intention which constitutes the crime; but that to warrant the bench, which is ignorant of everything at the trial, to presume that intention, and thereupon to pronounce judgment on the record, the jury must not merely find full evidence of the crime, but such facts as compose its legal definition. This wise principle is supported by authorities which are perfectly familiar.

If, in actions of trover, the plaintiff proves property in himself,

[2] Lord Mansfield's words were: "There may be cases where the fact of the publication, even of a libel, may be justified, or excused as lawful or innocent; for no fact which is not criminal, even though the paper be a libel, can amount to a publication of which a defendant ought to be found guilty."

possession in the defendant, and a demand and refusal of the thing charged to be converted, this evidence, unanswered, is full proof of a conversion; and if the defendant could not show to the jury why he had refused to deliver the plaintiff's property on a legal demand of it, the judge would direct them to find him guilty of the conversion. But on the same facts found by special verdict, no judgment could be given by the court. The judges would say: "If the special verdict contains the whole of the evidence given at the trial, the jury should have found the defendant guilty, for the conversion was fully proved; but we cannot declare these facts to amount to a conversion, for the defendant's intention was a fact which the jury should have found from the evidence, over which we have no jurisdiction." So, in the case put by Lord Coke (I believe in his first Institute, 115), if a *modus* is found to have existed beyond memory till within thirty years before the trial, the court cannot, upon such facts found by special verdict, pronounce against the *modus;* but any one of your lordships would tell the jury that, upon such evidence, they were warranted in finding against it. In all cases of prescription, the universal practice of judges is to direct juries, by analogy to the statute of limitations, to decide against incorporeal rights which for many years have been relinquished; but such modern relinquishments, if stated upon the record by special verdict, would in no instance warrant a judgment against any prescription. The principle of the difference is obvious and universal. The court, looking at a record, can presume nothing. It has nothing to do with reasonable probabilities, but is to establish legal certainties by its judgments. Every crime is, like every other complex idea, capable of a legal definition. If all the component parts which go to its formation are put as facts upon the record, the court can pronounce the perpetrator of them a criminal; but if any of them are wanting, it is a chasm in fact, and cannot be supplied. Wherever intention goes to the essence of the charge, it must be found by the jury. It must be either comprehended under the word "guilty" in the general verdict, or specifically found as a fact by the special verdict. This was solemnly decided by the court in Huggins' case, in 2 Ld. Raym. 1581, which was a special verdict of murder from the Old Bailey. It was an indictment against John Huggins and James Barnes for the murder of Edward Arne. The indictment charged that Barnes made an assault upon Edward Arne, being in the custody of the other prisoner, Huggins, and detained him for six weeks in a room newly built over the common sewer of the prison, where he languished and died. The

indictment further charged that Barnes and Huggins well knew that the room was unwholesome and dangerous. The indictment then charged that the prisoner Huggins, of his malice aforethought, was present, aiding and abetting Barnes to commit the murder aforesaid. This was the substance of the indictment. The special verdict found that Huggins was warden of the Fleet by letters patent; that the other prisoner, Barnes, was servant to Huggins, deputy in the care of all the prisoners, and of the deceased, a prisoner there; that the prisoner Barnes, on the 7th of September, put the deceased Arne in a room over the common sewer, which had been newly built, knowing it to be newly built and damp, and situated as laid in the indictment; and that, fifteen days before the prisoner's death, Huggins likewise well knew that the room was new built, damp, and situated as laid. They found that, fifteen days before the death of the prisoner, Huggins was present in the room, and saw him there under duress of imprisonment, but then and there turned away, and Barnes locked the door, and that from that time till his death the deceased remained locked up. It was argued before the twelve judges, in Sergeant's Inn, whether Huggins was guilty of murder. It was agreed that he was not answerable criminally for the act of his deputy, and could not be guilty unless the criminal intention was brought personally home to himself. And it is remarkable how strongly the judges required the fact of knowledge and malice to be stated on the face of the verdict, as opposed to evidence of intention, and inference from a fact. The court said: "It is chiefly relied on that Huggins was present in the room, and saw Arne *sub duritie imprisonamenti, et se avertit;* but he might be present, and not know all the circumstances. The words are, *vidit sub duritie;* but he might see him under duress, and not know he was under duress." It was answered that seeing him under duress evidently means he knew he was under duress. But, says the court: "We cannot take things by inference in this manner. His seeing is but evidence of his knowledge of these things, and therefore the jury, if the fact would have borne it, should have found that Huggins knew he was there without his consent, which not being done, we cannot intend these things nor infer them,—we must judge of facts, and not from the evidence of facts,"—and cited Kelynge, 78, that whether a man be aiding and abetting a murder is matter of fact, and ought to be expressly found by a jury.

The application of these last principles and authorities to the case before the court is obvious and simple. The criminal in-

tention is a fact, and must be found by the jury; and that finding can only be expressed upon the record by the general verdict of guilty, which comprehends it, or by the special enumeration of such facts as do not merely amount to evidence of, but which completely and conclusively constitute, the crime. But it has been shown, and is indeed admitted, that the publication of a libel is only *prima facie* evidence of the complex charge in the indictment, and not such a fact as amounts in itself, when specially stated, to conclusive guilt. For, as the judges cannot tell how the criminal inference from the fact of publishing a libel might have been rebutted at the trial, no judgment can follow from a special finding that the defendant published the paper indicted, according to the tenor laid in the indictment. It follows from this that, if the jury had only found the fact of publication (which was all that was left to them), without affixing the epithet of "guilty" (which could only be legally affixed by an investigation not permitted to them), a *venire facias de novo* must have been awarded because of the uncertainty of the verdict as to the criminal intention; whereas it will now be argued that, if the court shall hold the Dialogue to be a libel, the defendant is fully convicted, because the verdict does not merely find that he published, which is a finding consistent with innocence, but finds him guilty of publishing, which is a finding of the criminal publication charged by the indictment.

My lord, how I shall be able to defend my innocent client against such an argument I am not prepared to say. I feel all the weight of it; but that feeling surely entitles me to greater attention, when I complain of that which subjects him to it without the warrant of the law. It is the weight of such an argument that entitles me to a new trial; for the Dean of St. Asaph is not only found guilty, without any investigation of his guilt by the jury, but without that question being even open to your lordships on the record! Upon the record the court can only say the Dialogue is or is not a libel; but if it should pronounce it to be one, the criminal intention of the defendant in publishing it is taken for granted by the word "guilty"; although it has not only not been tried, but evidently appears, from the verdict itself, not to have been found by the jury. Their verdict is, "Guilty of publishing"; but whether a libel or not, they do not find. And it is therefore impossible to say that they can have found a criminal motive in publishing a paper, on the criminality of which they have formed no judgment. Printing and publishing that which is legal contains in it no crime. The guilt must arise from the publication

of a libel; and there is, therefore, a palpable repugnancy on the face of the verdict itself, which finds first the dean guilty of publishing, and then renders the finding a nullity by pronouncing ignorance in the jury whether the thing published comprehends any guilt!

To conclude this part of the subject, the epithet of "guilty," as I set out with at first, must either be taken to be substance or form. If it be substance, and, as such, conclusive of the criminal intention of the publisher, should the thing published be hereafter adjudged to be a libel, I ask a new trial, because the defendant's guilt in that respect has been found without having been tried; if, on the other hand, the word "guilty" is admitted to be but a word of form, then let it be expunged, and I am not hurt by the verdict.

(3) Having now established, according to my first two propositions, that the jury upon every general issue, joined in a criminal case, have a constitutional jurisdiction over the whole charge, I am next, in support of my third, to contend that the case of a libel forms no legal exception to the general principles which govern the trial of all other crimes; that the argument for the difference, namely, because the whole charge [in a prosecution for a libel] always appears on the record, is false in fact, and that, even if true, it would form no substantial difference in law.

As to the first, I still maintain that the whole case does by no means necessarily appear on the record. The crown may indict part of the publication, which may bear a criminal construction when separated from the context, and, the context omitted having no place in the indictment, the defendant can neither demur to it nor arrest the judgment after a verdict of guilty, because the court is absolutely circumscribed by what appears on the record, and the record contains a legal charge of a libel. I maintain, likewise, that, according to the principles adopted upon this trial, he is equally shut out from such defense before the jury. For though he may read the explanatory context in evidence, yet he can derive no advantage from reading it, if they are tied down to find him guilty of publishing the matter which is contained in the indictment, however its innocence may be established by a view of the whole work. The only operation which, looking at the context, it can have upon a jury, is to convince them that the matter upon the record, however libelous when taken by itself, was not intended to convey the meaning which the words indicted import in language, when separated from the general scope of the writing. But upon the principle contended for, they could not

acquit the defendant upon any such opinion, for that would be to take upon them the prohibited question of libel, which is said to be matter of law for the court.

My learned friend, Mr. Bearcroft, appealed to his audience with an air of triumph, whether any sober man could believe that an English jury, in the case I put from Algernon Sidney, would convict a defendant of publishing the Bible, should the crown indict a member of a verse which was blasphemous in itself if separated from the context. My lord, if my friend had attended to me, he would have found that, in considering such supposition as an absurdity, he was only repeating my own words! I never supposed that a jury would act so wickedly or so absurdly in a case where the principle contended for by my friend Mr. Bearcroft carried so palpable a face of injustice as in the instance which I selected to expose it, and which I therefore selected to show that there were cases in which the supporters of the doctrine were ashamed of it, and obliged to deny its operation. For it is impossible to deny that, if the jury can look at the context in the case put by Sidney, and acquit the defendant on the merits of the thing published, they may do it in cases which will directly operate against the principle he seems to support. This will appear from other instances, where the injustice is equal, but not equally striking. Suppose the crown were to select some passages from Locke upon Government; as, for instance, "that there is no difference between the king and the constable, when either of them exceeds his authority." That assertion, under certain circumstances, if taken by itself, without the context, might be highly seditious, and the question, therefore, would be, *quo animo* it was written? Perhaps the real meaning of the sentence might not be discoverable by the immediate context, without a view of the whole chapter,—perhaps of the whole book. Therefore, to do justice to the defendant, upon the very principle by which Mr. Bearcroft, in answering Sidney's case, can alone acquit the publisher of his Bible, the jury must look into the whole essay on Government, and form a judgment of the design of the author, and the meaning of his work.

LORD MANSFIELD: To be sure, they may judge from the whole work.

MR. ERSKINE: And what is this, my lord, but determining the question of libel, which is denied to-day? For if a jury may acquit the publisher of any part of Mr. Locke on Government from a judgment arising out of a view of the whole book, though there be no innuendoes to be filled up as facts in the indictment, what is it that bound the jury to convict the Dean of St. Asaph, as the

publisher of Sir William Jones' Dialogue, on the bare fact of publication, without the right of saying that his observations, as well as Mr. Locke's, were speculative, abstract, and legal?

LORD MANSFIELD: They certainly may, in all cases, go into the whole context.

MR. ERSKINE: And why may they go into the context? Clearly, my lord, to enable them to form a correct judgment of the meaning of the part indicted, even though no particular meaning be submitted to them by averments in the indictment. And therefore the very permission to look at the context for such a purpose (where there are no innuendoes to be filled up by them as facts) is a plausible admission of all I am contending for, namely, the right of the jury to judge of the merits of the paper, and the intention of its author. But it is said that, though a jury have a right to decide that a paper, criminal as far as it appears on the record, is nevertheless legal when explained by the whole work of which it is a part, yet that they shall have no right to say that the whole work itself, if it happens to be all indicted, is innocent and legal. This proposition, my lord, upon the bare stating of it, seems too preposterous to be seriously entertained; yet there is no alternative between maintaining it in its full extent, and abandoning the whole argument. If the defendant is indicted for publishing part of the verse in the Psalms, "There is no God," it is asserted that the jury may look at the context, and, seeing that the whole verse did not maintain that blasphemous proposition, but only that the fool had said so in his heart, may acquit the defendant upon a judgment that it is no libel to impute such imagination to a fool; but if the whole verse had been indicted, namely, "The fool has said in his heart, 'There is no God,'" the jury, on the principle contended for, would be restrained from the same judgment of its legality, and must convict of blasphemy on the fact of publishing, leaving the question of libel untouched on the record.

If, in the same manner, only part of this very dialogue had been indicted instead of the whole, it is said, even by your lordship, that the jury might have read the context, and then, notwithstanding the fact of publishing, might have collected from the whole its abstract and speculative nature, and have acquitted the defendant upon that judgment of it. And yet it is contended that they have no right to form the same judgment of it upon the present occasion, although the whole be before them upon the face of the indictment, but are bound to convict the defendant upon the fact of publishing, notwithstanding they should have come to the same judgment of its legality which it is admitted they might have

come to on trying an indictment for the publication of a part! Really, my lord, the absurdities and gross departures from reason which must be hazarded to support this doctrine are endless.

The criminality of the paper is said to be a question of law, yet the meaning of it, from which alone the legal interpretation can arise, is admitted to be a question of fact! If the text be so perplexed and dubious as to require innuendoes to explain, to point out, and to apply obscure expression or construction, the jury alone, as judges of fact, are to interpret and to say what sentiments the author must have meant to convey by his writing. Yet, if the writing be so plain and intelligible as to require no averments of its meaning, it then becomes so obscure and mysterious as to be a question of law, and beyond the reach of the very same men who, but a moment before, were interpreters for the judges; and though its object be most obviously peaceable, and its author innocent, they are bound to say, upon their oaths, that it is wicked and seditious and the publisher of it guilty! As a question of fact, the jury are to try the real sense and construction of the words indicted, by comparing them with the context; and yet, if that context itself, which affords the comparison, makes part of the indictment, the whole becomes a question of law, and they are then bound down to convict the defendant on the fact of publishing it, without any jurisdiction over the meaning! To complete the juggle, the intention of the publisher may likewise be shown as a fact by the evidence of any extrinsic circumstances, such as the context, to explain the writing, or the circumstances of mistake or ignorance under which it was published; and yet, in the same breath, the intention is pronounced to be an inference of law from the act of publication, which the jury cannot exclude, but which must depend upon the future judgment of the court!

But the danger of this system is no less obvious than its absurdity. I do not believe that its authors ever thought of inflicting death upon Englishmen without the interposition of a jury; yet its establishment would unquestionably extend to annihilate the substance of that trial in every prosecution for high treason, where the publication of any writing was laid as the overt act. I illustrated this by a case when I moved for a rule, and called upon my friends for an answer to it, but no notice has been taken of it by any of them. This was just what I expected. When a convincing answer cannot be found to an objection, those who understand controversy never give strength to it by a weak one. I said, and I again repeat, that if an indictment charges that a defendant did traitorously intend, compass, and imagine the death of the king,

and, in order to carry such treason into execution, published a paper, which it sets out *literatim* on the face of the record, the principle which is laid down to-day would subject that person to the pains of death by the single authority of the judges, without leaving anything to the jury but the bare fact of publishing the paper. For if that fact were proved, and the defendant called no witnesses, the judge who tried him would be warranted—nay, bound in duty by the principle in question—to say to the jury: "Gentlemen, the overt act of treason charged upon the defendant is the publication of this paper, intending to compass the death of the king. The fact is proved, and you are therefore bound to convict him. The treasonable intention is an inference of law from the act of publishing, and if the thing published does not, upon a future examination, intrinsically support that inference, the court will arrest the judgment, and your verdict will not affect the prisoner."

My lord, I will rest my whole argument upon the analogy between these two cases, and give up every objection to the doctrine when applied to the one, if, upon the strictest examination, it shall not be found to apply equally to the other. If the seditious intention be an inference of law from the fact of publishing the paper which this indictment charges to be a libel, is not the treasonable intention equally an inference from the fact of publishing that paper, which the other indictment charges to be an overt act of treason? In the one case, as in the other, the writing or publication of a paper is the whole charge; and the substance of the paper so written or published makes all the difference between the two offenses. If that substance be matter of law where it is a seditious libel, it must be matter of law where it is an act of treason; and if, because it is law, the jury are excluded from judging it in the one instance, their judgment must suffer an equal abridgment in the other. The consequence is obvious. If the jury, by an appeal to their consciences, are to be thus limited in the free exercise of that right which was given them by the constitution, to be a protection against judicial authority, where the weight and majesty of the crown is put into the scale against an obscure individual, the freedom of the press is at an end. For how can it be said that the press is free because everything may be published without a previous license, if the publisher of the most meritorious work which the united powers of genius and patriotism ever gave to the world may be prosecuted by information of the king's attorney general, without the consent of the grand jury,—may be convicted by the petty jury on the mere fact af publishing (who,

indeed, without perjuring themselves, must, on this system, inevitably convict him), and must then depend upon judges who may be the supporters of the very administration whose measures are questioned by the defendant, and who must, therefore, either give judgment against him or against themselves. To all this Mr. Bearcroft shortly answers: "Are you not in the hands of the same judges with respect to your property, and even to your life, when special verdicts are found in murder, felony, and treason? In these cases do prisoners run any hazard from the application of the law by the judges to the facts found by the juries? Where can you possibly be safer?"

My lord, this is an argument which I can answer without indelicacy or offense, because your lordship's mind is much too liberal to suppose that I insult the court by general observations on the principles of our legal government. However safe we might be or might think ourselves, the constitution never intended to invest judges with a discretion which cannot be tried and measured by the plain and palpable standard of law; and in all the cases put by Mr. Bearcroft, no such loose discretion is exercised as must be entertained by a judgment on a seditious libel, and therefore the cases are not parallel.

On a special verdict for murder, the life of the prisoner does not depend upon the religious, moral, or philosophical ideas of the judges concerning the nature of homicide. No; precedents are searched for, and, if he is condemned at all, he is judged exactly by the same rules as others have been judged by before him. His conduct is brought to a precise, clear, intelligible standard, and cautiously measured by it. It is the law, therefore, and not the judge, which condemns him. It is the same in all indictments or civil actions for slander upon individuals. Reputation is a personal right of the subject,—indeed, the most valuable of any,—and it is, therefore, secured by law, and all injuries to it clearly ascertained. Whatever slander hurts a man in his trade, subjects him to danger of life, liberty, or loss of property, or tends to render him infamous, is the subject of an action, and, in some instances, of an indictment. But in all these cases where the *malus animus* is found by the jury, the judges are in like manner a safe repository of the legal consequence, because such libels may be brought to a well-known standard of strict and positive law,—they leave no discretion in the judges. The determination of what words, when written or spoken of another, are actionable, or the subject of an indictment, leaves no more latitude to a court sitting in judgment on the record than a question of title does in a special verdict in ejectment.

But I beseech your lordship to consider by what rule the legality or illegality of this Dialogue is to be decided by the court as a question of law upon the record. Mr. Bearcroft has admitted in the most unequivocal terms—what, indeed, it was impossible for him to deny—that every part of it, when viewed in the abstract, was legal; but he says there is a great distinction to be taken between speculation and exhortation, and that it is this latter which makes it a libel. I readily accede to the truth of the observation; but how your lordship is to determine that difference as a question of law is past my comprehension. For if the Dialogue, in its phrase and composition, be general, and its libelous tendency arises from the purpose of the writer to raise discontent by a seditious application of legal doctrines, that purpose is surely a question of fact, if ever there was one, and must therefore be distinctly averred in the indictment, to give the cognizance of it as a fact to the jury, without which no libel can possibly appear upon the record. This is well known to be the only office of the innuendo; because the judges can presume nothing which the strictest rules of grammar do not warrant them to collect intrinsically from the writing itself.

Circumscribed by the record, your lordship can form no judgment of the tendency of this Dialogue to excite sedition by anything but the mere words. You must look at it as if it was an old manuscript dug out of the ruins of Herculaneum. You collect nothing from the time when, or the circumstances under which, it was published; the person by whom, and those among whom, it was circulated. Yet these may render a paper, at one time and under some circumstances, dangerously wicked and seditious, which at another time, and under different circumstances, might be innocent and highly meritorious. If puzzled by a task so inconsistent with the real sense and spirit of judicature, your lordship should spurn the fetters of the record, and, judging with the reason rather than the infirmities of men, should take into your consideration the state of men's minds on the subject of equal representation at this moment, and the great disposition of the present times to revolution in government; if, reading the record with these impressions, your lordship should be led to a judgment not warranted by an abstract consideration of the record,—then, besides that such a judgment would be founded on facts not in evidence before the court, and not within its jurisdiction if they were, let me further remind your lordships that, even if those objections to the premises were removed, the conclusion would be no conclusion of law. Your decision on the subject might be very sagacious as politicians, as moralists, as philosophers, or as licensers of the

press, but they would have no resemblance to the judgments of an English court of justice, because it could have no warrant from the act of your predecessors, nor afford any precedent to your successors. But all these objections are perfectly removed when the seditious tendency of a paper is considered as a question of fact. We are then relieved from the absurdity of legal discussion separated from all the facts from which alone the law can arise. The jury can do what (as I observed before) your lordships cannot do in judging by the record,—they can examine, by evidence, all those circumstances that tend to establish the seditious tendency of the paper, from which the court is shut out; they may know themselves, or it may be proved before them, that it has excited sedition already; they may collect from witnesses that it has been widely circulated and seditiously understood; or, if the prosecution (as is wisest) precedes these consequences, and the reasoning must be *a priori,* surely gentlemen living in the country are much better judges than your lordship what has or has not a tendency to disturb the neighborhood in which they live, and that very neighborhood is the forum of criminal trial. If they know that the subject of the paper is the topic that agitates the country around them,—if they see danger in that agitation, and have reason to think that the publisher must have intended it,—they say he is guilty. If, on the other hand, they consider the paper to be legal and enlightened in principle, likely to promote a spirit of activity and liberty in times when the activity of such a spirit is essential to the public safety, and have reason to believe it to be written and published in that spirit, they say, as they ought to do, that the writer or the publisher is not guilty; whereas your lordship's judgment upon the language of the record must ever be in the pure abstract, operating blindly and indiscriminately upon all times, circumstances, and intentions; making no distinction between the glorious attempts of a Sidney or a Russell, struggling against the terrors of despotism under the Stuarts, and those desperate adventurers of the year forty-five who libeled the person, and excited rebellion against the mild and gracious government of our late excellent sovereign King George the Second.

My lord, if the independent gentlemen of England are thus better qualified to decide from cause of knowledge, it is no offense to the court to say that they are full as likely to decide with impartial justice as judges appointed by the crown. Your lordships have but a life interest in the public property; but they have an inheritance in it for their children. Their landed property depends upon the security of the government, and no man who wan-

tonly attacks it can hope or expect to escape from the selfish lenity of a jury. On the first principles of human action, they must lean heavily against him. It is only when the pride of Englishmen is insulted by such doctrines as I am opposing to-day that they may be betrayed into a verdict delivering the guilty, rather than surrender the rights by which alone innocence, in the day of danger, can be protected.

(4) I venture, therefore, to say, in support of one of my original propositions, that where a writing indicted as a libel neither contains nor is averred by the indictment to contain any slander of an individual, so as to fall within those rules of law which protect personal reputation, but whose criminality is charged to consist, as in the present instance, in its tendency to stir up general discontent, the trial of such an indictment neither involves, nor can in its obvious nature involve, any abstract question of law for the judgment of a court, but must wholly depend upon the judgment of the jury on the tendency of the writing itself to produce such consequences, when connected with all the circumstances which attended its publication.

It is unnecessary to push this part of the argument further, because I have heard nothing from the bar against the position which it maintains. None of the gentlemen have, to my recollection, given the court any one single reason, good or bad, why the tendency of a paper to stir up discontent against government, separated from all the circumstances which are ever shut out from the record, ought to be considered as an abstract question of law. They have not told us where we are to find any matter in the books to enable us to argue such questions before the court, or where your lordships yourselves are to find a rule for your judgments on such subjects. I confess that to me it looks more like legislation or arbitrary power than English judicature. If the court can say this is a criminal writing,—not because we know that mischief was intended by its author, or is even contained in itself, but because fools, believing the one and the other, may do mischief in their folly,—the suppression of such writings, under particular circumstances, may be wise policy in a state; but upon what principle it can be criminal law in England, to be settled in the abstract by judges, I confess with humility that I have no organs to understand.

Mr. Leycester[8] felt the difficulty of maintaining such a proposition by any argument of law, and therefore had recourse to an argument of fact. "If," says my learned friend, "what is or is not a seditious libel be not a question of law for the court,

[8] Counsel for the crown.

but of fact for the jury, upon what principle do defendants, found guilty of such libels by a general verdict, defeat the judgment for error on the record? And what is still more in point, upon what principle does Mr. Erskine himself, if he fails in his present motion, mean to ask your lordships to arrest this very judgment by saying that the Dialogue is not a libel?"

My lord, the observation is very ingenious, and God knows the argument requires that it should be; but it is nothing more. The arrest of judgment which follows after a verdict of guilty for publishing a writing, which, on inspection of the record, exhibits to the court no specific offense against the law, is no impeachment of my doctrine. I never denied such a jurisdiction to the court. My position is that no man shall be punished for the criminal breach of any law until a jury of his equals have pronounced him guilty in mind as well as in act,—*Actus non facit reum nisi mens sit rea.* But I never asserted that a jury had the power to make criminal law, as well as to administer it; and therefore it is clear that they cannot deliver over a man to punishment if it appears by the record of his accusation, which it is the office of judicature to examine, that he has not offended against any positive law, because, however criminal he may have been in his disposition, which is a fact established by the verdict, yet statute and precedents can alone decide what is by law an indictable offense. If, for instance, a man were charged by an indictment with having held a discourse in words highly seditious, and were found guilty by the jury, it is evident that it is the province of the court to arrest that judgment. Why? Because, though the jury have found that he spoke the words as laid in the indictment with the seditious intention charged upon him, which they, and they only, could find, yet, as the words are not punishable by indictment, as when committed to writing, the court could not pronounce judgment. The declaration of the jury that the defendant was guilty in manner and form as accused could evidently never warrant a judgment if the accusation itself contained no charge of an offense against the law. In the same manner, if a butcher were indicted for privately putting a sheep to causeless and unnecessary torture in the exercise of his trade, but not in public view, so as to be productive of evil example, and the jury should find him guilty, I am afraid no judgment could follow; because, though done *malo animo,* yet neither statute nor precedent has, perhaps, determined it to be an indictable offense. It would be difficult to draw the line. An indictment would not lie for every inhuman neglect of

the sufferings of the smallest innocent animals which Providence has subjected to us:

> "Yet the poor beetle which we tread upon,
> In corporeal suffering feels a pang as great
> As when a giant dies."

A thousand other instances might be brought of acts base and immoral, and prejudicial in their consequences, which are yet not indictable by law.

In the case of The King v. Brewer, in Cowper's Reports, it was held that knowingly exposing to sale and selling gold under sterling for standard gold is not indictable, because the act refers to goldsmiths only, and private cheating is not a common-law offense. Here, too, the declaration of the jury that the defendant is guilty in manner and form as accused does not change the nature of the accusation. The verdict does not go beyond the charge; and if the charge be invalid in law, the verdict must be invalid also. All these cases, therefore, and many similar ones which might be put, are clearly consistent with my principle. I do not seek to erect jurors into legislators or judges. There must be a rule of action in every society, which it is the duty of the legislature to create, and of judicature to expound when created. I only support their right to determine guilt or innocence where the crime charged is blended by the general issue with the intention of the criminal; more especially when the quality of the act itself, even independent of that intention, is not measurable by any precise principle or precedent of law, but is inseparably connected with the time when, the place where, and the circumstances under which, the defendant acted.

My lord, in considering libels of this nature, as opposed to slander on individuals, to be mere questions of fact, or, at all events, to contain matter fit for the determination of the jury, I am supported not only by the general practice of courts, but even of those very practicers themselves, who, in prosecuting for the crown, have maintained the contrary doctrine. Your lordships will, I am persuaded, admit that the general practice of the profession—more especially of the very heads of it, prosecuting too, for the public—is strong evidence of the law. Attorneys general have seldom entertained such a jealousy of the king's judges in state prosecutions as to lead them to make presents of jurisdiction to juries which did not belong to them of right by the constitution of the country. Neither can it be supposed that men in high office and of great experience should in every instance, though differing from each other in temper, character, and talents, uniformly fall into the

same absurdity of declaiming to juries upon topics totally irrelevant, when no such inconsistency is found to disfigure the professional conduct of the same men in other cases. Yet I may appeal to your lordship's recollection, without having recourse to the state trials, whether, upon every prosecution for a seditious libel within living memory, the attorney general has not uniformly stated such writings at length to the jury, pointed out their seditious tendency which render them criminal, and exerted all his powers to convince them of their illegality, as the very point on which their verdict for the crown was to be founded.

On the trial of Mr. Horne for publishing an advertisement in favor of the widows of those American subjects who had been murdered by the king's troops at Lexington, did the present chancellor [Lord Thurlow], then attorney general, content himself with saying that he had proved the publication, and that the criminal quality of the paper which raised the legal inference of guilt against the defendant was matter for the court? No, my lord; he went at great length into its dangerous and pernicious tendency, and applied himself with skill and ability to the understandings and the consciences of the jurors. This instance is in itself decisive of his opinion. That great magistrate could not have acted thus upon the principle contended for to-day. He never was an idle declaimer,—close and masculine argument is the characteristic of his understanding.

The character and talents of the late Lord Chief Justice De Grey no less entitle me to infer his opinion from his uniform conduct. In all such prosecutions, while he was in office, he held the same language to juries; and particularly in the case of The King v. Woodfall—to use the expression of a celebrated writer on the occasion—"he tortured his faculties for more than an hour to convince them that Junius' letter was a libel."

The opinions of another crown lawyer, who has since passed through the first offices of the law, and filled them with the highest reputation, I am not driven to collect alone from his language as an attorney general, because he carried them with him to the seat of justice. Yet one case is too remarkable to be omitted. Lord Camden, prosecuting Dr. Shebbeare, told the jury that he did not desire their verdict upon any other principle than their solemn conviction of the truth of the information which charged the defendant with a wicked design to alienate the hearts of the subjects of this country from their king upon the throne.

To complete the account, my learned friend Mr. Bearcroft, though last, not least in favor, upon this very occasion spoke above

an hour to the jury at Shrewsbury to convince them of the libelous tendency of the Dialogue, which soon afterwards the learned judge desired them wholly to dismiss from their consideration as matter with which they had no concern! The real fact is that the doctrine is too absurd to be acted upon; too distorted in principle to admit of consistency in practice. It is contraband in law, and can only be smuggled by those who introduce it. It requires great talents and great address to hide its deformity; in vulgar hands it becomes contemptible.

Having supported the rights of juries by the uniform practice of crown lawyers, let us now examine the question of authority, and see how this court itself and its judges have acted upon trials for libels in former times; for, according to Lord Raymond, in Franklin's case, as cited by Mr. Justice Buller, at Shrewsbury, the principle I am supporting had, it seems, been only broached, about the year 1731, by some men of party spirit, and then, too, for the very first time. My lord, such an observation in the mouth of Lord Raymond proves how dangerous it is to take up as doctrine everything flung out at *nisi prius;* above all, upon subjects which engage the passions and interests of government. The most solemn and important trials with which history makes us acquainted, discussed, too, at the bar of this court, when filled with judges the most devoted to the crown, afford the most decisive contradiction to such an unfounded and unguarded assertion.

In the famous case of the seven bishops,[4] the question of libel or no libel was held unanimously by the court of king's bench, trying the cause at the bar, to be matter for the consideration and determination of the jury; and the bishops' petition to the king, which was the subject of the information, was accordingly delivered to them when they withdrew to consider of their verdict. Thinking this case decisive, I cited it at the trial, and the answer it received from Mr. Bearcroft was that it had no relation to the point in dispute between us, for that the bishops were acquitted, not upon the question of libel, but because the delivery of the petition to the king was held to be no publication. I was not a little surprised at this statement, but my turn of speaking was then past. Fortunately, to-day it is my privilege to speak last, and I have now lying before me the fifth volume of the State Trials, where the case of the bishops is printed, and where it appears that the publication was expressly proved; that nothing turned upon it

[4] Committed to the Tower by James II., A. D. 1688, and prosecuted for petitioning the king against their being required to promulgate his second declaration of indulgence in favor of the Roman Catholics.

in the judgment of the court, and that the charge turned wholly upon the question of libel, which was expressly left to the jury by every one of the judges. Lord Chief Justice Wright, in summing up the evidence, told them that a question had at first arisen about the publication, it being insisted on that the delivery of the petition to the king had not been proved; that the court was of the same opinion; and that he was just going to direct them to find the bishops not guilty when in came my lord president (such sort of witnesses were, no doubt, always at hand when wanted), who proved the delivery to his majesty. "Therefore," continued the chief justice, "if you believe it was the same petition, it is a publication sufficient, and we must therefore come to inquire whether it be a libel." He then gave his reasons for thinking it within the case *de libellis famosis*, and concluded by saying to the jury: "In short, I must give you my opinion. I do take it to be a libel. If my brothers have anything to say to it, I suppose they will deliver their opinion." What opinion? Not that the jury had no jurisdiction to judge of the matter, but an opinion for the express purpose of enabling them to give that judgment which the law required at their hands. Mr. Justice Holloway then followed the chief justice, and so pointedly was the question of libel or no libel, and not the publication, the only matter which remained in doubt, and which the jury, with the assistance of the court, were to decide upon, that, when the learned judge went into the facts which had been in evidence, the chief justice said to him: "Look you! By the way, brother, I did not ask you to sum up the evidence, but only to deliver your opinion to the jury whether it be a libel or no." The chief justice's remark, though it proves my position, was, however, very unnecessary, for, but a moment before, Mr. Justice Holloway had declared he did not think it was a libel, but, addressing himself to the jury, had said: "It is left to you, gentlemen." Mr. Justice Powell, who likewise gave his opinion that it was no libel, said to the jury: "But the matter of it is before you, and I leave the issue of it to God and your own consciences." And so little was it in the idea of any one of the court that the jury ought to found their verdict solely upon the evidence of the publication, without attending to the criminality or innocence of the petition, that the chief justice himself consented, on their withdrawing from the bar, that they should carry with them all the materials for coming to a judgment as comprehensive as the charge, and, indeed, expressly directed that the information, the libel, the declarations under the great seal, and even the statute book should be delivered to them.

The happy issue of this memorable trial, in the acquital of the bishops by the jury, exercising jurisdiction over the whole charge, freely granted to them as legal, even by King James' judges, is admitted by two of the gentlemen [for the crown] to have prepared and forwarded the glorious era of the Revolution. Mr. Bower, in particular, spoke with singular enthusiasm concerning this verdict, choosing—for reasons sufficiently obvious—to ascribe it to a special miracle wrought for the safety of the nation, rather than to the right lodged in the jury to save it by its laws and constitution!

My learned friend, finding his argument like nothing upon the earth, was obliged to ascend to heaven to support it. Having admitted that the jury not only acted like just men toward the bishops, but as patriot citizens toward their country, and not being able, without the surrender of his whole argument, to allow either their public spirit or their private justice to have been consonant to the laws, he is driven to make them the instruments of Divine Providence to bring good out of evil, and holds them up as men inspired by God to perjure themselves in the administration of justice, in order, by the by, to defeat the effects of that wretched system of judicature which he is defending to-day as the constitution of England! For if the king's judges could have decided the petition to be a libel, the Stuarts might yet have been on the throne.

My lord, this is an argument of a priest, not of a lawyer; and even if faith, and not law, were to govern the question, I should be as far from subscribing to it as a religious opinion. No man believes more firmly than I do that God governs the whole universe by the gracious dispensations of His providence, and that all the nations of the earth rise and fall at His command; but then, this wonderful system is carried on by the natural, though, to us, the often hidden, relation between effects and causes, which wisdom adjusted from the beginning, and which foreknowledge at the same time rendered sufficient, without disturbing either the laws of nature or of civil society. The prosperity and greatness of empires ever depended, and ever must depend, upon the use their inhabitants make of their reason in devising wise laws, and the spirit and virtue with which they watch over their just execution; and it is impious to suppose that men who have made no provision for their own happiness or security in their attention to their government are to be saved by the interposition of heaven in turning the hearts of their tyrants to protect them.

But if every case in which judges have left the question of libel to juries in opposition to law is to be considered as a miracle, England may vie with Palestine, and Lord Chief Justice Holt steps next into view as an apostle; for that great judge, in Tutchin's case, left the question of libel to the jury in the most unambiguous terms. After summing up the evidence of writing and publishing, he said to them as follows: "You have now heard the evidence, and you are to consider whether Mr. Tutchin be guilty. They say they are innocent papers, and no libels, and they say nothing is a libel but what reflects upon some particular person; but this is a very strange doctrine,—to say it is not a libel reflecting on the government, endeavoring to possess the people that the government is maladministered by corrupt persons, that are employed in such or such stations, either in the navy or army. To say that corrupt officers are appointed to administer affairs is certainly a reflection on the government. If people should not be called to account for possessing the people with an ill opinion of the government, no government can subsist. For it is very necessary for all governments that the people should have a good opinion of it; and nothing can be worse to any government than to endeavor to procure animosities as to the management of it. This has always been looked upon as a crime, and no government can be safe without it be punished."

Having made these observations, did the chief justice tell the jury that whether the publication in question fell within that principle, so as to be a libel on government, was a matter of law for the court, with which they had no concern? Quite the contrary. He considered the seditious tendency of the paper as a question for their sole determination, saying to them: "Now, you are to consider whether these words I have read to you do not tend to beget an ill opinion of the administration of government; to tell us that those that are employed know nothing of the matter, and those that do know are not employed. Men are not adapted to offices, but offices to men, out of a particular regard to their interest, and not to their fitness for the places. This is the purport of these papers." In citing the words of judges in judicature, I have a right to suppose their discourse to be pertinent and relevant, and that, when they state the defendant's answer to the charge, and make remarks on it, they mean that the jury should exercise a judgment under their direction. This is the practice we must certainly impute to Lord Holt, if we do him the justice to suppose that he meant to convey the sentiments which he expressed. So that, when we come to sum up this case, I do not find myself so far behind the

learned gentleman, even in point of express authority, putting all reason, and the analogies of law which unite to support me, wholly out of the question. There is court of king's bench against court of king's bench; Chief Justice Wright against Chief Justice Lee; and Lord Holt against Lord Raymond. As to living authorities, it would be invidious to class them; but it is a point on which I am satisfied myself, and on which the world will be satisfied likewise, if ever it comes to be a question. But even if I should be mistaken in that particular, I cannot consent implicitly to receive any doctrine as the law of England, though pronounced to be such by magistrates the most respectable, if I find it to be in direct violation of the very first principles of English judicature. The great jurisdictions of the country are unalterable except by parliament, and, until they are changed by that authority, they ought to remain sacred,—the judges have no power over them. What parliamentary abridgment has been made upon the right of juries since the trial of the bishops, or since Tutchin's case, when they were fully recognized by this court? None. Lord Raymond and Lord Chief Justice Lee ought, therefore, to have looked there—to their predecessors—for the law, instead of setting up a new one for their successors.

But supposing the court should deny the legality of all these propositions, or, admitting their legality, should resist the conclusions I have drawn from them, then I have recourse to my last proposition, in which I am supported even by all those authorities on which the learned judge relies for the doctrines contained in his charge, to-wit:

"That, in all cases where the mischievous intention, which is agreed to be the essence of the crime, cannot be collected by simple inference from the fact charged, because the defendant goes into evidence to rebut such inference, the intention then becomes a pure, unmixed question of fact, for the consideration of the jury."

I said the authorities of the king against Woodfall and Almon were with me. In the first, which is reported in fifth Burrow, your lordship expressed yourself thus: "Where an act, in itself indifferent, becomes criminal when done with a particular intent, there the intent must be proved and found; but where the act itself is unlawful, as in the case of a libel, the proof of justification or excuse lies on the defendant, and, in failure thereof, the law implies a criminal intent." Most luminously expressed to convey this sentiment, namely, that when a man publishes a libel, and has nothing to say for himself,—no explanation or exculpation,—a criminal intention need not be proved. I freely admit that it need

not. It is an inference of common sense, not of law. But the publication of a libel does not exclusively show criminal intent, but is only an implication of law, in failure of the defendant's proof. Your lordship immediately afterwards, in the same case, explained this further: "There may be cases where the publication may be justified or excused as lawful or innocent; for no fact which is not criminal, though the paper be a libel, can amount to such a publication of which a defendant ought to be found guilty." But no question of that kind arose at the trial,—that is, at the trial of Woodfall. Why? Your lordship immediately explained why,—"because the defendant called no witnesses;" expressly saying that the publication of a libel is not in itself a crime unless the intent be criminal, and that it is not merely in mitigation of punishment, but that such a publication does not warrant a verdict of guilty.

In the case of The King v. Almon, a magazine, containing one of Junius' letters, was sold at Almon's shop. There was proof of that sale at the trial. Mr. Almon called no witnesses, and was found guilty. To found a motion for a new trial, an affidavit was offered from Mr. Almon that he was not privy to the sale, nor knew his name was inserted as a publisher, and that this practice of booksellers being inserted as publishers by their correspondents, without notice, was common in the trade. Your lordship said: "Sale of a book in a bookseller's shop is *prima facie* evidence of publication by the master, and the publication of a libel is *prima facie* evidence of criminal intent. It stands good till answered by the defendant. It must stand till contradicted or explained, and, if not contradicted, explained, or exculpated, becomes tantamount to conclusive when the defendant calls no witnesses." Mr. Justice Aston said: "*Prima facie* evidence, not answered, is sufficient to ground a verdict upon. If the defendant had a sufficient excuse, he might have proved it at the trial. His having neglected it where there was no surprise is no ground for a new one." Mr. Justice Willes and Mr. Justice Ashurst agreed upon those express principles.

These cases declare the law, beyond all controversy, to be that publication, even of a libel, is no conclusive proof of guilt, but only *prima facie* evidence of it till answered; and that, if the defendant can show that his intention was not criminal, he completely rebuts the inference arising from the publication, because, though it remains true that he published, yet, according to your lordship's express words, it is not such a publication of which a defendant ought to be found guilty. Apply Mr. Justice Buller's summing

up to this law, and it does not require even a legal apprehension to distinguish the repugnancy.

The advertisement was proved to convince the jury of the dean's motive for publishing. Mr. Jones' testimony went strongly to aid it, and the evidence to character, though not sufficient in itself, was admissible to be thrown into the scale. But not only no part of this was left to the jury, but the whole of it was expressly removed from their consideration, although, in the cases of Woodfall and Almon, it was as expressly laid down to be within their cognizance, and a complete answer to the charge, if satisfactory, to the minds of the jurors. In support of the learned judge's charge there can be, therefore, but the two arguments, which I stated on moving for the rule: Either that the defendant's evidence, namely, the advertisement, Mr. Jones' evidence in confirmation of its being *bona fide,* and the evidence to character to strengthen that construction, were not sufficient proof that the dean believed the publication meritorious, and published it in vindication of his honest intentions, or else that, even admitting it to establish that fact, it did not amount to such an exculpation as to be evidence on "not guilty," so as to warrant a verdict. I still give the learned judge the choice of the alternative.

As to the first, namely, whether it showed honest intention in point of fact, that was a question for the jury. If the learned judge had thought it was not sufficient evidence to warrant the jury's believing that the dean's motives were such as he had declared them, I conceive he should have given his opinion of it as a point of evidence, and left it there. I cannot condescend to go further. It would be ridiculous to argue a self-evident proposition.

As to the second, namely, that even if the jury had believed, from the evidence, that the dean's intention was wholly innocent, it would not have warranted them in acquitting, and therefore should not have been left to them upon "not guilty." That argument can never be supported. For if the jury had declared: "We find that the dean published this pamphlet,—whether a libel or not, we do not find,—and we find further that, believing it in his conscience to be meritorious and innocent, he *bona fide* published it with the prefixed advertisement, as a vindication of his character from the reproach of seditious intentions, and not to excite sedition,"—it is impossible to say, without ridicule, that on such a special verdict the court could have pronounced a criminal judgment. Then why was the consideration of that evidence, by which those facts might have been found, withdrawn from the jury after they brought in a

verdict of guilty of publishing only, which, in The King v. Woodfall, was simply said not to negative the criminal intention, because the defendant called no witnesses? Why did the learned judge confine his inquiries to the innuendoes, and, finding them agreed in, direct the epithet of "guilty," without asking the jury if they believed the defendant's evidence to rebut the criminal inference? Some of them positively meant to negative the criminal inference by adding the word "only," and all would have done it if they had thought themselves at liberty to enter upon that evidence. But they were told expressly that they had nothing to do with the consideration of that evidence, which, if believed, would have warranted that verdict. The conclusion is evident: if they had a right to consider it, and their consideration might have produced such a verdict, and if such a verdict would have been an acquittal, it must be a misdirection. "But," says Mr. Bower, "if this advertisement prefixed to the publication, by which the dean professed his innocent intention in publishing it, should have been left to the jury as evidence of that intention, to found an acquittal on, even taking the Dialogue to be a libel, no man could ever be convicted of publishing anything, however dangerous; for he would only have to tack an advertisement to it by way of preface, professing the excellence of its principles and the sincerity of its motives, and his defense would be complete." My lord, I never contended for any such position. If a man of education, like the dean, were to publish a writing so palpably libelous that no ignorance or misapprehension imputable to such a person could prevent his discovering the mischievous design of the author, no jury would believe such an advertisement to be *bona fide,* and would therefore be bound, in conscience, to reject it as if it had no existence. The effect of such evidence must be to convince the jury of the defendant's purity of mind, and must therefore depend upon the nature of the writing itself, and all the circumstances attending its publication. If, upon reading the paper, and considering the whole of the evidence, they have reason to think that the defendant did not believe it to be illegal, and did not publish it with the seditious purpose charged by the indictment, he is not guilty upon any principle or authority of law, and would have been acquitted even in the Star Chamber; for it was held by that court, in Lambe's case, in the eighth year of King James the First, as reported by Lord Coke, who then presided in it, that every one who should be convicted of a libel must be the writer or contriver, or a malicious publisher, knowing it to be a libel.

This case of Lambe being of too high authority to be opposed, and too much in point to be passed over, Mr. Bower endeavors to avoid its force by giving it a new construction of his own. He says that not knowing a writing to be a libel, in the sense of that case, means not knowing the contents of the thing published; as by conveying papers sealed up, or having a sermon and a libel, and delivering one by mistake for the other. In such cases, he says, *Ignorantia facti excusat,* because the mind does not go with the act; *sed ignorantia legis non excusat;* and therefore, if the party knows the contents of the paper which he publishes, his mind goes with the act of publication, though he does not find out anything criminal, and he is bound to abide by the legal consequences. This is to make criminality depend upon the consciousness of an act, and not upon the knowledge of its quality, which would involve lunatics and children in all the penalties of criminal law; for whatever they do is attended with consciousness, though their understanding does not reach to the consciousness of offense. The publication of a libel, not believing it to be one after having read it, is a much more favorable case than publishing it unread by mistake. The one, nine times in ten, is a culpable negligence, which is no excuse at all. For a man cannot throw papers about the world without reading them, and afterwards say he did not know their contents were criminal. But if a man reads a paper, and, not believing it to contain anything seditious, having collected nothing of that tendency himself, publishes it among his neighbors as an innocent and useful work, he cannot be convicted as a criminal publisher. How is he to convince the jury that his purpose was innocent, though the thing published be a libel, must depend upon circumstances, and these circumstances he may, on the authority of all the cases, ancient and modern, lay before the jury in evidence, because, if he can establish the innocence of his mind, he negatives the very gist of the indictment.

"In all crimes," says Lord Hale, in his Pleas of the Crown, "the intention is the principal consideration. It is the mind that makes the taking of another's goods to be felony, or a bare trespass only. It is impossible to prescribe all the circumstances evidencing a felonious intent, or the contrary, but the same must be left to the attentive consideration of judge and jury, wherein the best rule is *in dubiis,* rather to incline to acquittal than conviction." In the same work he says: "By the statute of Philip and Mary, touching importation of coin counterfeit of foreign money, it must, to make it treason, be with the intent to utter and make payment of the same; and the intent in this case may be tried and found by circumstances of fact, by words, letters, and a thousand evidences be-

sides the bare doing of the fact." This principle is illustrated by frequent practice, where the intention is found by the jury as a fact in a special verdict. It occurred, not above a year ago, at East Grinstead, on an indictment for burglary before Mr. Justice Ashurst, where I was myself counsel for the prisoner. It was clear upon the evidence that he had broken into the house by force, in the night, but I contended that it appeared from proof that he had broken and entered with an intent to rescue his goods, which had been seized that day by the officers of excise; which rescue, though a capital felony by modern statute, was but a trespass, *temp.* Henry VIII., and consequently not a burglary. Mr. Justice Ashurst saved this point of law, which the twelve judges afterwards determined for the prisoner; but in order to create the point of law, it was necessary that the prisoner's intention should be ascertained as a fact, and, for this purpose, the learned judge directed the jury to tell him with what intention they found that the prisoner broke and entered the house, which they did by answering, "To rescue his goods," which verdict was recorded.

In the same manner, in the case of The King v. Pierce, at the Old Bailey, the intention was found by the jury as a fact in the special verdict. The prisoner, having hired a horse, and afterwards sold him, was indicted for felony; but the judges, doubting whether it was more than a fraud, unless he originally hired him intending to sell him, recommended it to the jury to find a special verdict, comprehending their judgment of his intention from the evidence. Here the quality of the act depended on the intention, which intention it was held to be the exclusive province of the jury to determine, before the judges could give the act any legal denomination.

My lord, I am ashamed to have cited so many authorities to establish the first elements of the law, but it has been my fate to find them disputed. The whole mistake arises from confounding criminal with civil cases. If a printer's servant, without his master's consent or privity, inserts a slanderous article against me in his newspaper, I ought not in justice to indict him, and, if I do, the jury, on such proof, should acquit him; but it is no defense against an action, for he is responsible to me *civiliter* for the damage which I have sustained from the newspaper, which is his property. Is there anything new in this principle? So far from it, that every student knows it is as applicable to all other cases. But people are resolved, from some fatality or other, to distort every principle of law into nonsense when they come to apply it to printing, as if none of the rules and maxims which regulate all the transactions of society had any reference to it. If a man, rising in his

sleep, walks into a china shop, and breaks everything about him, his being asleep is a complete answer to an indictment for a trespass, but he must answer in an action for everything he has broken. If the proprietor of the York coach, though asleep in his bed at that city, has a drunken servant on the box at London, who drives over my leg, and breaks it, he is responsible to me in damages for the accident, but I cannot indict him as the criminal author of my misfortune. What distinction can be more obvious and simple? Let us only, then, extend these principles, which were never disputed in other criminal cases, to the crime of publishing a libel; and let us, at the same time, allow to the jury, as our forefathers did before us, the same jurisdiction in that instance which we agree in rejoicing to allow them in all others, and the system of English law will be wise, harmonious, and complete.

My lord, I have now finished my argument, having answered the several objections to my five original propositions, and established them by all the principles and authorities which appear to me to apply, or to be necessary for their support. In this process I have been unavoidably led into a length not more inconvenient to the court than to myself, and have been obliged to question several judgments which had been before questioned and confirmed. They, however, who may be disposed to censure me for the zeal which has animated me in this cause will at least, I hope, have the candor to give me credit for the sincerity of my intentions. It is surely not my interest to stir up opposition to the decided authorities of the court in which I practice. With a seat here within the bar at my time of life, and looking no further than myself, I should have been contented with the law as I found it, and have considered how little might be said with decency, rather than how much; but feeling as I have ever done upon the subject, it was impossible I should act otherwise. It was the first command and counsel to my youth always to do what my conscience told me to be my duty, and to leave the consequences to God. I shall carry with me the memory, and, I hope, the practice, of this parental lesson to the grave. I have hitherto followed it, and have no reason to complain that the adherence to it has been even a temporal sacrifice. I have found it, on the contrary, the road to prosperity and wealth, and shall point it out as such to my children. It is impossible, in this country, to hurt an honest man; but even if it were possible, I should little deserve that title if I could, upon any principle, have consented to tamper or temporize with a question which involves, in its determination and its consequences, the liberty of the press, and, in that liberty, the very existence of every part of the public freedom.

ARGUMENT IN DEFENSE OF JAMES HADFIELD, IN THE COURT OF KING'S BENCH, BEFORE LORD CHIEF JUSTICE KENYON AND A SPECIAL JURY, 1800.

STATEMENT.

This was a prosecution against James Hadfield, a soldier in the British army, for firing a pistol at the king in the Drury Lane Theater. Erskine defended the prisoner on the ground of insanity. The facts are fully stated in the argument. After the examination of a few witnesses on behalf of the defense, Chief Justice Kenyon stopped the trial, being convinced that a clear case of insanity had been established.[1] Hadfield was confined in Bedlam, where he lived for many years, though he was never afterwards free from attacks of mental hallucination.

ARGUMENT.

Gentlemen of the Jury: The scene which we are engaged in, and the duty which I am not merely privileged, but appointed by the authority of the court, to perform, exhibits to the whole civilized world a perpetual monument of our national justice. The transaction, indeed, in every part of it, as it stands recorded in the evidence already before us, places our country and its government and its inhabitants upon the highest pinnacle of human elevation. It appears that, upon the 15th day of May last, his majesty, after a reign of forty years, not merely in sovereign power, but spontaneously in the very hearts of his people, was openly shot at (or to all appearance shot at) in a public theater, in the center of his capital, and amid the loyal plaudits of his subjects, yet not a hair of the head of the supposed assassin was touched. In this unparalleled scene of calm forbearance, the king himself, though he stood first in personal interest and feeling, as well as in command, was a singular and fortunate example. The least appearance of emotion on the part of that august personage must unavoidably have produced a scene quite different, and far less honorable, than the court is now witnessing. But his majesty remained unmoved, and the person apparently offending was only secured, without injury or reproach, for the business of this day.

Gentlemen, I agree with the attorney general[1] (indeed, there can be no possible doubt) that if the same pistol had been maliciously fired by the prisoner, in the same theater, at the meanest

[1] Sir John Mitford, afterward Lord Redesdale, and lord chancellor of Ireland.

man within its walls, he would have been brought to immediate trial, and, if guilty, to immediate execution. He would have heard the charge against him for the first time when the indictment was read upon his arraignment. He would have been a stranger to the names, and even to the existence, of those who were to sit in judgment upon him, and of those who were to be the witnesses against him. But upon the charge of even this murderous attack upon the king himself he is covered all over with the armor of the law. He has been provided with counsel by the king's own judges, and not of their choice, but of his own. He has had a copy of the indictment ten days before his trial. He has had the names, descriptions, and abodes of all the jurors returned to the court, and the highest privilege of peremptory challenges derived from, and safely directed by, that indulgence. He has had the same description of every witness who could be received to accuse him, and there must at this hour be twice the testimony against him which would be legally competent to establish his guilt on a similar prosecution by the meanest and most helpless of mankind.

Gentlemen, when this melancholy catastrophe happened, and the prisoner was arraigned for trial, I remember to have said to some now present that it was, at first view, difficult to bring those indulgent exceptions to the general rules of trial within the principle which dictated them to our humane ancestors in cases of treasons against the political government, or of rebellious conspiracy against the person of the king. In these cases, the passions and interests of great bodies of powerful men being engaged and agitated, a counterpoise became necessary to give composure and impartiality to criminal tribunals; but a mere murderous attack upon the king's person, not at all connected with his political character, seemed a case to be ranged and dealt with like a similar attack upon any private man. But the wisdom of the law is greater than any man's wisdom. How much more, therefore, than mine! An attack upon the king is considered to be parricide against the state, and the jury and the witnesses, and even the judges, are the children. It is fit, on that account, that there should be a solemn pause before we rush to judgment; and what can be a more sublime spectacle of justice than to see a statutable disqualification of a whole nation for a limited period,—a fifteen days' quarantine before trial,—lest the mind should be subject to the contagion of partial affections!

From a prisoner so protected by the benevolence of our institutions, the utmost good faith would, on his part, be due to the public if he had consciousness and reason to reflect upon the obligation. The duty, therefore, devolves on me, and, upon my honor, it shall be fulfilled. I will employ no artifices of speech. I claim only the strictest protection of the law for the unhappy man before you. I should, indeed, be ashamed if I were to say anything of the rule in the abstract by which he is to be judged which I did not honestly feel. I am sorry, therefore, that the subject is so difficult to handle with brevity and precision. Indeed, if it could be brought to a clear and simple criterion, which could admit of a dry admission or contradiction, there might be very little difference, perhaps none at all, between the attorney general and myself, upon the principles which ought to govern your verdict. But this is not possible, and I am therefore under the necessity of submitting to you, and to the judges for their direction, and at greater length than I wish, how I understand this difficult and momentous subject.

The law, as it regards this most unfortunate infirmity of the human mind, like the law in all its branches, aims at the utmost degree of precision; but there are some subjects, as I have just observed to you, and the present is one of them, upon which it is extremely difficult to be precise. The general principle is clear, but the application is most difficult. It is agreed by all jurists, and is established by the law of this and every other country, that it is the reason of man which makes him accountable for his actions, and that the deprivation of reason acquits him of crime. This principle is indisputable. Yet so fearfully and wonderfully are we made, so infinitely subtle is the spiritual part of our being, so difficult is it to trace with accuracy the effect of diseased intellect upon human action, that I may appeal to all who hear me whether there are any causes more difficult, or which, indeed, so often confound the learning of the judges themselves, as when insanity, or the effects and consequences of insanity, become the subjects of legal consideration and judgment. I shall pursue the subject as the attorney general has properly discussed it. I shall consider insanity as it annuls a man's dominion over property, as it dissolves his contracts and other acts, which otherwise would be binding, and as it takes away his responsibility for crimes. If I could draw the line in a moment between these two views of the subject, I am sure the judges will do me the justice to believe

that I would fairly and candidly do so; but great difficulties press upon my mind, which oblige me to take a different course.

I agree with the attorney general that the law in neither civil nor criminal cases will measure the degrees of men's understandings. A weak man, however much below the ordinary standard of human intellect, is not only responsible for crimes, but is bound by his contracts, and may exercise dominion over his property. Sir Joseph Jekyll, in the Duchess of Cleveland's case, took the clear, legal distinction when he said: "The law will not measure the sizes of men's capacities, so as they may be *compos mentis.*" Lord Coke, in speaking of the expression *non compos mentis,* says: "Many times (as here) the Latin word expresses the true sense, and calleth him not *amens, demens, furiosus, lunaticus, fatuus, stultus,* or the like, for *non compos mentis* is the most sure and legal." He then says: "*Non compos mentis* is of four sorts: First, *ideota,* which from his nativity, by a perpetual infirmity, is *non compos mentis;* secondly, he that by sickness, grief, or other accident wholly loses his memory and understanding; thirdly, a lunatic that hath sometimes his understanding, and sometimes not,—*aliquando gaudet lucidis intervallis,*—and, therefore, he is called *non compos mentis* so long as he hath not understanding." But notwithstanding the precision with which this great author points out the different kinds of this unhappy malady, the nature of his work, in this part of it, did not open to any illustration which it can now be useful to consider. In his fourth Institute he is more particular; but the admirable work of Lord Chief Justice Hale, in which he refers to Lord Coke's Pleas of the Crown, renders all other authorities unnecessary. Lord Hale says: "There is a partial insanity of mind, and a total insanity. The former is either in respect to things, *quoad hoc vel illud insanire;* some persons that have a competent use of reason in respect of some subjects are yet under a particular *dementia* in respect of some particular discourses, subjects, or applications,—or else it is partial in respect of degrees; and this is the condition of very many, especially melancholy persons, who for the most part discover their defect in excessive fears and griefs, and yet are not wholly destitute of the use of reason, and this partial insanity seems not to excuse them in the committing of any offense for its matter capital. For, doubtless, most persons that are felons of themselves and others are under a degree of partial insanity when they commit these offenses. It is very difficult to define the invisible line that divides perfect and

partial insanity; but it must rest upon circumstances duly to be weighed and considered both by judge and jury, lest on the one side there be a kind of inhumanity toward the defects of human nature, or, on the other side, too great an indulgence given to great crimes."

Nothing, gentlemen, can be more accurately nor more humanely expressed; but the application of the rule is often most difficult. I am bound, besides, to admit that there is a wide distinction between civil and criminal cases. If, in the former, a man appears, upon the evidence, to be *non compos mentis,* the law avoids his act, though it cannot be traced or connected with the morbid imagination which constitutes his disease, and which may be extremely partial in its influence upon conduct; but to deliver a man from responsibility for crimes, above all, for crimes of great atrocity and wickedness, I am by no means prepared to apply this rule, however well established when property only is concerned.

In the very recent instance of Mr. Greenwood (which must be fresh in his lordship's recollection), the rule in civil cases was considered to be settled. That gentleman, while insane, took up an idea that a most affectionate brother had administered poison to him. Indeed, it was the prominent feature of his insanity. In a few months he recovered his senses. He returned to his profession as an advocate; was sound and eminent in his practice, and in all respects a most intelligent and useful member of society; but he could never dislodge from his mind the morbid delusion which disturbed it, and under the pressure, no doubt, of that diseased prepossession, he disinherited his brother. The cause to avoid this will was tried here. We are not now upon the evidence, but upon the principle adopted as the law. The noble and learned judge who presides upon this trial, and who presided upon that, told the jury that, if they believed Mr. Greenwood, when he made the will, to have been insane, the will could not be supported, whether it had disinherited his brother or not; that the act, no doubt, strongly confirmed the existence of the false idea, which, if believed by the jury to amount to madness, would equally have affected his testament, if the brother, instead of being disinherited, had been in his grave; and that, on the other hand, if the unfounded notion did not amount to madness, its influence could not vacate the devise. This principle of law appears to be sound and reasonable, as it applies to civil cases, from the extreme difficulty of tracing with precision the secret motions of a mind deprived by disease of its soundness and strength. Whenever,

therefore, a person may be considered *non compos mentis,* all his civil acts are void, whether they can be referred or not to the morbid impulse of his malady, or even though, to all visible appearances, totally separated from it. But I agree with Mr. Justice Tracey that it is not every man of an idle, frantic appearance and behavior who is to be considered as a lunatic, either as it regards obligations or crimes, but that he must appear to the jury to be *non compos mentis,* in the legal acceptation of the term, and that, not at any anterior period, which can have no bearing upon any case whatsoever, but at the moment when the contract was entered into, or the crime committed.

The attorney general, standing undoubtedly upon the most revered authorities of the law, has laid it down that, to protect a man from criminal responsibility, there must be a total deprivation of memory and understanding. I admit that this is the very expression used both by Lord Coke and by Lord Hale; but the true interpretation of it deserves the utmost attention and consideration of the court. If a total deprivation of memory was intended by these great lawyers to be taken in the literal sense of the words; if it was meant that, to protect a man from punishment, he must be in such a state of prostrated intellect as not to know his name, nor his condition, nor his relation toward others,—that, if a husband, he should not know he was married, or, if a father, could not remember that he had children, nor know the road to his house, nor his property in it,—then no such madness ever existed in the world. It is idiocy alone which places a man in this helpless condition, where, from an original malorganization, there is the human frame alone without the human capacity, and which, indeed, meets the very definition of Lord Hale himself when, referring to Fitzherbert, he says: "Idiocy or fatuity *a nativitate, vel dementia naturalis,* is such a one as described by Fitzherbert, who knows not to tell twenty shillings, nor knows his own age, or who was his father." But in all the cases which have filled Westminster Hall with the most complicated considerations, the lunatics and other insane persons who have been the subjects of them have not only had memory, in my sense of the expression,—they have not only had the most perfect knowledge and recollections of all the relations they stood in toward others, and of the acts and circumstances of their lives,—but have, in general, been remarkable for subtlety and acuteness. Defects in their reasonings have seldom been traceable, the disease consisting in the delusive sources of thought; all their de-

ductions within the scope of the malady being founded upon the immovable assumption of matters as realities, either without any foundation whatsoever, or so distorted and disfigured by fancy as to be almost nearly the same thing as their creation. It is true, indeed, that in some, perhaps in many, cases, the human mind is stormed in its citadel, and laid prostrate under the stroke of frenzy. These unhappy sufferers, however, are not so much considered by physicians as maniacs, but to be in a state of delirium, as if from fever. There, indeed, all the ideas are overwhelmed, for reason is not merely disturbed, but driven wholly from her seat. Such unhappy patients are unconscious, therefore, except at short intervals, even of external objects, or, at least, are wholly incapable of considering their relations. Such persons, and such persons alone (except idiots), are wholly deprived of their "understandings," in the attorney general's seeming sense of that expression. But these cases are not only extremely rare, but never can become the subjects of judicial difficulty. There can be but one judgment concerning them. In other cases, reason is not driven from her seat, but distraction sits down upon it along with her, holds her, trembling, upon it, and frightens her from her propriety. Such patients are victims to delusions of the most alarming description, which so overpower the faculties, and usurp so firmly the place of realities, as not to be dislodged and shaken by the organs of perception and sense. In such cases the images frequently vary, but in the same subject are generally of the same terrific character. Here, too, no judicial difficulties can present themselves; for who could balance upon the judgment to be pronounced in cases of such extreme disease? Another class, branching out into almost infinite subdivisions, under which, indeed, the former and every case of insanity may be classed, is where the delusions are not of that frightful character, but infinitely various, and often extremely circumscribed, yet where imagination (within the bounds of the malady) still holds the most uncontrollable dominion over reality and fact. These are the cases which frequently mock the wisdom of the wisest in judicial trials, because such persons often reason with a subtlety which puts in the shade the ordinary conceptions of mankind. Their conclusions are just, and frequently profound; but the premises from which they reason, when within the range of the malady, are uniformly false,—not false from any defect of knowledge or judgment, but because a delusive image, the inseparable companion of real insanity, is thrust upon the subjugated understanding, incapable of resist-

ance, because unconscious of attack. Delusion, therefore, where there is no frenzy or raving madness, is the true character of insanity. Where it cannot be predicated of a man standing for life or death for a crime, he ought not, in my opinion, to be acquitted; and if courts of law were to be governed by any other principle, every departure from sober, rational conduct would be an emancipation from criminal justice. I shall place my claim to your verdict upon no such dangerous foundation. I must convince you, not only that the unhappy prisoner was a lunatic, within my own definition of lunacy, but that the act in question was the immediate, unqualified offspring of the disease. In civil cases, as I have already said, the law avoids every act of the lunatic during the period of the lunacy, although the delusion may be extremely circumscribed, although the mind may be quite sound in all that is not within the shades of the very partial eclipse, and although the act to be avoided can in no way be connected with the influence of the insanity; but to deliver a lunatic from responsibility to criminal justice, above all in a case of such atrocity as the present, the relation between the disease and the act should be apparent. Where the connection is doubtful the judgment should certainly be most indulgent, from the great difficulty of diving into the secret sources of a disordered mind; but still I think that, as a doctrine of law, the delusion and the act should be connected.

You perceive, therefore, gentlemen, that the prisoner, in naming me for his counsel, has not obtained the assistance of a person who is disposed to carry the doctrine of insanity in his defense so far as even books would warrant me in carrying it. Some of the cases—that of Lord Ferrers, for instance—which I shall consider hereafter, as distinguished from the present, would not, in my mind, bear the shadow of an argument as a defense against an indictment for murder. I cannot allow the protection of insanity to a man who only exhibits violent passions and malignant resentments, acting upon real circumstances; who is impelled to evil by no morbid delusions, but who proceeds upon the ordinary perceptions of the mind. I cannot consider such a man as falling within the protection which the law gives, and is bound to give, to those whom it has pleased God, for mysterious causes, to visit with this most afflicting calamity. He alone can be so emancipated whose disease (call it what you will) consists, not merely in seeing with a prejudiced eye, or with odd and absurd particularities, differing in many respects from the contemplations of sober

sense, upon the actual existence of things, but he, only, whose reasoning and corresponding conduct, though governed by the ordinary dictates of reason, proceed upon something which has no foundation or existence.

Gentlemen, it has pleased God so to visit the unhappy man before you; to shake his reason in its citadel; to cause him to build up as realities the most impossible phantoms of the mind, and to be impelled by them as motives irresistible,—the whole fabric being nothing but the unhappy vision of his disease, existing nowhere else, having no foundation whatsoever in the very nature of things.

Gentlemen, it has been stated by the attorney general, and established by evidence which I am in no condition to contradict, nor have, indeed, any interest in contradicting, that, when the prisoner bought the pistol which he discharged at or towards his majesty, he was well acquainted with the nature and use of it; that, as a soldier, he could not but know that, in his hands, it was a sure instrument of death; that, when he bought the gunpowder, he knew it would prepare the pistol for its use; that, when he went to the playhouse, he knew he was going there, and knew everything connected with the scene, as perfectly as any other person. I freely admit all this. I admit, also, that every person who listened to his conversation and observed his deportment upon his apprehension must have given precisely the evidence delivered by his royal highness the Duke of York, and that nothing like insanity appeared to those who examined him. But what then? I conceive, gentlemen, that I am more in the habit of examination than either that illustrious person or the witnesses from whom you have heard this account. Yet I well remember (indeed, I never can forget it) that, since the noble and learned judge has presided in this court, I examined, for the greater part of a day, in this very place, an unfortunate gentleman who had indicted a most affectionate brother, together with the keeper of a madhouse at Hoxton [Dr. Sims], for having imprisoned him as a lunatic, while, according to his evidence, he was in his perfect senses. I was, unfortunately, not instructed in what his lunacy consisted, although my instructions left me no doubt of the fact; but, not having the clue, he completely foiled me in every attempt to expose his infirmity. You may believe that I left no means unemployed which long experience dictated, but without the smallest effect. The day was wasted, and the prosecutor, by the most affecting history of unmerited suffering, appeared to the judge

and jury, and to a humane English audience, as the victim of the most wanton and barbarous oppression. At last Dr. Sims came into court, who had been prevented, by business, from an earlier attendance, and whose name, by the by, I observe to-day in the list of the witnesses for the crown. From Dr. Sims I soon learned that the very man whom I had been above an hour examining, and with every possible effort which counsel are so much in the habit of exerting, believed himself to be the Lord and Savior of mankind, not merely at the time of his confinement, which was alone necessary for my defense, but during the whole time that he had been triumphing over every attempt to surprise him in the concealment of his disease! I then affected to lament the indecency of my ignorant examination when he expressed his forgiveness, and said, with the utmost gravity and emphasis, in the face of the whole court, "I am the Christ," and so the cause ended. Gentlemen, this is not the only instance of the power of concealing this malady. I could consume the day if I were to enumerate them; but there is one so extremely remarkable that I cannot help stating it. Being engaged to attend the assizes at Chester upon a question of lunacy, and having been told that there had been a memorable case tried before Lord Mansfield in this place, I was anxious to procure a report of it. From that great man himself (who, within these walls, will ever be reverenced, being then retired, in his extreme old age, to his seat near London, in my own neighborhood) I obtained the following account of it: "A man of the name of Wood," said Lord Mansfield, "had indicted Dr. Monro for keeping him as a prisoner (I believe in the same madhouse at Hoxton) when he was sane. He underwent the most severe examination by the defendant's counsel without exposing his complaint; but Dr. Battye, having come upon the bench by me, and having desired me to ask him what was become of the princess whom he had corresponded with in cherry juice, he showed in a moment what he was. He answered that there was nothing at all in that, because, having been (as everybody knew) imprisoned in a high tower, and being debarred the use of ink, he had no other means of correspondence but by writing his letters in cherry juice, and throwing them into the river which surrounded the tower, where the princess received them in a boat. There existed, of course, no tower, no imprisonment, no writing in cherry juice, no river, no boat; but the whole the inveterate phantom of a morbid imagination. I immediately," continued Lord Mansfield, "directed Dr. Monro to be acquitted. But this man,

Wood, being a merchant in Philpot Lane, and having been carried through the city on his way to the madhouse, he indicted Dr. Monro over again for the trespass and imprisonment in London, knowing that he had lost his cause by speaking of the princess at Westminster. And such," said Lord Mansfield, "is the extraordinary subtlety and cunning of madmen, that when he was cross-examined on the trial in London as he had successfully been before, in order to expose his madness, all the ingenuity of the bar, and all the authority of the court, could not make him say a syllable upon that topic which had put an end to the indictment before, although he still had the same indelible impression upon his mind, as he signified to those who were near him; but, conscious that the delusion had occasioned his defeat at Westminster, he obstinately persisted in holding it back."

Now, gentlemen, let us look to the application of these cases. I am not examining, for the present, whether either of these persons ought to have been acquitted if they had stood in the place of the prisoner now before you. That is quite a distinct consideration, which we shall come to hereafter. The direct application of them is only this: that if I bring before you such evidence of the prisoner's insanity as, if believed to have really existed, shall, in the opinion of the court, as the rule for your verdict in point of law, be sufficient for his deliverance, then that you ought not to be shaken in giving full credit to such evidence, notwithstanding the report of those who were present at his apprehension, who describe him as discovering no symptom whatever of mental incapacity or disorder. For I have shown you that insane persons frequently appear in the utmost state of ability and composure, even in the highest paroxysms of insanity, except when frenzy is the characteristic of the disease. In this respect the cases I have cited to you have the most decided application, because they apply to the overthrow of the whole of the evidence (admitting, at the same time, the truth of it), by which the prisoner's case can alone be encountered. But it is said that, whatever delusions may overshadow the mind, every person ought to be responsible for crimes who has the knowledge of good and evil. I think I can presently convince you that there is something too general in this mode of considering the subject, and you do not, therefore, find any such proposition in the language of the celebrated writer alluded to by the attorney general in his speech. Let me suppose that the character of an insane delusion consisted in the belief that some given person was any brute animal, or an inanimate being (and

such cases have existed), and that, upon the trial of such a lunatic for murder, you firmly, upon your oaths, were convinced, upon the uncontradicted evidence of a hundred persons, that he believed the man he had destroyed to have been a potter's vessel. Suppose it was quite impossible to doubt that fact, although to all other intents and purposes he was sane; conversing, reasoning, and acting as men not in any manner tainted with insanity converse and reason and conduct themselves. Let me suppose, further, that he believed the man whom he destroyed, but whom he destroyed as a potter's vessel, to be the property of another, and that he had malice against such supposed person, and that he meant to injure him, knowing the act he was doing to be malicious and injurious, and that, in short, he had full knowledge of all the principles of good and evil. Yet would it be possible to convict such a person of murder if, from the influence of his disease, he was ignorant of the relation he stood in to the man he had destroyed, and was utterly unconscious that he had struck at the life of a human being? I only put this case, and many others might be brought as examples, to illustrate that the knowledge of good and evil is too general a description. I really think, however, that the attorney general and myself do not, in substance, very materially differ. From the whole of his most able speech, taken together, his meaning may, I think, be thus collected: that where the act which is criminal is done under the dominion of malicious mischief and wicked intention, although such insanity might exist in a corner of the mind as might avoid the acts of the delinquent as a lunatic in a civil case, yet that he ought not to be protected if malicious mischief, and not insanity, had impelled him to the act for which he was criminally to answer; because, in such a case, the act might be justly ascribed to malignant motives, and not to the dominion of disease. I am not disposed to dispute such a proposition in a case which would apply to it, and I can well conceive such cases may exist. The question, therefore, which you will have to try, is this: whether, when this unhappy man discharged the pistol in a direction which convinced, and ought to convince, every person that it was pointed at the person of the king, he meditated mischief and violence to his majesty, or whether he came to the theater (which it is my purpose to establish) under the dominion of the most melancholy insanity that ever degraded and overpowered the faculties of man. I admit that when he bought the pistol and the gunpowder to load it, and when he loaded it, and came with it to the theater, and,

lastly, when he discharged it, every one of these acts would be overt acts of compassing the king's death, if at all or any of these periods he was actuated by that mind and intention, which would have constituted murder in the case of an individual, supposing the individual had been actually killed. I admit, also, that the mischievous, and, in this case, traitorous, intention must be inferred from all these acts, unless I can rebut the inferences by proof. If I were to fire a pistol towards you, gentlemen, where you are now sitting, the act would undoubtedly infer the malice. The whole proof, therefore, is undoubtedly cast upon me.

In every case of treason or murder, which are precisely the same, except that the unconsummated intention in the case of the king is the same as the actual murder of a private man, the jury must impute to the person whom they condemn by their verdict the motive which constitutes the crime; and your province to-day will therefore be to decide whether the prisoner, when he did the act, was under the uncontrollable dominion of insanity, and was impelled to it by a morbid delusion, or whether it was the act of a man who, though occasionally mad, or even at the time not perfectly collected, was yet not actuated by the disease, but by the suggestion of a wicked and malignant disposition. I admit, therefore, freely, that if, after you have heard the evidence, which I hasten to lay before you, of the state of the prisoner's mind, and close up to the very time of this catastrophe, you shall still not feel yourselves clearly justified in negativing the wicked motives imputed by this indictment, I shall leave you in the hands of the learned judges to declare to you the law of the land, and shall not seek to place society in a state of uncertainty by any appeal addressed only to your compassion. I am appointed by the court to claim for the prisoner the full protection of the law, but not to misrepresent it in his protection.

Gentlemen, the facts of this melancholy case lie within a narrow compass. The unfortunate person before you was a soldier. He became so, I believe, in the year 1793, and is now about twenty-nine years of age. He served in Flanders, under the Duke of York, as appears by his royal highness' evidence, and, being a most approved soldier, he was one of those singled out as an orderly man to attend upon the person of the commander in chief. You have been witnesses, gentlemen, to the calmness with which the prisoner has sitten in his place during the trial. There was but one exception to it. You saw the emotion which overpowered him when the illustrious person now in court took his seat

upon the bench. Can you then believe, from the evidence, for I do not ask you to judge as physiognomists, or to give the rein to compassionate fancy,—but can there be any doubt that it was the generous emotion of the mind, on seeing the prince, under whom he had served with so much bravery and honor? Every man, certainly, must judge for himself. I am counsel, not a witness, in the cause. But it is a most striking circumstance, as you find from the crown's evidence, that when he was dragged through the orchestra under the stage, and charged with an act for which he considered his life as forfeited, he addressed the Duke of York with the same enthusiasm which has marked the demeanor I am adverting to. Mr. Richardson, who showed no disposition in his evidence to help the prisoner, but who spoke with the calmness and circumspection of truth, and who had no idea that the person he was examining was a lunatic, has given you the account of the burst of affection on his first seeing the Duke of York, against whose father and sovereign he was supposed to have had the consciousness of treason. The king himself, whom he was supposed to have so malignantly attacked, never had a more gallant, loyal, or suffering soldier. His gallantry and loyalty will be proved; his sufferings speak for themselves. About five miles from Lisle, upon the attack made on the British army, this unfortunate soldier was in the fifteenth light dragoons, in the thickest of the ranks, exposing his life for his prince, whom he is supposed to-day to have sought to murder. The first wound he received is most materially connected with the subject we are considering. You may see the effect of it now. The point of a sword was impelled against him with all the force of a man urging his horse in battle. When the court put the prisoner under my protection, I thought it my duty to bring Mr. Cline to inspect him in Newgate. It will appear by the evidence of that excellent and conscientious person, who is known to be one of the first anatomists in the world, that from this wound one of two things must have happened: either that, by the immediate operation of surgery, the displaced part of the skull must have been taken away, or been forced inward on the brain. The second stroke also speaks for itself. You may now see its effects. [Here Mr. Erskine touched the head of the prisoner.] He was cut across all the nerves which give sensibility and animation to the body, and his head hung down almost dissevered, until, by the act of surgery, it was placed in the position you now see it. But thus, almost destroyed, he still recollected his duty, and

continued to maintain the glory of his country, when a sword divided the membrane of his neck where it terminates in the head. Yet he still kept his place, though his helmet had been thrown off by the blow which I secondly described, when by another sword he was cut into the very brain. You may now see its membrane uncovered. Mr. Cline will tell you that he examined these wounds, and he can better describe them. I have myself seen them, but am no surgeon. From his evidence you will have to consider their consequences. It may be said that many soldiers receive grievous wounds without their producing insanity. So they may, undoubtedly; but we are upon the fact. There was a discussion the other day whether a man who had been seemingly hurt by a fall beyond remedy could get up and walk. The people around said it was impossible; but he did get up and walk, and so there was an end to the impossibility. The effects of the prisoner's wounds were known by the immediate event of insanity, and Mr. Cline will tell you that it would have been strange, indeed, if any other event had followed. We are not here upon a case of insanity arising from the spiritual part of man, as it may be affected by hereditary taint, by intemperance, or by violent passions, the operations of which are various and uncertain, but we have to deal with a species of insanity more resembling what has been described as idiocy, proceeding from original malorganization. There the disease is, from its very nature, incurable; and so, where a man (like the prisoner) has become insane from violence to the brain, which permanently affects its structure, however such a man may appear occasionally to others, his disease is immovable. If the prisoner, therefore, were to live a thousand years, he never could recover from the consequence of that day. But this is not all. Another blow was still aimed at him, which he held up his arm to avoid, when his hand was cut into the bone. It is an afflicting subject, gentlemen, and better to be spoken of by those who understand it; and, to end all further description, he was then thrust almost through and through the body with a bayonet, and left in a ditch among the slain. He was afterwards carried to a hospital, where he was known by his tongue to one of his countrymen, who will be examined as a witness, who found him not merely as a wounded soldier deprived of the powers of his body, but bereft of his senses forever. He was affected from the very beginning with that species of madness which, from violent agitation, fills the mind with the most inconceivable imaginations, wholly unfitting it for all dealing with

human affairs, according to the sober estimate and standard of reason. He imagined that he had constant intercourse with the Almighty Author of all things; that the world was coming to a conclusion; and that, like our blessed Savior, he was to sacrifice himself for its salvation. So obstinately did this morbid image continue that you will be convinced he went to the theater to perform, as he imagined, that blessed sacrifice; and, because he would not be guilty of suicide, though called upon by the imperious voice of heaven, he wished that, by the appearance of crime, his life might be taken away from him by others. This bewildered, extravagant species of madness appeared immediately after his wounds, on his first entering the hospital, and on the very same account he was discharged from the army on his return to England, which the attorney general very honorably and candidly seemed to intimate.

To proceed with the proofs of his insanity down to the very period of his supposed guilt. This unfortunate man before you is the father of an infant of eight months; and I have no doubt that, if the boy had been brought into court (but this is a grave place for the consideration of justice, and not a theater for stage effect),—I say, I have no doubt whatever that, if this poor infant had been brought into court, you would have seen the unhappy father wrung with all the emotions of parental affection. Yet, upon the Tuesday preceding the Thursday when he went to the playhouse, you will find his disease still urging him forward, with the impression that the time was come when he must be destroyed for the benefit of mankind; and in the confusion, or, rather, delirium, of this wild conception, he came to the bed of the mother, who had this infant in her arms, and endeavored to dash out its brains against the wall. The family was alarmed, and, the neighbors being called in, the child was with difficulty rescued from the unhappy parent, who, in his madness, would have destroyed it. Now let me for a moment suppose that he had succeeded in the accomplishment of his insane purpose, and the question had been whether he was guilty of murder. Surely the affection for this infant, up to the very moment of his distracted violence, would have been conclusive in his favor. But not more so than his loyalty to the king, and his attachment to the Duke of York, as applicable to the case before us; yet at that very period, even of extreme distraction, he conversed as rationally on all other subjects as he did with the Duke of York at the theater. The prisoner knew perfectly that he was the husband

of the woman and the father of the child. The tears of affection ran down his face at the very moment that he was about to accomplish its destruction. During the whole of this scene of horror he was not at all deprived of memory, in the attorney general's sense of the expression. He could have communicated, at that moment, every circumstance of his past life, and everything connected with his present condition, except only the quality of the act he was meditating. In that he was under the overruling dominion of a morbid imagination, and conceived that he was acting against the dictates of nature in obedience to the superior commands of heaven, which had told him that the moment he was dead, and the infant with him, all nature was to be changed, and all mankind were to be redeemed by his dissolution. There was not an idea in his mind, from the beginning to the end, of the destruction of the king. On the contrary, he always maintained his loyalty,—lamented that he could not go again to fight his battles in the field; and it will be proved that, only a few days before the period in question, being present when a song was sung, indecent, as it regarded the person and condition of his majesty, he left the room with loud expressions of indignation, and immediately sang "God save the King," with all the enthusiasm of an old soldier who had bled in the service of his country.

I confess to you, gentlemen, that this last circumstance, which may, to some, appear insignificant, is, in my mind, most momentous testimony. For if this man had been in the habit of associating with persons inimical to the government of our country, so that mischief might have been fairly argued to have mixed itself with madness (which, by the by, it frequently does); if it could in any way have been collected that, from his disorder, more easily inflamed and worked upon, he had been led away by disaffected persons to become the instrument of wickedness; if it could have been established that such had been his companions and his habits,—I should have been ashamed to lift up my voice in his defense. I should have felt that, however his mind might have been weak and disordered, yet, if his understanding sufficiently existed to be methodically acted upon as an instrument of malice, I could not have asked for an acquittal. But you find, on the contrary, in the case before you, that, notwithstanding the opportunity which the crown has had, and which, upon all such occasions, it justly employs, to detect treason, either against the person of the king or against his government, not one witness has been able to fix upon the prisoner before you any one com-

panion of even a doubtful description, or any one expression from which disloyalty could be inferred, while the whole history of his life repels the imputation. His courage in defense of the king and his dominions, and his affection for his son, in such unanswerable evidence, all speak aloud against the presumption that he went to the theater with a mischievous intention.

To recur again to the evidence of Mr. Richardson, who delivered most honorable and impartial testimony. I certainly am obliged to admit that what a prisoner says for himself when coupled at the very time with an overt act of wickedness is no evidence whatever to alter the obvious quality of the act he has committed. If, for instance, I, who am now addressing you, had fired the same pistol toward the box of the king, and, having been dragged under the orchestra and secured for criminal justice, I had said that I had no intention to kill the king, but was weary of my life, and meant to be condemned as guilty, would any man, who was not himself insane, consider that as a defense? Certainly not; because it would be without the whole foundation of the prisoner's previous condition, part of which it is even difficult to apply closely and directly by strict evidence, without taking his undoubted insanity into consideration, because it is his unquestionable insanity which alone stamps the effusions of his mind with sincerity and truth. The idea which had impressed itself, but in most confused images, upon this unfortunate man, was that he must be destroyed, but ought not to destroy himself. He once had the idea of firing over the king's carriage in the street; but then he imagined he should be immediately killed, which was not the mode of propitiation for the world. And as our Savior, before his passion, had gone into the garden to pray, this fallen and afflicted being, after he had taken the infant out of bed to destroy it, returned also to the garden, saying, as he afterwards said to the Duke of York, "that all was not over,—that a great work was to be finished"; and there he remained in prayer, the victim of the same melancholy visitation.

Gentlemen, these are the facts, freed from even the possibility of artifice or disguise, because the testimony to support them will be beyond all doubt. In contemplating the law of the country, and the precedents of its justice to which they must be applied, I find nothing to challenge or question. I approve of them throughout. I subscribe to all that is written by Lord Hale. I agree with all the authorities cited by the attorney general from Lord Coke; but, above all, I do most cordially agree in the in-

stance of convictions by which he illustrated them in his able address. I have now lying before me the case of Earl Ferrers. Unquestionably there could not be a shadow of doubt, and none appears to have been entertained, of his guilt. I wish, indeed, nothing more than to contrast the two cases; and so far am I from disputing either the principle of that condemnation, or the evidence that was the foundation of it, that I invite you to examine whether any two instances in the whole body of the criminal law are more diametrically opposite to each other than the case of Earl Ferrers and that now before you. Lord Ferrers was divorced from his wife by act of parliament; and a person of the name of Johnson, who had been his steward, had taken part with the lady in that proceeding, and had conducted the business in carrying the act through the two houses. Lord Ferrers consequently wished to turn him out of a farm which he occupied under him, but, his estate being in trust, Johnson was supported by the trustees in his possession. There were also some differences respecting coal mines, and, in consequence of both transactions, Lord Ferrers took up the most violent resentment against him. Let me here observe, gentlemen, that this was not a resentment founded upon any illusion,—not a resentment forced upon a distempered mind by fallacious images, but depending upon actual circumstances and real facts,—and, acting like any other man under the influence of malignant passions, he repeatedly declared that he would be revenged on Mr. Johnson, particularly for the part he had taken in depriving him of a contract respecting the mines. Now, suppose Lord Ferrers could have showed that no difference with Mr. Johnson had ever existed regarding his wife at all, that Mr. Johnson had never been his steward, and that he had only, from delusion, believed so when his situation in life was quite different. Suppose, further, that an illusive imagination had alone suggested to him that he had been thwarted by Johnson in his contract for these coal mines, there never having been any contract at all for coal mines,—in short, that the whole basis of his enmity was without any foundation in nature, and had been shown to have been a morbid image imperiously fastened upon his mind. Such a case as that would have exhibited a character of insanity in Lord Ferrers extremely different from that in which it was presented by the evidence to his peers. Before them, he only appeared as a man of turbulent passions, whose mind was disturbed by no fallacious images of things without existence; whose quarrel with Johnson was founded upon no il-

lusions, but upon existing facts; whose resentment proceeded to the fatal consummation with all the ordinary indications of mischief and malice, and who conducted his own defense with the greatest dexterity and skill. Who, then, could doubt that Lord Ferrers was a murderer? When the act was done, he said: "I am glad I have done it. He was a villain, and I am revenged." But when he afterwards saw that the wound was probably mortal, and that it involved consequences fatal to himself, he desired the surgeon to take all possible care of his patient, and, conscious of his crime, kept at bay the men who came with arms to arrest him, showing, from the beginning to the end, nothing that does not generally accompany the crime for which he was condemned. He was proved, to be sure, to be a man subject to unreasonable prejudices, addicted to absurd practices, and agitated by violent passions. But the act was not done under the dominion of uncontrollable disease; and whether the mischief and malice were substantive, or marked in the mind of a man whose passions bordered upon, or even amounted to, insanity, it did not convince the lords that, under all the circumstances of the case, he was not a fit object of criminal justice.

In the same manner, Arnold, who shot at Lord Onslow, and who was tried at Kingston soon after the Black Act passed on the accession of George I. Lord Onslow having been very vigilant as a magistrate in suppressing clubs which were supposed to be set on foot to disturb the new government, Arnold had frequently been heard to declare that Lord Onslow would ruin his country; and although he appeared from the evidence to be a man of most wild and turbulent manners, yet the people round Guildford who knew him did not, in general, consider him to be insane. His counsel could not show that any morbid delusion had ever overshadowed his understanding. They could not show, as I shall, that just before he shot at Lord Onslow he had endeavored to destroy his own beloved child. It was a case of human resentment.

I might instance, also, the case of Oliver, who was indicted for the murder of Mr. Wood, a potter, in Staffordshire. Mr. Wood had refused his daughter to this man in marriage. My friend, Mr. Milles, was counsel for him at the assizes. He had been employed as a surgeon and apothecary by the father, who forbid him his house, and desired him to bring in his bill for payment, when, in the agony of disappointment, and brooding over the injury he had suffered, on his being admitted to Mr. Wood to receive pay-

ment, he shot him upon the spot. The trial occupied a great part of the day; yet, for my own part, I cannot conceive that there was anything in the case for a jury to deliberate on. He was a man acting upon existing facts, and upon human resentments connected with them. He was at the very time carrying on his business, which required learning and reflection, and, indeed, a reach of mind beyond the ordinary standard, being trusted by all who knew him as a practitioner in medicine. Neither did he go to Mr. Wood's under the influence of illusion; but he went to destroy the life of a man who was placed exactly in the circumstances which the mind of the criminal represented him. He went to execute vengeance on him for refusing his daughter. In such a case there might, no doubt, be passion approaching to frenzy, but there wanted that characteristic of madness to emancipate him from criminal justice.

There was another instance of this description in the case of a most unhappy woman, who was tried in Essex for the murder of Mr. Errington, who had seduced and abandoned her and the children she had borne to him. It must be a consolation to those who prosecuted her that she was acquitted, as she is at this time in a most undoubted and deplorable state of insanity. But I confess, if I had been upon the jury who tried her, I should have entertained great doubts and difficulties; for, although the unhappy woman had before exhibited strong marks of insanity, arising from grief and disappointment, yet she acted upon facts and circumstances which had an existence, and which were calculated, upon the ordinary principles of human action, to produce the most violent resentment. Mr. Errington having just cast her off and married another woman, or taken her under his protection, her jealousy was excited to such a pitch as occasionally to overpower her understanding; but when she went to Mr. Errington's house, where she shot him, she went with the express and deliberate purpose of shooting him. That fact was unquestionable. She went there with a resentment long ranking in her bosom, bottomed on an existing foundation. She did not act under a delusion that he had deserted her, when he had not, but took revenge upon him for an actual desertion. But still the jury, in the humane consideration of her sufferings, pronounced the insanity to be predominant over resentment, and they acquitted her. But let me suppose (which would liken it to the case before us) that she had never cohabited with Mr. Errington; that she never had had children by him; and, consequently, that he neither had, nor could

possibly have, deserted or injured her. Let me suppose, in short, that she had never seen him in her life, but that her resentment had been founded on the morbid delusion that Mr. Errington, who had never seen her, had been the author of all her wrongs and sorrows, and that, under that diseased impression, she had shot him. If that had been the case, gentlemen, she would have been acquitted upon the opening, and no judge would have sat to try such a cause. The act itself would have been decisively characteristic of madness, because, being founded upon nothing existing, it could not have proceeded from malice, which the law requires to be charged and proved, in every case of murder, as the foundation of a conviction.

Let us now recur to the cause we are engaged in, and examine it upon those principles by which I am ready to stand or fall, in the judgment of the court. You have a man before you who will appear, upon the evidence, to have received those almost deadly wounds which I described to you, producing the immediate and immovable effects which the eminent surgeon, whose name I have mentioned, will prove that they could not but have produced. It will appear that, from that period, he was visited by the severest paroxysms of madness, and was repeatedly confined with all the coercion which it is necessary to practice upon lunatics; yet, what is quite decisive against the imputation of treason against the person of the king, his loyalty never forsook him. Sane or insane, it was his very characteristic to love his sovereign and his country, although the delusions which distracted him were sometimes, in other respects, as contradictory as they were violent. Of this inconsistency, there was a most striking instance on only the Tuesday before the Thursday in question, when it will be proved that he went to see one Truelet, who had been committed by the Duke of Portland as a lunatic. This man had taken up an idea that our Savior's second advent, and the dissolution of all human beings, were at hand, and conversed in this strain of madness. This mixing itself with the insane delusion of the prisoner, he immediately broke out upon the subject of his own propitiation and sacrifice for mankind, although only the day before he had exclaimed that the Virgin Mary was a whore; that Christ was a bastard; that God was a thief; and that he and this Truelet were to live with him at White Conduit House, and there to be enthroned together. His mind, in short, was overpowered and overwhelmed with distraction.

The charge against the prisoner is the overt act of compassing the death of the king, in firing a pistol at his majesty,—an act which only differs from murder inasmuch as the bare compassing is equal to the accomplishment of the malignant purpose; and it will be your office, under the advice of the judge, to decide by your verdict to which of the two impulses of the mind you refer the act in question. You will have to decide whether you attribute it wholly to mischief and malice, or wholly to insanity, or to the one mixing itself with the other. If you find it attributable to mischief and malice only, let the man die. The law demands his death for the public safety. If you consider it as conscious malice and mischief mixing itself with insanity, I leave him in the hands of the court to say how he is to be dealt with. It is a question too difficult for me. I do not stand here to disturb the order of society, or to bring confusion upon my country. But if you find that the act was committed wholly under the dominion of insanity; if you are satisfied that he went to the theater contemplating his own destruction only, and that, when he fired the pistol, he did not maliciously aim at the person of the king,—you will then be bound, even upon the principle which the attorney general himself humanely and honorably stated to you, to acquit this most unhappy prisoner. If, in bringing these considerations hereafter to the standard of the evidence, any doubts should occur to you on the subject, the question for your decision will then be, which of the two alternatives is the most probable,—a duty which you will perform in the exercise of that reason of which, for wise purposes, it has pleased God to deprive the unfortunate man whom you are trying. Your sound understandings will easily enable you to distinguish infirmities, which are misfortunes, from motives, which are crimes. Before the day ends, the evidence will be decisive upon this subject.

There is, however, another consideration which I ought distinctly to present to you, because I think that more turns upon it than any other view of the subject, namely, whether the prisoner's defense can be impeached for artifice or fraud. I admit that if, at the moment when he was apprehended, there can be fairly imputed to him any pretense or counterfeit of insanity, it would taint the whole case, and leave him without protection; but for such a suspicion there is not even a shadow of foundation. It is repelled by the whole history and character of his disease, as well as of his life, independent of it. If you were trying a man under the Black Act, for shooting at another, and there was a doubt upon the

question of malice, would it not be important, or rather decisive, evidence, that the prisoner had no resentment against the prosecutor, but that, on the contrary, he was a man whom he had always loved and served? Now the prisoner was maimed, cut down, and destroyed in the service of the king.

Gentlemen, another reflection presses very strongly on my mind, which I find it difficult to suppress. In every state there are political differences and parties, and individuals disaffected to the system of government under which they live as subjects. There are not many such, I trust, in this country. But whether there are many or any of such persons, there is one circumstance which has peculiarly distinguished his majesty's life and reign, and which is in itself as a host in the prisoner's defense, since, amid all the treasons and all the seditions which have been charged on reformers of government as conspiracies to disturb it, no hand or voice has been lifted up against the person of the king. There have, indeed, been unhappy lunatics who, from ideas too often mixing themselves with insanity, have intruded themselves into the palace, but no malicious attack has ever been made upon the king to be settled by a trial. His majesty's character and conduct have been a safer shield than guards, or than laws. Gentlemen, I wish to continue to that sacred life that best of all securities. I seek to continue it under that protection where it has been so long protected. We are not to do evil that good may come of it. We are not to stretch the laws to hedge round the life of the king with a greater security than that which the Divine Providence has so happily realized.

Perhaps there is no principle of religion more strongly inculcated by the sacred scriptures than that beautiful and encouraging lesson of our Saviour himself upon confidence in the Divine protection: "Take no heed for your life, what ye shall eat, or what ye shall drink, or wherewithal ye shall be clothed, but seek ye first the kingdom of God, and all these things shall be added unto you." By which it is undoubtedly not intended that we are to disregard the conservation of life, or to neglect the means necessary for its sustentation, nor that we are to be careless of whatever may contribute to our comfort and happiness, but that we should be contented to receive them as they are given to us, and not seek them in the violation of the rule and order appointed for the government of the world. On this principle, nothing can more tend to the security of his majesty and his government than the scene which this day exhibits in the calm, humane, and impar-

tial administration of justice; and if, in my part of this solemn duty, I have in any manner trespassed upon the just security provided for the public happiness, I wish to be corrected. I declare to you, solemnly, that my only aim has been to secure for the prisoner at the bar, whose life and death are in the balance, that he should be judged rigidly by the evidence and the law. I have made no appeal to your passions,—you have no right to exercise them. This is not even a case in which, if the prisoner be found guilty, the royal mercy should be counseled to interfere. He is either an accountable being, or not accountable. If he was unconscious of the mischief he was engaged in, the law is a corollary, and he is not guilty. But if, when the evidence closes, you think he was conscious, and maliciously meditated the treason he is charged with, it is impossible to conceive a crime more vile and detestable; and I should consider the king's life to be ill attended to, indeed, if not protected by the full vigor of the laws, which are watchful over the security of the meanest of his subjects. It is a most important consideration, both as it regards the prisoner and the community of which he is a member. Gentlemen, I leave it with you.

ARGUMENT IN THE CASE OF MARKHAM AGAINST FAWCETT, BEFORE THE SHERIFF OF MIDDLESEX AND A SPECIAL JURY, 1802.

STATEMENT.

This was an action by the Reverend George Markham against John Fawcett for criminal conversation. The facts are fully stated in the argument. The defendant allowed judgment to be taken against him by default, and it only remained, therefore, to take an inquisition of damages. The sheriff's jury assessed the plaintiff's damages at the sum of seven thousand pounds. The damages were never levied, however, the defendant having left the country.

ARGUMENT.

Mr. Sheriff, and Gentlemen of the Jury: In representing the unfortunate gentleman who has sustained the injury which has been stated to you by my learned friend, Mr. Holroyd, who opened the pleadings, I feel one great satisfaction—a satisfaction founded, as I conceive, on a sentiment perfectly constitutional. I am about to address myself to men whom I personally know; to men, honorable in their lives, moral, judicious, and capable of correctly estimating the injuries they are called upon to condemn in their character of jurors. This, gentlemen, is the only country in the world where there is such a tribunal as the one before which I am now to speak; for, however in other countries such institutions as our own may have been set up of late, it is only by that maturity which it requires ages to give to governments—by that progressive wisdom which has slowly ripened the constitution of our country—that it is possible there can exist such a body of men as you are. It is the great privilege of the subjects of England that they judge one another. It is to be recollected that, although we are in this private room, all the sanctions of justice are present. It makes no manner of difference whether I address you in the presence of the undersheriff, your respectable chairman, or with the assistance of the highest magistrate of the state.

The defendant has, on this occasion, suffered judgment by default. Other adulterers have done so before him. Some have done so under the idea that, by suffering judgment against them, they had retired from the public eye,—from the awful presence of the judge,—and that they came into a corner where there was not such an assembly of persons to witness their misconduct, and

where it was to be canvassed before persons who might be less qualified to judge the case to be addressed to them. It is not long, however, since such persons have had an opportunity of judging how much they were mistaken in this respect. The largest damages, in cases of adultery, have been given in this place. By this place, I do not mean the particular room in which we are now assembled, but under inquisitions directed to the sheriff; and the instances to which I allude are of modern, and, indeed, recent, date.

Gentlemen, after all the experience I have had, I feel myself, I confess, considerably embarrassed in what manner to address you. There are some subjects that harass and overwhelm the mind of man. There are some kinds of distresses one knows not how to deal with. It is impossible to contemplate the situation of the plaintiff without being disqualified, in some degree, to represent it to others with effect. It is no less impossible for you, gentlemen, to receive on a sudden the impressions which have been long in my mind, without feeling overpowered with sensations which, after all, had better be absent when men are called upon, in the exercise of duty, to pronounce a legal judgment.

The plaintiff is the third son of his grace the Archbishop of York, a clergyman of the Church of England; presented, in the year 1791, to the living of Stokeley, in Yorkshire; and now, by his majesty's favor, dean of the Cathedral of York. He married, in the year 1789, Miss Sutton, the daughter of Sir Richard Sutton, Bart., of Norwood, in Yorkshire, a lady of great beauty and accomplishments, most virtuously educated, and who, but for the crime of the defendant, which assembles you here, would, as she has expressed it herself, have been the happiest of womankind. This gentleman having been presented, in 1791, by his father, to this living, where, I understand, there had been no resident rector for forty years, set an example to the church and to the public which was peculiarly virtuous in a man circumstanced as he was; for, if there can be any person more likely than another to protect himself securely with privileges and indulgences, it might be supposed to be the son of the metropolitan of the province. This gentleman, however, did not avail himself of the advantages of his birth and station. Although he was a very young man, he devoted himself entirely to the sacred duties of his profession. At a large expense he repaired the rectory house for the reception of his family, as if it had been his own patrimony, while, in his extensive improvements, he adopted only those arrangements which

were calculated to lay the foundation of an innocent and peaceful life. He had married this lady, and entertained no other thoughts than that of cheerfully devoting himself to all the duties, public and private, which his situation called upon him to perform. About this time, or soon afterwards, the defendant became the purchaser of an estate in the neighborhood of Stokeley, and, by such purchase, an inhabitant of that part of the country, and the neighbor of this unfortunate gentleman. It is a most affecting circumstance that the plaintiff and the defendant had been bred together at Westminster School; and in my mind it is still more affecting when I reflect what it is which has given to that school so much rank, respect, and illustration. It has derived its highest advantages from the reverend father of the unfortunate gentleman whom I represent.[1] It was the School of Westminster which gave birth to that learning which afterwards presided over it, and advanced its character. However some men may be disposed to speak or write concerning public schools, I take upon me to say they are among the wisest of our institutions. Whoever looks at the national character of the English people, and compares it with that of all the other nations upon the earth, will be driven to impute it to that reciprocation of ideas and sentiments which fill and fructify the mind in the early period of youth, and to the affectionate sympathies and friendships which rise up in the human heart before it is deadened or perverted by the interests and corruptions of the world. These youthful attachments are proverbial, and, indeed, few instances have occurred of any breaches of them; because a man, before he can depart from the obligations they impose, must have forsaken every principle of virtue, and every sentiment of manly honor. When, therefore, the plaintiff found his old school fellow and companion settled in his neighborhood, he immediately considered him as his brother. Indeed, he might well consider him as a brother, since, after having been at Westminster, they were again thrown together in the same college at Oxford, so that the friendship they had formed in their youth became cemented and consolidated upon their first entrance into the world. It is no wonder, therefore, that when the defendant come down to settle in the neighborhood of the plaintiff, he should be attracted towards him by the impulse of his former attachment. He recommended him to the lord lieutenant of the

[1] Dr. Markham, afterwards Archbishop of York, was for some years at the head of the Westminster School, and was chosen to be private tutor of the Prince of Wales and his brother the Duke of York.

county, and, being himself a magistrate, he procured him a share in the magistracy. He introduced him to the respectable circle of his acquaintances. He invited him to his house, and cherished him there as a friend. It is this which renders the business of to-day most affecting as it regards the plaintiff, and wicked in the extreme as it relates to the defendant, because the confidences of friendship conferred the opportunities of seduction. The plaintiff had no pleasures or affections beyond the sphere of his domestic life; and except in his occasional residences at York, which were but for short periods, and at a very inconsiderable distance from his home, he constantly reposed in the bosom of his family. I believe it will be impossible for my learned friend to invade his character. On the contrary, he will be found to have been a pattern of conjugal and parental affection.

Mr. Fawcett being thus settled in the neighborhood, and thus received by Mr. Markham as his friend and companion, it is needless to say he could harbor no suspicion that the defendant was meditating the seduction of his wife. There was nothing, indeed, in his conduct, or in the conduct of the unfortunate lady, that could administer any cause of jealousy to the most guarded or suspicious temper. Yet, dreadful to relate, and it is, indeed, the bitterest evil of which the plaintiff has to complain, a criminal intercourse for nearly five years before the discovery of the connection had most probably taken place. I will leave you to consider what must have been the feelings of such a husband upon the fatal discovery that his wife, and such a wife, had conducted herself in a manner that not merely deprived him of her comfort and society, but placed him in a situation too horrible to be described. If a man without children is suddenly cut off by an adulterer from all the comforts and happiness of marriage, the discovery of his condition is happiness itself when compared with that to which the plaintiff is reduced. When children, by a woman lost forever to the husband by the arts of the adulterer, are begotten in the unsuspected days of virtue and happiness, there remains a consolation; mixed, indeed, with the most painful reflections, yet a consolation still. But what is the plaintiff's situation? He does not know at what time this heavy calamity fell upon him; he is tortured with the most afflicting of all human sensations. When he looks at the children, whom he is by law bound to protect and provide for, and from whose existence he ought to receive the delightful return which the union of instinct and reason has provided for the continuation of the world, he knows not whether

he is lavishing his fondness and affection upon his own children, or upon the seed of a villain, sown in the bed of his honor and his delight. He starts back with horror when, instead of seeing his own image reflected from their infant features, he thinks he sees the destroyer of his happiness; a midnight robber introduced into his house under professions of friendship and brotherhood; a plunderer, not in the repositories of his treasure, which may be supplied or lived without, "but there where he had garnered up his hopes, where either he must live or bear no life."

In this situation the plaintiff brings his case before you, and the defendant attempts no manner of defense. He admits his guilt,—he renders it unnecessary for me to go into any proof of it; and the only question, therefore, that remains, is for you to say what shall be the consequences of his crime, and what verdict you will pronounce against him. You are placed, therefore, in a situation most momentous to the public. You have a duty to discharge, the result of which not only deeply affects the present generation, but which remotest posterity will contemplate to your honor or dishonor. On your verdict it depends whether persons of the description of the defendant, who have cast off all respect for religion, who laugh at morality when it is opposed to the gratification of their passions, and who are careless of the injuries they inflict upon others, shall continue their impious and destructive course with impunity. On your verdict it depends whether such men, looking to the proceedings of courts of justice, shall be able to say to themselves that there are certain limits beyond which the damages of juries are not to pass. On your verdict it depends whether men of large fortunes shall be able to adopt this kind of reasoning to spur them on in the career of their lusts: "There are many chances that I may not be discovered at all. There are chances that, if I am discovered, I may not be the object of legal inquiry. And supposing I should, there are certain damages beyond which a jury cannot go. They may be large, but still within a certain compass. If I cannot pay them myself, there may be persons belonging to my family who will pity my situation. Somehow or other the money may be raised, and I may be delivered from the consequences of my crime." I trust the verdict of this day will show men who reason thus that they are mistaken.

The action for adultery, like every other action, is to be considered according to the extent of the injury which the person complaining to a court of justice has received. If he has received an injury or sustained a loss that can be estimated directly in money, there is then no other medium of redress but in moneys numbered

according to the extent of the proof. I apprehend it will not be even stated by the counsel for the defendant that, if a person has sustained a loss, and can show it is to any given extent, he is not entitled to the full measure of it in damages. If a man destroys my house or furniture, or deprives me of a chattel, I have a right, beyond all manner of doubt, to recover their corresponding values in money, and it is no answer to me to say that he who has deprived me of the advantage I before possessed is in no situation to render me satisfaction. A verdict pronounced upon such a principle, in any of the cases I have alluded to, would be set aside by the court, and a new trial awarded. It would be a direct breach of the oaths of jurors if, impressed with a firm conviction that a plaintiff had received damages to a given amount, they retired from their duty because they felt commiseration for a defendant, even in a case where he might be worthy of compassion from the injury being unpremeditated and inadvertent. But there are other wrongs which cannot be estimated in money: "You cannot minister to a mind diseased." You cannot redress a man who is wronged beyond the possibility of redress. The law has no means of restoring to him what he has lost. God himself, as he has constituted human nature, has no means of alleviating such an injury as the one I have brought before you. While the sensibilities, affections, and feelings he has given to man remain, it is impossible to heal a wound which strikes so deep into the soul. When you have given to a plaintiff, in damages, all that figures can number, it is as nothing. He goes away hanging down his head in sorrow, accompanied by his wretched family, dispirited and dejected. Nevertheless, the law has given a civil action for adultery, and, strange to say, it has given nothing else. The law commands that the injury shall be compensated (as far as it is practicable) in money, because courts of civil justice have no other means of compensation than money; and the only question, therefore, and which you upon your oaths are to decide, is this: Has the plaintiff sustained an injury up to the extent which he has complained of? Will twenty thousand pounds place him in the same condition of comfort and happiness that he enjoyed before the adultery, and which the adulterer has deprived him of? You know that it will not. Ask your own hearts the question, and you will receive the same answer. I should be glad to know, then, upon what principle, as it regards the private justice which the plaintiff has a right to, or upon what principle, as the example of that justice

affects the public and the remotest generations of mankind, you can reduce this demand even in a single farthing.

This is a doctrine which has been frequently countenanced by the noble and learned lord [Lord Kenyon] who lately presided in the court of king's bench; but his lordship's reasoning on the subject has been much misunderstood, and frequently misrepresented. The noble lord is supposed to have said that, although a plaintiff may not have sustained an injury by adultery to a given amount, yet that large damages, for the sake of public example, should be given. He never said any such thing. He said that which law and morals dictated to him, and which will support his reputation as long as law and morals have a footing in the world. He said that every plaintiff had a right to recover damages up to the extent of the injury he had received, and that public example stood in the way of showing favor to an adulterer by reducing the damages below the sum which the jury would otherwise consider as the lowest compensation for the wrong. If the plaintiff shows you that he was a most affectionate husband; that his parental and conjugal affections were the solace of his life; that for nothing the world could bestow in the shape of riches or honors would he have bartered one moment's comfort in the bosom of his family,—he shows you a wrong that no money can compensate. Nevertheless, if the injury is only measurable in money, and if you are sworn to make upon your oaths a pecuniary compensation, though I can conceive that the damages, when given to the extent of the declaration,—and you can give no more,—may fall short of what your consciences would have dictated, yet I am utterly at a loss to comprehend upon what principle they can be lessened. But then comes the defendant's counsel, and says: "It is true that the injury cannot be compensated by the sum which the plaintiff has demanded; but you will consider the miseries my client must suffer if you make him the object of a severe verdict. You must, therefore, regard him with compassion; though I am ready to admit the plaintiff is to be compensated for the injury he has received."

Here, then, Lord Kenyon's doctrine deserves consideration. "He who will mitigate damages below the fair estimate of the wrong which he has committed must do it upon some principle which the policy of the law will support." Let me then examine whether the defendant is in a situation which entitles him to have the damages against him mitigated, when private justice to the injured party calls upon you to give them to the utmost farthing.

The question will be: On what principle of mitigation can he stand before you? I had occasion, not a great while ago, to remark to a jury that the wholesome institutions of the civilized world came seasonably in aid of the dispensations of Providence for our well-being in the world. If I were to ask: What it is that prevents the prevalence of the crime of incest by taking away those otherwise natural impulses, from the promiscuous gratification of which we should become like the beasts of the field, and lose all the intellectual endearments which are at once the pride and the happiness of man? What is it that renders our houses pure and our families innocent? It is that, by the wise institutions of all civilized nations, there is placed a kind of guard against the human passions, in that sense of impropriety and dishonor which the law has raised up and impressed with almost the force of a second nature. This wise and politic restraint beats down, by the habits of the mind, even a propensity to incestuous commerce, and opposes those inclinations which nature, for wise purposes, has implanted in our breasts at the approach of the other sex. It holds the mind in chains against the seductions of beauty. It is a moral feeling in perpetual opposition to human infirmity. It is like an angel from heaven placed to guard us from propensities which are evil. It is that warning voice, gentlemen, which enables you to embrace your daughter, however lovely, without feeling that you are of a different sex. It is that which enables you, in the same manner, to live familiarly with your nearest female relations without those desires which are natural to man.

Next to the tie of blood (if not, indeed, before it) is the sacred and spontaneous relation of friendship. The man who comes under the roof of a married friend ought to be under the dominion of the same moral restraint, and, thank God, generally is so, from the operation of the causes which I have described. Though not insensible to the charms of female beauty, he receives its impressions under an habitual reserve, which honor imposes. Hope is the parent of desire, and honor tells him he must not hope. Loose thoughts may arise, but they are rebuked and dissipated:

> "Evil into the mind of God or man
> May come and go, so unapproved, and leave
> No spot or blame behind."

Gentlemen, I trouble you with these reflections that you may be able properly to appreciate the guilt of the defendant, and to show you that you are not in a case where large allowances are to be made for the ordinary infirmities of our imperfect natures. When a man does wrong in the heat of sudden passion,—as, for

instance, when, upon receiving an affront, he rushes into immediate violence, even to the deprivation of life,—the humanity of the law classes his offense among the lower degrees of homicide. It supposes the crime to have been committed before the mind had time to parley with itself. But is the criminal act of such a person, however disastrous may be the consequence, to be compared with that of the defendant? Invited into the house of a friend; received with the open arms of affection, as if the same parents had given them birth and bred them,—in this situation, this most monstrous and wicked defendant deliberately perpetrated his crime, and, shocking to relate, not only continued the appearances of friendship after he had violated its most sacred obligations, but continued them as a cloak to the barbarous repetitions of his offense,—writing letters of regard, while, perhaps, he was the father of the last child, whom his injured friend and companion was embracing and cherishing as his own! What protection can such conduct possibly receive from the humane consideration of the law for sudden and violent passions? A passion for a woman is progressive. It does not, like anger, gain an uncontrolled ascendency in a moment, nor is a modest matron to be seduced in a day. Such a crime cannot, therefore, be committed under the resistless dominion of sudden infirmity. It must be deliberately, willfully, and wickedly committed. The defendant could not possibly have incurred the guilt of this adultery without often passing through his mind (for he had the education and principles of a gentleman) the very topics I have been insisting upon before you for his condemnation. Instead of being suddenly impelled toward mischief, without leisure for such reflections, he had innumerable difficulties and obstacles to contend with. He could not but hear, in the first refusals of this unhappy lady, everything to awaken conscience, and even to excite horror. In the arguments he must have employed to seduce her from her duty, he could not but recollect and willfully trample upon his own. He was a year engaged in the pursuit. He resorted repeatedly to his shameful purpose, and advanced to it at such intervals of time and distance as entitle me to say that he determined in cold blood to enjoy a future and momentary gratification, at the expense of every principle of honor which is held sacred among gentlemen, even where no laws interpose their obligations or restraints.

I call upon you, therefore, gentlemen of the jury, to consider well this case, for it is your office to keep human life in tone; your verdict must decide whether such a case can be indulgently considered without tearing asunder the bonds which unite society together.

Gentlemen, I am not preaching a religion which men can scarcely practice. I am not affecting a severity of morals beyond the standard of those whom I am accustomed to respect, and with whom I associate in common life. I am not making a stalking horse of adultery, to excite exaggerated sentiment. This is not the case of a gentleman meeting a handsome woman in a public street or in a place of public amusement, where, finding the coast clear for his addresses, without interruption from those who should interrupt, he finds himself engaged (probably the successor of another) in a vain and transitory intrigue. It is not the case of him who, night after night, falls in with the wife of another, to whom he is a stranger, in the boxes of a theater, or other resorts of pleasure, inviting admirers by indecent dress and deportment, unattended by anything which bespeaks the affectionate wife and mother of many children. Such connections may be of evil example; but I am not here to reform public manners, but to demand private justice. It is impossible to assimilate the sort of cases I have alluded to, which ever will be occasionally occurring, with this atrocious invasion of household peace,—this portentous disregard of everything held sacred among men, good or evil. Nothing, indeed, can be more affecting than even to be called upon to state the evidence I must bring before you. I can scarcely pronounce to you that the victim of the defendant's lust was the mother of nine children, seven of them females and infants, unconscious of their unhappy condition, deprived of their natural guardian, separted from her forever, and entering the world with a dark cloud hanging over them. But it is not in the descending line alone that the happiness of this worthy family is invaded. It hurts me to call before you the venerable progenitor of both the father and the children, who has risen by extraordinary learning and piety to his eminent rank in the church; and who, instead of receiving, unmixed and undisturbed, the best consolation of age, in counting up the number of his descendants, carrying down the name and honor of his house to future times, may be forced to turn aside his face from some of them that bring to his remembrance the wrongs which now oppress him, and which it is his duty to forget, because it is his, otherwise impossible, duty to forgive them.

Gentlemen, if I make out this case by evidence (and, if I do not, forget everything you have heard, and reproach me for having abused your honest feelings), I have established a claim for damages that has no parallel in the annals of fashionable adultery. It

is rather like the entrance of Sin and Death into this lower world. The undone pair were living like our first parents in Paradise till this demon saw and envied their happy condition. Like them, they were in a moment cast down from the pinnacle of human happiness into the very lowest abyss of sorrow and despair. In one point, indeed, the resemblance does not hold, which, while it aggravates the crime, redoubles the sense of suffering. It was not from an enemy, but from a friend, that this evil proceeded. I have just had put into my hand a quotation from the Psalms upon this subject, full of that unaffected simplicity which so strikingly characterizes the sublime and sacred poet:

"It is not an open enemy that hath done me this dishonor, for then I could have borne it.

"Neither was it mine adversary that did magnify himself against me, for then, peradventure, I would have hid myself from him.

"But it was even thou, my companion, my guide, mine own familiar friend."

This is not the language of counsel, but the inspired language of truth. I ask you solemnly, upon your honors and your oaths, if you would exchange the plaintiff's former situation for his present for a hundred times the compensation he requires at your hands. I am addressing myself to affectionate husbands, and to the fathers of beloved children. Suppose I were to say to you: "There is twenty thousand pounds for you. Embrace your wife for the last time, and the child that leans upon her bosom and smiles upon you; retire from your house and make way for the adulterer; wander about, an object for the hand of scorn to point its slow and moving finger at; think no more of the happiness and tranquillity of your former state,—I have destroyed them forever. But never mind, don't make yourself uneasy, here is a draft upon my banker, it will be paid at sight,—there is no better man in the city." I can see you think I am mocking you, gentlemen, and well you may, but it is the very pith and marrow of this cause. It is impossible to put the argument in mitigation of damages in plain English without talking such a language as appears little better than an insult to your understandings, dress it up as you will. But it may be asked: If no money can be an adequate, or, indeed, any, compensation, why is Mr. Markham a plaintiff in a civil action? Why does he come here for money? Thank God, gentlemen, it is not my fault. I take honor to myself that I was one of those who endeavored to put an end to this species of action by the adoption of a more salutary course of proceeding. I take honor

to myself that I was one of those who supported in parliament the adoption of a law to pursue such outrages with the terrors of criminal justice. I thought then, and I shall always think, that every act *malum in se,* directly injurious to an individual, and most pernicious in its consequences to society, should be considered to be a misdemeanor. Indeed, I know of no other definition of the term. The legislature, however, thought otherwise, and I bow to its decision; but the business of this day may produce some changes of opinion on the subject. I never meant that every adultery was to be similarly considered. Undoubtedly there are cases where it is comparatively venial, and judges would not overlook the distinctions. I am not a pretender to any extraordinary purity. My severity is confined to cases in which there can be but one sentiment among men of honor as to the offense, though they may differ in the mode and measure of its correction.

It is this difference of sentiment, gentlemen, that I am alone afraid of. I fear you may think there is a sort of limitation in verdicts, and that you may look to precedents for the amount of damages, though you can find no precedent for the magnitude of the crime; but you might as well abolish the action altogether as lay down a principle which limits the consequences of adultery to what it may be convenient for the adulterer to pay. By the adoption of such a principle, or by any mitigation of severity, arising even from an insufficient reprobation of it, you unbar the sanctuary of domestic happiness, and establish a sort of license for debauchery, to be sued out like other licenses, at its price. A man has only to put money into his pocket, according to his degree and fortune, and he may then debauch the wife or daughter of his best friend, at the expense he chooses to go to. He has only to say to himself what Iago says to Roderigo in the play: "Put money in thy purse—go to—put money in thy purse."[2]

Persons of immense fortunes might, in this way, deprive the best men in the country of their domestic satisfactions, with what to them might be considered as impunity. The most abandoned profligate might say to himself, or to other profligates: "I have suffered judgment by default. Let them send down their deputy sheriff to the King's Arms Tavern. I shall be concealed from the eye of the public. I have drawn upon my banker for the utmost damages, and I have as much more to spare to-morrow if I can find another woman whom I would choose to enjoy at such a price." In this manner I have seen a rich delinquent, too lightly

[2] Othello, Act. i., Scene 3.

fined by courts of criminal justice, throw down his bank notes to the officers, and retire with a deportment, not of contrition, but contempt.

For these reasons, gentlemen, I expect from you to-day the full measure of damages demanded by the plaintiff. Having given such a verdict, you will retire with a monitor within confirming that you have done right. You will retire in sight of an approving public, and an approving Heaven. Depend upon it, the world cannot be held together without morals; nor can morals maintain their station in the human heart without religion, which is the corner-stone of the fabric of human virtue.

We have lately had a most striking proof of this sublime and consoling truth in one result, at least, of the Revolution which has astonished and shaken the earth. Though a false philosophy was permitted, for a season, to raise up her vain fantastic front, and to trample down the Christian establishments and institutions, yet, on a sudden, God said: "Let there be light, and there was light." The altars of religion were restored. Not purged, indeed, of human errors and superstitions; not reformed in the just sense of reformation; yet the Christian religion is still re-established, leading on to further reformation, fulfilling the hope that the doctrines and practice of Christianity shall overspread the face of the earth.

Gentlemen, as to us, we have nothing to wait for. We have long been in the center of light. We have a true religion and a free government, and you are the pillars and supporters of both.

I have nothing further to add, except that, since the defendant committed the injury complained of, he has sold his estate, and is preparing to remove into some other country. Be it so. Let him remove; but you will have to pronounce the penalty of his return. It is for you to declare whether such a person is worthy to be a member of our community. But if the feebleness of your jurisdiction, or a commiseration which destroys the exercise of it, shall shelter such a criminal from the consequences of his crimes, individual security is gone, and the rights of the public are unprotected. Whether this be our condition or not, I shall know by your verdict.

ARGUMENT IN DEFENSE OF JOHN STOCKDALE, IN THE COURT OF KING'S BENCH, BEFORE LORD CHIEF JUSTICE KENYON AND A SPECIAL JURY, 1789.

STATEMENT.

This was a prosecution directed against John Stockdale, an eminent bookseller of London, for publishing a pamphlet in defense of Warren Hastings which contained severe strictures upon the latter's prosecutors. The well-known articles of impeachment against Warren Hastings, as prepared by Edmund Burke, were printed and widely circulated long before Hastings' trial. To counteract the impression likely to be formed against the accused by this procedure, a Scotch minister named Logan prepared an able, but somewhat offensive, review of Burke's articles, which was published by Stockdale in the usual course of his business. In the course of his review, Mr. Logan did not hesitate to assert that the charges against Hastings had their origin in misrepresentation and falsehood; that the House of Commons, in the prosecution of some of the charges, resembled a "tribunal of inquisition, rather than a court of parliament"; and that the impeachment was "carried on from motives of personal animosity, not from regard to public justice." Upon motion of Charles James Fox, one of the managers of the impeachment, the House voted an address praying the king to direct the attorney general to file an information against Stockdale, as the publisher of a libel upon the House of Commons. The case was tried before Chief Justice Kenyon and a special jury at Westminster. Sir Archibald Macdonald, the attorney general, appeared for the prosecution. Erskine defended on the ground that the pamphlet, as a whole, referred, not to the House of Commons as a whole, nor to the public conduct of its members, but to the proceedings of particular persons; therefore, the averments which must be established to sustain the information were untrue. Chief Justice Kenyon delivered a brief charge to the jury, in which he stated that there were two points for their consideration,—whether the defendant published the work (which was admitted), and whether the sense affixed to the different passages by the innuendoes in the information were fairly affixed to them. The jury, after two hours' deliberation, returned a verdict of "Not guilty."[1]

ARGUMENT.

Gentlemen of the Jury: Mr. Stockdale, who is brought as a criminal before you for the publication of this book, has, by employing me as his advocate, reposed what must appear to many an extraordinary degree of confidence; since, although he well knows that I am personally connected in friendship with most of those whose conduct and opinions are principally arraigned by its author, he nevertheless commits to my hands his defense and justification. From a trust apparently so delicate and singular,

[1] 22 Howell, St. Tr. 237.

vanity is but too apt to whisper an application to some fancied merit of one's own; but it is proper, for the honor of the English bar, that the world should know that such things happen to all of us daily and of course, and that the defendant, without any knowledge of me, or any confidence that was personal, was only not afraid to follow up an accidental retainer, from the knowledge he has of the general character of the profession. Happy, indeed, is it for this country that, whatever interested divisions may characterize other places, of which I may have occasion to speak to-day,—however the counsels of the highest departments of the state may be occasionally distracted by personal considerations,—they never enter these walls to disturb the administration of justice. Whatever may be our public principles, or the private habits of our lives, they never cast even a shade across the path of our professional duties. If this be the characteristic even of the bar of an English court of justice, what sacred impartiality may not every man expect from its jurors and its bench!

As, from the indulgence which the court was yesterday pleased to give to my indisposition, this information was not proceeded on when you were attending to try it, it is probable you were not altogether inattentive to what passed at the trial of the other indictment, prosecuted also by the House of Commons. Without, therefore, a restatement of the same principles and a similar quotation of authorities to support them, I need only remind you of the law applicable to this subject, as it was then admitted by the attorney general, in concession to my propositions, and confirmed by the higher authority of the court, namely, that every information or indictment must contain such a description of the crime that, first, the defendant may know what crime it is which he is called upon to answer; secondly, the jury may appear to be warranted in their conclusion of guilty or not guilty; and, thirdly, the court may see such a precise and definite transgression upon the record as to be able to apply the punishment which judicial discretion may dictate, or which positive law may inflict. It was admitted, also, to follow as a mere corollary from these propositions, that, where an information charges a writing to be composed or published of and concerning the Commons of Great Britain, with an intent to bring that body into scandal and disgrace with the public, the author cannot be brought within the scope of such a charge unless the jury, on examination and comparison of the whole matter written or published, shall be satisfied that the particular passages charged as criminal, when explained

by the context, and considered as part of one entire work, were meant and intended by the author to vilify the House of Commons as a body, and were written of and concerning them in parliament assembled.

These principles being settled, we are now to see what the present information is. It charges that the defendant, "unlawfully, wickedly, and maliciously devising, contriving, and intending to asperse, scandalize, and vilify the Commons of Great Britain in parliament assembled, and most wickedly and audaciously to represent their proceedings as corrupt and unjust, and to make it believed and thought as if the Commons of Great Britain in parliament assembled were a most wicked, tyrannical, base, and corrupt set of persons, and to bring them into disgrace with the public," the defendant published—what? Not those latter ends of sentences which the attorney general has read from his brief as if they had followed one another in order in this book. Not those scraps and tails of passages which are patched together upon this record, and pronounced in one breath, as if they existed without intermediate matter in the same page, and without context anywhere. No! This is not the accusation, even mutilated as it is; for the information charges that, with intention to vilify the House of Commons, the defendant published the whole book, describing it on the record by its title: "A review of the principal charges against Warren Hastings, Esq., late governor general of Bengal,"—in which, among other things, the matter particularly selected is to be found. Your inquiry, therefore, is not confined to this: whether the defendant published those selected parts of it, and whether, looking at them as they are distorted by the information, they carry, in fair construction, the sense and meaning which the innuendoes put upon them, but whether the author of the entire work,—I say the author, since, if he could defend himself, the publisher unquestionably can,—whether the author wrote the volume which I hold in my hand as a free, manly, *bona fide* disquisition of criminal charges against his fellow citizen; or whether the long, eloquent discussion of them, which fills so many pages, was a mere cloak and cover for the introduction of the supposed scandal imputed to the selected passages, the mind of the writer all along being intent on traducing the House of Commons, and not on fairly answering their charges against Mr. Hastings. This, gentlemen, is the principal matter for your consideration. And therefore, if, after you shall have taken the book itself into the chamber which will be provided for you, and shall have read the whole of it with impartial attention;

if, after the performance of this duty, you can return here, and with clear consciences pronounce upon your oaths that the impression made upon you by these pages is that the author wrote them with the wicked, seditious, and corrupt intentions charged by the information,—you have then my full permission to find the defendant guilty. But if, on the other hand, the general tenor of the composition shall impress you with respect for the author, and point him out to you as a man mistaken, perhaps, himself, but not seeking to deceive others; if every line of the work shall present to you an intelligent, animated mind, glowing with a Christian compassion towards a fellow man, whom he believed to be innocent, and with a patriot zeal for the liberty of his country, which he considered as wounded through the sides of an oppressed fellow citizen; if this shall be the impression on your consciences and understandings, when you are called upon to deliver your verdict,—then hear from me that you not only work private injustice, but break up the press of England, and surrender her rights and liberties forever, if you convict the defendant.

Gentlemen, to enable you to form a true judgment of the meaning of this book and of the intention of its author, and to expose the miserable juggle that is played off in the information by the combination of sentences which, in the work itself, have no bearing upon one another, I will first give you the publication as it is charged upon the record, and presented by the attorney general in opening the case for the crown, and I will then, by reading the interjacent matter which is studiously kept out of view, convince you of its true interpretation.

The information, beginning with the first page of the book, charges as a libel upon the House of Commons the following sentence: "The House of Commons has now given its final decision with regard to the merits and demerits of Mr. Hastings. The grand inquest of England have delivered their charges, and preferred their impeachment; then allegations are referred to proof; and from the appeal to the collective wisdom and justice of the nation in the supreme tribunal of the kingdom, the question comes to be determined whether Mr. Hastings be guilty or not guilty." It is but fair, however, to admit that this first sentence, which the most ingenious malice cannot torture into a criminal construction, is charged by the information rather as introductory to what is made to follow it than as libelous in itself. For the attorney general, from this introductory passage in the first page, goes on at a leap to page thirteenth, and reads, almost without a stop,

as if it immediately followed the other, this sentence: "What credit can we give to multiplied and accumulated charges, when we find that they originate from misrepresentation and falsehood?" From these two passages, thus standing together, without the intervenient matter, which occupies thirteen pages, one would imagine that, instead of investigating the probability or improbability of the guilt imputed to Mr. Hastings,—instead of carefully examining the charges of the Commons, and the defense of them which had been delivered before them, or which was preparing for the Lords,—the author had immediately, and in a moment after stating the mere fact of the impeachment, decided that the act of the Commons originated from misrepresentation and falsehood.

Gentlemen, in the same manner a veil is cast over all that is written in the next seven pages; for, knowing that the context would help to the true construction, not only of the passages charged before, but of those in the sequel of this information, the attorney general, aware that it would convince every man who read it that there was no intention in the author to calumniate the House of Commons, passes over, by another leap, to page twenty; and in the same manner, without drawing his breath, and as if it directly followed the two former sentences in the first and thirteenth pages, reads from page twentieth: "An impeachment of error in judgment with regard to the quantum of a fine, and for an intention that never was executed and never known to the offending party, characterizes a tribunal of inquisition, rather than a court of parliament." From this passage, by another vault, he leaps over one and thirty pages more, to page fifty-one, where he reads the following sentence, which he mainly relies on, and upon which I shall by and by trouble you with some observations: "Thirteen of them passed in the House of Commons, not only without investigation, but without being read; and the votes were given without inquiry, argument, or conviction. A majority had determined to impeach. Opposite parties met each other, and 'jostled in the dark, to perplex the political drama, and bring the hero to a tragic catastrophe.'" From thence, deriving new vigor from every exertion, he makes his last grand stride over forty-four pages more, almost to the end of the book, charging a sentence in the ninety-fifth page. So that out of a volume of one hundred and ten pages, the defendant is only charged with a few scattered fragments of sentences, picked out of three or four. Out of a work consisting of about two thousand five hundred and thirty lines of manly, spirited eloquence, only forty or

fifty lines are culled from different parts of it, and artfully put together so as to rear up a libel, out of a false context, by a supposed connection of sentences with one another, which are not only entirely independent, but which, when compared with their antecedents, bear a totally different construction. In this manner, the greatest works upon government, the most excellent books of science, the sacred Scriptures themselves, might be distorted into libels by forsaking the general context, and hanging a meaning upon selected parts. Thus, as in the text put by Algernon Sidney, "The fool hath said in his heart, 'There is no God,'" the attorney general, on the principle of the present proceeding against this pamphlet, might indict the publisher of the Bible for blasphemously denying the existence of heaven in printing, "There is no God," for these words alone, without the context, would be selected by the information, and the Bible, like this book, would be underscored to meet it. Nor could the defendant, in such a case, have any possible defense, unless the jury were permitted to see, by the book itself, that the verse, instead of denying the existence of the Divinity, only imputed that imagination to a fool.

Gentlemen, having now gone through the attorney general's reading, the book shall presently come forward and speak for itself; but before I can venture to lay it before you, it is proper to call your attention to how matters stood at the time of its publication, without which the author's meaning and intention cannot possibly be understood. The Commons of Great Britain in parliament assembled had accused Mr. Hastings, as governor general of Bengal, of high crimes and misdemeanors, and their jurisdiction, for that high purpose of national justice, was unquestionably competent. But it is proper you should know the nature of this inquisitorial capacity. The Commons, in voting an impeachment, may be compared to a grand jury finding a bill of indictment for the crown. Neither the one nor the other can be supposed to proceed but upon the matter which is brought before them. Neither of them can find guilt without accusation, nor the truth of accusation without evidence. When, therefore, we speak of the "accuser" or "accusers" of a person indicted for any crime, although the grand jury are the accusers in form, by giving effect to the accusation, yet, in common parlance, we do not consider them as the responsible authors of the prosecution. If I were to write of a most wicked indictment, found against an innocent man, which was preparing for trial, nobody who read

it would conceive I meant to stigmatize the grand jury that found the bill; but it would be inquired immediately, who was the prosecutor, and who were the witnesses on the back of it? In the same manner, I mean to contend that, if this book is read with only common attention, the whole scope of it will be discovered to be this: that, in the opinion of the author, Mr. Hastings had been accused of maladministration in India, from the heat and spleen of political divisions in parliament, and not from any zeal for national honor or justice; that the impeachment did not originate from government, but from a faction banded against it, which, by misrepresentation and violence, had fastened it on an unwilling House of Commons; that, possessed with this sentiment (which, however unfounded, makes no part of the present business, since the publisher is not called before you for defaming individual members of the Commons, but for a contempt of the Commons as a body), the author pursues the charges, article by article,—enters into a warm and animated vindication of Mr. Hastings, by regular answers to each of them; and that, as far as the mind and soul of a man can be visible,—I might almost say embodied in his writings,—his intention throughout the whole volume appears to have been to charge with injustice the private accusers of Mr. Hastings, and not the House of Commons as a body, which undoubtedly rather reluctantly gave way to, than heartily adopted, the impeachment. This will be found to be the palpable scope of the book; and no man who can read English, and who, at the same time, will have the candor and common sense to take up his impressions from what is written in it, instead of bringing his own along with him to the reading of it, can possibly understand it otherwise.

But it may be said that, admitting this to be the scope and design of the author, what right had he to canvass the merits of an accusation upon the records of the Commons, more especially while it was in the course of legal procedure? This, I confess, might have been a serious question; but the Commons, as prosecutors of this information, seem to have waived or forfeited their right to ask it. Before they sent the attorney general into this place to punish the publication of answers to their charges, they should have recollected that their own want of circumspection in the maintenance of their privileges, and in the protection of persons accused before them, had given to the public the charges themselves, which should have been confined to their own journals. The course and practice of parliament might warrant the printing of them for the use of their own members, but there

the publication should have stopped, and all further progress been resisted by authority. If they were resolved to consider answers to their charges as a contempt of their privileges, and to punish the publication of them by such severe prosecutions, it would have well become them to have begun first with those printers who, by publishing the charges themselves throughout the whole kingdom, or rather throughout the whole civilized world, were anticipating the passions and judgments of the public against a subject of England upon his trial, so as to make the publication of answers to them not merely a privilege, but a debt and duty to humanity and justice. The Commons of Great Britain claimed and exercised the privileges of questioning the innocence of Mr. Hastings by their impeachment; but as, however questioned, it was still to be presumed and protected until guilt was established by a judgment, he whom they had accused had an equal claim upon their justice to guard him from prejudice and misrepresentation until the hour of trial. Had the Commons, therefore, by the exercise of their high, necessary, and legal privileges, kept the public aloof from all canvass of their proceedings by an early punishment of printers who, without reserve or secrecy, had sent out the charges into the world from a thousand presses in every form of publication, they would have then stood upon ground to-day from whence no argument of policy or justice could have removed them, because nothing can be more incompatible with either than appeals to the many upon subjects of judicature, which, by common consent, a few are appointed to determine, and which must be determined by facts and principles, which the multitude have neither leisure nor knowledge to investigate. But, then, let it be remembered that it is for those who have the authority to accuse and punish to set the example of and to enforce this reserve, which is so necessary for the ends of justice. Courts of law, therefore, in England, never endure the publication of their records. A prosecutor of an indictment would be attached for such a publication; and, upon the same principle, a defendant would be punished for anticipating the justice of his country by the publication of his defense, the public being no party to it, until the tribunal appointed for its determination be open for its decision.

Gentlemen, you have a right to take judicial notice of these matters, without the proof of them by witnesses. For jurors may not only, without evidence, found their verdicts on facts that are notorious, but upon what they know privately themselves,

after revealing it upon oath to one another. Therefore, you are always to remember that this book was written when the charges against Mr. Hastings, to which it is an answer, were, to the knowledge of the Commons (for we cannot presume our watchmen to have been asleep), publicly hawked about in every pamphlet, magazine, and newspaper in the kingdom. You well know with what a curious appetite these charges were devoured by the whole public, interesting as they were, not only from their importance, but from the merit of their composition; certainly not so intended by the honorable and excellent composer to oppress the accused, but because the commonest subjects swell into eloquence under the touch of his sublime genius. Thus, by the remissness of the Commons, who are now the prosecutors of this information, a subject of England, who was not even charged with contumacious resistance to authority, much less a proclaimed outlaw, and therefore fully entitled to every protection which the customs and statutes of the kingdom hold out for the protection of British liberty, saw himself pierced with the arrows of thousands and ten thousands of libels.

Gentlemen, before I venture to lay the book before you, it must be yet further remembered (for the fact is equally notorious) that, under these inauspicious circumstances, the trial of Mr. Hastings at the bar of the Lords had actually commenced long before its publication. There the most august and striking spectacle was daily exhibited which the world ever witnessed. A vast stage of justice was erected, awful from its high authority, splendid from its illustrious dignity, venerable from the learning and wisdom of its judges, captivating and affecting from the mighty concourse of all ranks and conditions which daily flocked into it as into a theater of pleasure. There, when the whole public mind was at once awed and softened to the impression of every human affection, there appeared, day after day, one after another, men of the most powerful and exalted talents, eclipsing by their accusing eloquence the most boasted harangues of antiquity; rousing the pride of national resentment by the boldest invectives against broken faith and violated treaties, and shaking the bosom with alternate pity and horror by the most glowing pictures of insulted nature and humanity; ever animated and energetic, from the love of fame, which is the inherent passion of genius; firm and indefatigable, from a strong prepossession of the justice of their cause.

Gentlemen, when the author sat down to write the book now before you, all this terrible, unceasing, exhaustless artillery of

warm zeal, matchless vigor of understanding, consuming and devouring eloquence, united with the highest dignity, was daily, and without prospect of conclusion, pouring forth upon one private, unprotected man, who was bound to hear it, in the face of the whole people of England, with reverential submission and silence. I do not complain of this, as I did of the publication of the charges, because it is what the law allowed and sanctioned in the course of a public trial. But when it is remembered that we are not angels, but weak, fallible men, and that even the noble judges of that high tribunal are clothed beneath their ermines with the common infirmities of man's nature, it will bring us all to a proper temper for considering the book itself, which will in a few moments be laid before you. But first let me once more remind you that it was under all these circumstances, and amid the blaze of passion and prejudice, which the scene I have been endeavoring faintly to describe to you might be supposed likely to produce, that the author, whose name I will now give to you, sat down to compose the book which is prosecuted to-day as a libel.

The history of it is very short and natural.

The Rev. Mr. Logan, minister of the Gospel at Leith, in Scotland, a clergyman of the purest morals, and, as you will see by and by, of very superior talents, well acquainted with the human character, and knowing the difficulty of bringing back public opinion after it is settled on any subject, took a warm, unbought, unsolicited interest in the situation of Mr. Hastings, and determined, if possible, to arrest and suspend the public judgment concerning him. He felt for the situation of a fellow citizen exposed to a trial which, whether right or wrong, is undoubtedly a severe one; a trial certainly not confined to a few criminal acts like those we are accustomed to, but comprehending the transactions of a whole life, and the complicated policies of numerous and distant nations; a trial which had neither visible limits to its duration,[1] bounds to its expense, nor circumscribed compass for the grasp of memory or understanding; a trial which had therefore broke loose from the common form of decision, and had become the universal topic of discussion in the world, superseding not only every other grave pursuit, but every fashionable dissipation.

Gentlemen, the question you have therefore to try upon all this matter is extremely simple. It is neither more nor less than this:

[1] The trial began 13th February, 1788, and was protracted until April 22d, 1785 (occupying one hundred and forty-eight days), when Mr. Hastings was acquitted by a large majority on every separate article charged against him. The costs of the defense amounted to £76,080.

At a time when the charges against Mr. Hastings were, by the implied consent of the Commons, in every hand, and on every table; when, by their managers, the lightning of eloquence was incessantly consuming him, and flashing in the eyes of the public; when every man was with perfect impunity saying and writing and publishing just what he pleased of the supposed plunderer and devastator of nations,—would it have been criminal in Mr. Hastings himself to have reminded the public that he was a native of this free land, entitled to the common protection of her justice, and that he had a defense, in his turn, to offer to them, the outlines of which he implored them, in the meantime, to receive as an antidote to the unlimited and unpunished poison in circulation against him? This is, without color or exaggeration, the true question you are to decide. For I assert, without the hazard of contradiction, that if Mr. Hastings himself could have stood justified or excused in your eyes for publishing this volume in his own defense, the author, if he wrote it *bona fide* to defend him, must stand equally excused and justified; and if the author be justified, the publisher cannot be criminal, unless you have evidence that it was published by him with a different spirit and intention from those in which it was written. The question, therefore, is correctly what I just now stated it to be,—could Mr. Hastings have been condemned to infamy for writing this book?

Gentlemen, I tremble with indignation to be driven to put such a question in England. Shall it be endured that a subject of this country, instead of being arraigned and tried for some single act in her ordinary courts, where the accusation, as soon, at least, as it is made public, is followed within a few hours by the decision, may be impeached by the Commons for the transactions of twenty years; that the accusation shall spread as wide as the region of letters; that the accused shall stand, day after day and year after year, as a spectacle before the public, which shall be kept in a perpetual state of inflammation against him,—yet that he shall not, without the severest penalties, be permitted to submit anything to the judgment of mankind in his defense? If this be law (which it is for you to-day to decide), such a man has no trial! That great hall, built by our fathers for English justice, is no longer a court, but an altar; and an Englishman, instead of being judged in it by God and his country, is a victim and a sacrifice!

You will carefully remember that I am not presuming to question either the right or duty of the Commons of Great Britain to impeach; neither am I arraigning the propriety of their select-

ing, as they have done, the most extraordinary persons for ability which the age has produced, to manage their impeachment. Much less am I censuring the managers themselves, charged with the conduct of it before the Lords, who are undoubtedly bound, by their duty to the House and to the public, to expatiate upon the crimes of the persons whom they had accused. None of these points are questioned by me, nor are in this place questionable. I only desire to have it decided whether, if the Commons, when national expediency happens to call in their judgment for an impeachment, shall, instead of keeping it on their own records, and carrying it with due solemnity to the Peers for trial, permit it, without censure and punishment, to be sold like a common newspaper in the shop of my client, so crowded with their own members that no plain man, without privilege of parliament, can hope even for a sight of the fire in the winter's day, every man buying it, reading it, and commenting upon it, the gentleman himself who is the object of it, or his friend in his absence, may not, without stepping beyond the bounds of English freedom, put a copy of what is thus published into his pocket, and send back to the very same shop for publication a *bona fide,* rational, able answer to it, in order that the bane and antidote may circulate together, and the public be kept straight till the day of decision. If you think, gentlemen, that this common duty of self-preservation to the accused himself, which nature writes as a law upon the hearts of even savages and brutes, is nevertheless too high a privilege to be enjoyed by an impeached and suffering Englishman, or if you think it beyond the offices of humanity and justice, when brought home to the hand of a brother or a friend, you will say so by your verdict of guilty. The decision will then be yours, and the consolation mine, that I have labored to avert it. A very small part of the misery which will follow from it is likely to light upon me; the rest will be divided among yourselves and your children.

Gentlemen, I observe plainly and with infinite satisfaction that you are shocked and offended at my even supposing it possible you should pronounce such a detestable judgment, and that you only require of me to make out to your satisfaction, as I promised, that the real scope and object of this book is a *bona fide* defense of Mr. Hastings, and not a cloak and cover for scandal on the House of Commons. I engage to do this, and I engage for nothing more. I shall make an open, manly defense. I mean to torture no expressions from their natural constructions, to dispute no innuendoes on the record, should any of them have a fair ap-

plication, nor to conceal from your notice any unguarded, intemperate expressions which may, perhaps, be found to chequer the vigorous and animated career of the work. Such a conduct might, by accident, shelter the defendant, but it would be the surrender of the very principle on which alone the liberty of the English press can stand; and I shall never defend any man from a temporary imprisonment by the permanent loss of my own liberty and the ruin of my country. I mean, therefore, to submit to you that, though you should find a few lines in page thirteen or twenty-one, a few more in page fifty-one, and some others in other places, containing expressions bearing on the House of Commons, even as a body, which, if written as independent paragraphs by themselves, would be indefensible libels, yet that you have a right to pass them over in judgment, provided the substance clearly appears to be a *bona fide* conclusion, arising from the honest investigation of a subject which it was lawful to investigate, and the questionable expressions, the visible effusion of a zealous temper, engaged in an honorable and legal pursuit. After this preparation, I am not afraid to lay the book in its genuine state before you.

The pamphlet begins thus: "The House of Commons has now given its final decision with regard to the merits and demerits of Mr. Hastings. The grand inquest of England have delivered their charges, and preferred their impeachment; their allegations are referred to proof; and, from the appeal to the collective wisdom and justice of the nation in the supreme tribunal of the kingdom, the question comes to be determined whether Mr. Hastings be guilty or not guilty." Now, if immediately after what I have just read to you, which is the first part charged by the information, the author had said: "Will accusations built on such a baseless fabric prepossess the public in favor of the impeachment? What credit can we give to multiplied and accumulated charges when we find that they originate from misrepresentation and falsehood?"—every man would have been justified in pronouncing that he was attacking the House of Commons, because the groundless accusations mentioned in the second sentence could have no reference but to the House itself, mentioned by name in the first and only sentence which preceded it.

But, gentlemen, to your astonishment, I will now read what intervenes between these two passages. From this you will see, beyond a possibility of doubt, that the author never meant to calumniate the House of Commons, but to say that the accusations of Mr. Hastings before the whole House grew out of a com-

mittee of secrecy established some years before, and was afterwards brought forward by the spleen of private enemies and a faction in the government. This will appear not only from the grammatical construction of the words, but from what is better than words,—from the meaning which a person writing as a friend of Mr. Hastings must be supposed to have intended to convey. Why should such a friend attack the House of Commons? Will any man gravely tell me that the House of Commons, as a body, ever wished to impeach Mr. Hastings? Do we not all know that they constantly hung back from it, and hardly knew where they were, or what to do, when they found themselves entangled with it? My learned friend, the attorney general, is a member of this assembly. Perhaps he may tell you by and by what he thought of it, and whether he ever marked any disposition in the majority of the Commons hostile to Mr. Hastings. But why should I distress my friend by the question? The fact is sufficiently notorious; and what I am going to read from the book itself, which is left out in the information, is too plain for controversy.

"Whatever may be the event of the impeachment, the proper exercise of such power is a valuable privilege of the British constitution,—a formidable guardian of the public liberty and the dignity of the nation. The only danger is that, from the influence of faction, and the awe which is annexed to great names, they may be prompted to determine before they inquire, and to pronounce judgment without examination." Here is the clue to the whole pamphlet. The author trusts to and respects the House of Commons, but is afraid their mature and just examination may be disturbed by faction. Now, does he mean government by faction? Does he mean the majority of the Commons by faction? Will the House, which is the prosecutor here, sanction that application of the phrase; or will the attorney general admit the majority to be the true innuendo of faction? I wish he would. I should then have gained something, at least, by this extraordinary debate. But I have no expectation of the sort. Such a concession would be too great a sacrifice to any prosecution at a time when everything is considered as faction that disturbs the repose of the minister in parliament. But indeed, gentlemen, some things are too plain for argument. The author certainly means my friends, who, whatever qualifications may belong to them, must be contented with the appellation of "faction," while they oppose the minister in the House of Commons; but the House, having given this meaning to the phrase of "faction" for its own purposes, can-

not, in decency, change the interpretation in order to convict my client. I take that to be beyond the privilege of parliament. The same bearing upon individual members of the Commons, and not on the Commons as a body, is obvious throughout. Thus, after saying, in page ninth, that the East India Company had thanked Mr. Hastings for his meritorious services, which is unquestionably true, he adds "that mankind would abide by their deliberate decision, rather than by the intemperate assertion of a committee." This he writes after the impeachment was found by the Commons at large. But he takes no account of their proceedings, imputing the whole to the original committee,—that is, the committee of secrecy; so called, I suppose, from their being the authors of twenty volumes in folio, which will remain a secret to all posterity, as nobody will ever read them. The same construction is equally plain from what immediately follows: "The report of the committee of secrecy also states that the happiness of the native inhabitants of India has been deeply affected, their confidence in English faith and lenity shaken and impaired, and the character of this nation wantonly and wickedly degraded." Here, again, you are grossly misled by the omission of nearly twenty-one pages. For the author, though he is here speaking of this committee by name, which brought forward the charges to the notice of the House, and which he continues to do onward to the next selected paragraph, yet, by arbitrarily sinking the whole context, he is taken to be speaking to the House as a body, when, in the passage next charged by the information, he reproaches the accusers of Mr. Hastings; although, so far is he from considering them as the House of Commons that, in the very same page, he speaks of the articles as the charges, not even of the committee, but of Mr. Burke alone,—the most active and intelligent member of that body,—having been circulated in India by a relation of that gentleman: "The charges of Mr. Burke have been carried to Calcutta, and carefully circulated in India."

Now, if we were considering these passages of the work as calumniating a body of gentlemen, many of whom I must be supposed highly to respect, or as reflecting upon my worthy friend whose name I have mentioned, it would give rise to a totally different inquiry, which it is neither my duty nor yours to agitate. But surely, the more that consideration obtrudes itself upon us, the more clearly it demonstrates that the author's whole direction was against the individual accusers of Mr. Hastings, and not against the House of Commons, which merely trusted to the matter they had collected.

Although, from a caution which my situation dictates, as representing another, I have thought it my duty thus to point out to you the real intention of the author, as it appears by the fair construction of the work, yet I protest that, in my own apprehension, it is very immaterial whether he speaks of the committee or of the House, provided you shall think the whole volume a *bona fide* defense of Mr. Hastings. This is the great point I am, by all my observations, endeavoring to establish, and which, I think, no man who reads the following short passages can doubt. Very intelligent persons have, indeed, considered them, if founded in facts, to render every other amplification unnecessary. The first of them is as follows: "It was known at that time that Mr. Hastings had not only descended from a public to a private station, but that he was persecuted with accusations and impeachments. But none of these suffering millions have sent their complaints to this country; not a sigh nor a groan has been wafted from India to Britain. On the contrary, testimonies the most honorable to the character and merit of Mr. Hastings have been transmitted by those very princes whom he has been supposed to have loaded with the deepest injuries."

Here, gentlemen, we must be permitted to pause together a little; for, in examining whether these pages were written as an honest answer to the charges of the Commons, or as a prostituted defense of a notorious criminal, whom the writer believed to be guilty, truth becomes material at every step. For if, in any instance, he be detected of a willful misrepresentation, he is no longer an object of your attention. Will the attorney general proceed, then, to detect the hypocrisy of our author, by giving us some details of the proofs by which these personal enormities have been established, and which the writer must be supposed to have been acquainted with? I ask this as the defender of Mr. Stockdale, not of Mr. Hastings, with whom I have no concern. I am sorry, indeed, to be so often obliged to repeat this protest; but I really feel myself embarrassed with those repeated coincidences of defense which thicken on me as I advance, and which were, no doubt, overlooked by the Commons when they directed this interlocutory inquiry into his conduct. I ask, then, as counsel for Mr. Stockdale, whether, when a great state criminal is brought for justice at an immense expense to the public, accused of the most oppressive cruelties, and charged with the robbery of princes and the destruction of nations, it is not open to any one to ask, who are his accusers? What are the sources and the authorities of these shocking complaints? Where are the ambassadors or

memorials of those princes whose revenues he has plundered? Where are the witnesses for those unhappy men in whose persons the rights of humanity have been violated? How deeply buried is the blood of the innocent, that it does not rise up in retributive judgment to confound the guilty? These surely are questions which, when a fellow citizen is upon a long, painful, and expensive trial, humanity has a right to propose, which the plain sense of the most unlettered man may be expected to dictate, and which all history must provoke from the more enlightened. When Cicero impeached Verres, before the great tribunal of Rome, of similar cruelties and depredations in her provinces, the Roman people were not left to such inquiries. All Sicily surrounded the Forum, demanding justice upon her plunderer and spoiler, with tears and imprecations. It was not by the eloquence of the orator, but by the cries and tears of the miserable, that Cicero prevailed in that illustrious cause. Verres fled from the oaths of his accusers and their witnesses, and not from the voice of Tully. To preserve the fame of his eloquence, he composed his five celebrated speeches, but they were never delivered against the criminal, because he had fled from the city, appalled with the sight of the persecuted and the oppressed. It may be said that the cases of Sicily and India are widely different. Perhaps they may be; whether they are or not is foreign to my purpose. I am not bound to deny the possibility of answers to such questions; I am only vindicating the right to ask them.

Gentlemen, the author, in the other passage which I marked out to your attention, goes on thus: "Lord Cornwallis and Sir John Macpherson, his successors in office, have given the same voluntary tribute of approbation to his measures as governor general of India. A letter from the former, dated the 10th of August, 1786, gives the following account of our dominions in Asia: 'The native inhabitants of this kingdom are the happiest and best-protected subjects in India. Our native allies and tributaries confide in our protection. The country powers are aspiring to the friendship of the English; and from the King of Tidore, towards New Guinea, to Timur Shah, on the banks of the Indus, there is not a state that has not lately given us proofs of confidence and respect.'"

Still pursuing the same test of sincerity, let us examine this defensive allegation. Will the attorney general say that he does not believe such a letter from Lord Cornwallis ever existed? No; for he knows that it is as authentic as any document from India upon the table of the House of Commons. What, then, is the let-

ter? "The native inhabitants of this kingdom," says Lord Cornwallis (writing from the very spot), "are the happiest and best-protected subjects in India," etc. The inhabitants of this kingdom! Of what kingdom? Of the very kingdom which Mr. Hastings has just returned from governing for thirteen years, and for the misgovernment and desolation of which he stands every day as a criminal, or rather as a spectacle, before us. This is matter for serious reflection, and fully entitles the author to put the question which immediately follows: "Does this authentic account of the administration of Mr. Hastings, and of the state of India, correspond with the gloomy picture of despotism and despair drawn by the committee of secrecy?" Had that picture been even drawn by the House of Commons itself, he would have been fully justified in asking this question. But you observe it has no bearing on it. The last words not only entirely destroy that interpretation, but also the meaning of the very next passage, which is selected by the information as criminal, namely: "What credit can we give to multiplied and accumulated charges when we find that they originate from misrepresentation and falsehood?" This passage, which is charged as a libel on the Commons, when thus compared with its immediate antecedent, can bear but one construction. It is impossible to contend that it charges misrepresentation on the House that found the impeachment, but upon the committee of secrecy just before adverted to, who were supposed to have selected the matter, and brought it before the whole House for judgment. I do not mean, as I have often told you, to vindicate any calumny on that honorable committee, or upon any individual of it, any more than upon the Commons at large; but the defendant is not charged by this information with any such offenses.

Let me here pause once more to ask you whether the book, in its genuine state, as far as we have advanced in it, makes the same impression on your minds now as when it was first read to you in detached passages; and whether, if I were to tear off the first part of it, which I hold in my hand, and give it to you as an entire work, the first and last passages, which have been selected as libels on the Commons, would now appear to be so, when blended with the interjacent parts. I do not ask your answer. I shall have it in your verdict. The question is only put to direct your attention, in pursuing the remainder of the volume, to this main point,—is it an honest, serious defense? For this purpose, and as an example for all others, I will read the author's entire answer to the first article of charge concerning

Cheyte Sing, the zemindar of Benares, and leave it to your impartial judgments to determine whether it be a mere cloak and cover for the slander imputed by the information to the concluding sentence of it, which is the only part attacked, or whether, on the contrary, that conclusion itself, when embodied with what goes before it, does not stand explained and justified.

"The first article of impeachment," continues our author, "is concerning Cheyte Sing, the zemindar of Benares. Bulwart Sing, the father of this rajah, was merely an 'aumil,' or farmer and collector of the revenues for Sujah ul Dowlah, nabob of Oude and vizier of the Mogul empire. When, on the decease of his father, Cheyte Sing was confirmed in the office of collector for the vizier, he paid £200,000 as a gift, or 'nuzzeranah,' and an additional rent of £30,000 per annum.

"As the father was no more than an 'aumil' [agent], the son succeeded only to his rights and pretensions. But by a 'sunnud' [decree] granted to him by the Nabob Sujah Dowlah in September, 1773, through the influence of Mr. Hastings, he acquired a legal title to property in the land, and was raised from the office of 'aumil' to the rank of 'zemindar.' About four years after the death of Bulwart Sing, the governor general and council of Bengal obtained the sovereignty paramount of the province of Benares. On the transfer of this sovereignty, the governor and council proposed a new grant to Cheyte Sing, confirming his former privileges, and conferring upon him the addition of the sovereign rights of the mint, and the powers of criminal justice with regard to life and death. He was then recognized by the company as one of their zemindars,—a tributary subject, or feudatory vassal, of the British empire in Hindostan. The feudal system, which was formerly supposed to be peculiar to our Gothic ancestors, has always prevailed in the east. In every description of that form of government, notwithstanding accidental variations, there are two associations expressed or understood,—one for internal security, the other for external defense. The king or nabob confers protection on the feudatory baron as tributary prince, on condition of an annual revenue in the time of peace, and of military service, partly commutable for money, in the time of war. The feudal incidents in the Middle Ages in Europe, the fine paid to the superior on marriage, wardship, relief, etc., correspond to the annual tribute in Asia. Military service in war, and extraordinary aids in the event of extraordinary emergencies, were common to both.

"When the governor general of Bengal, in 1778, made an extraordinary demand on the zemindar of Benares for five lacks of rupees, the British empire, in that part of the world, was surrounded with enemies which threatened its destruction. In 1779, a general confederacy was formed among the great powers of Hindostan for the expulsion of the English from their Asiatic dominions. At this crisis the expectation of a French armament augmented the general calamities of the country. Mr. Hastings is charged by the committee with making his first demand, under the false pretense that hostilities had commenced with France. Such an insidious attempt to pervert a meritorious action into a crime is new, even in the history of impeachments. On the 7th of July, 1778, Mr. Hastings received private intelligence from an English merchant at Cairo that war had been declared by Great Britain on the 23d of March, and by France on the 30th of April. Upon this intelligence, considered as authentic, it was determined to attack all the French settlements in India. The information was afterwards found to be premature; but in the latter end of August a secret dispatch was received from England, authorizing and appointing Mr. Hastings to take the measures which he had already adopted in the preceding month. The directors and the board of control have expressed their approbation of this transaction by liberally rewarding Mr. Baldwyn, the merchant, for sending the earliest intelligence he could procure to Bengal. It was two days after Mr. Hastings' information of the French war that he formed the resolution of exacting the five lacks of rupees from Cheyte Sing, and would have made similar exactions from all the dependencies of the company in India had they been in the same circumstances. The fact is that the great zemindars of Bengal pay as much to government as their lands can afford. Cheyte Sing's collections were above fifty lacks, and his rent not twenty-four.

"The right of calling for extraordinary aids and military service in times of danger being universally established in India, as it was formerly in Europe during the feudal times, the subsequent conduct of Mr. Hastings is explained and vindicated. The governor general and council of Bengal having made a demand upon a tributary zemindar for three successive years, and that demand having been resisted by their vassal, they are justified in his punishment. The necessities of the company, in consequence of the critical situation of their affairs in 1781, calling for a high fine, the ability of the zemindar, who possessed near two crores of rupees in money and jewels, to pay the sum required; his backward-

ness to comply with the demands of his superiors; his disaffection to the English interest, and desire of revolt, which even then began to appear, and were afterwards conspicuous,—fully justify Mr. Hastings in every subsequent step of his conduct. In the whole of his proceedings, it is manifest that he had not early formed a design hostile to the zemindar, but was regulated by events which he could neither foresee nor control. When the necessary measures which he had taken for supporting the authority of the company, by punishing a refractory vassal, were thwarted and defeated by the barbarous massacre of the British troops, and the rebellion of Cheyte Sing, the appeal was made to arms, an unavoidable revolution took place in Benares, and the zemindar became the author of his own destruction."

Here follows the concluding passage, which is arraigned by the information:

"The decision of the House of Commons on this charge against Mr. Hastings is one of the most singular to be met with in the annals of parliament. The minister, who was followed by the majority, vindicated him in everything that he had done, and found him blamable only for what he intended to do; justified every step of his conduct, and only criminated his proposed intention of converting the crimes of the zemindar to the benefit of the state by a fine of fifty lacks of rupees. An impeachment of error in judgment with regard to the quantum of a fine, and for an intention that never was executed, and never known to the offending party, characterizes a tribunal of inquisition, rather than a court of parliament."

Gentlemen, I am ready to admit that this sentiment might have been expressed in language more reserved and guarded; but you will look to the sentiment itself, rather than to its dress; to the mind of the writer, and not to the bluntness with which he may happen to express it. It is obviously the language of a warm man, engaged in the honest defense of his friend, and who is brought to what he thinks a just conclusion in argument, which, perhaps, becomes offensive in proportion to its truth. Truth is undoubtedly no warrant for writing what is reproachful of any private man. If a member of society lives within the law, then, if he offends, it is against God alone, and man has nothing to do with him; and if he transgresses the laws, the libeler should arraign him before them, instead of presuming to try him himself. But as to writings on general subjects, which are not charged as an infringement on the rights of individuals, but as of a seditious tendency, it is far otherwise. When, in the progress either of

legislation or of high national justice in parliament, they who are amenable to no law are supposed to have adopted, through mistake or error, a principle which, if drawn into precedent, might be dangerous to the public, I shall not admit it to be a libel, in the course of a legal and *bona fide* publication, to state that such a principle had in fact been adopted. The people of England are not to be kept in the dark touching the proceedings of their own representatives. Let us, therefore, coolly examine this supposed offense, and see what it amounts to.

First, was not the conduct of the right honorable gentleman, whose name is here mentioned, exactly what it is represented? Will the attorney general, who was present in the House of Commons, say that it was not? Did not the minister vindicate Mr. Hastings in what he had done, and was not his consent to that article of the impeachment founded on the intention only of levying a fine on the zemindar for the service of the state, beyond the quantum which he, the minister, thought reasonable? What else is this but an impeachment of error in judgment in the quantum of a fine?

So much for the first part of the sentence, which, regarding Mr. Pitt only, is foreign to our purpose; and as to the last part of it, which imputes the sentiments of the minister to the majority that followed him with their votes on the question, that appears to me to be giving handsome credit to the majority for having voted from conviction, and not from courtesy to the minister. To have supposed otherwise, I dare not say would have been a more natural libel, but it would certainly have been a greater one. The sum and substance, therefore, of the paragraph is only this: that an impeachment for an error in judgment is not consistent with the theory or the practice of the English government. So say I. I say, without reserve, speaking merely in the abstract, and not meaning to decide upon the merits of Mr. Hastings' cause, that an impeachment for an error in judgment is contrary to the whole spirit of English criminal justice, which, though not binding on the House of Commons, ought to be a guide to its proceedings. I say that the extraordinary jurisdiction of impeachment ought never to be assumed to expose error or to scourge misfortune, but to hold up a terrible example to corruption and willful abuse of authority by extra legal pains. If public men are always punished with due severity when the source of their misconduct appears to have been selfishly corrupt and criminal, the public can never suffer when their errors are treated with gentleness. From such protection to the magistrate, no man can

think lightly of the charge of magistracy itself when he sees, by the language of the saving judgment, that the only title to it is an honest and zealous intention. If at this moment, gentlemen, or, indeed, in any other in the whole course of our history, the people of England were to call upon every man in this impeaching House of Commons who had given his voice on public questions, or acted in authority, civil or military, to answer for the issues of our councils and our wars, and if honest single intentions for the public service were refused as answers to impeachments, we should have many relations to mourn for, and many friends to deplore. For my own part, gentlemen, I feel, I hope, for my country, as much as any man that inhabits it; but I would rather see it fall, and be buried in its ruins, than lend my voice to wound any minister or other responsible person, however unfortunate, who had fairly followed the lights of his understanding and the dictates of his conscience for their preservation.

Gentlemen, this is no theory of mine. It is the language of English law, and the protection which it affords to every man in office, from the highest to the lowest trust of government. In no one instance that can be named, foreign or domestic, did the court of king's bench ever interpose its extraordinary jurisdiction, by information, against any magistrate for the widest departure from the rule of his duty, without the plainest and clearest proof of corruption. To every such application, not so supported, the constant answer has been, "Go to a grand jury with your complaint." God forbid that a magistrate should suffer from an error in judgment if his purpose was honestly to discharge his trust. We cannot stop the ordinary course of justice; but wherever the court has a discretion, such a magistrate is entitled to its protection. I appeal to the noble judge, and to every man who hears me, for the truth and universality of this position. And it would be a strange solecism, indeed, to assert that, in a case where the supreme court of criminal justice in the nation would refuse to interpose an extraordinary, though a legal, jurisdiction, on the principle that the ordinary execution of the laws should never be exceeded, but for the punishment of malignant guilt, the Commons, in their higher capacity, growing out of the same constitution, should reject that principle, and stretch them still further by a jurisdiction still more eccentric. Many impeachments have taken place because the law could not adequately punish the objects of them; but who ever heard of one being set on foot because the law, upon principle, would not punish them? Many impeachments have been adopted for a higher example

than a prosecution in the ordinary courts, but surely never for a different example. The matter, therefore, in the offensive paragraph, is not only an indisputable truth, but a truth in the propagation of which we are all deeply concerned.

Whether Mr. Hastings, in the particular instance, acted from corruption or from zeal for his employers, is what I have nothing to do with. It is to be decided in judgment. My duty stops with wishing him, as I do, an honorable deliverance. Whether the minister or the Commons meant to found this article of the impeachment on mere error, without corruption, is likewise foreign to the purpose. The author could only judge from what was said and done on the occasion. He only sought to guard the principle, which is a common interest, and the rights of Mr. Hastings under it. He was therefore justified in publishing that an impeachment, founded in error in judgment, was, to all intents and purposes, illegal, unconstitutional, and unjust.

Gentlemen, it is now time for us to return again to the work under examination. The author having discussed the whole of the first article through so many pages, without even the imputation of an incorrect or intemperate expression, except in the concluding passage (the meaning of which I trust I have explained), goes on with the same earnest disposition to the discussion of the second charge respecting the princesses of Oude, which occupies eighteen pages, not one syllable of which the attorney general has read, and on which there is not even a glance at the House of Commons. The whole of this answer is, indeed, so far from being a mere cloak for the introduction of slander, that I aver it to be one of the most masterly pieces of writing I ever read in my life. From thence he goes on to the charge of contracts and salaries, which occupies five pages more, in which there is not a glance at the House of Commons, nor a word read by the attorney general. He afterwards defends Mr. Hastings against the charges respecting the opium contracts. Not a glance at the House of Commons; not a word by the attorney general. And, in short, in this manner he goes on with the others, to the end of the book.

Now, is it possible for any human being to believe that a man, having no other intention than to vilify the House of Commons (as this information charges), should yet keep his mind thus fixed and settled, as the needle to the pole, upon the serious merits of Mr. Hastings' defense, without ever straying into matter even questionable, except in the two or three selected parts out of two or three hundred pages? This is a forbearance which

could not have existed, if calumny and detraction had been the malignant objects which led him to the inquiry and publication. The whole fallacy, therefore, arises from holding up to view a few detached passages, and carefully concealing the general tenor of the book.

Having now finished most, if not all, of these critical observations, which it has been my duty to make upon this unfair mode of prosecution, it is but a tribute of common justice to the attorney general (and which my personal regard for him makes it more pleasant to pay), that none of my commentaries reflect in the most distant manner upon him, nor upon the solicitor for the crown, who sits near me, who is a person of the most correct honor,—far from it. The attorney general having orders to prosecute, in consequence of the address of the House to his majesty, had no choice in the mode,—no means at all of keeping the prosecutors before you in countenance but by the course which has been pursued. But so far has he been from enlisting into the cause those prejudices which it is not difficult to slide into a business originating from such exalted authority, he has honorably guarded you against them; pressing, indeed, severely upon my client with the weight of his ability, but not with the glare and trappings of his high office.

Gentlemen, I wish that my strength would enable me to convince you of the author's singleness of intention, and of the merit and ability of his work, by reading the whole that remains of it; but my voice is already nearly exhausted. I am sorry my client should be a sufferer by my infirmity. One passage, however, is too striking and important to be passed over. The rest I must trust to your private examination. The author having discussed all the charges, article by article, sums them all up with this striking appeal to his readers:

"The authentic statement of facts which has been given, and the arguments which have been employed, are, I think, sufficient to vindicate the character and conduct of Mr. Hastings, even on the maxims of European policy. When he was appointed governor general of Bengal, he was invested with a discretionary power to promote the interests of the India Company ; of the British empire in that quarter of the globe. The general instructions sent to him from his constituents were: 'That, in all your deliberations and resolutions, you make the safety and prosperity of Bengal your principal object, and fix your attention on the security of the possessions and revenues of the company.' His superior genius sometimes acted in the spirit, rather than com-

plied with the letter, of the law; but he discharged the trust, and preserved the empire committed to his care, in the same way, and with greater splendor and success, than any of his predecessors in office. His departure from India was marked with the lamentations of the natives and the gratitude of his countrymen, and, on his return to England, he received the cordial congratulations of that numerous and respectable society whose interests he had promoted, and whose dominions he had protected and extended."

Gentleman of the jury, if this be a willfully false account of the instructions given to Mr. Hastings for his government, and of his conduct under them, the author and publisher of this defense deserves the severest punishment for a mercenary imposition on the public. But if it be true that he was directed to make the safety and prosperity of Bengal the first object of his attention, and that, under his administration, it has been safe and prosperous; if it be true that the security and preservation of our possessions and revenues in Asia were marked out to him as the great leading principle of his government, and that those possessions and revenues, amid unexampled dangers, have been secured and preserved,—then a question may be unaccountably mixed with your consideration, much beyond the consequence of the present prosecution, involving, perhaps, the merit of the impeachment itself which gave it birth,—a question which the Commons, as prosecutors of Mr. Hastings, should, in common prudence, have avoided, unless, regretting the unwieldy length of their proceedings against him, they wish to afford him the opportunity of this strange anomalous defense. For, although I am neither his counsel nor desire to have anything to do with his guilt or innocence, yet, in the collateral defense of my client, I am driven to state matter which may be considered by many as hostile to the impeachment. For if our dependencies have been secured, and their interests promoted, I am driven, in the defense of my client, to remark that it is mad and preposterous to bring to the standard of justice and humanity the exercise of a dominion founded upon violence and terror. It may and must be true that Mr. Hastings has repeatedly offended against the rights and privileges of Asiatic government if he was the unfaithful deputy of a power which could not maintain itself for an hour without trampling upon both. He may and must have offended against the laws of God and nature if he was the faithful viceroy of an empire wrested in blood from the people to whom God and nature had given it. He may and must have preserved that unjust dominion over timorous and abject nations by a terrifying, overbearing, insulting

superiority, if he was the faithful administrator of your government, which, having no root in consent or affection, no foundation in similarity of interests, no support from any one principle which cements men together in society, could only be upheld by alternate startagem and force. The unhappy people of India, feeble and effeminate as they are from the softness of their climate, and subdued and broken as they have been by the knavery and strength of civilization, still occasionally start up in all the vigor and intelligence of insulted nature. To be governed at all, they must be governed with a rod of iron; and our empire in the east would long since have been lost to Great Britain if civil skill and military prowess had not united their efforts to support an authority which Heaven never gave, by means which it never can sanction.

Gentlemen, I think I can observe that you are touched with this way of considering the subject, and I can account for it. I have not been considering it through the cold medium of books, but have been speaking of man and his nature, and of human dominion, from what I have seen of them myself among reluctant nations submitting to our authority. I know what they feel, and how such feelings can alone be repressed. I have heard them in my youth from a naked savage, in the indignant character of a prince surrounded by his subjects, addressing the governor of a British colony, holding a bundle of sticks in his hand, as the notes of his unlettered eloquence. "Who is it," said the jealous ruler over the desert, encroached upon by the restless foot of English adventure,—"who is it that causes this river to rise in the high mountains, and to empty itself into the ocean? Who is it that causes to blow the loud winds of winter, and that calms them again in summer? Who is it that rears up the shade of those lofty forests, and blasts them with the quick lightning at his pleasure? The same Being who gave to you a country on the other side of the waters, and gave ours to us, and by this title we will defend it," said the warrior, throwing down his tomahawk upon the ground, and raising the war sound of his nation. These are the feelings of subjugated man all round the globe; and depend upon it, nothing but fear will control where it is vain to look for affection. These reflections are the only antidotes to those anathemas of superhuman eloquence which have lately shaken these walls that surround us, but which it unaccountably falls to my province, whether I will or no, a little to stem the torrent of, by reminding you that you have a mighty sway in Asia, which cannot be maintained by the finer sympathies of life, or the practice

of its charities and affections. What will they do for you when surrounded by two hundred thousand men with artillery, cavalry, and elephants, calling upon you for their dominions which you have robbed them of? Justice may, no doubt, in such a case, forbid the levying of a fine to pay a revolting soldiery. A treaty may stand in the way of increasing a tribute to keep up the very existence of the government; and delicacy for women may forbid all entrance into a zenana for money, whatever may be the necessity for taking it. All these things must ever be occurring. But under the pressure of such constant difficulties, so dangerous to national honor, it might be better, perhaps, to think of effectually securing it altogether by recalling our troops and our merchants, and abandoning our oriental empire. Until this be done, neither religion nor philosophy can be pressed very far into the aid of reformation and punishment. If England, from a lust of ambition and dominion, will insist on maintaining despotic rule over distant and hostile nations, beyond all comparison more numerous and extended than herself, and gives commission to her viceroys to govern them, with no other instructions than to preserve them, and to secure permanently their revenues, with what color of consistency or reason can she place herself in the moral chair, and affect to be shocked at the execution of her own orders; adverting to the exact measure of wickedness and injustice necessary to their execution, and complaining only of the excess as the immorality, considering her authority as a dispensation for breaking the commands of God, and the breach of them as only punishable when contrary to the ordinances of man? Such a proceeding, gentlemen, begets serious reflection. It would be better, perhaps, for the masters and the servants of all such governments to join in supplication, that the great Author of violated humanity may not confound them together in one common judgment.

Gentlemen, I find, as I said before, I have not sufficient strength to go on with the remaining parts of the book. I hope, however, that, notwithstanding my omissions, you are now completely satisfied that, whatever errors or misconceptions may have misled the writer of these pages, the justification of a person whom he believed to be innocent, and whose accusers had themselves appealed to the public, was the single object of his contemplation. If I have succeeded in that object, every purpose which I had in addressing you has been answered. It only now remains to remind you that another consideration has been strongly pressed upon you, and, no doubt, will be insisted on in reply. You will be told that the matters which I have been justifying as legal, and

even meritorious, have therefore not been made the subject of complaint, and that, whatever intrinsic merit parts of the book may be supposed or even admitted to possess, such merit can afford no justification to the selected passages, some of which, even with the context, carry the meaning charged by the information, and which are indecent animadversions on authority. To this I would answer (still protesting, as I do, against the application of any one of the innuendoes), that, if you are firmly persuaded of the singleness and purity of the author's intentions, you are not bound to subject him to infamy, because, in the zealous career of a just and animated composition, he happens to have tripped with his pen into an intemperate expression in one or two instances of a long work. If this severe duty were binding on your consciences, the liberty of the press would be an empty sound, and no man could venture to write on any subject, however pure his purpose, without an attorney at one elbow and a counsel at the other.

From minds thus subdued by the terrors of punishment, there could issue no works of genius to expand the empire of human reason, nor any masterly compositions on the general nature of government, by the help of which the great commonwealths of mankind have founded their establishments; much less any of those useful applications of them to critical conjunctures, by which, from time to time, our own constitution, by the exercise of patriot citizens, has been brought back to its standard. Under such terrors, all the great lights of civilization must be extinguished; for men cannot communicate their free thoughts to one another with a lash held over their heads. It is the nature of everything that is great and useful, both in the animate and inanimate world, to be wild and irregular, and we must be contented to take them with the alloys which belong to them, or live without them. Genius breaks from the fetters of criticism, but its wanderings are sanctioned by its majesty and wisdom when it advances in its path. Subject it to the critic, and you tame it into dullness. Mighty rivers break down their banks in the winter, sweeping away to death the flocks which are fattened on the soil that they fertilize in the summer. The few may be saved by embankments from drowning, but the flock must perish for hunger. Tempests occasionally shake our dwellings and dissipate our commerce; but they scourge before them the lazy elements, which without them would stagnate into pestilence. In like manner, Liberty herself, the last and best gift of God to his creatures, must be taken just as she is. You might pare her down into bashful regularity, and

shape her into a perfect model of severe, scrupulous law, but she would then be Liberty no longer; and you must be content to die under the lash of this inexorable justice which you had exchanged for the banners of Freedom.

If it be asked where the line to this indulgence and impunity is to be drawn, the answer is easy. The liberty of the press, on general subjects, comprehends and implies as much strict observance of positive law as is consistent with perfect purity of intention, and equal and useful society. What that latitude is cannot be promulgated in the abstract, but must be judged of in the particular instance, and consequently, upon this occasion, must be judged of by you, without forming any possible precedent for any other case; and where can the judgment be possibly so safe as with the members of that society which alone can suffer, if the writing is calculated to do mischief to the public? You must, therefore, try the book by that criterion, and say whether the publication was premature and offensive, or, in other words, whether the publisher is bound to have suppressed it until the public ear was anticipated and abused, and every avenue to the human heart or understanding secured and blocked up? I see around me those by whom, by and by, Mr. Hastings will be most ably and eloquently defended;[2] but I am sorry to remind my friends that, but for the right of suspending the public judgment concerning him till their season of exertion comes round, the tongues of angels would be insufficient for the task.

Gentlemen, I hope I have now performed my duty to my client; I sincerely hope that I have. For certainly, if ever there was a man pulled the other way by his interests and affections; if ever there was a man who should have trembled at the situation in which I have been placed on this occasion,—it is myself, who not only love, honor, and respect, but whose future hopes and preferments are linked, from free choice, with those who, from the mistakes of the author, are treated with great severity and injustice. These are strong retardments; but I have been urged on to activity by considerations which can never be inconsistent with honorable attachments, either in the political or social world, the love of justice and of liberty, and a zeal for the constitution of my country, which is the inheritance of our posterity, of the public, and of the world. These are the motives which have animated me in defense of this person, who is an entire stranger to me, whose shop I never go to, and the author of whose publication, as well

[2] Mr. Law (afterwards Lord Ellenborough), Mr. Plumer, and Mr. Dallas.

as Mr. Hastings, who is the object of it, I never spoke to in my life.

One word more, gentlemen, and I have done. Every human tribunal ought to take care to administer justice, as we look hereafter to have justice administered to ourselves. Upon the principle on which the attorney general prays sentence upon my client— God have mercy upon us! Instead of standing before Him in judgment with the hopes and consolations of Christians, we must call upon the mountains to cover us; for which of us can present, for omniscient examination, a pure, unspotted, and faultless course? But I humbly expect that the benevolent Author of our being will judge us as I have been pointing out for your example. Holding up the great volume of our lives in His hands, and regarding the general scope of them, if He discovers benevolence, charity, and good will to man beating in the heart, where He alone can look; if He finds that our conduct, though often forced out of the path by our infirmities, has been in general well directed,—His all-searching eye will assuredly never pursue us into those little corners of our lives, much less will His justice select them for punishment, without the general context of our existence, by which faults may be sometimes found to have grown out of virtues, and very many of our heaviest offenses to have been grafted by human imperfection upon the best and kindest of our affections. No, gentlemen, believe me, this is not the course of divine justice, or there is no truth in the Gospels of Heaven. If the general tenor of a man's conduct be such as I have represented it, he may walk through the shadow of death, with all his faults about him, with as much cheerfulness as in the common paths of life; because he knows that, instead of a stern accuser to expose before the Author of his nature those frail passages which, like the scored matter in the book before you, checkers the volume of the brightest and best-spent life, His mercy will obscure them from the eye of His purity, and our repentance blot them out forever.

All this would, I admit, be perfectly foreign and irrelevant if you were sitting here in a case of property between man and man, where a strict rule of law must operate, or there would be an end of civil life and society. It would be equally foreign, and still more irrelevant, if applied to those shameful attacks upon private reputation which are the bane and disgrace of the press, by which whole families have been rendered unhappy during life by aspersions, cruel, scandalous, and unjust. Let such libelers remember that no one of my principles of defense can, at any

time or upon any occasion, ever apply to shield them from punishment; because such conduct is not only an infringement of the rights of men, as they are defined by strict law, but is absolutely incompatible with honor, honesty, or mistaken good intention. On such men let the attorney general bring forth all the artillery of his office, and the thanks and blessings of the whole public will follow him. But this is a totally different case. Whatever private calumny may mark this work, it has not been made the subject of complaint, and we have therefore nothing to do with that, nor any right to consider it. We are trying whether the public could have been considered as offended and endangered if Mr. Hastings himself, in whose place the author and publisher have a right to put themselves, had, under all the circumstances which have been considered, composed and published the volume under examination. That question cannot, in common sense, be anything resembling a question of law, but is a pure question of fact, to be decided on the principles which I have humbly recommended. I therefore ask of the court that the book itself may now be delivered to you. Read it with attention, and, as you shall find it, pronounce you verdict.

ALEXANDER HAMILTON.

[Alexander Hamilton was born in the island of Nevis, West Indies, 1757. Much uncertainty surrounds his birth and parentage, but the accepted view is that he was the son of James Hamilton, a Scotch merchant, and a French lady named Faucette. At the age of thirteen he was placed in the office of a West Indian merchant, where he showed such precocity that funds were supplied by relatives and friends to send him to this country. He arrived in New York in 1772, and later entered King's (now Columbia) College. At a patriotic meeting in the fields on July 6, 1774, he made a speech which brought him, at the age of seventeen, into public notice. Thereafter, upon the platform and in the press, he was active in the colonial cause. In 1776 he organized a company of artillery, and commanded it in subsequent engagements with such gallantry that he was placed on Gen. Washington's staff. He held this position until 1781, when he resigned on account of a reproof from Washington; but he remained with the army, and commanded a storming party which took one of the British redoubts at Yorktown. Meantime, in 1780, he had married a daughter of Gen. Schuyler. After he left the army, and while he was studying law in Albany, Robert Morris, who had been impressed by some of Hamilton's financial studies, appointed him continental receiver of taxes in New York. He was shortly afterwards admitted to the bar in that city. In 1782 he entered congress, where he made a hopeless attempt to relieve the troubles of the Confederacy. In 1783 he returned to his practice; but the needs of the nation were uppermost in his mind, and he was one of the delegates to the Annapolis convention of 1786. He framed the call for the Philadelphia convention of 1787, in which he was also a delegate. His participation in the formation of the constitution, and his services with voice and pen in securing its adoption, are well known. Placed at the head of the treasury department by President Washington, he displayed the highest order of creative statesmanship. His Report on Public Credit, 1790, is one of the greatest state papers in our history. In 1795 he resigned, and returned to the practice of the law in New York. He defended Jay's treaty in the celebrated papers of Camillus, and contributed largely to Washington's farewell address. He was chiefly instrumental in securing the election of Jefferson over Burr, and in 1804 was killed by the latter in a duel. He was buried in Trinity churchyard, New York.]

The extraordinary versatility which characterized Hamilton's career has left so many imposing evidences of creative statesman-

ship that his professional reputation seems slight in comparison. Yet he was for several years the recognized leader of the New York bar. He had, indeed, a mind suited to the law. His technical learning, though not profound, was thoroughly systematized. He had emphatically a logical mind; everything to which he devoted his attention took the form of argumentative statement. To the comprehensive grasp of his understanding he added a penetration, power of analysis, and quickness of apprehension which fitted him peculiarly for the law. His greatest efforts, it is true, were directed elsewhere. His share in the institution of a federal government constitutes his chief title to remembrance. The Federalist still remains the most profound and penetrating exposition ever made of that instrument. And his political writings and speeches abound in ideas which then and there found their first expression, but which have become so firmly impressed upon our institutions that their origin is forgotten.

Of his purely professional work, few specimens have been preserved. The New York reports during his time show that he was engaged in almost all the important causes, and he argued several important cases in the supreme court of the United States. His greatest forensic effort was his argument in behalf of Crosswell, charged with a criminal libel on President Jefferson. The issue in this case was the same as that involved in the Dean of St. Asaph's case, and his precise and logical brief may be favorably compared with the order of Erskine's argument of the same question:

"(1) The liberty of the press consists in the right to publish, with impunity, truth, for justifiable ends, though reflecting on government, magistracy, or individuals.

"(2) That the allowance of this right is essential to the preservation of free government; the disallowance of it fatal.

"(3) That its abuse is to be guarded against by subjecting the exercise of it to the animadversion and control of the tribunals of justice; but that this control cannot safely be intrusted to a permanent body of magistracy, and requires the effectual co-operation of court and jury.

"(4) That, to confine the jury to the mere question of publication and the application of terms, without the right of inquiry into the intent or tendency, referring to the court the exclusive right of pronouncing upon the construction, tendency, and intent of the libel, is calculated to render nugatory the function of the jury, enabling the court to make a libel of any writing whatsoever, the most innocent or commendable.

"(5) That it is the general rule of criminal law that the intent constitutes the crime, and that it is equally a general rule that the intent, mind, or *quo animo*, is an inference of fact to be drawn by the jury.

"(6) That, if there are exceptions to this rule, they are confined to cases in which not only the principal fact, but its circumstances, can be and are defined by statute or judicial precedent.

"(7) That, in respect to libel, there is no such specific and precise definition of facts and circumstances to be found; that, consequently, it is difficult, if not impossible, to pronounce that any libel is, *per se*, and exclusive of all circumstances, libelous; that its libelous character must depend upon intent and tendency, the one and the other being matters of fact."

Chancellor Kent, whose notes, taken at the hearing, are all that remain of Hamilton's argument, says of it: "He never before, in my hearing, made any effort in which he commanded higher reverence for his principles, nor equal admiration for the power and pathos of his eloquence." But the best available specimen of his reasoning powers as a lawyer is his opinion on the constitutionality of the United States Bank. This opinion, written in the closing weeks of a busy congressional session, is a splendid illustration of his creative genius at work upon the virgin page of constitutional law. With marvelous penetration and foresight he at once seized upon, and developed with faultless logic, the doctrine of implied powers,—a doctrine which has been to this day the support and protection of national power.

Hamilton had the passionate energy, and the strong, commanding will, characteristic of the true orator. Like Erskine, whom he is said to have resembled in manner, directness was his distinguishing trait, and, whether he appealed to the head or to the heart, he went straight to the mark. Chief Justice Spencer, of New York, his lifelong professional and political opponent, thus summed up his career:

"Alexander Hamilton was the greatest man this country has ever produced. I knew him well. I was in situations often to observe and study him. He argued cases before me while I sat as judge on the bench. Webster has done the same. In power of reasoning Hamilton was the equal of Webster, and more than this can be said of no man. In creative power, Hamilton was infinitely Webster's superior, and in this respect was endowed as God endows the most gifted of our race. If we call Shakespeare a genius or creator because he evoked plays and characters from the great chaos of thought, Hamilton merits the same appellation, for it was he, more than any other man, who thought out the constitution of the United States, and the details of the government of the Union, and, out of the chaos that existed after the Revolution, raised a fabric every part of which is instinct with his thought. I can truly say that hundreds of politicians and statesmen of the day got both the web and woof of their thought from Hamilton's brains. He, more than any other man, did the thinking of the time."

As time goes on, and only the broad outlines of our early history remain in view, many a reputation will be forgotten. But Hamilton's fame is secure, for, in comparison with his contemporaries, it may well be said of him, as was said of Papinian: *"Omnes longo post se intervallo reliquerit."*

OFFICIAL OPINION, AS SECRETARY OF THE TREASURY, ON THE CONSTITUTIONALITY OF A UNITED STATES BANK, 1791.

STATEMENT.

The primary importance of the prosperous administration of the finances of the new government led Alexander Hamilton, while secretary of the treasury, to recommend the incorporation of a national bank, as an instrument of great utility in the operations connected with the support of public credit. The constitutionality of the exercise of such a power was ably and elaborately debated in congress and in President Washington's cabinet. Thomas Jefferson, the secretary of state, and Edmund Randolph, the attorney general, united in the opinion that such a corporation was without warrant in the language of the constitution. The opposite view was maintained by Alexander Hamilton in the following opinion. President Washington adopted Hamilton's view, and approved the act incorporating the bank. It will be observed in the subsequent opinion of Chief Justice Marshall, in the case of McCulloch v. Maryand, that the learned judge adopted much of Hamilton's reasoning; in fact, at the close of the argument in that case, he remarked that "there was nothing in the whole field of argument that had not been brought forward by Hamilton."

OPINION.

The secretary of the treasury, having perused with attention the papers containing the opinions of the secretary of state and the attorney general, concerning the constitutionality of the bill for establishing a national bank, proceeds, according to the order of the president, to submit the reasons which have induced him to entertain a different opinion. It will naturally have been anticipated that, in performing this task, he would feel uncommon solicitude. Personal considerations alone, arising from the reflection that the measure originated with him, would be sufficient to produce it. The sense which he has manifested of the great importance of such an institution to the successful administration of the department under his particular care, and an expectation of serious ill consequences to result from a failure of the measure, do not permit him to be without anxiety on the public account. But the chief solicitude arises from a firm persuasion that principles of construction like those espoused by the secretary of state and the attorney general would be fatal to the just and indispensable authority of the United States.

In entering upon the argument, it ought to be premised that the objections of the secretary of state and the attorney general are founded on a general denial of the authority of the United States to erect corporations. The latter, indeed, expressly admits that, if there be anything in the bill which is not warranted by the constitution, it is the clause of incorporation. Now, it appears to the secretary of the treasury that this general principle is inherent in the very definition of government, and essential to every step of the progress to be made by that of the United States, namely, that every power vested in a government is in its nature sovereign, and includes, by force of the term, a right to employ all the means requisite and fairly applicable to the attainment of the ends of such power, and which are not precluded by restrictions and exceptions specified in the constitution, or not immoral, or not contrary to the essential ends of political society. This principle, in its application to government in general, would be admitted as an axiom; and it will be incumbent upon those who may incline to deny it to prove a distinction, and to show that a rule which, in the general system of things, is essential to the preservation of the social order, is inapplicable to the United States. The circumstance that the powers of sovereignty are in this country divided between the national and state governments does not afford the distinction required. It does not follow from this that each of the portion of powers delegated to the one or to the other is not sovereign with regard to its proper objects. It will only follow from it that each has sovereign power as to certain things, and not as to other things. To deny that the government of the United States has sovereign power as to its declared purposes and trusts, because its power does not extend to all cases, would be equally to deny that the state governments have sovereign power in any case, because their power does not extend to every case. The tenth section of the first article of the constitution exhibits a long list of very important things which they may not do. And thus the United States would furnish the singular spectacle of a political society without sovereignty, or a people governed without government.

If it would be necessary to bring proof to a proposition so clear as that which affirms that the powers of the federal government, as to its objects, were sovereign, there is a clause of its constitution which would be decisive. It is that which declares that the constitution, and the laws of the United States made in pursuance of it, and all treaties made, or which shall be made, under

their authority, shall be the supreme law of the land. The power which can create the supreme law of the land in any case is doubtless sovereign as to such case. This general and indisputable principle puts at once an end to the abstract question whether the United States have power to erect a corporation,—that is to say, to give a legal or artificial capacity to one or more persons, distinct from the natural. For it is unquestionably incident to sovereign power to erect corporations, and consequently to that of the United States, in relation to the objects intrusted to the management of the government. The difference is this: where the authority of the government is general, it can create corporations in all cases; where it is confined to certain branches of legislation, it can create corporations only in those cases. Here, then, as far as concerns the reasonings of the secretary of state and the attorney general, the affirmative of the constitutionality of the bill might be permitted to rest. It will occur to the president that the principle here advanced has been untouched by either of them. For a more complete elucidation of the point, nevertheless, the arguments which they had used against the power of the government to erect corporations, however foreign they are to the great and fundamental rule which has been stated, shall be particularly examined; and after showing that they do not tend to impair its force, it shall also be shown that the power of incorporation, incident to the government in certain cases, does fairly extend to the particular case which is the object of this bill.

The first of these arguments is that the foundation of the constitution is laid on this ground: "That all powers not delegated to the United States by the constitution, nor prohibited to it by the states, are reserved to the states, or to the people;" whence it is meant to be inferred that congress can in no case exercise any power not included in those enumerated in the constitution. And it is affirmed that the power of erecting a corporation is not included in any of the enumerated powers.

The main proposition here laid down, in its true signification, is not to be questioned. It is nothing more than a consequence of this republican maxim: that all government is a delegation of power. But how much is delegated in each case is a question of fact, to be made out by fair reasoning and construction, upon the particular provisions of the constitution, taking as guides the general principles and general ends of governments.

It is not denied that there are implied, as well as express, powers, and that the former are as effectually delegated as the lat-

ter; and for the sake of accuracy it shall be mentioned that there is another class of powers, which may be properly denominated "resulting powers." It will not be doubted that, if the United States should make a conquest of any of the territories of its neighbors, they would possess sovereign jurisdiction over the conquered territory. This would be rather a result from the whole mass of the powers of the government, and from the nature of political society, than a consequence of either of the powers specifically enumerated. But be this as it may, it furnishes a striking illustration of the general doctrine contended for. It shows an extensive case in which a power of erecting corporations is either implied in, or would result from, some or all of the powers vested in the national government. The jurisdiction acquired over such conquered country would certainly be competent to any species of legislation.

To return: It is conceded that implied powers are to be considered as delegated equally with express ones. Then it follows that, as a power of erecting a corporation may as well be implied as any other thing, it may as well be employed as an instrument or means of carrying into execution any of the specified powers as any other instrument or means whatever. The only question must be in this, as in every other case, whether the means to be employed, or, in this instance, the corporation to be erected, has a natural relation to any of the acknowledged objects or lawful ends of the government. Thus, a corporation may not be erected by congress for superintending the police of the city of Philadelphia, because they are not authorized to regulate the police of that city; but one may be erected in relation to the collection of taxes, or to the trade with foreign countries, or to the trade between the states, or with the Indian tribes, because it is the province of the federal government to regulate those objects, and because it is incident to a general sovereign or legislative power to regulate a thing to employ all the means which relate to its regulation to the best and greatest advantage.

A strange fallacy seems to have crept into the manner of thinking and reasoning upon this subject. Imagination appears to have been unusually busy concerning it. An incorporation seems to have been regarded as some great, independent, substantive thing,—as a political end of peculiar magnitude and moment,—whereas it is truly to be considered as a quality, capacity, or means to an end. Thus, a mercantile company is formed, with a certain capital, for the purpose of carrying on a particular branch of bus-

iness. Here the business to be prosecuted is the end. The association, in order to form the requisite capital, is the primary mean. Suppose that an incorporation were added to this, it would only be to add a new quality to that association, to give it an artificial capacity, by which it would be enabled to prosecute the business with more safety and convenience. That the importance of the power of incorporation has been exaggerated, leading to erroneous conclusions, will further appear from tracing it to its origin. The Roman law is the source of it, according to which a voluntary association of individuals, at any time, or for any purpose, was capable of producing it. In England, whence our notions of it are immediately borrowed, it forms part of the executive authority, and the exercise of it has been often delegated by that authority. Whence, therefore, the ground of the supposition that it lies beyond the reach of all those very important portions of sovereign power, legislative as well as executive, which belong to the government of the United States?

Through this mode of reasoning respecting the right of employing all the means requisite to the execution of the specified powers of the government, it is objected that none but necessary and proper means are to be employed; and the secretary of state maintains that no means are to be considered necessary but those without which the grant of the power would be nugatory. Nay, so far does he go in his restrictive interpretation of the word as even to make the case of necessity which shall warrant the constitutional exercise of the power to depend on casual and temporary circumstances,—an idea which alone refutes the construction. The expediency of exercising a particular power at a particular time must, indeed, depend on circumstances; but the constitutional right of exercising it must be uniform and invariable,—the same to-day as to-morrow. All the arguments, therefore, against the constitutionality of the bill derived from the accidental existence of certain state banks—institutions which happen to exist to-day, and, for aught that concerns the government of the United States, may disappear to-morrow—must not only be rejected as fallacious, but must be viewed as demonstrative that there is a radical source of error in the reasoning.

It is essential to the being of the national government that so erroneous a conception of the meaning of the word "necessary" should be exploded. It is certain that neither the grammatical nor popular sense of the term requires that construction. According to both, necessary often means no more than needful,

requisite, incidental, useful, or conducive to. It is a common mode of expression to say that it is necessary for a government or a person to do this or that thing, when nothing more is intended or understood than that the interests of the government or person require, or will be promoted by, the doing of this or that thing. The imagination can be at no loss for exemplifications of the use of the word in this sense; and it is the true one in which it is to be understood as used in the constitution. The whole turn of the clause containing it indicates that it was the intent of the convention, by that clause, to give a liberal latitude to the exercise of the specified powers. The expressions have peculiar comprehensiveness. They are, "to make all laws necessary and proper for carrying into execution the foregoing powers, and all other powers vested by the constitution in the government of the United States, or in any department or officer thereof." To understand the word as the secretary of state does would be to depart from its obvious and popular sense, and to give it a restrictive operation,—an idea never before entertained. It would be to give it the same force as if the word "absolutely" or "indispensably" had been prefixed to it. Such a construction would beget endless uncertainty and embarrassment. The cases must be palpable and extreme in which it could be pronounced with the certainty that a measure was absolutely necessary, or one without which the exercise of a given power would be nugatory. There are few measures of any government which would stand so severe a test. To insist upon it would be to make the criterion of the exercise of any implied power a case of extreme necessity, which is rather a rule to justify the overleaping of the bounds of constitutional authority than to govern the ordinary exercise of it.

It may be truly said of every government, as well as of that of the United States, that it has only a right to pass such laws as are necessary and proper to accomplish the objects intrusted to it; for no government has a right to do merely what it pleases. Hence, by a process of reasoning similar to that of the secretary of state, it might be proved that neither of the state governments has the right to incorporate a bank. It might be shown that all the public business of the state could be performed without a bank, and, inferring thence that it was unnecessary, it might be argued that it could not be done, because it is against the rule which has just been mentioned. A like mode of reasoning would prove that there was no power to incorporate the inhabitants of a town with a view to a more perfect police; for it is certain that

an incorporation may be dispensed with, though it is better to have one. It is to be remembered that there is no express power in any state constitution to erect corporations.

The degree in which a measure is necessary can never be a test of the legal right to adopt it; that must be a matter of opinion, and can only be a test of expediency. The relation between the measure and the end—between the nature of the means employed towards the execution of a power and the object of that power—must be the criterion of constitutionality, not the more or less of necessity or utility.

The practice of the government is against the rule of construction advocated by the secretary of state. Of this, the act concerning lighthouses, beacons, buoys, and public piers is a decisive example. This, doubtless, must be referred to the powers of regulating trade, and is fairly relative to it. But it cannot be affirmed that the exercise of that power in this instance was strictly necessary, or that the power itself would be nugatory, without that of regulating establishments of this nature. This restrictive interpretation of the word "necessary" is also contrary to this sound maxim of construction, namely, that the powers contained in a constitution of government, especially those which concern the general administration of the affairs of a country, its finances, trade, defense, etc., ought to be construed liberally in advancement of the public good. This rule does not depend on the particular form of a government, or the particular demarkation of the boundaries of its powers, but on the nature and objects of government itself. The means by which national exigencies are to be provided for, national inconveniences obviated, national prosperity promoted, are of such infinite variety, extent, and complexity that there must of necessity be great latitude of discretion in the selection and application of those means. Hence, consequently, the necessity and propriety of exercising the authorities intrusted to a government on principles of liberal construction.

The attorney general admits the rule, but takes a distinction between a state and the federal constitution. The latter, he thinks, ought to be construed with greater strictness, because there is more danger of error in defining partial than general powers. But the reason of the rule forbids such a distinction. This reason is the variety and extent of public exigencies, a far greater proportion of which, and of a far more critical kind, are objects of national than of state administration. The greater danger of error, as far as it is supposable, may be a prudential reason for

caution in practice, but it cannot be a rule of restrictive interpretation.

In regard to the clause of the constitution immediately under consideration, it is admitted by the attorney general that no restrictive effect can be ascribed to it. He defines the word "necessary" thus: "To be necessary is to be incidental, and may be denominated the natural means of executing a power." But while, on the one hand, the construction of the secretary of state is deemed inadmissible, it will not be contended, on the other, that the clause in question gives any new or independent power. But it gives an explicit sanction to the doctrine of implied powers, and is equivalent to an admission of the proposition that the government, as to its specified powers and objects, has plenary and sovereign authority, in some cases paramount to the states; in others, co-ordinate with it. For such is the plain import of the declaration, that it may pass all laws necessary and proper to carry into execution those powers. It is no valid objection to the doctrine to say that it is calculated to extend the power of the general government throughout the entire sphere of state legislation. The same thing has been said, and may be said, with regard to every exercise of power by implication or construction. The moment the literal meaning is departed from, there is a chance of error and abuse; and yet an adherence to the letter of its powers would at once arrest the motions of government. It is not only agreed, on all hands, that the exercise of constructive powers is indispensable, but every act which has been passed is more or less an exemplification of it. One has already been mentioned,—that relating to lighthouses, etc. That which declares the power of the president to remove officers at pleasure acknowledges the same truth in another and a signal instance. The truth is that difficulties on this point are inherent in the nature of the federal constitution; they result inevitably from a division of the legislative power. The consequence of this division is that there will be cases clearly within the power of the national government; others, clearly without its powers; and a third class, which will leave room for controversy and difference of opinion, and concerning which a reasonable latitude of judgment must be allowed. But the doctrine which is contended for is not chargeable with the consequences imputed to it. It does not affirm that the national government is sovereign in all respects, but that it is sovereign to a certain extent,—that is, to extent of the objects of its specified powers. It leaves, therefore, a criterion of what is

constitutional, and of what is not so. This criterion is the end to which the measure relates as a means. If the end be clearly comprehended within any of the specified powers, and if the measure have an obvious relation to that end, and is not forbidden by any particular provision of the constitution, it may safely be deemed to come within the compass of the national authority. There is also this further criterion, which may materially assist the decision: does the proposed measure abridge a pre-existing right of any state or of any individual? If it does not, there is a strong presumption in favor of its constitutionality, and slighter relations to any declared object of the constitution may be permitted to turn the scale.

The general objections which are to be inferred from the reasonings of the secretary of state and the attorney general to the doctrines which have been advanced have been stated, and, it is hoped, satisfactorily answered. Those of a more particular nature shall now be examined.

The secretary of state introduces his opinion with an observation that the proposed incorporation undertakes to create certain capacities, properties, or attributes, which are against the laws of alienage, descents, escheat, and forfeiture, distribution and monopoly, and to confer a power to make laws paramount to those of the states. And nothing, says he, in another place, but necessity, invincible by other means, can justify such a prostration of laws, which constitute the pillars of our whole system of jurisprudence, and are the foundation laws of the state governments. If these are truly the foundation laws of the several states, then have most of them subverted their own foundations; for there is scarcely one of them which has not, since the establishment of its particular constitution, made material alterations in some of those branches of its jurisprudence, especially the laws of descents. But it is not conceived how anything can be called the fundamental law of a state government which is not established in its constitution, unalterable by the ordinary legislature. And with regard to the question of necessity, it has been shown that this can only constitute a question of expediency, not of right.

To erect a corporation is to substitute a legal or artificial for a natural person, and, where a number are concerned, to give them individuality. To that legal or artificial person, once created, the common law of every state, of itself, annexes all those incidents and attributes which are represented as a prostration of the main

pillars of their jurisprudence. It is certainly not accurate to say that the erection of a corporation is against those different heads of the state laws; because it is rather to create a kind of person or entity, to which they are inapplicable, and to which the general rule of those laws assign a different regimen. The laws of alienage cannot apply to an artificial person, because it can have no country; those of descent cannot apply to it, because it can have no heirs; those of escheat are foreign to it, for the same reason; those of forfeiture, because it cannot commit a crime; those of distribution, because, though it may be dissolved, it cannot die. As truly might it be said that the exercise of the power of prescribing the rule by which foreigners shall be naturalized is against the law of alienage, while it is, in fact, only to put them in a situation to cease to be the subject of that law. To do a thing which is against a law is to do something which it forbids, or which is a violation of it.

But if it were even to be admitted that the erection of a corporation is a direct alteration of the stated laws in the enumerated particulars, it would do nothing towards proving that the measure was unconstitutional. If the government of the United States can do no act which amounts to an alteration of a state law, all its powers are nugatory; for almost every new law is an alteration, in some way or other, of an old law, either common or statute. There are laws concerning bankruptcy in some states. Some states have laws regulating the values of foreign coins. Congress are empowered to establish uniform laws concerning bankruptcy throughout the United States, and to regulate the values of foreign coins. The exercise of either of these powers by congress necessarily involves an alteration of the laws of those states. Again, every person, by the common law of each state, may export his property to foreign countries at pleasure; but congress, in pursuance of the power of regulating trade, may prohibit the exportation of commodities, in doing which they would alter the common law of each state, in abridgment of individual right. It can therefore never be good reasoning to say this or that act is unconstitutional because it alters this or that law of a state. It must be shown that the act which makes the alteration is unconstitutional on other accounts; not because it makes the alteration.

There are two points in the suggestions of the secretary of state, which have been noted, that are peculiarly incorrect. One is that the proposed incorporation is against the laws of monopoly,

because it stipulates an exclusive right of banking under the national authority; the other, that it gives power to the institution to make laws paramount to those of the states. But with regard to the first point: The bill neither prohibits the states from erecting as many banks as they please, nor any number of individuals from associating to carry on the business, and consequently is free from the charge of establishing a monopoly, for monopoly implies a legal impediment to the carrying on of the trade by others than those to whom it is granted. And with regard to the second point there is still less foundation. The by-laws of such an institution as a bank can operate only on its own members, can only concern the disposition of its own property, and must essentially resemble the rules of a private mercantile partnership. They are expressly not to be contrary to law; and law must here mean the law of a state, as well as of the United States. There never can be a doubt that a law of a corporation, if contrary to a law of a state, must be overruled, as void, unless the law of the state is contrary to that of the United States, and then the question will not be between the law of the state and that of the corporation, but between the law of the state and that of the United States.

Another argument made use of by the secretary of state is the rejection of a proposition by the convention to empower congress to make corporations, either generally or for some special purpose. What was the precise nature or extent of this proposition, or what the reasons for refusing it, is not ascertained by any authentic document, or even by accurate recollection. As far as any such document exists, it specifies only canals. If this was the amount of it, it would, at most, only prove that it was thought inexpedient to give a power to incorporate for the purpose of opening canals, for which purpose a special power would have been necessary, except with regard to the western territory, there being nothing in any part of the constitution respecting the regulation of canals. It must be confessed, however, that very different accounts are given of the import of the proposition, and of the motives for rejecting it. Some affirm that it was confined to the opening of canals and obstructions in rivers; others, that it embraced banks; and others, that it extended to the power of incorporating generally. Some, again, allege that it was disagreed to because it was thought improper to vest in congress a power of erecting corporations; others, because it was thought unnecessary to specify the power, and inexpedient to furnish an addi-

tional topic of objection to the constitution. In this state of the matter, no inference whatever can be drawn from it. But whatever may have been the nature of the proposition, or the reasons for rejecting it, it includes nothing in respect to the real merits of the question. The secretary of state will not deny that, whatever may have been the intention of the framers of a constitution or of a law, that intention is to be sought for in the instrument itself, according to the usual and established rules of construction. Nothing is more common than for laws to express and effect more or less than was intended. If, then, a power to erect a corporation in any case be deducible, by fair inference, from the whole or any part of the numerous provisions of the constitution of the United States, arguments drawn from extrinsic circumstances, regarding the intention of the convention, must be rejected.

Most of the arguments of the secretary of state which have not been considered in the foregoing remarks are of a nature rather to apply to the expediency than to the constitutionality of the bill. They will, however, be noticed in the discussions which will be necessary in reference to the particular heads of the powers of the government which are involved in the question. Those of the attorney general will now properly come under view.

His first objection is that the power of incorporation is not expressly given to congress. This shall be conceded, but in this sense only: that it is not declared in express terms that congress may erect a corporation. But this cannot mean that there are not certain express powers which necessarily include it. For instance, congress have express power to exercise exclusive legislation, in all cases whatsoever, over such district (not exceeding ten miles square) as may, by cession of particular states and the acceptance of congress, become the seat of the government of the United States, and to exercise like authority over all places purchased by consent of the legislature of the state in which the same shall be, for the erection of forts, arsenals, dock yards and other needful buildings. Here, then, is express power to exercise exclusive legislation, in all cases whatsoever, over certain places,—that is, to do, in respect to those places, all that any government whatsoever may do. For language does not afford a more complete designation of sovereign power than in those comprehensive terms. It is, in other words, a power to pass all laws whatsoever, and, consequently, to pass laws for erecting corporations, as well as for any other purpose which is the proper

object of law in a free government. Surely it can never be believed that congress, with exclusive powers of legislation in all cases whatsoever, cannot erect a corporation, within the district which shall become the seat of government, for the better regulation of its police. And yet there is an unqualified denial of the power to erect corporations in every case on the part both of the secretary of state and of the attorney general. The former, indeed, speaks of that power in these emphatical terms: that it is a right remaining exclusively with the states.

As far, then, as there is an express power to do any particular act of legislation, there is an express one to erect a corporation in the case above described; but, accurately speaking, no particular power is more than that implied in a general one. Thus, the power to lay a duty on a gallon of rum is only a particular implied in the general power to lay and collect taxes, duties, imposts, and excises. This serves to explain in what sense it may be said that congress have not an express power to make corporations.

This may not be an improper place to take notice of an argument which was used in debate in the house of representatives. It was there argued that, if the constitution intended to confer so important a power as that of erecting corporations, it would have been expressly mentioned. But the case which has been noticed is clearly one in which such a power exists, and yet without any specification or express grant of it, further than as every particular implied in a general power can be said to be so granted. But the argument itself is founded upon an exaggerated and erroneous conception of the nature of the power. It has been shown that it is not of so transcendent a kind as the reasoning supposes, and that, viewed in a just light, it is a means which ought to have been left to implication, rather than an end which ought to have been expressly granted.

Having observed that the power of erecting corporations is not expressly granted to congress, the attorney general proceeds thus: If it can be exercised by them, it must be (1) because the nature of the federal government implies it; (2) because it is involved in some of the specified powers of legislation; (3) because it is necessary and proper to carry into execution some of the specified powers. To be implied in the nature of the federal government, says he, would beget a doctrine so indefinite as to grasp at every power. This proposition, it ought to be remarked, is not precisely, or even substantially, that which has been relied upon.

The proposition relied upon is that the specified powers of congress are in their nature sovereign; that it is incident to sovereign power to erect corporations, and that, therefore, congress have a right, within the sphere and in relation to the objects of their power, to erect corporations. It shall, however, be supposed that the attorney general would consider the two propositions in the same light, and that the objection made to the one would be made to the other. To this objection an answer has been already given. It is this: that the doctrine is stated with this express qualification,—that the right to erect corporations does only extend to cases and objects within the sphere of the specified powers of the government. A general legislative authority implies a power to erect corporations in all cases. A particular legislative power implies authority to erect corporations in relation to cases arising under that power only. Hence the affirming that, as incident to sovereign power, congress may erect a corporation in relation to the collection of their taxes, is no more than to affirm that they may do whatever else they please; than the saying that they have a power to regulate trade would be to affirm that they have a power to regulate religion; or than the maintaining that they have sovereign power as to taxation would be to maintain that they have sovereign power as to everything else.

The attorney general undertakes, in the next place, to show that the power of erecting corporations is not involved in any of the specified powers of legislation confided to the national government. In order to this he has attempted an enumeration of the particulars which he supposes to be comprehended under the several heads of the powers to lay and collect taxes, etc.: To borrow money on the credit of the United States; to regulate commerce with sovereign nations, between the states, and with the Indian tribes; to dispose of and make all needful rules and regulations respecting the territory or other property belonging to the United States. The design of which enumeration is to show what is included under those different heads of power, and, negatively, that the power of erecting corporations is not included. The truth of this inference or conclusion must depend on the accuracy of the enumeration. If it can be shown that the enumeration is defective, the influence is destroyed. To do this will be attended with no difficulty.

The heads of the power to lay and collect taxes are stated to be: (1) To stipulate the sum to be lent; (2) an interest or no interest to be paid; (3) the time and manner of repaying, unless

the loan be placed on an irredeemable fund. This enumeration is liable to a variety of objections. It omits, in the first place, the pledging or mortgaging of the fund for the security of the money lent,—a usual, and in most cases an essential, ingredient. The idea of a stipulation of an interest or no interest is too confined. It should rather have been said, to stipulate the consideration of the loan. Individuals often borrow on considerations other than the payment of interest. So may governments, and so they often find it necessary to do. Every one recollects the lottery tickets and other *douceurs* often given in Great Britain as collateral inducements to the lending of money to the government. There are also frequently collateral conditions, which the enumeration does not contemplate. Every contract which has been made for moneys borrowed in Holland induces stipulations that the sum due shall be free from taxes, and from sequestration in time of war, and mortgages all the land and property of the United States for the reimbursements. It is also known that a lottery is a common expedient for borrowing money, which certainly does not fall under either of the enumerated heads.

The heads of the power to regulate commerce with foreign nations are stated to be: (1) To prohibit them or their commodities from our ports; (2) to impose duties on them, where none existed before, or to increase existing duties on them; (3) to subject them to any species of custom-house regulations; (4) to grant them any exemptions or privileges which policy may suggest. This enumeration is far more exceptionable than either of the former. It omits everything that relates to the citizens' vessels or commodities of the United States. The following palpable omissions occur at once: (1) Of the power to prohibit the exportation of commodities, which not only exists at all times, but which, in time of war, it would be necessary to exercise, particularly with relation to naval and warlike stores. (2) Of the power to prescribe rules concerning the characteristics and privileges of an American bottom; how she shall be navigated,—whether by citizens or foreigners, or by a proportion of each. (3) Of the power of regulating the manner of contracting with seamen, the police of ships on their voyages, etc., of which the act for the government and regulation of seamen in the merchant service is a specimen. That the three preceding articles are omissions will not be doubted. There is a long list of items, in addition, which admit of little, if any, question, of which a few samples shall be given: (1) The granting of bounties to

certain kinds of vessels, and certain species of merchandise. Of this nature is the allowance on dried and pickled fish and salted provisions. (2) The prescribing of rules concerning the inspection of commodities to be exported. Though the states individually are competent to this regulation, yet there is no reason, in point of authority, at least, why a general system might not be adopted by the United States. (3) The regulation of policies of insurance, of salvage upon goods found at sea, and the disposition of such goods. (4) The regulation of pilots. (5) The regulation of bills of exchange drawn by a merchant of one state upon a merchant of another state. This last rather belongs to a regulation of trade between the states, but is equally omitted in the specifications under that head.

The last enumeration relates to the power to dispose of and make all needful rules and regulations respecting the territory or other property belonging to the United States. The heads of this power are said to be: (1) To exert an ownership over the territory of the United States, which may properly be called the property of the United States, as in the western territory, and to institute a government therein; or (2) to exert an ownership over the other property of the United States. The idea of exerting an ownership over the territory or other property of the United States is particularly indefinite and vague. It does not at all satisfy the conception of what must have been intended by a power to make all needful rules and regulations, nor would there have been any use for a special clause which authorized nothing more, for the right of exerting an ownership is implied in the very definition of property. It is admitted that, in regard to the western territory, something more is intended, even the institution of a government,—that is, the creation of a body politic, or a corporation of the highest nature; one which, in its maturity, will be able itself to create other corporations. Why, then, does not the same clause authorize the erection of a corporation in respect to the regulation or disposal of any other of the property of the United States? This idea will be enlarged upon in another place. Hence it appears that the enumerations which have been attempted by the attorney general are so imperfect as to authorize no conclusion whatever. They therefore have no tendency to disprove that each and every of the powers to which they relate includes that of erecting corporations, which they certainly do, as the subsequent illustrations will more and more evince.

It is presumed to have been satisfactorily shown, in the course of the preceding observations, (1) that the power of the government, as to the objects intrusted to its management, is, in its nature, sovereign; (2) that the right of erecting corporations is one inherent in, and inseparable from, the idea of sovereign power; (3) that the position that the government of the United States can exercise no power but such as is delegated to it by the constitution does not militate against this principle; (4) that the word "necessary," in the general clause, can have no restrictive operation derogating from the force of this principle,—indeed, that the degree in which a measure is or is not necessary cannot be a test of constitutional right, but of expediency only; (5) that the power to erect corporations is not to be considered as an independent or substantive power, but as an incidental and auxiliary one, and was therefore more properly left to implication than expressly granted; (6) that the principle in question does not extend the power of the government beyond the prescribed limits, because it only affirms a power to incorporate for purposes within the sphere of the specified powers; and, lastly, that the right to exercise such a power in certain cases is unequivocally granted in the most positive and comprehensive terms. To all which it only remains to be added that such a power has actually been exercised in two very eminent instances, namely, in the erection of two governments,—one northwest of the river Ohio, and the other southwest, the last independent of any antecedent compact. And these result in a full and complete demonstration that the secretary of state and the attorney general are mistaken when they deny generally the power of the national government to erect corporations.

It shall now be endeavored to be shown that there is a power to erect one of the kind proposed by the bill. This will be done by tracing a natural and obvious relation between the institution of a bank and the objects of several of the enumerated powers of the government, and by showing that, politically speaking, it is necessary to the effectual execution of one or more of those powers. In the course of this investigation, various instances will be stated, by way of illustration, of a right to erect corporations under those powers. Some preliminary observations may be proper. The proposed bank is to consist of an association of persons for the purpose of creating a joint capital, to be employed chiefly and essentially in loans. So far the object is not only lawful, but it is the mere exercise of a right which the law allows to every in-

dividual. The Bank of New York, which is not incorporated, is an example of such an association. The bill proposes, in addition, that the government shall become a joint proprietor in this undertaking, and that it shall permit the bills of the company, payable on demand, to be receivable in its revenues, and stipulates that it shall not grant privileges, similar to those which are to be allowed to this company, to any others. All this is incontrovertibly within the compass of the discretion of the government. The only question is whether it has a right to incorporate this company in order to enable it the more effectually to accomplish ends which are in themselves lawful. To establish such a right, it remains to show the relation of such an institution to one or more of the specified powers of the government. Accordingly, it is affirmed that it has a relation, more or less direct, to the power of collecting taxes, to that of borrowing money, to that of regulating trade between the states, and to those of raising and maintaining fleets and armies. To the two former the relation may be said to be immediate; and in the last place it will be argued that it is clearly within the provision which authorizes the making of all needful rules and regulations concerning the property of the United States, as the same has been practiced upon by the government.

A bank relates to the collection of taxes in two ways,—indirectly, by increasing the quantity of circulating medium and quickening circulation, which facilitates the means of paying; directly, by creating a convenient species of medium in which they are to be paid. To designate or appoint the money or thing in which taxes are to be paid is not only a proper, but a necessary, exercise of the power of collecting them. Accordingly, congress, in the law concerning the collection of the duties on imposts and tonnage, have provided that they shall be paid in gold and silver. But while it was an indispensable part of the work to say in what they should be paid, the choice of the specific thing was mere matter of discretion. The payment might have been required in the commodities themselves. Taxes in kind, however ill-judged, are not without precedents, even in the United States; or it might have been in the paper money of the several states, or in the bills of the Bank of North America, New York, and Massachusetts, all or either of them; or it might have been in bills issued under the authority of the United States. No part of this can, it is presumed, be disputed. The appointment, then, of the money or thing in which the taxes are to be paid, is an incident to the

power of collection; and among the expedients which may be adopted is that of bills issued under the authority of the United States. Now, the manner of issuing these bills is again matter of discretion. The government might doubtless proceed in the following manner: It might provide that they should be issued under the direction of certain officers, payable on demand, and, in order to support their credit, and give them a ready circulation, it might, besides giving them a currency in its taxes, set apart, out of any moneys in its treasury, a given sum, and appropriate it, under the direction of those officers, as a fund for answering the bills as presented for payment. The constitutionality of all this would not admit of a question, and yet it would amount to the institution of a bank with a view to the more convenient collection of taxes. For the simplest and most precise idea of a bank is a deposit of coin, or other property, as a fund for circulating a credit upon it, which is to answer the purpose of money. That such an arrangement would be equivalent to the establishment of a bank would become obvious if the place where the fund to be set apart was kept should be made a receptacle of the moneys of all other persons who should incline to deposit them there for safe-keeping, and would become still more so if the officers charged with the direction of the fund were authorized to make discounts at the usual rate of interest, upon good security. To deny the power of the government to add these ingredients to the plan would be to refine away all government.

A further process will still more clearly illustrate the point: Suppose, when the specie of the bank which has been described was about to be instituted, it was to be urged that, in order to secure to it a due degree of confidence, the fund ought not only to be set apart and appropriated generally, but ought to be specifically vested in the officers who were to have the direction of it, and in their successors in office, to the end that it might acquire the character of private property, incapable of being resumed without a violation of the sanctions by which the rights of property are protected, and occasioning more serious and general alarm, the apprehension of which might operate as a check upon the government. Such a proposition might be opposed by arguments against the expediency of it, or the solidity of the reason assigned for it, but it is not conceivable what could be urged against its constitutionality; and yet such a disposition of the thing would amount to the erection of a corporation, for the true definition of a corporation seems to be this: It is a legal person,

or a person created by act of law, consisting of one or more natural persons authorized to hold property or a franchise in succession, in a legal, as contradistinguished from natural, capacity.

Let the illustration proceed a step further. Suppose a bank, of the nature which has been described, with or without incorporation, had been instituted, and that experience had evinced, as it probably would, that, being wholly under a public direction, it possessed not the confidence requisite to the credit of the bills. Suppose, also, that, by some of those adverse conjunctures which occasionally attend nations, there had been a very great drain of the specie of the country, so as not only to cause general distress for want of an adequate medium of circulation, but to produce, in consequence of that circumstance, considerable defalcations in the public revenues. Suppose, also, that there was no bank instituted in any state. In such a posture of things, would it not be most manifest that the incorporation of a bank like that proposed by the bill would be a measure immediately relative to the effectual collection of the taxes, and completely within the sovereign power of providing, by all laws necessary and proper, for that collection? If it be said that such a state of things would render that necessary, and therefore constitutional, which is not so now, the answer to this, and a solid one it doubtless is, must still be that which has been already stated,—circumstances may affect the expediency of the measure, but they can neither add to nor diminish its constitutionality.

A bank has a direct relation to the power of borrowing money, because it is a usual, and in sudden emergencies an essential, instrument in the obtaining of loans to government. A nation is threatened with war. Large sums are wanted on a sudden to make the necessary preparations. Taxes are laid for the purpose, but it requires time to obtain the benefit of them. Anticipation is indispensable. If there be a bank, the supply can at once be had. If there be none, loans from individuals must be sought. The progress of these is often too slow for the exigency,—in some situations they are not practicable at all. Frequently, when they are, it is of great consequence to be able to anticipate the product of them by advances from a bank. The essentiality of such an institution as an instrument of loans is exemplified at this very moment. An Indian expedition is to be prosecuted. The only fund out of which the money can arise, consistently with the public engagements, is a tax, which only begins to be collected in July next. The preparations, however, are instantly

to be made. The money must, therefore, be borrowed, and of whom could it be borrowed if there were no public banks? It happens that there are institutions of this kind, but, if there were none, it would be indispensable to create one. Let it then be supposed that the necessity existed (as but for a casualty would be the case), that proposals were made for obtaining a loan, but a number of individuals came forward and said: "We are willing to accommodate the government with the money. With what we have in hand, and the credit we can raise upon it, we doubt not of being able to furnish the sum required; but in order to this it is indispensable that we should be incorporated as a bank. This is essential towards putting it in our power to do what is desired, and we are obliged, on that account, to make it the consideration or condition of the loan." Can it be believed that a compliance with this proposition would be unconstitutional? Does not this alone evince the contrary? It is a necessary part of a power to borrow to be able to stipulate the consideration or conditions of a loan. It is evident, as has been remarked elsewhere, that this is not confined to the mere stipulation of a franchise. If it may,—and it is not perceived why it may not,—then the grant of a corporate capacity may be stipulated as a consideration of the loan. There seems to be nothing unfit or foreign from the nature of the thing in giving individuality, or a corporate capacity, to a number of persons, who are willing to lend a sum of money to the government, the better to enable them to do it, and make them an ordinary instrument of loans in future emergencies of the state. But the more general view of the subject is still more satisfactory. The legislative power of borrowing money, and of making all laws necessary and proper for carrying into execution that power, seems obviously competent to the appointment of the organ, through which the abilities and wills of individuals may be most efficaciously exerted for the accommodation of the government by loans. The attorney general opposes to this reasoning the following observations: "Borrowing money presupposes the accumulation of a fund to be lent, and is second to the creation of an ability to lend." This is plausible in theory, but is not true in fact. In a great number of cases, a previous accumulation of a fund equal to the whole sum required does not exist. And nothing more can be actually presupposed than that there exists resources which, put into activity to the greatest advantage by the nature of the operation with the government, will be equal to the effect desired to be produced. All the provisions

and operations of government must be presumed to contemplate as they really are.

The institution of a bank has also a natural relation to the regulation of trade between the states, in so far as it is conducive to the creation of a convenient medium of exchange between them, and to the keeping up of a full circulation, by preventing the frequent displacement of the metals in reciprocal remittances. Money is the very hinge upon which commerce turns. And this does not merely mean gold and silver,—many other things have served the purpose with different degrees of utility. Paper has been extensively employed. It cannot, therefore, be admitted, with the attorney general, that the regulation of trade between the states, as it concerns the medium of circulation and exchange, ought to be considered as confined to coin. It is even supposable that the whole, or the greatest part, of the coin of the country might be carried out of it.

The secretary of state objects to the relation here insisted upon by the following mode of reasoning: "To erect a bank," says he, "and to regulate commerce, are very different acts. He who creates a bank creates a subject of commerce; so does he who makes a bushel of wheat, or digs a dollar out of the mines; yet neither of these persons regulate commerce thereby. To make a thing which may be bought and sold is not to prescribe regulations for buying and selling." This making the regulation of commerce to consist in prescribing rules for buying and selling,—this, indeed, is a species of regulation of trade, but is one which falls more aptly within the province of the local jurisdictions than within that of the general government, whose care must be presumed to have been intended to be directed to those general political arrangements concerning trade on which its aggregate interests depend, rather than to the details of buying and selling. Accordingly, such only are the regulations to be found in the laws of the United States, whose objects are to give encouragement to the enterprise of our own merchants, and to advance our navigation and manufactures. And it is in reference to these general relations of commerce that an establishment which furnishes facilities to circulation, and a convenient medium of exchange and alienation, is to be regarded as a regulation of trade.

The secretary of state further argues that, if this was a regulation of commerce, it would be void, as extending as much to the internal commerce of every state as to its external. But what regulation of commerce does not extend to the internal commerce

of every state? What are all the duties upon imported articles, amounting to prohibitions, but so many bounties upon domestic manufactures, affecting the interests of different classes of citizens in different ways? What are all the provisions in the coasting act which relate to the trade between district and district of the same state? In short, what regulation of trade between the states but must affect the internal trade of each state? What can operate upon the whole, but must extend to every part?

The relation of a bank to the execution of the powers that can concern the common defense has been anticipated. It has been noted that, at this very moment, the aid of such an institution is essential to the measures to be pursued for the protection of our frontiers. It now remains to show that the incorporation of a bank is within the operation of the provision which authorizes congress to make all needful rules and regulations concerning the property of the United States. But it is previously necessary to advert to a distinction which has been taken by the attorney general. He admits that the word "property" may signify personal property, however acquired, and yet asserts that it cannot signify money arising from the sources of revenue pointed out in the constitution, "because," says he, "the disposal and regulation of money is the final cause for raising it by taxes." But it would be more accurate to say that the object to which money is intended to be applied is the final cause for raising it, than that the disposal and regulation of it is such. The support of government, the support of troops for the common defense, the payment of the public debt, are the true final causes for raising money. The disposition and regulation of it, when raised, are the steps by which it is applied to the ends for which it was raised, not the ends themselves. Hence, therefore, the money to be raised by taxes, as well as any other personal property, must be supposed to come within the meaning, as they certainly do within the letter, of authority to make all needful rules and regulations concerning the property of the United States. A case will make this plainer: Suppose the public debt discharged, and the funds now pledged for it liberated. In some instances it would be found expedient to repeal the taxes; in others, the repeal might injure our own industry,—our agriculture and manufactures. In these cases they would, of course, be retained. Here, then, would be the moneys arising from the authorized sources of revenue, which would not fall within the rule by which the attorney general endeavors to except them from other personal

property, and from the operation of the clause in question. The moneys being in the coffers of government, what is to hinder such a disposition to be made of them as is contemplated in the bill, or what, an incorporation of the parties concerned, under the clause which has been cited? It is admitted that, with regard to the western territory, they give a power to erect a corporation,—that is, to institute a government; and by what rule of construction can it be maintained that the same words in a constitution of government will not have the same effect when applied to one species of property as to another, as far as the subject is capable of it? Or that a legislative power to make all needful rules and regulations, or to pass all laws necessary and proper, concerning the public property, which is admitted to authorize an incorporation in one case, will not authorize it in another,—will justify the institution of a government over the western territory, and will not justify the incorporation of a bank for the more useful management of the moneys of the United States? If it will do the last, as well as the first, then, under this provision alone, the bill is constitutional, because it contemplates that the United States shall be joint proprietors of the stock of the bank.

There is an observation of the secretary of state to this effect, which may require notice in this place: "Congress," says he, "are not to lay taxes *ad libitum*, for any purpose they please, but only to pay the debts or provide for the welfare of the Union." Certainly no inference can be drawn from this against the power of applying their money for the institution of a bank. It is true that they cannot, without breach of trust, lay taxes for any other purpose than the general welfare; but so neither can any other government. The welfare of the community is the only legitimate end for which money can be raised on the community. Congress can be considered as under only one restriction, which does not apply to other governments,—they cannot rightfully apply the money they raise to any purpose merely or purely local; but with this exception they have as large a discretion in relation to the application of money as any legislature whatever. The constitutional test of a right application must always be whether it be for a purpose of general or local nature. If the former, there can be no want of constitutional power. The quality of the object, as how far it will really promote or not the welfare of the Union, must be matter of conscientious discretion, and arguments for or against a measure in this light must be arguments concerning expediency or inexpediency, not constitutional right. Whatever

relates to the general order of the finances, to the general interests of trade, etc., being general objects, are constitutional ones for the application of money. A bank, then, whose bills are to circulate in all the revenues of the country, is evidently a general object, and, for that very reason, a constitutional one, as far as regards the appropriation of money to it. Whether it will really be a beneficial one or not is worthy of careful examination, but is no more a constitutional point, in the particular referred to, than the question whether the western lands shall be sold for twenty or thirty cents per acre.

A hope is entertained that it has, by this time, been made to appear, to the satisfaction of the president, that a bank has a natural relation to the power of collecting taxes, to that of regulating trade, to that of providing for the common defense, and that, as the bill under consideration contemplates the government in the light of a joint proprietor of the stock of the bank, it brings the case within the provision of the clause of the constitution which immediately respects the property of the United States.

Under a conviction that such a relation subsists, the secretary of the treasury, with all deference, conceives that it will result, as a necessary consequence from the position, that all the specified powers of government are sovereign as to the proper objects; that the incorporation of a bank is a constitutional measure; and that the objections taken to the bill, in this respect, are ill-founded. But from an earnest desire to give the utmost possible satisfaction to the mind of the president on so delicate and important a subject, the secretary of the treasury will ask his indulgence while he gives some additional illustrations of cases in which a power of erecting corporations may be exercised under some of those heads of the specified powers of the government, which are alleged to include the incorporating a bank.

(1) It does not appear susceptible of a doubt that, if congress had thought proper to provide, in the collection laws, that the bonds to be given for the duties should be given to the collector of the district, A. or B., as the case might require, to inure to him and his successors in office, in trust for the United States, that it would have been consistent with the constitution to make such an arrangement; and yet this, it is conceived, would amount to an incorporation.

(2) It is not an unusual expedient of taxation to farm particular branches of revenue,—that is, to mortgage or sell the product of them for certain definite sums, leaving the collection to the

parties to whom they are mortgaged or sold. There are even examples of this in the United States. Suppose that there was any particular branch of revenue which it was manifestly expedient to place on this footing, and there were a number of persons willing to engage with the government, upon condition that they should be incorporated, and the sums vested in them, as well for their greater safety as for the more convenient recovery and management of the taxes. Is it supposable that there could be any constitutional obstacle to the measure? It is presumed that there could be none. It is certainly a mode of collection which it would be in the discretion of the government to adopt, though the circumstances must be very extraordinary that would induce the secretary to think it expedient.

(3) Suppose a new and unexplored branch of trade should present itself with some foreign country. Suppose it was manifest that to undertake it with advantage required a union of the capitals of a number of individuals, and that those individuals would not be disposed to embark without an incorporation, as well to obviate that consequence of a private partnership which makes every individual liable in his whole estate for the debts of the company to their utmost extent, as for the more convenient management of the business. What reason can there be to doubt that the national government would have a constitutional right to institute and incorporate such a company? None. They possess a general authority to regulate trade with foreign countries. This is a means which has been practiced to that end by all the principal commercial nations, who have trading companies to this day which have subsisted for centuries. Why may not the United States constitutionally employ the means usual in other countries for attaining the ends intrusted to them?

A power to make all needful rules and regulations concerning territory has been construed to mean a power to erect a government. A power to regulate trade is a power to make all needful rules and regulations concerning trade. Why may it not, then, include that of erecting a trading company, as well as, in other cases, to erect a government? It is remarkable that the state conventions, who had proposed amendments in relation to this point, have most, if not all, of them expressed themselves nearly thus: Congress shall not grant monopolies nor erect any company with exclusive advantages of commerce; thus, at the same time, expressing their sense that the power to erect trading companies or corporations was inherent in congress, and objecting to

it no further than as to the grant of exclusive privileges. The secretary entertains all the doubts which prevail concerning the utility of such companies, but he cannot fashion to his own mind a reason to induce a doubt that there is a constitutional authority in the United States to establish them. If such a reason were demanded, none could be given, unless it were this: that congress cannot erect a corporation; which would be no better than to say they cannot do it, because they cannot do it,—first presuming an inability, without reason, and then assigning that inability as the cause of itself. Illustrations of this kind might be multiplied without end. They shall, however, be pursued no further.

There is a sort of evidence on this point arising from an aggregate view of the constitution, which is of no inconsiderable weight: The very general power of laying and collecting taxes, and appropriating their proceeds; that of borrowing money indefinitely; that of coining money, and regulating foreign coins; that of making all needful rules and regulations respecting the property of the United States. These powers combined, as well as the reason and nature of the thing, speak strongly this language: that it is the manifest design and scope of the constitution to vest in congress all the powers requisite to the effectual administration of the finances of the United States. As far as concerns this object, there appears to be no parsimony of power.

To suppose, then, that the government is precluded from the employment of so usual and so important an instrument for the administration of its finances as that of a bank, is to suppose what does not coincide with the general tenor and complexion of the constitution, and what is not agreeable to impressions that any new spectator would entertain concerning it. Little less than a prohibitory clause can destroy the strong presumptions which result from the general aspect of the government. Nothing but demonstration should exclude the idea that the power exists. In all questions of this nature, the practice of mankind ought to have great weight against the theories of individuals. The fact, for instance, that all the principal commercial nations have made use of trading corporations or companies for the purpose of external commerce is a satisfactory proof that the establishment of them is an incident to the regulation of the commerce. This other fact, that banks are a usual engine in the administration of national finances, and an ordinary and most effectual instrument of loan, and one which, in this country, has been found essential, pleads strongly against the supposition that a government, clothed with most of

the most important prerogatives of sovereignty in relation to its revenues, its debts, its credits, its defense, its trade, its intercourse with foreign nations, is forbidden to make use of that instrument as an appendage to its own authority.

It has been stated, as an auxiliary test of constitutional authority, to try whether it abridges any pre-existing right of any state or individual. The proposed investigation will stand the most severe examination on this point. Each state may still erect as many banks as it pleases. Every individual may still carry on the banking business to any extent he pleases.

Another criterion may be this: whether the institution or thing has a more direct relation, as to its uses, to the objects of the reserved powers of the state governments than to those of the powers delegated by the United States. This rule, indeed, is less precise than the former, but it may still serve as some guide. Surely a bank has more reference to the objects intrusted to the national government than to those left to the care of the state governments. The common defense is decisive in this comparison.

It is presumed that nothing of consequence in the observations of the secretary of state and the attorney general has been left unnoticed. There are, indeed, a variety of observations of the secretary of state designed to show that the utilities ascribed to a bank, in relation to the collection of taxes and to trade, could be obtained without it, to analyze which would prolong the discussion beyond all bounds. It shall be forborne for two reasons: First, because the report concerning the bank may speak for itself in this respect; and, secondly, because all those observations are grounded on the erroneous idea that the quantum of necessity or utility is the test of a constitutional exercise of power. One or two remarks only shall be made. One is that he has taken no notice of a very essential advantage to trade in general, which is mentioned in the report as peculiar to the existence of a bank circulation, equal, in the public estimation, to gold and silver. It is this that renders it unnecessary to lock up the money of the country, to accumulate for months successively, in order to the periodical payment of interest. The order is this: that his arguments to show that treasury orders and bills of exchange, from the course of trade, will prevent any considerable displacement of the metals, are founded on a particular view of the subject. A case will prove this. The sums collected in a state may be small in comparison with the debt due to it. The balance of its trade, direct and circuitous, with the seat of government, may be even or nearly so. Here,

then, without bank bills, which in that state answer the purpose of coin, there must be a displacement of the coin in proportion to the difference between the sum collected in the state and that to be paid in it. With bank bills no such displacement would take place, or, as far as it did, it would be gradual and insensible. In many other ways, also, there would be at least a temporary and inconvenient displacement of the coin, even where the course of trade would eventually return it to its proper channels. The difference of the two situations in point of convenience to the treasury can only be appreciated by one who experiences the embarrassments of making provision for the payment of the interest on a stock continually changing place in thirteen different places.

One thing which has been omitted just occurs, although it is not very material to the main argument. The secretary of state affirms that the bill only contemplates a repayment, not a loan, to the government; but here he is certainly mistaken. It is true the government invests in the stock of the bank a sum equal to that it receives on loan; but let it be remembered that it does not, therefore, cease to be a proprietor of the stock, which would be the case if the money received back were in the nature of a payment. It remains a proprietor still, and will share in the profit or loss of the institution, according as the dividend is more or less than the interest it is to pay on the sum borrowed; hence that sum is manifestly, and in the strictest sense, a loan.

LORD STOWELL.

[William Scott, Lord Stowell, eldest son of a coal shipper of Newcastle, and brother of John Scott, afterwards Lord Eldon, was born Oct. 17, 1745. He was educated at Oxford, where he was graduated in 1764. In the following year he was admitted fellow of University College, and took a B. C. L. degree in 1772. In 1773 he was elected Camden Reader in Ancient History. Meantime, in 1762, he entered as a student at the Middle Temple. Upon his father's death, in 1776, he continued, for a time, the shipping business, and thus acquired practical experience, which was afterwards of value to him. He soon resigned his tutorship, and took chambers in London. Designing to practice in the admiralty and ecclesiastical courts, in 1779 he took the degree of D. C. L., and was soon afterwards admitted as a member of the faculty of advocates at Doctor's Commons. He was called to the bar in 1780. In 1782 he was appointed advocate general to the admiralty, and in the following year registrar of the court of faculties. In 1788 the Bishop of London appointed him judge of the consistory court of London. In the same year he was knighted, and appointed king's advocate general and vicar general for the province of Canterbury. In 1798 he became judge of the high court of admiralty, and was sworn of the privy council. In 1790 he entered parliament. He resigned his office in the consistory court in 1820, but sat as judge in admiralty long after loss of sight and weakness of voice compelled him to employ others to read his judgments. He resigned the latter office in 1828. In 1833 his mind gave way, and he died three years later.]

Lord Stowell had the good fortune, says Twiss, in his life of Lord Eldon, to live in an age peculiarly qualified to exercise and exhibit the high faculties of his mind.

"The greatest maritime questions which had ever presented themselves for adjudication arose in his time out of that great war in which England became the sole occupant of the sea, and held at her girdle the keys of all the harbors upon the globe. Of these questions, most of them of first impression, a large proportion could be determined only by a long and cautious process of reference to principle and induction from analogy. The genius of Lord Stowell, at once profound and expansive, vigorous and acute, impartial and decisive, penetrated, marshaled, and mastered all the difficulties of these complex inquiries, till, having sounded all their depths and shoals, he framed and laid down that great comprehensive chart of maritime law which has become the

rule of his successors and the admiration of the world. What he thus achieved in the wide field of international jurisprudence, he accomplished also, with equal success, in the narrower spheres of ecclesiastical, matrimonial, and testamentary law. And though, where so many excellences stand forth, that of style may seem comparatively immaterial, it is impossible not to notice that scholarlike finish of his judicial compositions, by which they delight the taste of the critic, as by their learning and their logic they satisfy the understanding of the lawyer."

In the eighteen years spent at Oxford, Lord Stowell laid the foundations of his broad and deep scholarship. He began the study of the civil law, not with a view to practice, but as part of a liberal education; but the opportunities of practice in the quiet walks of the civil law, where classical and polite literature have ever flourished, proved too attractive to his active mind. As "Dr. Scott of the Commons" he became a well-known figure in the literary circles of London, and the intimate friend of Johnson, Reynolds, and Burke.

His judicial service began in the consistory court, "where he delivered discourses on the regulation of the domestic forum which would have excited the admiration of Addison for their taste, and of Johnson for their morality." He was peculiarly fitted for the administration of the ecclesiastical law by his strong attachment for the church; and in the temporal jurisdiction of his court, involving the most sacred rights of individuals, and the best interests of society, his benevolent wisdom is indelibly recorded. The cases of Dalrymple, Evans, Loveden, Sullivan, and many others in the reports of Haggard and Phillimore are rare specimens of legal philosophy and practical ethics.

In the Evans case he drew an oft-quoted picture of matrimonial infelicity, and benevolently pointed out the limits of his corrective authority:

"Two persons marry together, both of good moral character, but with something of warmth and sensibility in each of their tempers. The husband is occasionally inattentive. The wife has a vivacity that sometimes offends, and sometimes is offended. Something like unkindness is produced, and is then easily inflamed. The lady broods over petty resentments, which are anxiously fed by the busy whispers of humble confidants. Her complaints, aggravated by their reports, are carried to her relations, and meet, perhaps, with a facility of reception from their honest, but well-intentioned, minds. A state of mutual irritation increases. Something like incivility is continually practicing, and, where it is not practiced, it is continually suspected. Every word, every act, every look has a meaning attached to it. It becomes a contest of spirit, in form, between two persons eager to take, and not absolutely backward to give, mutual offense. At last the husband breaks up the family connection, and breaks it up with circumstances sufficiently expressive of dis-

gust. Treaties are attempted, and they miscarry, as they might be expected to do in the hands of persons strongly disaffected towards each other; and then for the very first time a suit of cruelty is thought of. A libel is given in, black with criminating matter. Recrimination comes from the other side. Accusations rain heavy and thick on all sides, till all is involved in gloom, and the parties lose total sight of each other's real character, and of the truth of every fact which is involved in the cause. . . . . The humanity of the court has been loudly and repeatedly invoked. Humanity is the second virtue of courts, but undoubtedly the first is justice. If it were a question of humanity simply, and of humanity which confined its means merely to the happiness of the present parties, it would be a question easily decided upon first impressions. Everybody must feel a wish to separate those who wish to live separate from each other, who cannot live together with any degree of harmony, and, consequently, with any degree of happiness; but my situation does not allow me to indulge in the feelings, much less the first feelings, of an individual. The law has said that married persons shall not be legally separated from the mere disinclination of one or both to cohabit together. The disinclination must be founded upon reasons which the law approves, and it is my duty to see whether these reasons exist in the present case. To vindicate the policy of the law is no necessary part of the office of a judge; but, if it were, it would not be difficult to show that the law in this respect has acted with its usual wisdom and humanity; with that true wisdom and that real humanity that regards the general interests of mankind. For though, in particular cases, the repugnance of the law to dissolve the obligations of matrimonial cohabitation may operate with great severity upon individuals, yet it must be carefully remembered that the general happiness of the married life is secured by its indissolubility. When people understand that they must live together, except for a very few reasons known to the law, they learn to soften by mutual accommodation that yoke which they know they cannot shake off; they become good husbands and good wives from the necessity of remaining husbands and wives,—for necessity is a powerful master in teaching the duties which it imposes. If it were once understood that upon mutual disgust married persons might be legally separated, many couples who now pass through the world with mutual comfort, with attention to their offspring, and to the moral order of civil society might have been at this moment living in a state of mutual unkindness, in a state of estrangement from their common offspring, and in a state of the most licentious and unreserved immorality. In this case, as in many others, the happiness of some individuals must be sacrificed to the greater and more general good."

But the sphere in which he exercised his highest faculties was the court of admiralty, where for a period of thirty years he was engaged in laying the foundations of the law of the sea in the principles of universal justice. Indeed, for a generation he was rather a lawgiver than a judge. With the exception of a few manuscript notes by Sir E. Simpson, some scattered memoranda among the records of the Tower, and occasional references to tradition, there were no precedents for his guidance in adjudicating upon the novel cases arising out of the most important war in English

history. He was free to be guided by the writers on Roman, canon, and international law, and by the historical material with which his wide reading had made him familiar. At the same time, the unequaled variety of cases which came before him enabled him to give unity and consistency to the whole. And such was the accuracy of his judgment that, though often appealed from, it is said that not one of his decisions was reversed during his lifetime. Upon many maritime points his judgments are still the only law, and, little popular as they were at the time in this country, they have since been accepted by our courts as authoritative. Fortified by a store of knowledge at once profound and extensive, combining all the materials that indefatigable research and close and minute observation could provide for the supply of an acute, vigorous, and capacious mind, the judgments of Lord Stowell on international law have passed into precedents equal, if not superior, to those of Puffendorf, Grotius, and Vattel, the venerable authors of the science. His work, like theirs, is animated by the spirit of universal justice. "I trust," he said in the celebrated case of the Swedish convoy,[1] "that it has not escaped my anxious recollection for one moment what it is that the duty of my station calls for from me, namely, to consider myself as stationed here, not to deliver occasional and shifting opinions to serve present purposes of particular national interest, but to administer with indifference that justice which the law of nations holds out, without distinction, to independent states, some happening to be neutral, and some to be belligerent. The seat of judicial authority is, indeed, locally here in the belligerent country, according to the known law and practice of nations, but the law itself has no locality. It is the duty of the person who sits here to determine this question exactly as he would determine the same question if sitting in Stockholm; to assert no pretensions on the part of Great Britain which he would not allow to Sweden in the same circumstances, and to impose no duties on Sweden, as a neutral country, which he would not admit to belong to Great Britain in the same character. If, therefore, I mistake the law in this matter, I mistake that which I consider, and which I mean should be considered, as the universal law upon the question."

"If ever the praise of being luminous could be bestowed upon human compositions," says Brougham, "it was upon his judgments." Aware of the value of his productions, he bestowed extreme labor on their preparation. In some instances his language may seem

[1] 1 C. Rob. 349.

to be somewhat inflated,—the attention to diction may occasionally degenerate into purism; but the symmetry and elegance of the whole confirms Lord Lyndhurst's opinion that it is as vain to praise as to imitate him.

JUDICIAL OPINION IN THE CASE OF THE GRATITUDINE, IN THE HIGH COURT OF ADMIRALTY, 1801.

STATEMENT.

This was a case involving the power of a master of a vessel to hypothecate his cargo, in a foreign port, for the repair of damages sustained by the ship at sea; such repairs being absolutely necessary to enable the ship to proceed on her voyage for the purpose of delivering the cargo according to the charter party. The facts are stated in the opinion. It was decided that the master had such power.[1]

OPINION.

This case has been learnedly argued; and I have thought it due, not only to the arguments, but also to the extreme importance of the question, as affecting the commerce of this country, to take some time for deliberation in forming my judgment upon it. The case comes on, upon petition, which states "that the Imperial ship, the Gratitudine, having on board a cargo of fruit, and bound from Trieste, Zante, and Cephalonia to London, met with extremely tempestuous weather, and sprung a leak, whereby the cargo sustained considerable damage; that the master was obliged, for the safety of the ship and cargo, and for the preservation of the lives of the crew, to put into Lisbon and unlade; that the master applied for advice and assistance to F——— Calvert, who was the correspondent of Mr. ——— Powell, one of the principal consignees in England; that Mr. Calvert wrote a letter to Mr. Powell, advising him of the misfortune which had befallen the cargo, and the steps which had been taken, and desiring his directions for their further conduct; that, in answer to that application, he received a letter from Mr. Powell stating "that to the master it belonged exclusively to adopt every necessary measure for the preservation of the cargo, and that, if it was necessary to unlade, the master alone was to judge of the propriety of such a measure"; that the master, being in want of money to defray the charges of repairing the vessel, and unlading the cargo, borrowed of the aforesaid F——— Calvert the sum of £5,273. 12s. on a certain bottomry bond, bearing the date 31st January, 1801, binding the ship and appurtenances, cargo and freight, to the said sum of £5,273. 12s., within twenty-four hours after the arrival of

[1] 3 Chr. Robinson, 240.

the said ship in the port of London, or any other port; that the said bond had been duly presented to the master, who refused to discharge it; that the holder had no other means of recovering his debt than by proceeding against the ship, freight, and cargo, and prayed the court to decree a monition against the bail given, to answer the action in respect to the cargo and freight, for payment for the balance due, after payment of the proceeds of the sale of the ship.

On the other side it is alleged "that the master had not, under the circumstances stated, a right to hypothecate the cargo for the repairs of the ship, for payment whereof the ship, her master, owners, and freight are liable; that the cargo is by law only subject to pay an average proportion of the charges to which the cargo laden in the ship was liable to, for the unlading and reshipping the cargo, and other expenses relating thereto, all which, with the freight, the parties had always been and were willing to pay."

The proposition contained in the act does not go the length of asserting universally that the master has not a right to hypothecate his cargo in any possible case, but denies the power of the master to hypothecate it under the circumstances of this particular case. In the course of the discussion, however, the argument has been carried to the entire extent, and it has been contended that the master has no right to bind the owners of the cargo in any case; upon this ground, that, although he is the agent and representative of the ship, and by virtue of that relation may bind the ship and its owners, he is not the agent of the proprietors of the cargo, and therefore cannot bind it. It is said that he is the mere depository and common carrier as to the cargo, and that the whole of his relation to the goods is limited to the duties and authorities of safe custody and conveyance. This position—that in no case has he a right to bind the owners of the cargo—is, I think, not tenable, to the extent in which it has been thrown out; for though, in the ordinary state of things, he is a stranger to the cargo, beyond the purposes of safe custody and conveyance, yet, in cases of instant and unforeseen and unprovided necessity, the character of agent and supercargo is forced upon him, not by the immediate act and appointment of the owner, but by the general policy of the law. Unless the law can be supposed to mean that valuable property in his hand is to be left without protection and care, it must unavoidably be admitted that in some cases he must exercise the discretion of an authorized agent over the cargo, as well as in the prosecution of the voyage at sea as in intermediate

ports, into which he may be compelled to enter. The case of throwing overboard parts of the cargo at sea is of that kind. Nothing can be better settled than that the master has a right to exercise this power, in case of imminent danger. He may select what articles he pleases; he may determine what quantity, no proportion is limited,—a fourth, a moiety, three-fourths, nay, in cases of extreme necessity, when the lives of the crew cannot otherwise be saved, it never can be maintained that he might not throw the whole cargo overboard; the only obligation will be, the ship should contribute its average proportion. It is said this power of throwing over the whole cannot be but in cases of extreme danger, which sweeps all ordinary rules before it; and so it is. So, likewise, with respect to any proportion, he can be justified only by that necessity. Nothing short of that will do. The mere convenience of better sailing, or more commodious stowage, will not justify him to throw overboard the smallest part. It must be a necessity of the same species, though perhaps differing in the degree. Another case is that of ransom, in which it is well known that, by the general martime law, a master could bind by his contract the whole cargo, as well as the ship. He could not go beyond the value of the goods; but, up to the last farthing of their entire value, there is not a doubt but that he might bind the cargo as well as the vessel. A very modern regulation of our own private law, founded on certain purposes of policy, has put an end to the practice of ransoming; but I am speaking of general maritime law and practice, not superseded by private and positive regulation.

These are instances of authority at sea. There are other cases, also, in port, in which the master has the same authority forced upon him. Suppose the case of a ship driven into port with a perishable cargo, where the master could hold no correspondence with the proprietor; suppose the vessel unable to proceed, or to stand in need of repairs to enable her to proceed in time. In such emergencies, the authority of agent is necessarily devolved upon him, unless it could be supposed to be the policy of the law that the cargo should be left to perish without care. What must be done? He must, in such case, exercise his judgment whether it would be better to transship the cargo, if he has the means, or to sell it. It is admitted in argument that he is not absolutely bound to transship; he may not even have the means of transshipment; but, even if he has, he may act for the best in deciding to sell. If he acts unwisely in that decision, still the foreign pur-

chaser will be safe under his acts. If he had not the means of transshipping, he is under an obligation to sell, unless it can be said that he is under an obligation to let it perish.

With respect to practice, I understand from a gentleman very conversant with the commerce of the West Indies that it is by no means unfrequent for an application to be made to the vice admiralty courts in that part of the world for leave to empower the master to sell. I understand it likewise to be a matter of complaint that this power is sometimes abused by an improvident and collusive sale of cargoes, when no real necessity exists,—that is, in other words, that the power is usurped in cases where the party does not legally possess it. But the very grounds of the defect of power in such cases implies and affirms its existence in cases where the necessity is real.

In all these cases, the character of agent respecting the cargo is thrown on the master by the policy of the law, acting on the necessity of circumstances in which he is placed. But it is said that this can only be done for the immediate benefit of the cargo, and not for the repairs of the ship. It is very true that this involuntary agent ought, like an appointed agent, in all cases to act for the best respecting the property. Even in the case of an universal jactus, which appears least likely to conduce to the benefit of the cargo, still it is so. The ship is compelled in that case to pay an average, by which means the little which is to be taken as a remnant of the cargo is preserved, whereas, otherwise, both ship and cargo would have been totally lost. In the case of ransom, what was intended for the benefit of the cargo may eventually consume the whole. The proprietor will not be benefited in such a case, but he cannot be damnified. He will have had the advantage, without the danger or possibility of loss, for he cannot suffer beyond the value of the cargo, which, without such ransom, would have gone to the enemy *in toto*. It is the same consideration which founds the rule of law that applies to the hypothecation of a ship. In all cases it is the prospect of benefit to the proprietor that is the foundation of the authority of the master. It is therefore true that, if the repairs of the ship produce no benefit or prospect of benefit to the cargo, the master cannot bind the cargo for such repairs; but it appears to me that the fallacy of the argument that the master cannot bind the cargo for the repairs of the ship lies in supposing that whatever is done for the repairs of the ship is in no degree, and under no circumstances, done for the benefit, or with a prospect of a benefit, to the

cargo; whereas the fact is that, though the prospect of benefit may be more direct and more immediate to the ship, it may still be for the preservation and conveyance of the cargo, and is justly to be considered as done for the common benefit of both ship and cargo.

Suppose the cargo to be not instantly perishable, but that it can await the repair of the ship, what is the master to do in the situation before described, being a stranger in a foreign port, in a state of distress, without an opportunity of communication with the owners or their agent? What is his duty under such circumstances? It may be answered, generally, to look out for the means of accomplishing his contract, if possible,—that is, the safe conveyance of the property intrusted to his care, in that same vehicle which he had contracted to furnish. It is admitted that, though empowered to transship, he is not bound to transship. No such obligation exists according to any known rule of the maritime law, and, if it did, still he must be affected with the opportunity of transshipment, and with willful neglect of such opportunity, for willful neglect shall not be presumed. He may be even restrained from transshipment, if he has the means, by knowing that insurances were made on the original shipment which might be avoided by such a change. Having the general duty of carrying the cargo to the place of destination imposed upon him, not being obliged to transship, and it not being shown that he has the opportunity of transshipment, he must be presumed to look out for the means of repairing his ship for the accomplishment of his contract. The first and most obvious fund for raising the money is the hypothecation of the ship; but the foreign lender has a right to elect his security, for he is not bound to lend at all. He may refuse to lend upon the security of the ship, or on that security alone,—it is no injustice on his part,—and, if he does so refuse, the state of necessity still continues.

The security of the ship not being sufficient, and the master not being able to raise money on that alone, what is he to do? It cannot be said that he is in all cases to wait till he hears from a distant country. The repairs may be immediately necessary. It may be hoped that the repairs will be far advanced before he can hear from the consignees. The master may not know the proprietors at all, but only the consignees. They may be mere consignees, and have no power to direct him, but in single case of an actual delivery to them. If owners, they may be very

numerous, for in a carrier ship there may be a hundred owners of the cargoes, and the master may be in danger of receiving a hundred different opinions, supposing it were possible for him to apply to all. What does the necessity of such a case offer to be done? I conceive one of two things,—to sell a part of the cargo for the purpose of applying the proceeds to the prosecution of the voyage by the repair of the ship, or to hypothecate the whole for the same purpose. With respect to the former, the books overflow with authorities, many of which have been stated. They all admit that he may sell a part. Some ancient regulations have attempted to define what part; others have not. The general law does not fix any aliquot part, and, indeed, it is not consistent with good sense to impose a restraint, or to fix any limitation to measure a state of things which is to arise only from necessity. It must, generally speaking, be adequate to the occasion. One limitation, however, the policy of the law necessarily prescribes,—that the power of selling cannot extend to the whole, because it never can be for the benefit of the cargo that the whole should be sold to repair a ship which is to proceed empty to the place of her destination. There will, in that case, be no safe custody and transmission; and therefore the power of selling for the repairs of the ship must be limited to the sale of a part, though it may not be possible to assign the exact part, except where positive regulations have fixed it. But hypothecation may be of the whole, because it may be for the benefit of the whole that the whole should be conveyed to its proper market; the presumption being that this hypothecation of the whole, if it affects the cargo at all, will finally operate to the sale of a part, and this in the best market, at the place of its destination, and in the hands of its proper consignees. In the unfortunate case before us, in which there has been such a combination of calamitous circumstances as can hardly be expected to happen again, the loss of a part of the whole, sold in the hands of its proper consignees, is all the effect that will be produced, and it can hardly ever happen that the hypothecation will reach the total value of the cargo. On the other hand, the safe conveyance of a valuable cargo may be, in many instances, of infinitely more value to the merchants than the whole expense of the repairs, if the whole could be devolved on the cargo. Generally it cannot be so, in the very form and structure of the bonds, the ship and freight being the first things that are hypothecated; but if it were to happen that they were omitted in the literal terms of the bonds, still they would be liable

in contribution to the extent of their value, although the cargo alone had been made immediately answerable to the foreign lender, who has nothing to do with averages of any kind. On principle, therefore, the right of hypothecation of the whole cargo is extremely natural, and, if I am right in considering it as equivalent to a sale of a part, it is little more than what all books of maritime jurisprudence direct to be done. It is, in truth, but a power to make a partial sale, conducted with greater probability of ultimate advantage to the whole; for, as all must finally contribute in the case of an actual sale of a part, what new hardship is imposed? All contribute in this, as a portion of the whole value of the cargo is abraided for the general benefit, probably with less inconvenience to the parties than if any one person's whole adventure of goods had been sacrificed by a disadvantageous sale in the first instance.

Cross accidents may intervene in the sequel to make the contract of hypothecation less beneficial than might have been expected at the time. In the present case the ship was estimated by public authority at Lisbon, at £2,300. The freight amounted to as much. The sum to which it is admitted the cargo is liable for its own proper charges would have made up almost the whole of what remained, so that a very small part of the cargo would have been affected. It has happened, by subsequent accidents, that the matter has turned out so as to affect a larger portion of the cargo; but subsequent accidents, as it was observed in argument, cannot invalidate the original contract. The worst that can happen, and this only by a most perverse combination of circumstances, is that the whole value of the cargo might be answerable. Still I should say, speaking with all the caution that is due on such important interests, better is it that this should happen (if it can happen) in a few very eccentric and almost unnatural instances, than that the master should have no discretionary power to act for the preservation of the cargo; but that he should be compelled, in all cases and under all circumstances, to proceed to the sale of possibly a considerable part of his cargo at a most improper port, for which his cargo is not adapted, as a distressed man, and as a man whose distresses are known to every person who has to deal with him in the purchase of those parts of his cargo.

An extreme case has been put by the king's advocate of a large and valuable ship, with a cargo of inconsiderable value, belonging to Dover, and falling into this distress in a neighboring port, as at Calais; and it is asked if it would be reasonable to consume a

small cargo in the service of a ship so situated? It may be sufficient to answer that it is not the case before the court, and that it differs from this case in the exact proportion of the difference of the distance between London and Lisbon and of that between Dover and Calais. Supposing such a case, it would be expected, undoubtedly, that the master should use his utmost endeavors to correspond with the consignees or proprietors; but a case of instant necessity might occur even so near. The master might not be able to receive their directions. All communication might be interrupted, as it is sometimes for a fortnight or three weeks, or more, in adverse or tempestuous weather, and then the same principle would apply. But whatever might be the objection to such a case, just the same objection would lie against the known and admitted power of the master to hypothecate the ship, supposing the owner of that ship to live at Dover. If necessity was urgent, even that extreme case would come under the operation of the same principle.

So much upon mere principle. How does the matter stand with regard to authorities? In the first place, it is not improper to observe that the law of cases of necessity is not likely to be well furnished with precise rules. Necessity creates the law, it supersedes rules, and whatever is reasonable and just in such cases is likewise legal. It is not to be considered as a matter of surprise, therefore, if much instituted rule is not to be found on such subjects. In the next place, if I am right in considering hypothecation of the whole as equivalent to a sale of a part, then all authorities for a partial sale are authorities also for a total hypothecation. Thirdly, I must observe that it is not to be expected that the ancient codes should contain much precise regulation or direct authority on this subject; this contract of bottomry being comparatively of later growth, and arising out of the necessities of an enlarged commerce. Bynkershoek expresses himself, I apprehend, with great historical accuracy on this subject, when he says: *"Origo hujus contractus ex jure Romano, sed quae ibi legimus vix trientem absolvunt totius argumenti—Adeo tennuia etiam apud nos fuerunt ejus contractus initia, ut non nisi mutuum significaverit, quo magistro peregre agenti permissum est, navem ex causa necessitatis obligare."* But still I think authorities are not wanting from the ancient codes. The passage which has been cited from the Consolato[1] is applicable. There it is said that a

[1] Article 105.

merchant, being on board a ship with his goods (which was the custom, according to the simplicity of ancient commerce), having money, was obliged to advance it for the necessities of the voyage, and, if he had not money, the master might sell a portion of his lading. The ordinance of Antwerp, likewise, seems expressly to recognize it; and the passage of Bynkershoek which has been cited seems to me to be capable of no other interpretation. The passage is very general in its terms, and is by no means limited to the peculiar case in which the owner of the ship is likewise owner of the cargo. The *dictum* is perfectly unqualified in describing the authority of the character of master.

So far for foreign authorities. Upon the authorities of our own law, it is to be observed that the power of hypothecation has been but incidentally noticed in the books of the common law, because such bonds are exclusively proceeded upon in the courts of admiralty, which can alone give possession of the *res*, which is the actual security in dispute. It is principally in attempts to obtain prohibition that the power of hypothecation can be noticed by the common law; and what is only incidentally noticed in the courts is, of course, but slightly and indistinctly noticed by the writers. It is of importance, however, that, wherever occasion has called for incidental observations on this contract, it appears to have met with countenance. A *dictum* expressly recognizing such a power appears to have dropped from Lord Hardwicke in the case of Buxton v. Snee, where it is spoken of as a power arising out of his authority as master, and the necessity thereof during the voyage, without which both ship and cargo would perish, and as a power which both the maritime law and the law of this country allow. An earlier instance is that in Justin v. Ballam. How that *dictum* arose does not sufficiently appear. There was nothing, I find on reference to the books of the court of admiralty, in the circumstances of the case, to lead to it, as it was the case of a suit against the ship only for a cable and anchor supplied in the Thames by merchants of this town. Whether it was a *dictum* of the court, or only of the counsel, *non constat.* It might have found its way into the argument, and have received incidentally the countenance of the court, though, it is true, the report of the same case by Lord Raymond makes no mention of it. It is, at the very lowest, the impression of that reporter, although the reason assigned for it is expressed in too general terms; for the master does not ordinarily represent the owner of the cargo as well as of the ship, but only in cases of accidental necessity, in which the

policy of the law throws that character upon him. This *dictum*, wherever it comes from, derives some confirmation from its reception into the Digest of Lord Chief Baron Comyns,[2] where it is cited amongst the rules of unquestioned authority. I observe that Mr. Viner,[3] in citing the case of Trantor and Shippin (which, in other books, is cited as Trantor and Watson), represents Mr. Justice Powel as expressly extending the master's power of hypothecation to the goods; but from a report of the same case[4] he rather appears to have said no more than that, "if the master possessed such a power, it would bind the property in the hands of a third party;" on which it is to be remarked that, although this hypothetical form of speaking asserts nothing directly, it pretty strongly implies that that able and learned judge, as I have always understood him to be traditionally reputed, did not feel any of his notions of law or equity offended by the supposition that such a power legally existed. Of Molloy I say nothing, knowing well that the authority to which he refers does not sustain him, and that his own authority amounts to little.

These passages are all that I can find affirmatively in the common-law writers; but it is no slight negative argument of the understanding of the common law, and no small confirmation of the fitness of this principle, that, during a long series of years, no instance has happened in which a prohibition to the enforcement of such a contract has issued; and the inference will be stronger if it shall appear that numerous suits have actually been entertained in the court of admiralty on such bonds. The mention of numerous suits brings me to the result of a research which I directed to be made in the records of this court,—a court whose practice on a question of this nature—a question of the general maritime law—is not without its authority. I find from the list that has been returned to me that there has been, in later times, at least, a constant practice of proceeding on such bonds, as well against the cargo as the ship. How early this practice may have prevailed, or what may be the most ancient instances of it to be found in these records, has not been ascertained; but I find two instances in the year 1750, and from that time downwards there is a list of twenty-three or twenty-four cases in which the proceeding has been, in some, against the cargo only; in others (and much more generally), against the ship and cargo together. In some of these cases protests have been entered, almost to the extent of the present protest, denying the power of the master to bind the cargo under the circumstances of those cases; but these

[2] Tit. "Admiralty," E, 10.
[3] Tit. "Hypothecation," A.
[4] 6 Mod. 13.

protests have been either waived or overruled. In the year 1786 there was the case of the Vier Gebroeders, in which I was of counsel, and although the decision, as it is said by the king's advocate, proceeded on other grounds, the fact appeared that the master had exercised this power, and it seemed to be admitted, tacitly, at least, in the argument, that he possessed generally such a power. It is likewise something in addition to the practice of this court that such bonds are frequently occurring in the practice of merchants, being notoriously given and taken; and the practice of merchants in such a matter goes a great way to constitute that *lex mercatoria* which all tribunals are bound to respect, wherever that practice does not cross upon any known principle of law, justice, or national policy. Adverting, therefore, to the fair foundation of the general principle, and to the authority of the maritime law, as it has been for some years practiced in this court, and countenanced in all the instances in which it has been brought to the notice of the courts of common law,—adverting, also, to the practice of what I may call the *lex mercatoria*,—I think I am warranted in pronouncing for the power of the master to bind the cargo for the repairs of the ship in order to effect the prosecution of the voyage, in such a manner as to entitle the party who advances the money to sue for the enforcement of his bond in the court of admiralty. At the same time I think myself bound to observe that it is perhaps the first instance in which a judgment has been demanded upon this point; and, as I cannot but feel with peculiar weight the insufficiency of the opinion of any one individual to decide on such extensive interests as may depend on this question in such a commercial country as this, it becomes me to suggest that it may perhaps be not improper that a resort should be had to the collective wisdom of another jurisdiction.

It remains to consider whether the situation of the master was such as to authorize the exercise of this power, which, I have said, only in the case of a severe necessity may belong to him; and, secondly, whether the lender has at all acted unfairly under that necessity, by taking undue advantage, so as to vitiate the contract either in whole or in part. For it must be proved upon the lender that he has taken such undue advantage. It will not be sufficient, either upon principle or upon determinations of the court, that the master has taken undue advantage against his employer. That is a matter between him and his employer, with which the third person has nothing to do, unless personally impli-

cated, by the facts of the transaction, in the fraud that may have been practiced.

The protest of the master states "that he sailed from Trieste with his ship in good condition; that he went to Venice, Zante, and Cephalonia, and took in a cargo of fruit for London; that, in the course of his voyage to London, he met with tempestuous weather, and sprung a leak, so as to make it necessary to unship and reload; that he proceeded to Gibraltar, but that a gale of wind sprung up, and drove him off from that port without a bill of health; that he approached the bar of Lisbon, but was not permitted to enter on account of his not having the bill of health; that he was proceeding on his voyage when he was again driven back by tempestuous weather into Lisbon, in a state of as complete distress as he could possibly be." What was he to do in this situation? It is admitted that he was not obliged to transship. If at liberty to do so, still he knew that his cargo was insured in that very ship, and that all his policies would be voided upon a transshipment. To have sold the whole or parts of a cargo consisting generally of fruit, in a fruit country, would scarcely be thought advisable. It is said he might have written to the propretors; but it does not appear that he knew who the proprietors were. Those to whom he was to deliver might be mere consignees. The court would, undoubtedly, be very unwilling to relax the general obligation of masters to correspond with the proprietors where it is practicable; but taking the obligation to be such, the master has complied with that obligation. He applied to the correspondent of the principal consignee, and through him to the consignee who is described as owner of a part of the cargo. From him he received an answer sent by that consignee and proprietor, Mr. Powell, expressly declining to give particular directions, and referring him entirely to his own discretion. From that conduct I think that all the authority that might become necessary for the preservation of the cargo was devolved upon him by the very act of the consignee, even if he had not possessed it under the general law; for if he was remitted to his own discretion, everything then which he did under that discretion, justly exercised, was expressly warranted by the act of his employer, so far, at least, as the interests of that particular employer were concerned. Certain it is that no such directions given or withheld by that employer could at all affect the agency of the master with respect to the other parts of the cargo in which that

employer was not concerned. With respect to them he possesses the authority which the general law gave him, and no more.

In the state of consummate distress in which he arrives at Lisbon, what is this man to do? A great deal of argument has been used to show what he should not have done. I could have wished that a word or two had been employed in showing satisfactorily what he ought to have done, or could have done with more propriety in this situation. It has been said there was the ship and freight. He has acted rightly in binding both in this very bond. It has been added that he might have bound himself. This, also, he had actually done; though I presume that the mere personal security of such a man—a hired master of a vessel—would go but a little way to satisfy a foreign lender of money. It is said that he ought to have bound his owners likewise; but those who propose that should first prove his authority to bind his owners personally beyond the value of their ship (which value he has already bound), and likewise find merchants at Lisbon who would be willing to advance money upon the personal security of the owners, living at Trieste, whom they might be under the necessity of ultimately following into a personal suit in the supreme court of the empire. Then, the ship and freight being pledged, and the master having no other funds, and being anxious to convey the cargo to the place of its destination, what could he do better than hypothecate the cargo, under the reasonable expectation which this case afforded that the ship and freight, and average expenses falling particularly on the lading, would have been sufficient to discharge the bond without calling on the cargo? In pursuing this resolution, it was hardly possible for a man to act with more caution than this master appears to have done. He applied not only to the consul of his nation, but likewise to the court of justice in the foreign country. It seems to be the particular regulation of that country that matters of this nature shall not be transacted without the sanction of a court of justice. As to the policy of that regulation, doubts may be entertained whether it might not be safer to leave matters of this sort to the vigilance and honesty of the parties intrusted, rather than to the superficial attention which may be given by persons employed to inspect the circumstances of the case by a court of justice. The court at Lisbon, however, proceeded to examine the truth of the representation given by the master; witnesses were examined; surveys under public authority were made. The result was that the ship is reported by surveyors to be of sufficient authority to warrant the repairs. The repairs are made, and the master has the authority

of the court, not only for the propriety of the repairs, but likewise for the reasonableness of his expectation that the ship alone would be able to answer the expense of them. Still, however, the foreign lender was not obliged to advance money, but such security as he liked, and in this situation the master pledges the additional security of the cargo. He proceeds on his voyage to England, and the bond which became due on the event of his arrival is put in suit. The consequence is that the ship is sold; and being sold as a foreign ship, unable to procure a register, sells for not more than half the value at which she was estimated at Lisbon.

Upon this state of the case it is evident that, instead of the cargo being sacrificed to the ship, which is the present complaint, the ship has been made the martyr of the cargo. For it is in the service of that cargo that she has been brought to a place where the owners suffer this extreme diminution of her value. In her unrepaired state at Lisbon she is valued at six millions of rees, and therefore would have sold there in that condition for a much larger sum than she produced, after her repairs, by a sale in England, for a purpose which absorbs the whole of her value, freight included, and a good deal more. She adheres with fidelity to her engagements with the cargo, and is a victim to the execution of that duty.

On the whole, I am of opinion that the situation and the conduct of the master were such as to justify the exercise of that right which belongs to him in cases of necessity, although interests of the owners of the cargo, whose ordinary agent he is not, may be affected by it; and they must be affected by it unless it can be shown that the other contracting party—the money lender—was prevented from contracting by any incompetency which would vitiate the whole of the bond, or that he has fraudulently charged sums, computing the account for which the bond is given, which would vitiate it *pro tanto*. With respect to the first, it is true that Mr. Calvert (who advances the money at Lisbon) is the correspondent of one of the consignees of the cargo; and it is argued to be an extraordinary thing, and a proof of collusion on his part, that would constitute a total incompetency, that he, the correspondent, should enter into such a contract. In the first place, it is to be observed that Mr. Calvert is the correspondent of one consignee only, and therefore, with respect to all other interests in this ship and cargo, he is, as far as appears, a mere stranger. Secondly, even with respect to the goods of that consignee, I am still to learn that it is the bounden duty of a foreign correspondent to advance his money without authority, and with-

out such security as he may approve. And, thirdly, this consignee having declined to give any orders, and having expressly thrown the whole matter on the discretion of the master, I think that Mr. Calvert stood with respect to these goods on the same footing as any other merchant; and if the master was driven to the resource of bottomry, nothing in the relation of Mr. Calvert to those goods created an incompetency in Mr. Calvert to advance his money on such security as any other man might have demanded for it.

There being nothing in the conduct of the parties to invalidate the contract, it remains only to inquire whether any articles have found their way into these charges that ought not to have appeared there. It does not appear that many articles are questionable. I perceive there is a pretty heavy commission charged. I know that the word "commission" sounds sweet in a merchant's ear; but whether it is a proper charge or not on this occasion I will not take upon myself to determine without a reference to the registrar, properly assisted. The master, being in a situation of distress, was left to act for the best conveyance of his cargo, and I think he may fairly be supposed to have done so. The bondholder advances the money, having a right to elect his security, and he has run his risk on that security. If the ship and cargo had perished, he would have lost the whole. The owners of the ship have lost all, and there is a great loss besides. On whom is this loss to fall? It can only fall on the proprietors of the cargo, or on the bondholder, who has advanced his money and run his risk upon the given security, and under circumstances which by no means affect him with incompetency to enter into such a contract,—a contract from which the cargo has received a considerable benefit. I think that there is no question of the liability of the cargo.

As to some particular goods for which a farther distinction has been taken on the ground that they are privileged goods, not paying freight, I think that distinction insufficient. They have had in an equal degree the benefit of this conveyance to the place of their destination, and it is not reasonable that they should be exempted from the obligation attaching on the whole cargo of being amenable for contribution to the bond, although the owner of the vessel might, as far as his interests alone were concerned, have been willing to show them a particular indulgence. If they are the goods of the owner of the ship, they can have no more right to be exempted from contributing than the ship itself.

Bond enforced against the cargo.

JOHN PHILPOT CURRAN.

[John Philpot Curran was born in County Cork, Ireland, 1750. By the assistance of friends he was educated at Trinity College, Dublin. His industry was fitful and ill directed, and for several years he led a dissolute life. Though designed by his family for the church, he determined to go to the bar. Accordingly, in 1773, he went to London and entered the Middle Temple. He spent two years there in severe study, amid many privations, and in poor health. In 1775 he was called to the Irish bar. For some time he lived in great poverty, and on more than one occasion turned his thoughts towards America. At length, by the patronage of Lord Avonmore, he received a silk gown, and was elected to the Irish house of commons. He was by this time the popular advocate on the Munster circuit, and soon acquired considerable influence in politics. From 1792 to 1800 he established enduring fame in the state trials arising out of the public discontent and ultimate uprising of 1798. Disheartened by ill health and domestic troubles, Curran again thought of going to America. He also contemplated joining the English bar. When, however, the Whigs came into power in 1806, he was offered, and reluctantly accepted, the appointment of master of the rolls, with a seat in the privy council. He was not at home on the bench, and spent much time in England with Lord Holland, Erskine, and Moore. In 1812 he made an unsuccessful effort to enter parliament. In 1814 he retired from the bench on a pension, and spent some time in travel. In the spring of 1817, while staying with Moore, in London, he had a slight attack of apoplexy, which resulted in his death in the same year. In 1834 his remains were removed, by public subscription, to a tomb at Glasnevin, designed by Moore, and at the same time a medallion was placed in St. Patrick's in Dublin. His life was written by his son. The best edition of his forensic speeches was published by Callaghan & Co., Chicago, 1877.]

Curran was one of the greatest orators of a remarkable generation. His power lay in the variety and strength of his emotions. His faults, which appear on every page of his work, lay chiefly in excess,—intense expression, strained imagery, and overwrought passion. Though abounding in passages of extraordinary eloquence, his speeches are by no means models of style. Very few of them, in fact, have been preserved with accuracy. They were

always largely extemporaneous, and he could never be induced to prepare them for the press.

Curran's professional acquirements were never extensive. Whatever knowledge of the law he possessed was mainly acquired during his two-years residence at the Middle Temple. When he was called to the Irish bar, in 1775, it was looked upon as the nursery of the public service, and the avenue to political success. The course of study was literary, rather than technical, and a turgid and pompous eloquence was the chief recommendation of a barrister. Nor was his stormy career calculated to inspire studious application. His first considerable cause led to a duel; and he subsequently fought four others. In the political ferment of the last decade of the century Curran was a conspicuous figure. His defense of Rowan, charged with seditious libel, in 1792, is his most fully reported speech. The impersonal character of this speech is due to the fact that Rowan directed his counsel to aim, not so much to secure an acquittal, as to defend the principles of the Society of United Irishmen. During the next five years he defended successively Dr. Drennan, the Drogheda Defenders, the proprietor of the Northern Star, and Finnerty, on charges of seditious libel and conspiracy. During this period he also defended Weldon and Jackson on charges of treason. The latter died in court during the hearing of a motion in arrest of judgment, from poison taken in prison. Whatever may have been Curran's connection with the uprising of 1798, he zealously defended nearly all the prisoners in the resulting state prosecutions. In consequence of his efforts in their behalf, he was threatened with deprivation of his rank as king's counsel, soldiers were vexatiously billeted on him, anonymous and menacing letters were sent to him, and he was threatened with arrest. In the first case tried (that of Sheares), after a sixteen-hours sitting, with but twenty minutes' interval, Curran was compelled to begin his speech at midnight. On the trial of Bond, the court was filled with soldiers, and Curran, whose health had given way under the strain, was thrice menaced by interruptions. "You may assassinate me," he cried, "but you shall not intimidate me." Domestic troubles overwhelmed him. His wife eloped with a clergyman named Sandys. Robert Emmet, who was secretly attached to Curran's youngest daughter, was captured in consequence of having spent the hours during which he might have escaped in lingering about Curran's house to say farewell.

In such a school of experience Curran's passions were developed. He understood the Irish character as few have ever understood it, and swayed it by his power of melting pathos and burning invective. The conditions under which he struggled were eloquently portrayed by him in his defense of Rowan:

"You are living," he said to the jury, "in a country where the constitution is rightly stated to be only ten years old; where the people have not the ordinary rudiments of education. It is a melancholy story that the lower orders of people here have less means of being enlightened than the same class of people in any other country. If there be no means left by which public measures can be canvassed, what will be the consequence? Where the press is free, and discussion unrestrained, the mind, by the collision of intercourse, gets rid of its own asperities; a sort of insensible perspiration takes place in the body politic, by which those acrimonies, which would otherwise fester and inflame, are quietly dissolved and dissipated. But now, if any aggregate assembly shall meet, they are censured; if a printer publishes their resolutions, he is punished,—rightly, to be sure, in both cases, for it has been lately done. If the people say, 'Let us not create tumult, but meet in delegation,' they cannot do it. If they are anxious to promote parliamentary reform in that way, they cannot do it. The law of the last session has for the first time declared such meetings to be a crime. What, then, remains? The liberty of the press only,—that sacred palladium which no influence, no power, no minister, no government, which nothing but the depravity or folly or corruption of a jury, can ever destroy. And what calamities are the people saved from by having public communication left open to them? I will tell you, gentlemen, what they are saved from, and what the government is saved from. I will tell you also to what both are exposed by shutting up that communication. In one case, sedition speaks aloud, and walks abroad. The demagogue goes forth; the public eye is upon him; he frets his busy hour upon the stage; but soon either weariness, or bribe, or punishment, or disappointment bears him down, or drives him off, and he appears no more. In the other case, how does the work of sedition go forward? Night after night the muffled rebel steals forth in the dark, and casts another and another brand upon the pile to which, when the hour of fatal maturity shall arrive, he will apply the torch. If you doubt of the horrid consequences of suppressing the effusion, even of individual discontent, look to those enslaved countries where the protection of despotism is supposed to be secured by such restraints. Even the person of the despot there is never in safety. Neither the fears of the despot nor the machinations of the slave have any slumber,—the one anticipating the moment of peril, the other watching the opportunity of aggression. The fatal crisis is equally a surprise to both. The decisive instant is precipitated without warning,—by folly on the one side, or by frenzy on the other, and there is no notice of the treason till the traitor acts. In those unfortunate countries—one cannot read it without horror —there are officers whose province it is to have the water which is to be drunk by their rulers sealed up in bottles, lest some wretched miscreant should throw poison into the draught. But, gentlemen, if you wish for a nearer and more interesting example, you have it in the history of your own revolution. You have it at that memorable period when the monarch found a servile acquiescence in the ministers of his

folly; when the liberty of the press was trodden under foot; when venal sheriffs returned packed juries to carry into effect those fatal conspiracies of the few against the many; when the devoted benches of public justice were filled by some of those foundlings of fortune who, overwhelmed in the torrent of corruption at an early period, lay at the bottom, like drowned bodies, while soundness or sanity remained in them, but at length, becoming buoyant by putrefaction, they rose as they rotted, and floated to the surface of the polluted stream, where they drifted along, the objects of terror and contagion and abomination. In that awful moment of the nation's travail, of the last gasp of tyranny, and the first breath of freedom, how pregnant is the example,—the press extinguished, the people enslaved, and the prince undone."

[What a contrast is this with the spirit of British law] "which makes liberty commensurate with and inseparable from British soil; which proclaims, even to the stranger and sojourner, the moment he sets his foot upon British earth, that the ground on which he treads is holy and consecrated by the genius of universal emancipation. No matter in what language his doom may have been pronounced; no matter what complexion incompatible with freedom an Indian or an African sun may have burnt upon him; no matter in what disastrous battle his liberty may have been cloven down; no matter with what solemnities he may have been devoted upon the altar of slavery,—the first moment he touches the sacred soil of Britain, the altar and the god sink together in the dust; his soul walks abroad in her own majesty; his body swells beyond the measure of his chains, that burst from around him, and he stands redeemed, regenerated, and disenthralled by the irresistible genius of universal emancipation."

He poured out his invectives like lava on political informers,—"the forsaken prostitute of every vice, who calls upon you, with one breath, to blast the memory of the dead, and to blight the character of the living"; who "measures his value by the coffins of his victims, and, in the field of evidence, appreciates his fame as the Indian warrior does in fight,—by the number of scalps with which he can swell his triumphs. He calls upon you, by the solemn league of eternal justice, to accredit the purity of a conscience washed in his own atrocities. He has promised and betrayed; he has sworn and foresworn; and whether his soul shall go to heaven or to hell he seems altogether indifferent, for he has established an interest in both." On the trial of Finnerty he said:

"I speak of what your own eyes have seen, day after day, during the course of this commission, from the box where you are now sitting,—the number of horrid miscreants who acknowledged upon their oaths that they had come from the seat of government,—from the very chambers of the castle,—where they had been worked upon, by the fear of death and the hope of compensation, to give evidence against their fellows; that the mild and wholesome and merciful counsels of this government are holden over these catacombs of living death, where the wretch that is buried a man lies till his heart has time to fester and dissolve, and is then dug up as a witness. Is this a picture created by a hag-ridden fancy, or is it a fact? Have you not seen him, after his resurrection from that region of death and corruption, make his ap-

pearance upon the table, the living image of life and of death, and the supreme arbiter of both? Have you not marked, when he entered, how the stormy wave of the multitude retired at his approach? Have you not seen how the human heart bowed to the supremacy of his power, in the undissembled homage of deferential horror? How his glance, like the lightning of heaven, seemed to rive the body of the accused, and mark it for the grave, while his voice warned the devoted wretch of woe and death,—a death which no innocence can escape, no art elude, no force resist, no antidote prevent. There was an antidote,—a juror's oath! But even that adamantine chain that bound the integrity of man to the throne of eternal justice is solved and molten in the breath that issues from the informer's mouth. Conscience swings from her moorings, and the appalled and affrighted juror consults his own safety in the surrender of his victim:

'Et quae sibi quisque timebat,
Unius in miseri exitium conversa tulere.'

Informers are worshipped in the temple of justice, even as the devil has been worshipped by pagans and savages; even so, in this wicked country, is the informer an object of judicial idolatry; even so is he soothed by the music of human groans; even so is he placated and incensed by the fumes and by the blood of human sacrifices."

Deeply sensible of his duty, and proud of his privilege as an advocate in such stirring times, he modestly and gracefully referred, on the trial of Judge Johnson, to his own services:

"No man dares to mutter, no newspaper dares to whisper, that such a question is afloat. It seems an inquiry among the tombs, or, rather, in the shades beyond them. *'Ibant sola sub nocte per umbram.'* I am glad that it is so; I am glad of this factitious dumbness; for if murmurs dare to become audible, my voice would be too feeble to drown them. But when all is hushed, when nature sleeps,—*'Cum quies mortalibus aegris,'*—the weakest voice is heard; the shepherd's whistle shoots across the listening darkness of the interminable heath, and gives notice that the wolf is upon his walk, and the same gloom and stillness that tempt the monster to come abroad facilitate the communication of the warning to beware."

So often defeated in his best efforts, oppressed by responsibility, and exhausted by his labors, it is not to be wondered at that he looked beyond legal tribunals for final judgment. As he said to the judges in moving to set aside the verdict against Rowan:

"You are standing on the scanty isthmus that divides the great ocean of duration,—a ground that, while you yet hear me, is washed from beneath your feet. Let me remind you, my lord, while your determination is yet in your power, *'Dum versatur adhuc intra penetralia vestae,'* that on that ocean of future you must set your judgment afloat, and future ages will assume the same authority which you have assumed; posterity feel the same emotions which you have felt when your little hearts have beaten, and your infant eyes have overflowed, at reading the sad history of the sufferings of a Russell or a Sidney."

Curran's acceptance of judicial office was a mistake. His temperament was forensic, rather than judicial, and his technical learning was inadequate for judicial station. He lost interest in his work, and, like Erskine, enjoyed himself most in rehearsing the scenes of his early activity. His parliamentary career, though important, was not particularly distinguished; but there can be no doubt of his devotion to his country. As O'Connell said, "There never was so honest an Irishman."[1]

[1] His opinion in the case of Merry v. Power is his ablest judicial effort.

ARGUMENT IN THE CASE OF THE REV. CHARLES MASSY AGAINST THE MARQUIS OF HEADFORT, AT THE ENNIS ASSIZES, COUNTY CLARE, IRELAND, BEFORE BARON SMITH AND A SPECIAL JURY, 1804.

STATEMENT.

This was an action for criminal conversation. The Rev. Charles Massy, the plaintiff, was a clergyman, who, in 1796, had married, contrary to his father's wishes, and at a sacrifice of £16,000 a year, Miss Rosslewin, a girl of eighteen, of remarkable personal attractions. In 1803, while they were living at Summer Hill, about five miles from Limerick, the Marquis of Headfort, an officer in the British army, was quartered with his regiment in Limerick. As the marquis' mother had been a former parishioner of Mr. Massy's, the two became acquainted, and the marquis, who was then over fifty years of age, was shown every hospitality. Shortly afterwards, while Mr. Massy was engaged in the service of his church, Mrs. Massy eloped with the marquis. The case was argued by Bartholomew Hoar and John Philpot Curran for the plaintiff, and by Thomas Quin and George Ponsonby for the defendant. Bartholomew Hoar opened the case in a speech of great power. His striking simile is often quoted: "The Cornish plunderer, intent on the spoil, callous to every touch of humanity, shrouded in darkness, holds out false lights to the tempest-tossed vessel, and lures her and her pilot to that shore upon which she must be lost forever,—the rock unseen, the ruffian invisible, and nothing apparent but the treacherous signal of security and repose. So, this prop of the throne, this pillar of the state, this stay of religion, the ornament of the peerage, this common protector of the people's privileges and of the crown's prerogatives, descends from these high grounds of character to muffle himself in the gloom of his own base and dark designs; to play before the eyes of the deluded wife and the deceived husband the falsest lights of love to the one, and of friendly and hospitable regards to the other, until she is at length dashed upon that hard bosom where her honor and happiness are wrecked and lost forever."

The defense did not deny the fact charged, but defended upon the theory that, in view of Mrs. Massy's frivolous character, the plaintiff was guilty of constructive connivance in permitting her to associate with the marquis. After Curran's closing speech for the plaintiff, the jury promptly returned a verdict for the plaintiff, and fixed his damages at £10,000. This cause enlisted Curran's feelings, as well as his intellect, for he himself had suffered a similar wrong. It is unquestionably the best specimen of his eloquence.

ARGUMENT.

Never so clearly as in the present instance have I observed that safeguard of justice which Providence has placed in the nature of man. Such is the imperious dominion with which truth and reason wave their scepter over the human intellect, that no solicita-

tion, however artful, no talent, however commanding, can reduce it from its allegiance. In proportion to the humility of our submission to its rule do we rise into some faint emulation of that ineffable and presiding divinity, whose characteristic attribute it is to be coerced and bound by the inexorable laws of its own nature, so as to be all-wise and all-just from necessity, rather than election. You have seen it, in the learned advocate who has preceded me, most peculiarly and strikingly illustrated. You have seen even his great talents, perhaps the first in any country, languishing under a cause too weak to carry him, and too heavy to be carried by him. He was forced to dismiss his natural candor and sincerity, and, having no merits in his case, to substitute the dignity of his own manner, the resources of his own ingenuity, over the overwhelming difficulties with which he was surrounded. Wretched client! unhappy advocate! What a combination do you form! But such is the condition of guilt,—its commission mean and tremulous; its defense artificial and insincere; its prosecution candid and simple; its condemnation dignified and austere. Such has been the defendant's guilt, such his defense, such shall be my address, and such, I trust, your verdict.

The learned counsel has told you that this unfortunate woman is not to be estimated at £40,000. Fatal and unquestionable is the truth of this assertion. Alas! gentlemen, she is no longer worth anything. Faded, fallen, degraded, and disgraced, she is worth less than nothing. But it is for the honor, the hope, the expectation, the tenderness, and the comforts that have been blasted by the defendant, and have fled forever, that you are to remunerate the plaintiff by the punishment of the defendant. It is not her present value which you are to weigh, but it is her value at that time when she sat basking in a husband's love, with the blessing of Heaven on her head, and its purity in her heart; when she sat among her family, and administered the morality of the parental board. Estimate that past value, compare it with its present deplorable diminution, and it may lead you to form some judgment of the severity of the injury and the extent of the compensation.

The learned counsel has told you you ought to be cautious, because your verdict cannot be set aside for excess. The assertion is just; but has he treated you fairly by its application? His cause would not allow him to be fair,—for why is the rule adopted in this single action? Because, this being peculiarly an injury to the most susceptible of all human feelings, it leaves the injury

of the husband to be ascertained by the sensibility of the jury, and does not presume to measure the justice of their determination by the cold and chilly exercise of its own discretion. In any other action it is easy to calculate. If a tradesman's arm is cut off, you can measure the loss which he has sustained; but the wound of feeling and the agony of the heart cannot be judged by any standard with which I am acquainted. You are therefore unfairly dealt with when you are called on to appreciate the present suffering of the husband by the present guilt, delinquency, and degradation of his wife. As well might you, if called on to give compensation to a man for the murder of his dearest friend, find the measure of his injury by weighing the ashes of the dead. But it is not, gentlemen of the jury, by weighing the ashes of the dead that you would estimate the loss of the survivor.

The learned counsel has referred you to other cases and other countries for instances of moderate verdicts. I can refer you to some authentic instances of just ones. In the next county, £15,000 against a subaltern officer. In Travers and McCarthy, £5,000 against a servant. In Tighe vs. Jones, £10,000 against a man not worth a shilling. What, then, ought to be the rule where rank and power and wealth and station have combined to render the example of his crime more dangerous; to make his guilt more odious; to make the injury to the plaintiff more grievous, because more conspicuous? I affect no leveling familiarity when I speak of persons in the higher ranks of society. Distinctions of orders are necessary, and I always feel disposed to treat them with respect. But when it is my duty to speak of the crimes by which they are degraded, I am not so fastidious as to shrink from their contact, when to touch them is essential to their dissection. In this action, the condition, the conduct, and circumstances of the party are justly and peculiarly the objects of your consideration. Who are the parties? The plaintiff, young, amiable, of family and education. Of the generous disinterestedness of his heart you can form an opinion even from the evidence of the defendant that he declined an alliance which would have added to his fortune and consideration, and which he rejected for an unportioned union with his present wife. She, too, at that time young, beautiful, and accomplished, and feeling her affection for her husband increase in proportion as she remembered the ardor of his love, and the sincerity of his sacrifice. Look now to the defendant! I blush to name him! I blush to name a rank which he has tarnished, and a patent that he has worse than canceled! High in the army,

high in the state; the hereditary counselor of the king; of wealth incalculable,—and to this last I advert with an indignant and contemptuous satisfaction, because, as the only instrument of his guilt and shame, it will be the means of his punishment, and the source of compensation for his guilt.

But let me call your attention distinctly to the questions you have to consider. The first is the fact of guilt. Is this noble lord guilty? His counsel knew too well how they would have mortified his vanity had they given the smallest reason to doubt the splendor of his achievement. Against any such humiliating suspicion he had taken the most studious precaution by the publicity of the exploit. And here in this court, and before you, and in the face of the country, has he the unparalleled effrontery of disdaining to resort even to a confession of innocence. His guilt established, your next question is the damages you should give. You have been told that the amount of the damages should depend on circumstances. You will consider these circumstances, whether of aggravation or mitigation. His learned counsel contend that the plaintiff has been the author of his own suffering, and ought to receive no compensation for the ill consequences of his own conduct. In what part of the evidence do you find any foundation for that assertion? He indulged her, it seems, in dress. Generous and attached, he probably indulged her in that point beyond his means; and the defendant now impudently calls on you to find an excuse for the adulterer in the fondness and liberality of the husband. But you have been told that the husband connived. Odious and impudent aggravation of injury,—to add calumny to insult, and outrage to dishonor. From whom but a man hackneyed in the paths of shame and vice; from whom but from a man having no compunctions in his own breast to restrain him,—could you expect such brutal disregard for the feelings of others? From whom but the cold-blooded, veteran seducer; from what but from the exhausted mind, the habitual community with shame; from what but the habitual contempt of virtue and of man,—could you have expected the arrogance, the barbarity, and folly of so foul, because so false, an imputation? He should have reflected and have blushed before he suffered so vile a topic of defense to have passed his lips. But, ere you condemn, let him have the benefit of the excuse, if the excuse be true. You must have observed how his counsel fluttered and vibrated between what they called "connivance" and "injudicious confidence," and how, in affecting to distinguish, they have confounded them both together.

If the plaintiff has connived, I freely say to you, do not reward the wretch who has prostituted his wife and surrendered his own honor; do not compensate the pander of his own shame, and the willing instrument of his own infamy. But as there is no sum so low to which such a defense, if true, ought not to reduce your verdict, so neither is any so high to which such a charge ought not to inflame it, if such a charge be false. Where is the single fact in this case on which the remotest suspicion of connivance can be hung? Odiously has the defendant endeavored to make the softest and most amiable feelings of the heart the pretext of his slanderous imputations. An ancient and respectable prelate, the husband of his wife's sister, was chained down to the bed of sickness, perhaps to the bed of death. In that distressing situation, my client suffered that wife to be the bearer of consolation to the bosom of her sister,—he had not the heart to refuse her,—and the softness of his nature is now charged on him as a crime! He is now insolently told that he connived at his dishonor, and that he ought to have foreseen that the mansion of sickness and of sorrow would have been made the scene of assignation and of guilt. On this charge of connivance I will not further weary you or exhaust myself. I will add nothing more than that it is as false as it is impudent; that, in the evidence, it has not a color of support; and that, by your verdict, you should mark it with reprobation. The other subject, namely, that he was indiscreet in his confidence, does, I think, call for some discussion, for I trust you see that I affect not any address to your passions by which you may be led away from the subject. I presume merely to separate the parts of this affecting case, and to lay them, item by item, before you, with the coldness of detail, and not with any coloring or display of fiction or fancy. Honorable to himself was his unsuspecting confidence. Fatal must we admit it to have been when we look to the abuse committed upon it. But where was the guilt of this indiscretion? He did admit this noble lord to pass his threshold as his guest. Now the charge which this noble lord builds on this indiscretion is: "Thou fool! thou hast confidence in my honor, and that was a guilty indiscretion. Thou simpleton! thou thoughtest that an admitted and cherished guest would have respected the laws of honor and hospitality, and thy indiscretion was guilt. Thou thoughtest that he would have shrunk from the meanness and barbarity of requiting kindness with treachery, and the indiscretion was guilt."

Gentlemen, what horrid alternative in the treatment of wives would such reasoning recommend? Are they to be immured by worse than Eastern barbarity? Are their principles to be depraved, their passions sublimated, every finer motive of action extinguished by the inevitable consequences of thus treating them like slaves? Or is a liberal and generous confidence in them to be the passport of the adulterer, and the justification of his crime?

Honorably, but fatally, for his own repose, he was neither jealous, suspicious, nor cruel. He treated the defendant with the confidence of a friend, and his wife with the tenderness of a husband. He did leave to the noble marquis the physical possibility of committing against him the greatest crime which can be perpetrated against a being of an amiable heart and refined education. In the middle of the day, at the moment of divine worship, when the miserable husband was on his knees, directing the prayers and thanksgiving of his congregation to their God, that moment did the remorseless adulterer choose to carry off the deluded victim from her husband, from her child, from her character, from her happiness, as if not content to leave his crime confined to its miserable aggravations, unless he also gave it a cast and color of factitious sacrilege and impiety. Oh! how happy had it been, when he arrived at the bank of the river with the ill-fated fugitive, ere yet he had committed her to that boat, of which, like the fabled bark of Styx, the exile was eternal,—how happy at that moment, so teeming with misery and with shame, if you, my lord, had met him, and could have accosted him in the character of that good genius which had abandoned him. How impressively might you have pleaded the cause of the father, of the child, of the mother, and even of the worthless defendant himself. You would have said: "Is this the requital that you are about to make for the respect and kindness and confidence in your honor? Can you deliberately expose this young man, in the bloom of life, with all his hopes yet before him? Can you expose him, a wretched outcast from society, to the scorn of a merciless world? Can you set him adrift upon the tempestuous ocean of his own passions at this early season, when they are most headstrong; and can you cut him out from the moorings of those domestic obligations, by whose cable he might ride at safety from their turbulence? Think, if you can conceive it, what a powerful influence arises from the sense of home, from the sacred religion of the hearth, in quelling the passions, in reclaiming the wanderings, in correcting the disorders of the human heart. Do not cruelly take from him the

protection of these attachments. But if you have no pity for the father, have mercy, at least, upon his innocent and helpless child. Do not condemn him to an education scandalous or neglected. Do not strike him into that most dreadful of all human conditions,—the orphanage that springs not from the grave, that falls not from the hand of Providence or the stroke of death, but comes before its time, anticipated and inflicted by the remorseless cruelty of parental guilt." For the poor victim herself, not yet immolated, while yet balancing upon the pivot of her destiny, your heart could not be cold, nor your tongue be wordless. You would have said to him: "Pause, my lord, while there is yet a moment for reflection. What are your motives, what your views, what your prospects from what you are about to do? You are a married man, the husband of the most amiable and respectable of women. You cannot look to the chance of marrying this wretched fugitive. Between you and such an event there are two sepulchers to pass. What are your inducements? Is it love, think you? No. Do not give that name to any attraction you can find in the faded refuse of a violated bed. Love is a noble and generous passion. It can be founded only on a pure and ardent friendship, on an exalted respect, on an implicit confidence in its object. Search your heart; examine your judgment. Do you find the semblance of any one of these sentiments to bind you to her? What could degrade a mind to which nature or education had given port or stature or character into a friendship for her? Could you repose upon her faith? Look in her face, my lord. She is at this moment giving you the violation of the most sacred of human obligations as the pledge of her fidelity. She is giving you the most irrefragable proof that, as she is deserting her husband for you, so she would, without scruple, abandon you for another. Do you anticipate any pleasure you might feel in the possible event of your becoming the parents of a common child? She is at this moment proving to you that she is as dead to the sense of parental as of conjugal obligation, and that she would abandon your offspring to-morrow with the same facility with which she now deserts her own. Look, then, at her conduct as it is, as the world must behold it, blackened by every aggravation that can make it either odious or contemptible, and unrelieved by a single circumstance of mitigation that could palliate its guilt or retrieve it from abhorrence. Mean, however, and degraded as this woman must be, she will still (if you take her with you) have strong and heavy claims upon you. The force of such claims does certainly depend

upon circumstances. Before, therefore, you expose her fate to the dreadful risk of your caprice or ingratitude, in mercy to her weigh well the confidence she can place in your future justice and honor. At that future time, much nearer than you think, by what topics can her cause be pleaded to a sated appetite, to a heart that repels her, to a just judgment, in which she never could have been valued or respected? Here is not the case of an unmarried woman, with whom a pure and generous friendship may insensibly have ripened into a more serious attachment, until at last her heart became too deeply pledged to be reassumed. If so circumstanced, without any husband to betray, or child to desert, or motive to restrain, except what related solely to herself, her anxiety for your happiness made her overlook every other consideration, and commit her destiny to your honor,—in such a case (the strongest and the highest that man's imagination can suppose), in which you, at least, could see nothing but the most noble and disinterested sacrifice, in which you could find nothing but what claimed from you the most kind and exalted sentiment of tenderness and devotion and respect, and in which the most fastidious rigor would find so much more subject for sympathy than blame,—let me ask you, could you, even in that case, answer for your own justice and gratitude? I do not allude to the long and pitiful catalogue of paltry adventures, in which, it seems, your time has been employed,—the coarse and vulgar succession of casual connections, joyless, loveless, and unendeared. But do you not find upon your memory some trace of an engagement of the character I have sketched? Has not your sense of what you would owe in such a case, and to such a woman, been at least once put to the test of experiment? Has it not once, at least, happened that such a woman, with all the resolution of strong faith, flung her youth, her hope, her beauty, her talent upon your bosom, weighed you against the world, which she found but a feather in the scale, and took you as an equivalent?[1] How did you then acquit yourself? Did you prove yourself worthy of the sacred trust reposed in you? Did your spirit so associate with hers as to leave her no room to regret the splendid and disinterested sacrifice she had made? Did her soul find a pillow in the tenderness of yours, and a support in its firmness? Did you preserve her high in her own consciousness, proud in your admiration and friendship, and happy in your affection? You might have so acted (and the man that was worthy of her

[1] This refers to a previous elopement of another with the marquis, and his desertion of her.

would have perished rather than not so act) as to make her delighted with having confided so sacred a trust to his honor. Did you so act? Did she feel that, however precious to your heart, she was still more exalted and honored in your reverence and respect? Or did she find you coarse and paltry, fluttering and unpurposed, unfeeling and ungrateful? You found her a fair and blushing flower, its beauty and its fragrance bathed in the dews of heaven. Did you so tenderly transplant it as to preserve that beauty and fragrance unimpaired? Or did you so rudely cut it as to interrupt its nutriment, to waste its sweetness, to blast its beauty, to bow down its faded and sickly head? And did you at last fling it, like 'a loathsome weed, away'? If, then, to such a woman, so clothed with every title that could ennoble and exalt and endear her to the heart of man, you could be cruelly and capriciously deficient, how can a wretched fugitive like this, in every point her contrast, hope to find you just? Send her, then, away. Send her back to her home, to her child, to her husband, to herself."

Alas, there was none to hold such language to this noble defendant. He did not hold it to himself. But he paraded his despicable prize in his own carriage, with his own retinue, his own servants. This veteran Paris hawked his enamored Helen from this western quarter of the island to a seaport in the eastern, crowned with the acclamations of a senseless and grinning rabble, glorying and delighted, no doubt, in the leering and scoffing admiration of grooms and hostlers and waiters as he passed. In this odious contempt of every personal feeling, of public opinion, of common humanity, did he parade this woman to the seaport, whence he transported his precious cargo to a country where her example may be less mischievous than in her own; where I agree with my learned colleague in heartily wishing he may remain with her forever. We are too poor, too simple, too unadvanced a country for the example of such achievements. When the relaxation of morals is the natural growth and consequence of the great progress of arts and wealth, it is accompanied by a refinement that makes it less gross and shocking. But for such palliations we are at least a century too young. I advise you, therefore, most earnestly to rebuke this budding mischief by letting the wholesome vigor and chastisement of a liberal verdict speak what you think of its enormity. In every point of view in which I can look at the subject I see you are called upon to give a verdict of bold and just and indignant and exemplary compensation. The injury

of the plaintiff demands it from your justice. The delinquency of the defendant provokes it by its enormity. The rank on which he has relied for impunity calls upon you to tell him that crime does not ascend to the rank of the perpetrator, but the perpetrator sinks from his rank, and descends to the level of his delinquency. The style and mode of his defense is a gross aggravation of his conduct, and a gross insult upon you. Look upon the different subjects of his defense as you ought, and let him profit by them as he deserves. Vainly presumptuous upon his rank, he wishes to overawe you by the despicable consideration. He next resorts to a cruel aspersion upon the character of the unhappy plaintiff, whom he had already wounded beyond the possibility of reparation. He has ventured to charge him with connivance. As to that I will only say, gentlemen of the jury, do not give this vain boaster a pretext for saying that, if the husband connived in the offense, the jury also connived in the reparation.

But he has pressed another curious topic upon you. After the plaintiff had cause to suspect his designs, and the likelihood of their being fatally successful, he did not then act precisely as he ought. Gracious God, what an argument for him to dare to advance! It is saying thus to him: "I abused your confidence, your hospitality; I laid a base plan for the seduction of the wife of your bosom; I succeeded at last, so as to throw in upon you that most dreadful of all suspicions to a man fondly attached, proud of his wife's honor, and tremblingly alive to his own,—that you were possibly a dupe to the confidence in the wife as much as in the guest. In this so pitiable distress, which I myself had studiously and deliberately contrived for you,—between hope and fear, and doubt and love, and jealousy and shame; one moment shrinking from the cruelty of your suspicion, the next fired with indignation at the facility and credulity of your acquittal,—in this labyrinth of doubt, in this frenzy of suffering, you were not collected and composed. You did not act as you might have done if I had not worked you to madness; and upon that very madness which I have inflicted upon you—upon the very completion of my guilt and of your misery—I will build my defense. You will not act critically right, and therefore are unworthy of compensation." Gentlemen, can you be dead to the remorseless atrocity of such a defense? And shall not your honest verdict mark it as it deserves?

But let me go a little further. Let me ask you, for I confess I have no distinct idea of what should be the conduct of a husband

so placed, and who is to act critically right: Shall he lock her up or turn her out? Or enlarge or abridge her liberty of acting as she pleases? Oh, dreadful Areopagus of the tea table! How formidable thy inquests; how tremendous thy condemnations! In the first case, he is brutal and barbarous,—an odious Eastern despot. In the next: What! turn an innocent woman out of his house, without evidence or proof, but merely because he is vile and mean enough to suspect the wife of his bosom, and the mother of his child! Between these extremes, what intermediate degree is he to adopt? I put this question to you: Do you at this moment, uninfluenced by any passion, as you now are, but cool and collected, and uninterested as you must be, do you see clearly this proper and exact line which the plaintiff should have pursued? I much question if you do. But if you did or could, must you not say that he was the last man from whom you should expect the coolness to discover, or the steadiness to pursue it? And yet this is the outrageous and insolent defense that is put forward to you. My miserable client, when his brain was on fire, and every fiend of hell was let loose upon his heart, he should then, it seems, have placed himself before his mirror; he should have taught the stream of agony to flow decorously down his forehead; he should have composed his features to harmony; he should have writhed with grace and groaned in melody.

But look farther to this noble defendant and his honorable defense. The wretched woman is to be successively the victim of seduction and of slander. She, it seems, received marked attentions. Here, I confess, I felt myself not a little at a loss. The witnesses could not describe what these marked attentions were or are. They consisted not, if you believe the witness that swore to them, in any personal approach or contact whatsoever, nor in any unwarrantable topics of discourse. Of what materials, then, were they composed? Why, it seems, a gentleman had the insolence at table to propose to her a glass of wine, and she, O most abandoned lady! instead of flying, like an angry parrot, at his head, and besmirching and bescratching him for his insolence, tamely and basely replies: "Port, sir, if you please." But, gentlemen, why do I advert to this folly, this nonsense? Not, surely, to vindicate from censure the most innocent and the most delightful intercourse of social kindness, of harmless and cheerful courtesy; "where virtue is, these are most virtuous." But I am soliciting your attention and your feeling to the mean and odious aggravation,—to the unblushing and remorseless barbarity of

falsely aspersing the wretched woman he had undone. One good he has done,—he has disclosed to you the point in which he can feel; for how imperious must that avarice be which could resort to so vile an expedient of frugality! Yes, I will say that, with the common feelings of a man, he would have rather suffered his £30,000 a year to go as compensation to the plaintiff than saved a shilling of it by so vile an expedient of economy. He would rather have starved with her in a jail—he would rather have sunk with her into the ocean—than have so villified her, than have so degraded himself.

But it seems, gentlemen, and, indeed, you have been told, that long as the course of his gallantries has been (and he has grown gray in the service), it is the first time he has been called upon for damages. To how many might it have been fortunate if he had not that impunity to boast? Your verdict will, I trust, put an end to that encouragement to guilt that is built upon impunity. The devil, it seems, has saved the noble marquis harmless in the past; but your verdict will tell him the term of that indemnity is expired, that his old friend and banker has no more effects in his hands, and that, if he draws any more upon him, he must pay his own bills himself. You will do much good by doing so. You may not enlighten his conscience nor touch his heart, but his frugality will understand the hint. It will adopt the prudence of age, and deter him from pursuits in which, though he may be insensible of shame, he will not be regardless of expense. You will do more; you will not only punish him in his tender point, but you will weaken him in his strong one,—his money. We have heard much of this noble lord's wealth, and much of his exploits, but not much of his accomplishments or his wit. I know not that his verses have soared even to the poet's corner. I have heard it said that an ass laden with gold could find his way through the gate of the strongest city. But, gentlemen, lighten the load upon his back, and you will completely curtail the mischievous faculty of a grave animal, whose momentum lies not in his agility, but his weight; not in the quantity of motion, but the quantity of his matter.

There is another ground on which you are called upon to give most liberal damages, and that has been laid by the unfeeling vanity of the defendant. This business has been marked by the most elaborate publicity. It is very clear that he has been allured by the glory of the chase, and not the value of the game. The poor object of his pursuit could be of no value to him, or he could

not have so wantonly and cruelly and unnecessarily abused her. He might easily have kept this unhappy intercourse an unsuspected secret. Even if he wished for her elopement, he might easily have so contrived it that the place of her retreat would be profoundly undiscoverable. Yet, though even the expense (a point so tender to his delicate sensibility) of concealing could not be a one-fortieth of the cost of publishing her, his vanity decided him in favor of glory and publicity. By that election he has in fact put forward the Irish nation and its character, so often and so variously calumniated, upon its trial before the tribunal of the empire; and your verdict will this day decide whether an Irish jury can feel with justice and spirit upon a subject that involves conjugal affection and comfort, domestic honor and repose, the certainty of issue, the weight of public opinion, the gilded and presumptuous criminality of overweening rank and station. I doubt not but he is at this moment reclined on a silken sofa, anticipating that submissive and modest verdict by which you will lean gently on his errors; and expecting, from your patriotism, no doubt, that you will think again and again before you condemn any great portion of the immense revenue of a great absentee to be detained in the nation that produced it, instead of being transmitted, as it ought, to be expended in the splendor of another country. He is now probably waiting for the arrival of the report of this day, which I understand a famous note taker has been sent hither to collect. (Let not the gentleman be disturbed.) Gentlemen, let me assure you it is more, much more, the trial of you, than of the noble marquis, of which this imported recorder is at this moment collecting the materials. His noble employer is now expecting a report to the following effect: "Such a day came on to be tried at Ennis, by a special jury, the cause of Charles Massy against the most noble the Marquis of Headfort. It appeared that the plaintiff's wife was young, beautiful, and captivating; the plaintiff himself, a person fond of this beautiful creature to distraction,—and both doting on their child. But the noble marquis approached her. The plume of glory nodded on his head. Not the goddess Minerva, but the goddess Venus, had lighted upon his casque 'the fire that never tires,—such as many a lady gay had been dazzled with before.' At the first advance she trembled; at the second she struck to the redoubted son of Mars and pupil of Venus. The jury saw it was not his fault (it was an Irish jury); they felt compassion for the tenderness of the mother's heart, and for the warmth of the lover's passion. The jury saw, on the one side, a

young, entertaining gallant; on the other, a beauteous creature, of charms irresistible. They recollected that Jupiter had been always successful in his amours, although Vulcan had not always escaped some awkward accidents. The jury was composed of fathers, brothers, husbands, but they had not the vulgar jealousy that views little things of that sort with rigor; and wishing to assimilate their country in every respect to England, now that they are united to it, they, like English gentlemen, returned to their box with a verdict of sixpence damages and sixpence costs." Let this be sent to England. I promise you your odious secret will not be kept better than that of the wretched Mrs. Massy. There is not a bawdy chronicle in London in which the epitaph which you would have written on yourselves will not be published, and our enemies will delight in the spectacle of our precocious depravity, in seeing that we can be rotten before we are ripe. I do not suppose it; I do not, cannot, will not believe it. I will not harrow up myself with the anticipated apprehension.

There is another consideration, gentlemen, which I think most imperiously demands even a vindictive award of exemplary damages, and that is the breach of hospitality. To us peculiarly does it belong to avenge the violation of its altar. The hospitality of other countries is a matter of necessity or convention,—in savage nations, of the first; in polished, of the latter. But the hospitality of an Irishman is not the running account of posted and ledgered courtesies, as in other countries. It springs, like all his qualities, his faults, his virtues, directly from his heart. The heart of an Irishman is by nature bold, and he confides; it is tender, and he loves; it is generous, and he gives; it is social, and he is hospitable. This sacrilegious intruder has profaned the religion of that sacred altar, so elevated in our worship, so precious to our devotion, and it is our privilege to avenge the crime. You must either pull down the altar and abolish the worship, or you must preserve its sanctity undebased. There is no alternative between the universal exclusion of all mankind from your threshold, and the most rigorous punishment of him who is admitted and betrays. This defendant has been so trusted, has so betrayed, and you ought to make him a most signal example.

Gentlemen, I am the more disposed to feel the strongest indignation and abhorrence at this odious conduct of the defendant when I consider the deplorable condition to which he has reduced the plaintiff, and perhaps the still more deplorable one that he has in prospect before him. What a progress has he to travel through

before he can attain the peace and tranquillity which he has lost? How like the wounds of the body are those of the mind! How burning the fever! How painful the suppuration! How slow, how hesitating, how relapsing the process to convalescence! Through what a variety of suffering, what new scenes and changes, must my unhappy client pass ere he can re-attain, should he ever re-attain, that health of soul of which he has been despoiled by the cold and deliberate machinations of this praticed and gilded seducer? If, instead of drawing upon his incalculable wealth for a scanty retribution, you were to stop the progress of his despicable achievements by reducing him to actual poverty, you could not, even so, punish him beyond the scope of his offense, nor reprise the plaintiff beyond the measure of his suffering. Let me remind you that in this action the law not only empowers you, but that its policy commands you, to consider the public example, as well as the individual injury, when you adjust the amount of your verdict. I confess I am most anxious that you should acquit yourselves worthily upon this important occasion. I am addressing you as fathers, husbands, brothers. I am anxious that a feeling of those high relations should enter into, and give dignity to, your verdict. But I confess it, I feel a ten-fold solicitude when I remember that I am addressing you as my countrymen,—as Irishmen,—whose characters as jurors, as gentlemen, must find either honor or degradation in the result of your decision. Small as must be the distributive share of that national estimation that can belong to so unimportant an individual as myself, yet do I own I am tremblingly solicitous for its fate. Perhaps it appears of more value to me because it is embarked on the same bottom with yours; perhaps the community of peril, of common safety, or common wreck gives a consequence to my share of the risk which I could not be vain enough to give it if it were not raised to it by that mutuality. But why stoop to think at all of myself, when I know that you, gentlemen of the jury, when I know that our country itself, are my clients on this day, and must abide the alternative of honor or of infamy, as you shall decide. But I will not despond. I will not dare to despond. I have every trust and hope and confidence in you; and to that hope I will add my most fervent prayer to the God of all truth and justice, so to raise and enlighten and fortify your minds that you may so decide as to preserve to yourselves, while you live, the most delightful of all recollections,—that of acting justly,—and to transmit to your children the most precious of all inheritances,—the memory of your virtue.

CHIEF JUSTICE MARSHALL.

[John Marshall was born in Germantown, Fauquier county, Va., 1755. He was privately educated, and had just begun his legal studies when the Revolutionary struggle began. He enlisted in a Virginia regiment, and served throughout the war. In 1779 he was promoted to a captaincy. While in Richmond, on detail, in the winter of 1779-80, he attended the law lectures of George Wythe, of William and Mary College, and in the summer of 1780 was admitted to the bar. In 1781, after six years' service, he resigned his commission, and, as soon as the courts reopened, began the practice of the law. In 1782 he was elected to the house of burgesses, and, in the same year, a member of the executive council. In 1784 he took up his permanent residence in Richmond. In 1788, as a delegate to the state convention called to consider the adoption of the federal constitution, he was the recognized leader of the majority in favor of ratification. He served in the state legislature on various occasions, and was a warm supporter of Washington's administration. Meantime he had risen to leadership at the Virginia bar. In 1797 he was appointed by President Adams, with Pinckney and Gerry, envoy to France. In the following year he declined an appointment to the supreme bench. In 1799 he was elected to congress. Before his term expired he was nominated as secretary of war by President Adams. Before this nomination was confirmed, however, he was nominated and appointed as secretary of state, and served as such during the remainder of the administration. Upon the resignation of Chief Justice Ellsworth, in 1800, Marshall was appointed in his place, and took his seat at the February term, 1801. In 1807 he presided at the celebrated trial of Aaron Burr for treason. In 1829 he served as a delegate in the constitutional convention of Virginia. At the request of Washington's family, he published a life of that patriot, in five volumes, 1804-07. He died in Philadelphia, July 6, 1835.]

In the small company of constructive jurists John Marshall holds distinguished rank. An able advocate, a distinguished statesman, and a learned judge, he will nevertheless be remembered as the founder of our constitutional jurisprudence. When Marshall was appointed chief justice in 1801 the supreme court was still in its formative period. During the first ten years the court averaged less than six decisions a year, and they were mostly questions of practice on preliminary motion. The case of Chisholm v. Geor-

gia, in 1793, was the first important case to be finally disposed of; and there were not more than a dozen such during that decade. In the absence of causes, the judges engaged in political and diplomatic service. Jay held at the same time the offices of chief justice and secretary of state, and was absent from the bench more than a year on a diplomatic mission to England. He resigned only when, in addition, he was elected governor of New York. Chief Justice Ellsworth was also minister plenipotentiary to France. Doubt and uncertainty as to its true position clouded the court's earlier years, when, as Shirley says, "the politicians or statesmen of that day bivouacked in the chief justiceship on their march from one political position to another." When, upon the resignation of Ellsworth, Jay was reappointed, he declined because he was "convinced that, under a system so defective, it [the court] would not obtain the energy, weight, and dignity which was essential to its affording due support to the national government, nor acquire the public confidence and respect which, as the last resort of the justice of the nation, it should possess."

It is difficult to convey a proper conception of the extent to which the distinctive work of the tribunal was new. Nottingham, Mansfield, and Stowell were aided by the work of continental jurists; but Marshall had little assistance from any quarter. Only six decisions had been rendered on constitutional questions. Not only were the nation, the constitution, and the laws in their infancy, but an absolutely new problem in political science was presented,—whether it was possible to successfully carry out a scheme contemplating the contemporaneous sovereignty of two governments, distinct and separate in their action, yet commanding with equal authority the obedience of the same people. Viewed against this somber background of an untried and difficult experiment, Marshall's services assume heroic proportions. On account of the lack of precedent, in many cases an opposite decision could have been given which, as a matter of pure law, could have been well supported. Much depended, therefore, upon the spirit in which the work should be approached. Marshall brought to the task a mind which had been trained in forensic strife with the ablest bar that Virginia has ever known. In the Virginia legislature, in congress, and in the constitutional convention of Virginia, he had become familiar with the fundamental principles of government. And the temper in which he assumed the responsibilities of his station is shown by his remarks on the trial of Aaron Burr:

"That this court dares not usurp power is most true. That this court does not shrink from its duty is no less true. No man is desirous of placing himself in a disagreeable situation. No man is desirous of becoming the peculiar subject of calumny. No man, might he let the bitter cup pass from him without reproach, would drain it to the bottom. But if he has no choice in the case,—if there is no alternative presented to him but a dereliction of duty or the opprobrium of those who are denominated the world,—he merits the contempt, as well as the indignation, of his country, who can hesitate which to embrace."

Under Marshall, the supreme court assumed the "energy, weight, and dignity" which Jay had considered necessary for the effectual exercise of its functions. In Marbury v. Madison, Fletcher v. Peck, Worcester v. Georgia, and Cohens v. Virginia he maintained the supremacy of the constitution over conflicting acts of federal and state authority, and fixed the right of his court to determine their validity. In Gibbons v. Ogden, Brown v. Maryland, and Craig v. Missouri he sustained the supremacy of federal control over domestic and foreign commerce, and the right of the federal government to the exclusive use of agencies granted by the constitution. In preserving such agencies from state interference in McCulloch v. Maryland he laid down rules for the determination of the necessary and proper powers of the federal government; and in Dartmouth College v. Woodward, Sturges v. Crowninshield, and Ogden v. Saunders he illustrated, in various phases, the scope of the fundamental provision with respect to the obligation of contracts. As Mr. Carson finely puts it, "beneath the strong and steady rays cast by his mind, the mists were rising, and the bold outlines of our national system were gradually revealed." The corner-stone of this national system is his brief but conclusive demonstration of the supremacy of the constitution in Marbury v. Madison:[1]

"The question whether an act repugnant to the constitution can become the law of the land is a question deeply interesting to the United States, but, happily, not of an intricacy proportioned to its interest. It seems only necessary to recognize certain principles, supposed to have been long and well established, to decide it. That the people have an original right to establish for their future government such principles as, in their opinion, shall most conduce to their own happiness, is the basis on which the whole American fabric has been erected. The exercise of this original right is a very great exertion; nor can it, nor ought it, to be frequently repeated. The principles, therefore, so established, are deemed fundamental; and as the authority from which they proceed is supreme, and can seldom act, they are designed to be permanent. This original and supreme will organizes the government, and assigns to different departments their respective powers. It may either

[1] 1 Cranch, 137.

stop here or establish certain limits, not to be transcended by those departments. The government of the United States is of the latter description. The powers of the legislature are defined and limited, and, that those limits may not be mistaken or forgotten, the constitution is written. To what purpose are powers limited, and to what purpose is that limitation committed to writing, if these limits may, at any time, be passed by those intended to be restrained? The distinction between a government with limited and unlimited powers is abolished if those limits do not confine the persons on whom they are imposed, and if acts prohibited and acts allowed are of equal obligation. It is a proposition too plain to be contested that the constitution controls any legislative act repugnant to it, or that the legislature may alter the constitution by an ordinary act. Between these alternatives there is no middle ground. The constitution is either a superior, paramount law, unchangeable by ordinary means, or it is on a level with ordinary legislative acts, and, like other acts, is alterable when the legislature shall please to alter it. If the former part of the alternative be true, then a legislative act contrary to the constitution is not law; if the latter part be true, then written constitutions are absurd attempts on the part of the people to limit a power in its own nature illimitable. Certainly all those who have framed written constitutions contemplate them as forming the fundamental and paramount law of the nation, and consequently the theory of every such government must be that an act of the legislature repugnant to the constitution is void."

During the thirty-four years that he presided over the court, one thousand two hundred and fifteen cases were decided, the reports of which fill thirty volumes.[2] In something more than one hundred cases no opinion was given, or, if given, was reported as *per curiam*. Of the remainder, Marshall delivered the opinion of the court in five hundred and nineteen. Nor was Marshall's ascendency merely apparent. Of the sixty-two decisions during his time on questions of constitutional law, he wrote the opinion in thirty-six. In twenty-three of the latter, comprising most of his greatest efforts, there was no dissent. In the other thirteen there is no dissenting opinion to be compared with Justice Iredell's dissent in Chisholm v. Georgia, except the dissenting opinion in Ogden v. Saunders, and that is by Marshall himself. He dissented from the majority but eight times in all.

Marshall's qualifications did not end with his ability to reach a correct result. Questions of constitutional law concern not only individual litigants, but are matters of universal concern. "It is now seen on every hand," wrote William Wirt to President Monroe in 1823, "that the functions to be performed by the supreme court of the United States are among the most difficult and perilous which are to be performed under the constitution. They demand the loftiest range of talents and learning, and a sort of

[2] 1 Cranch to 9 Peters.

Roman purity and firmness. The questions which come before them frequently involve the fate of the constitution, the happiness of the whole nation, and even its peace as it concerns other nations." It is obviously a most needful qualification for such a task to be able to demonstrate the accuracy of a conclusion. Especially is this necessary in building up a new system of law. Marshall possessed this power of clear statement and pure reasoning to a remarkable degree. His style is simple in the extreme. There is no attempt at ornament or external illustration. It is all the product of pure reason working on the facts in issue. His was, as Mr. Phelps says, "that simple, direct, straightforward, honest reasoning that silences as a demonstration in Euclid silences,—because it convinces." Occasionally his fancy seems to have been warmed by the glowing eloquency of Pinkney. In his opinion in the case of The Nereide[3] he said: "With a pencil dipped in the most vivid colors, and guided by the hand of a master, a splendid portrait has been drawn, exhibiting this vessel and her freighter as forming a single figure, composed of the most discordant materials,—of peace and war. So exquisite was the skill of the artist, so dazzling the garb in which the figure was presented, that it required the exercise of that cold, investigating faculty which ought always to belong to those who sit on this bench to discover its only imperfection,—its want of resemblance."

His forensic style was graphically described by Wirt in the British Spy:

"Without the aid of fancy—without the advantages of person, voice, attitude, gesture, or any of the ornaments of the orator—he seizes the attention with irresistible force, and never permits it to flag until the hearer has received the conviction which the speaker intends. He possessed an almost supernatural faculty for developing a subject by a single glance of his mind, and detecting at once the very point on which the controversy depends. All his eloquence consists in the apparently deep self-conviction and emphatic earnestness of manner, the correspondent simplicity and energy of his style, the close and logical connection of his thoughts, and the easy gradations by which he opens his lights on the attentive minds of his hearers. The mind is never permitted to pause for a moment. There is no stopping to ornament a favorite argument. Every sentence is progressive; every idea sheds new light on the subject; the subject opens gradually to the view, until it rises in clear relief in all its proportions."

The original bias of his mind was towards general principles and comprehensive views, rather than to technical and recondite learning. His reasoning is, for the most part, simple logical deduction, unaided by analogies, and unsupported by precedent or

[3] 9 Cranch, 389.

authority. This type of mind is well contrasted by Judge Story, whose concurring opinion in the Dartmouth College case bristles with authorities: "When I examine a question, I go from headland to headland; from case to case. Marshall has a compass, puts out to sea, and goes directly to his result." This great judge, who sat by Marshall's side for nearly a quarter of a century, thus describes the latter's judicial methods:

"It was a matter of surprise to see how easily he grasped the leading principles of a case, and cleared it of all its accidental incumbrances; how readily he evolved the true point of the controversy, even when it was manifest that he had never before caught even a glimpse of the learning on which it depended. He seized, as it were, by intuition, the very spirit of juridical doctrines, though cased up in the armor of centuries; and he discussed authorities as if the very minds of the judges themselves stood disembodied before him. Perhaps no judge ever excelled him in the capacity to hold a legal proposition before the eyes of others in such various forms and colors. It seemed a pleasure to him to cast the darkest shade of objection over it, that he might show how it could be dissipated by a single glance of light. He would, by the most subtle analysis, resolve every argument into its ultimate principles, and then, with a marvelous facility, apply them to the decision of the cause. His powers of analysis were indeed marvelous. He separated the accidental from the essential circumstances with a subtlety and exactness which surprised those most who were accustomed to its exercise. No error in reasoning escaped his detection. He followed it through all the doublings, until it became palpable, and stripped of all its disguises. But what seemed peculiarly his own was the power with which he seized upon a principle or argument, apparently presented in the most elementary form, and showed it to be a mere corollary from some more general truth, which lay at immeasurable distances beyond it. If his mind had been less practical, he would have been the most consummate of metaphysicians, and the most skillful of sophists; but his love of dialectics was constantly controlled by his superior love of truth."

Chief Justice Marshall has come to be regarded, says Mr. Bryce, as a special gift of favoring Providence.

"No other man did half so much either to develop the constitution by expounding it, or to secure for the judiciary its rightful place in the government as the living voice of the constitution. No one vindicated more strenuously the duty of the court to establish the authority of the fundamental law of the land; no one abstained more scrupulously from trespassing on the field of executive administration or political controversy. The admiration and respect which he and his colleagues won for the court remain its bulwark. The traditions which were formed under him and them have continued, in general, to guide the action and elevate the sentiments of their successors."

JUDICIAL OPINION IN THE CASE OF McCULLOCH AGAINST THE STATE OF MARYLAND, IN THE SUPREME COURT OF THE UNITED STATES, 1819.

STATEMENT.

This case is an incident of the prolonged controversy over the Bank of the United States, which had been originally established in 1791 on the recommendation of Alexander Hamilton. A branch of this bank having been established at Baltimore, the legislature of Maryland, in 1818, imposed a stamp duty on the circulating notes of all banks and branches thereof located in that state, not chartered by the legislature. The Maryland branch bank refused to pay the tax, whereupon the state instituted an action against McCulloch, its cashier, to recover the tax. Judgment was rendered against him in the state court, and he carried the case to the supreme court of the United States by a writ of error. The case was therefore one of momentous interest. It involved not only the constitutionality of the act incorporating the national bank, but also the power of the states to tax an agency of the federal government. In the course of an argument which Justice Story pronounced the greatest that he had ever heard, William Pinkney said: "I have a deep and awful conviction that upon that judgment it will depend mainly whether the constitution under which we live and prosper is to be considered, like its precursor, a mere phantom of political power, to deceive and mock us; a pageant of mimic sovereignty, calculated to raise up hopes, that it may leave them to perish; a frail and tottering edifice that can afford no shelter from storm, either foreign or domestic; a creature half made up, without heart, or brain, or nerve, or muscle, without protecting power or redeeming energy,—or whether it is to be viewed as a competent guardian of all that is dear to us as a nation." The case was argued by William Pinkney, Daniel Webster, and William Wirt for the bank, and by Luther Martin, Francis Hopkinson and Walter Jones for the state of Maryland.[1]

OPINION.

In the case now to be determined, the defendant, a sovereign state, denies the obligation of a law enacted by the legislature of the Union, and the plaintiff, on his part, contests the validity of an act which has been passed by the legislature of that state. The constitution of our country, in its most interesting and vital parts, is to be considered; the conflicting powers of the government of the Union and of its members, as marked in that constitution, are to be discussed; and an opinion given which may essentially influence the great operations of the government. No tribunal can approach such a question without a deep sense of its importance, and of the awful responsibility involved in its decision. But it must be decided peacefully, or remain a source

[1] 4 Wheaton, 316.

of hostile legislation, perhaps of hostility of a still more serious nature, and, if it is to be so decided, by this tribunal alone can the decision be made. On the supreme court of the United States has the constitution of our country devolved this important duty.

The first question made in the cause is, has congress power to incorporate a bank? It has been truly said that this can scarcely be considered as an open question, entirely unprejudiced by the former proceedings of the nation respecting it. The principle now contested was introduced at a very early period of our history, has been recognized by many successive legislatures, and has been acted upon by the judicial department, in cases of peculiar delicacy, as a law of undoubted obligation. It will not be denied that a bold and daring usurpation might be resisted, after an acquiescence still longer and more complete than this. But it is conceived that a doubtful question,—one on which human reason may pause, and the human judgment be suspended,—in the decision of which the great principles of liberty are not concerned, but the respective powers of those who are equally the representatives of the people are to be adjusted, if not put at rest by the practice of the government, ought to receive a considerable impression from that practice. An exposition of the constitution, deliberately established by legislative acts, on the faith of which an immense property has been advanced, ought not to be lightly disregarded.

The power now contested was exercised by the first congress elected under the present constitution. The bill for incorporating the Bank of the United States did not steal upon an unsuspecting legislature, and pass unobserved. Its principle was completely understood, and was opposed with equal zeal and ability. After being resisted, first in the fair and open field of debate, and afterwards in the executive cabinet, with as much persevering talent as any measure has ever experienced, and being supported by arguments which convinced minds as pure and as intelligent as this country can boast, it became a law. The original act was permitted to expire; but a short experience of the embarrassments to which the refusal to revive it exposed the government convinced those who were most prejudiced against the measure of its necessity, and induced the passage of the present law. It would require no ordinary share of intrepidity to assert that a measure adopted under these circumstances was a bold and plain usurpation, to which the constitution gave no countenance. These observations belong to the cause; but they are not made

under the impression that, were the question entirely new, the law would be found irreconcilable with the constitution. In discussing this question, the counsel for the state of Maryland have deemed it of some importance, in the construction of the constitution, to consider that instrument, not as emanating from the people, but as the act of sovereign and independent states. The powers of the general government, it has been said, are delegated by the states, who alone are truly sovereign, and must be exercised in subordination to the states, who alone possess supreme dominion. It would be difficult to sustain this proposition. The convention which framed the constitution was indeed elected by the state legislatures; but the instrument, when it came from their hands, was a mere proposal, without obligation or pretensions to it. It was reported to the then existing congress of the United States, with a request that it might "be submitted to a convention of delegates chosen in each state by the people thereof, under the recommendation of its legislature, for their assent and ratification." This mode of proceeding was adopted, and by the convention, by congress, and by the state legislatures the instrument was submitted to the people. They acted upon it in the only manner in which they can act safely, effectively, and wisely on such a subject,—by assembling in convention. It is true, they assembled in their several states,—and where else should they have assembled? No political dreamer was ever wild enough to think of breaking down the lines which separate the states, and of compounding the American people into one common mass. Of consequence, when they act, they act in their states; but the measures they adopt do not, on that account, cease to be the measures of the people themselves, or become the measures of the state governments. From these conventions the constitution derives its whole authority. The government proceeds directly from the people; is "ordained and established" in the name of the people; and is declared to be ordained "in order to form a more perfect union, establish justice, insure domestic tranquillity, and secure the blessings of liberty to themselves and to their posterity." The assent of the states, in their sovereign capacity, is implied in calling a convention, and thus submitting that instrument to the people. But the people were at perfect liberty to accept or reject it, and their act was final. It required not the affirmance of, and could not be negatived by, the state governments. The constitution, when thus adopted, was of complete obligation, and bound the state sovereignties.

It has been said that the people had already surrendered all their powers to the state sovereignties, and had nothing more to give. But surely the question whether they may resume and modify the powers granted to government does not remain to be settled in this country. Much more might the legitimacy of the general government be doubted had it been created by the states. The powers delegated to the state sovereignties were to be exercised by themselves, not by a distinct and independent sovereignty, created by themselves. To the formation of a league, such as was the confederation, the state sovereignties were certainly competent. But when, "in order to form a more perfect union," it was deemed necessary to change this alliance into an effective government, possessing great and sovereign powers, and acting directly on the people, the necessity of referring it to the people, and of deriving its powers directly from them, was felt and acknowledged by all. The government of the Union, then (whatever may be the influence of this fact on the case), is emphatically and truly a government of the people. In form and in substance it emanates from them. Its powers are granted by them, and are to be exercised directly on them, and for their benefit.

This government is acknowledged by all to be one of enumerated powers. The principle that it can exercise only the powers granted to it would seem too apparent to have required to be enforced by all those arguments which its enlightened friends, while it was depending before the people, found it necessary to urge. That principle is now universally admitted. But the question respecting the extent of the powers actually granted is perpetually arising, and will probably continue to arise as long as our system shall exist. In discussing these questions, the conflicting powers of the general and state governments must be brought into view, and the supremacy of their respective laws, when they are in opposition, must be settled. If any one proposition could command the universal assent of mankind, we might expect it would be this: that the government of the Union, though limited in its powers, is supreme within its sphere of action. This would seem to result necessarily from its nature. It is the government of all; its powers are delegated by all; it represents all, and acts for all. Though any one state may be willing to control its operations, no state is willing to allow others to control them. The nation, on those subjects on which it can act, must necessarily bind its component parts. But this question is not left to mere

reason,—the people have, in express terms, decided it by saying: "This constitution, and the laws of the United States which shall be made in pursuance thereof, shall be the supreme law of the land," and by requiring that the members of the state legislatures, and the officers of the executive and judicial departments of the states, shall take the oath of fidelity to it.

The government of the United States, then, though limited in its powers, is supreme; and its laws, when made in pursuance of the constitution, form the supreme law of the land, "anything in the constitution or laws of any state to the contrary notwithstanding." Among the enumerated powers we do not find that of establishing a bank or creating a corporation; but there is no phrase in the instrument which, like the articles of confederation, excludes incidental or implied powers, and which requires that everything granted shall be expressly and minutely described. Even the tenth amendment, which was framed for the purpose of quieting the excessive jealousies which had been excited, omits the word "expressly," and declares only that the powers "not delegated to the United States, nor prohibited to the states, are reserved to the states or to the people"; thus leaving the question whether the particular power which may become the subject of contest has been delegated to the one government, or prohibited to the other, to depend on a fair construction of the whole instrument. The men who drew and adopted this amendment had experienced the embarrassments resulting from the insertion of this word in the articles of confederation, and probably omitted it to avoid those embarrassments. A constitution, to contain an accurate detail of all the subdivisions of which its great powers will admit, and of all the means by which they may be carried into execution, would partake of the prolixity of a legal code, and could scarcely be embraced by the human mind. It would probably never be understood by the public. Its nature, therefore, requires that only its great outlines should be marked, its important objects designated, and the minor ingredients which compose those objects be deduced from the nature of the objects themselves. That this idea was entertained by the framers of the American constitution is not only to be inferred from the nature of the instrument, but from the language. Why else were some of the limitations found in the ninth section of the first article introduced? It is also, in some degree, warranted by their having omitted to use any restrictive term which might prevent its receiving a fair and just interpretation. In considering this

question, then, we must never forget that it is a constitution we are expounding.

Although, among the enumerated powers of government, we do not find the word "bank" or "incorporation," we find the great powers to lay and collect taxes, to borrow money, to regulate commerce, to declare and conduct a war, and to raise and support armies and navies. The sword and the purse, all the external relations, and no inconsiderable portion of the industry of the nation, are intrusted to its government. It can never be pretended that these vast powers draw after them others of inferior importance, merely because they are inferior. Such an idea can never be advanced. But it may, with great reason, be contended that a government intrusted with such ample powers, on the due execution of which the happiness and prosperity of the nation so vitally depend, must also be intrusted with ample means for their execution. The power being given, it is the interest of the nation to facilitate its execution. It can never be their interest, and cannot be presumed to have been their intention, to clog and embarrass its execution by withholding the most appropriate means. Throughout this vast republic, from the St. Croix to the Gulf of Mexico, from the Atlantic to the Pacific, revenue is to be collected and expended, armies are to be marched and supported. The exigencies of the nation may require that the treasure raised in the north should be transported to the south, that raised in the east conveyed to the west, or that this order should be reversed. Is that construction of the constitution to be preferred which would render these operations difficult, hazardous, and expensive? Can we adopt that construction (unless the words imperiously require it) which would impute to the framers of that instrument, when granting these powers for the public good, the intention of impeding their exercise by withholding a choice of means? If, indeed, such be the mandate of the constitution, we have only to obey; but that instrument does not profess to enumerate the means by which the powers it confers may be executed, nor does it prohibit the creation of a corporation, if the existence of such a being be essential to the beneficial exercise of those powers. It is, then, the subject of fair inquiry, how far such means may be employed. It is not denied that the powers given to the government imply the ordinary means of execution. That, for example, of raising revenue, and applying it to national purposes, is admitted to imply the power of conveying money from place to place, as the exigencies of the nation may require, and of em-

ploying the usual means of conveyance. But it is denied that the government has its choice of means, or that it may employ the most convenient means, if, to employ them, it be necessary to erect a corporation. On what foundation does this argument rest? On this alone: the power of creating a corporation is one appertaining to sovereignty, and is not expressly conferred on congress. This is true. But all legislative powers appertain to sovereignty. The original power of giving the law on any subject whatever is a sovereign power; and if the government of the Union is restrained from creating a corporation, as a means for performing its functions, on the single reason that the creation of a corporation is an act of sovereignty,—if the sufficiency of this reason be acknowledged,—there would be some difficulty in sustaining the authority of congress to pass other laws for the accomplishment of the same objects. The government which has a right to do an act, and has imposed on it the duty of performing that act, must, according to the dictates of reason, be allowed to select the means; and those who contend that it may not select any appropriate means—that one particular mode of effecting the object is excepted—take upon themselves the burthen of establishing that exception.

The creation of a corporation, it is said, appertains to sovereignty. This is admitted. But to what portion of sovereignty does it appertain? Does it belong to one more than to another? In America, the powers of sovereignty are divided between the government of the Union and those of the states. They are each sovereign with respect to the objects committed to it, and neither sovereign with respect to the objects committed to the other. We cannot comprehend that train of reasoning which would maintain that the extent of power granted by the people is to be ascertained, not by the nature and terms of the grant, but by its date. Some state constitutions were formed before, some since, that of the United States. We cannot believe that their relation to each other is in any degree dependent upon this circumstance. Their respective powers must, we think, be precisely the same as if they had been formed at the same time. Had they been formed at the same time, and had the people conferred on the general government the power contained in the constitution, and on the states the whole residuum of power, would it have been asserted that the government of the Union was not sovereign with respect to those objects which were intrusted to it, in relation to which its laws were declared to be supreme? If this could not have been as-

serted, we cannot well comprehend the process of reasoning which maintains that a power appertaining to sovereignty cannot be connected with that vast portion of it which is granted to the general government, so far as it is calculated to subserve the legitimate objects of that government. The power of creating a corporation, though appertaining to sovereignty, is not, like the power of making war, or levying taxes, or of regulating commerce, a great substantive and independent power, which cannot be implied as incidental to other powers, or used as a means of executing them. It is never the end for which other powers are exercised, but a means by which other objects are accomplished. No contributions are made to charity for the sake of an incorporation, but a corporation is created to administer the charity. No seminary of learning is instituted in order to be incorporated, but the corporate character is conferred to subserve the purposes of education. No city was ever built with the sole object of being incorporated, but is incorporated as affording the best means of being well governed. The power of creating a corporation is never used for its own sake, but for the purpose of effecting something else. No sufficient reason is therefore perceived why it may not pass as incidental to those powers which are expressly given, if it be a direct mode of executing them.

But the constitution of the United States has not left the right of congress to employ the necessary means for the execution of the powers conferred on the government to general reasoning. To its enumeration of powers is added that of making "all laws which shall be necessary and proper for carrying into execution the foregoing powers, and all other powers vested by this constitution in the government of the United States, or in any department thereof." The counsel for the state of Maryland have urged various arguments to prove that this clause, though in terms a grant of power, is not so in effect, but is really restrictive of the general right, which might otherwise be implied, of selecting means for executing the enumerated powers. In support of this proposition they have found it necessary to contend that this clause was inserted for the purpose of conferring on congress the power of making laws; that, without it, doubts might be entertained whether congress could exercise its powers in the form of legislation. But could this be the object for which it was inserted? A government is created by the people, having legislative, executive, and judicial powers. Its legislative powers are vested in a congress, which is to consist of a senate and house of

representatives. Each house may determine the rule of its proceedings; and it is declared that every bill which shall have passed both houses shall, before it becomes a law, be presented to the president of the United States. The seventh section describes the course of proceedings by which a bill shall become a law; and then the eighth section enumerates the powers of congress. Could it be necessary to say that a legislature should exercise legislative powers in the shape of legislation? After allowing each house to prescribe its own course of proceeding, after describing the manner in which a bill should become a law, would it have entered into the mind of a single member of the convention that an express power to make laws was necessary to enable the legislature to make them? That a legislature, endowed with legislative powers, can legislate, is a proposition too self-evident to have been questioned. But the argument on which most reliance is placed is drawn from the peculiar language of this clause. Congress is not empowered by it to make all laws which may have relation to the powers conferred on the government, but such only as may be "necessary and proper" for carrying them into execution. The word "necessary" is considered as controlling the whole sentence, and as limiting the right to pass laws for the execution of the granted powers to such as are indispensable, and without which the power would be nugatory; that it excludes the choice of means, and leaves to congress, in each case, that only which is most direct and simple. Is it true that this is the sense in which the word "necessary" is always used? Does it always import an absolute physical necessity; so strong that one thing, to which another may be termed necessary, cannot exist without that other? We think it does not. If reference be had to its use in the common affairs of the world, or in approved authors, we find that it frequently imports no more than that one thing is convenient or useful or essential to another. To employ the means necessary to an end is generally understood as employing any means calculated to produce the end, and not as being confined to those single means, without which the end would be entirely unattainable. Such is the character of human language that no word conveys to the mind, in all situations, one single, definite idea; and nothing is more common than to use words in a figurative sense. Almost all compositions contain words which, taken in their rigorous sense, would convey a meaning different from that which is obviously intended. It is essential to just construction that many words which import something excessive should be understood

in a more mitigated sense,—in that sense which common usage justifies.

The word "necessary" is of this description. It has not a fixed character peculiar to itself. It admits of all degrees of comparison, and is often connected with other words, which increase or diminish the impression the mind receives of the urgency it imports. A thing may be necessary, very necessary, absolutely or indispensably necessary. To no mind would the same idea be conveyed by these several phrases. This comment on the word is well illustrated by the passage cited at the bar from the tenth section of the first article of the constitution. It is, we think, impossible to compare the sentence which prohibits a state from laying "imposts or duties on imports or exports, except what may be absolutely necessary for executing its inspection laws," with that which authorizes congress "to make all laws which shall be necessary and proper for carrying into execution" the powers of the general government, without feeling a conviction that the convention understood itself to change materially the meaning of the word "necessary" by prefixing the word "absolutely." This word, then, like others, is used in various senses, and, in its construction, the subject, the context, the intention of the person using them are all to be taken into view. Let this be done in the case under consideration. The subject is the execution of those great powers on which the welfare of a nation essentially depends. It must have been the intention of those who gave these powers to insure, as far as human prudence could insure, their beneficial execution. This could not be done by confiding the choice of means to such narrow limits as not to leave it in the power of congress to adopt any which might be appropriate, and which were conducive to the end. This provision is made in a constitution intended to endure for ages to come, and, consequently, to be adapted to the various crises of human affairs. To have prescribed the means by which government should, in all future time, execute its powers, would have been to change entirely the character of the instrument, and give it the properties of a legal code. It would have been an unwise attempt to provide, by immutable rules, for exigencies which, if foreseen at all, must have been seen dimly, and which can be best provided for as they occur. To have declared that the best means shall not be used, but those alone without which the power given would be nugatory, would have been to deprive the legislature of the capacity to avail itself of experience, to exercise its reason, and to

accommodate its legislation to circumstances. If we apply this principle of construction to any of the powers of the government, we shall find it so pernicious in its operation that we shall be compelled to discard it. The powers vested in congress may certainly be carried into execution without prescribing an oath of office. The power to exact this security for the faithful performance of duty is not given, nor is it indispensably necessary. The different departments may be established, taxes may be imposed and collected, armies and navies may be raised and maintained, and money may be borrowed without requiring an oath of office. It might be argued with as much plausibility as other incidental powers have been assailed, that the convention was not unmindful of this subject. The oath which might be exacted—that of fidelity to the constitution—is prescribed, and no other can be required. Yet he would be charged with insanity who should contend that the legislature might not superadd to the oath directed by the constitution such other oath of office as its wisdom might suggest. So with respect to the whole penal code of the United States. Whence arises the power to punish in cases not prescribed by the constitution? All admit that the government may legitimately punish any violation of its laws; and yet this is not among the enumerated powers of congress. The right to enforce the observance of law by punishing its infraction might be denied with the more plausibility because it is expressly given in some cases. Congress is empowered "to provide for the punishment of counterfeiting the securities and current coin of the United States," and "to define and punish piracies and felonies committed on the high seas, and offenses against the law of nations." The several powers of congress may exist in a very imperfect state, to be sure, but they may exist, and be carried into execution, although no punishment should be inflicted in cases where the right to punish is not expressly given. Take, for example, the power to "establish post offices and post roads." This power is executed by the single act of making the establishment. But from this has been inferred the power and duty of carrying the mail along the post road, from one post office to another; and from this implied power has again been inferred the right to punish those who steal letters from the post office, or rob the mail. It may be said with some plausibility that the right to carry the mail, and to punish those who rob it, is not indispensably necessary to the establishment of a post office and post road. This right is indeed essential to the beneficial exercise of the power, but not indis-

pensably necessary to its existence. So of the punishment of the crimes of stealing or falsifying a record or process of a court of the United States, or of perjury in such a court. To punish these offenses is certainly conducive to the due administration of justice. But courts may exist, and may decide the causes brought before them, though such crimes escape punishment. The baneful influence of this narrow construction on all the operations of the government, and the absolute impracticability of maintaining it without rendering the government incompetent to its great objects, might be illustrated by numerous examples drawn from the constitution, and from our laws. The good sense of the public has pronounced, without hesitation, that the power of punishment appertains to sovereignty, and may be exercised whenever the sovereign has a right to act, as incidental to his constitutional powers. It is a means for carrying into execution all sovereign powers, and may be used, although not indispensably necessary. It is a right incidental to the power, and conducive to its beneficial exercise. If this limited construction of the word "necessary" must be abandoned in order to punish, whence is derived the rule which would reinstate it when the government would carry its powers into execution by means not vindictive in their nature? If the word "necessary" means "needful," "requisite," "essential," "conducive to," in order to let in the power of punishment for the infraction of law, why is it not equally comprehensive when required to authorize the use of means which facilitate the execution of the powers of government without the infliction of punishment?

In ascertaining the sense in which the word "necessary" is used in this clause of the constitution, we may derive some aid from that with which it is associated. Congress shall have power "to make all laws which shall be necessary and proper to carry into execution" the powers of the government. If the word "necessary" was used in that strict and rigorous sense for which the counsel for the state of Maryland contend, it would be an extraordinary departure from the usual course of the human mind, as exhibited in composition, to add a word, the only possible effect of which is to qualify that strict and rigorous meaning; to present to the mind the idea of some choice of means of legislation not straitened and compressed within the narrow limits for which gentlemen contend. But the argument which most conclusively demonstrates the error of the construction contended for by the counsel for the state of Maryland is founded on the

intention of the convention, as manifested in the whole clause. To waste time and argument in proving that, without it, congress might carry its powers into execution, would be not much less idle than to hold a lighted taper to the sun. As little can it be required to prove that, in the absence of this clause, congress would have some choice of means; that it might employ those which, in its judgment, would most advantageously effect the object to be accomplished; that any means adapted to the end—any means which tended directly to the execution of the constitutional powers of the government—were in themselves constitutional. This clause, as construed by the state of Maryland, would abridge and almost annihilate this useful and necessary right of the legislature to select its means. That this could not be intended is, we should think, had it not been already controverted, too apparent for controversy. We think so for the following reasons: (1) The clause is placed among the powers of congress, not among the limitations on those powers. (2) Its terms purport to enlarge, not to diminish, the powers vested in the government. It purports to be an additional power, not a restriction on those already granted. No reason has been or can be assigned for thus concealing an intention to narrow the discretion of the national legislature under words which purport to enlarge it. The framers of the constitution wished its adoption, and well knew that it would be endangered by its strength, not by its weakness. Had they been capable of using language which would convey to the eye one idea, and, after deep reflection, impress on the mind another, they would rather have disguised the grant of power than its limitation. If, then, their intention had been, by this clause, to restrain the free use of means which might otherwise have been implied, that intention would have been inserted in another place, and would have been expressed in terms resembling these: "In carrying into execution the foregoing powers, and all others," etc., "no laws shall be passed but such as are necessary and proper." Had the intention been to make this clause restrictive, it would unquestionably have been so in form as well as in effect. The result of the most careful and attentive consideration bestowed upon this clause is that, if it does not enlarge, it cannot be construed to restrain, the powers of congress, or to impair the right of the legislature to exercise its best judgment in the selection of measures to carry into execution the constitutional powers of the government. If no other motive for its insertion can be suggested, a sufficient one is found in the desire to remove all

doubts respecting the right to legislate on that vast mass of incidental powers which must be involved in the constitution, if that instrument be not a splendid bauble.

We admit, as all must admit, that the powers of the government are limited, and that its limits are not to be transcended. But we think the sound construction of the constitution must allow to the national legislature that discretion with respect to the means by which the powers it confers are to be carried into execution which will enable that body to perform the high duties assigned to it, in the manner most beneficial to the people. Let the end be legitimate,—let it be within the scope of the constitution,—and all means which are appropriate, which are plainly adapted to that end, which are not prohibited, but consist with the letter and spirit of the constitution, are constitutional. That a corporation must be considered as a means not less usual, not of higher dignity, not more requiring a particular specification than other means, has been sufficiently proved. If we look to the origin of corporations, to the manner in which they have been framed in that government from which we have derived most of our legal principles and ideas, or to the uses to which they have been applied, we find no reason to suppose that a constitution, omitting, and wisely omitting, to enumerate all the means for carrying into execution the great powers vested in government, ought to have specified this. Had it been intended to grant this power as one which should be distinct and independent, to be exercised in any case whatever, it would have found a place among the enumerated powers of the government; but being considered merely as a means to be employed only for the purpose of carrying into execution the given powers, there could be no motive for particularly mentioning it. The propriety of this remark would seem to be generally acknowledged by the universal acquiescence in the construction which has been uniformly put on the third section of the fourth article of the constitution. The power to "make all needful rules and regulations respecting the territory or other property belonging to the United States" is not more comprehensive than the power "to make all laws which shall be necessary and proper for carrying into execution" the powers of the government. Yet all admit the constitutionality of a territorial government, which is a corporate body.

If a corporation may be employed indiscriminately with other means to carry into execution the powers of the government, no particular reason can be assigned for excluding the use of a

bank, if required for its fiscal operations. To use one must be within the discretion of congress, if it be an appropriate mode of executing the powers of government. That it is a convenient, a useful, and essential instrument in the prosecution of its fiscal operations is not now a subject of controversy. All those who have been concerned in the administration of our finances have concurred in representing its importance and necessity; and so strongly have they been felt, that statesmen of the first class, whose previous opinion against it had been confirmed by every circumstance which can fix the human judgment, have yielded those opinions to the exigencies of the nation. Under the confederation, congress, justifying the measure by its necessity, transcended, perhaps, its powers to obtain the advantage of a bank; and our own legislation attests the universal conviction of the utility of this measure. The time has passed away when it can be necessary to enter into any discussion in order to prove the importance of this instrument as a means to effect the legitimate objects of the government. But were its necessity less apparent, none can deny its being an appropriate measure, and, if it is, the degree of its necessity, as has been very justly observed, is to be discussed in another place. Should congress, in the execution of its powers, adopt measures which are prohibited by the constitution; or should congress, under the pretext of executing its powers, pass laws for the accomplishment of objects not intrusted to the government,—it would become the painful duty of this tribunal, should a case requiring such a decision come before it, to say that such an act was not the law of the land. But where the law is not prohibited, and is really calculated to effect any of the objects intrusted to the government, to undertake here to inquire into the degree of its necessity would be to pass the line which circumscribes the judicial department, and to tread on legislative ground. This court disclaims all pretensions to such a power. After this declaration, it can scarcely be necessary to say that the existence of state banks can have no possible influence on the question. No trace is to be found in the constitution of an intention to create a dependence of the government of the Union on those of the states for the execution of the great powers assigned to it. Its means are adequate to its ends, and on those means alone was it expected to rely for the accomplishment of its ends. To impose on it the necessity of resorting to means which it cannot control—which another government may furnish or withhold—would render its course precarious, the result of its

measures uncertain, and create a dependence on other governments which might disappoint its most important designs, and is incompatible with the language of the constitution. But were it otherwise, the choice of means implies a right to choose a national bank in preference to state banks, and congress alone can make the election.

After the most deliberate consideration, it is the unanimous and decided opinion of this court that the act to incorporate the Bank of the United States is a law made in pursuance of the constitution, and is a part of the supreme law of the land. The branches, proceeding from the same stock, and being conducive to the complete accomplishment of the object, are equally constitutional. It would have been unwise to locate them in the charter, and it would be unnecessarily inconvenient to employ the legislative power in making those subordinate arrangements. The great duties of the bank are prescribed; those duties require branches; and the bank itself may, we think, be safely trusted with the selection of places where those branches shall be fixed, reserving always to the government the right to require that a branch shall be located where it may be deemed necessary.

It being the opinion of the court that the act incorporating the bank is constitutional, and that the power of establishing a branch in the state of Maryland might be properly exercised by the bank itself, we proceed to inquire whether the state of Maryland may, without violating the constitution, tax that branch? That the power of taxation is one of vital importance; that it is retained by the states; that it is not abridged by the grant of a similar power to the government of the Union; that it is to be concurrently exercised by the two governments,—are truths which have never been denied; but, such is the paramount character of the constitution, that its capacity to withdraw any subject from the action of even this power is admitted. The states are expressly forbidden to lay any duties on imports or exports except what may be absolutely necessary for executing their inspection laws. If the obligation of this prohibition must be conceded,—if it may restrain a state from the exercise of its taxing power on imports and exports,—the same paramount character would seem to restrain, as it certainly may restrain, a state from such other exercise of this power as is in its nature incompatible with, and repugnant to, the constitutional laws of the Union. A law absolutely repugnant to another, as entirely repeals that other as if express terms of repeal were used.

On this ground the counsel for the bank place its claim to be exempted from the power of a state to tax its operations. There is no express provision for the case, but the claim has been sustained on a principle which so entirely pervades the constitution, is so intermixed with the materials which compose it, so interwoven with its web, so blended with its texture, as to be incapable of being separated from it without rending it into shreds. This great principle is that the constitution, and the laws made in pursuance thereof, are supreme; that they control the constitution and laws of the respective states, and cannot be controlled by them. From this, which may be almost termed an axiom, other propositions are deduced as corollaries, on the truth or error of which, and on their application to this case, the cause has been supposed to depend. These are (1) that a power to create implies a power to preserve; (2) that a power to destroy, if wielded by a different hand, is hostile to, and incompatible with, these powers to create and to preserve; (3) that, where this repugnancy exists, that authority which is supreme must control, not yield to that over which it is supreme. These propositions, as abstract truths, would, perhaps, never be controverted. Their application to this case, however, has been denied; and, both in maintaining the affirmative and the negative, a splendor of eloquence and strength of argument, seldom, if ever, surpassed, have been displayed.

The power of congress to create, and of course to continue, the bank, was the subject of the preceding part of this opinion, and is no longer to be considered as questionable. That the power of taxing it by the states may be exercised so as to destroy it is too obvious to be denied. But taxation is said to be an absolute power, which acknowledges no other limits than those expressly prescribed in the constitution, and, like sovereign power of every other description, is trusted to the discretion of those who use it. But the very terms of this argument admit that the sovereignty of the state, in the article of taxation itself, is subordinate to, and may be controlled by, the constitution of the United States. How far it has been controlled by that instrument must be a question of construction. In making this construction, no principle not declared can be admissible which would defeat the legitimate operations of a supreme government. It is 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 own influence. This effect need not be stated in terms. It is so involved in the dec-

taration of supremacy—so necessarily implied in it—that the expression of it could not make it more certain. We must therefore keep it in view while construing the constitution.

The argument on the part of the state of Maryland is, not that the states may directly resist a law of congress, but that they may exercise their acknowledged powers upon it, and that the constitution leaves them this right in the confidence that they will not abuse it. Before we proceed to examine this argument, and to subject it to the test of the constitution, we must be permitted to bestow a few considerations on the nature and extent of this original right of taxation, which is acknowledged to remain with the states. It is admitted that the power of taxing the people and their property is essential to the very existence of government, and may be legitimately exercised on the objects to which it is applicable, to the utmost extent to which the government may choose to carry it. The only security against the abuse of this power is found in the structure of the government itself. In imposing a tax, the legislature acts upon its constituents. This is, in general, a sufficient security against erroneous and oppressive taxation. The people of a state, therefore, give to their government a right of taxing themselves and their property, and, as the exigencies of government cannot be limited, they prescribe no limits to the exercise of this right, resting confidently on the interest of the legislator, and on the influence of the constituents over their representative, to guard them against its abuse. But the means employed by the government of the Union have no such security, nor is the right of a state to tax them sustained by the same theory. Those means are not given by the constituents of the legislature which claim the right to tax them, but by the people of all the states. They are given by all, for the benefit of all, and, upon theory, should be subjected to that government only which belongs to all. It may be objected to this definition that the power of taxation is not confined to the people and property of a state. It may be exercised upon every object brought within its jurisdiction. This is true. But to what source do we trace this right? It is obvious that it is an incident of sovereignty, and is coextensive with that to which it is an incident. All subjects over which the sovereign power of a state extends are objects of taxation; but those over which it does not extend are, upon the soundest principles, exempt from taxation. This proposition may almost be pronounced self-evident. The sovereignty of a state extends to everything which exists by its own authority, or is in-

troduced by its permission; but does it extend to those means which are employed by congress to carry into execution powers conferred on that body by the people of the United States? We think it demonstrable that it does not. Those powers are not given by the people of a single state. They are given by the people of the United States, to a government whose laws, made in pursuance of the constitution, are declared to be supreme. Consequently, the people of a single state cannot confer a sovereignty which will extend over them.

If we measure the power of taxation residing in a state by the extent of sovereignty which the people of a single state possess, and can confer on its government, we have an intelligible standard, applicable to every case to which the power may be applied. We have a principle which leaves the power of taxing the people and property of a state unimpaired; which leaves to a state the command of all its resources, and which places beyond its reach all those powers which are conferred by the people of the United States on the government of the Union, and all those means which are given for the purpose of carrying those powers into execution. We have a principle which is safe for the states, and safe for the Union. We are relieved, as we ought to be, 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. We are not driven to the perplexing inquiry, so unfit for the judicial department, what degree of taxation is the legitimate use, and what degree may amount to the abuse of the power. The attempt to use it on the means employed by the government of the Union in pursuance of the constitution is itself an abuse, because it is the usurpation of a power which the people of a single state cannot give. We find, then, on just theory, a total failure of this original right to tax the means employed by the government of the Union for the execution of its powers. The right never existed, and the question whether it has been surrendered cannot arise.

But waiving this theory for the present, let us resume the inquiry whether this power can be exercised by the respective states consistently with a fair construction of the constitution? That the power to tax involves the power to destroy; that the power to destroy may defeat and render useless the power to create; that there is a plain repugnance in conferring on one government a

power to control the constitutional measures of another, which other, with respect to those very measures, is declared to be supreme over that which exerts the control,—are propositions not to be denied. But all inconsistencies are to be reconciled by the magic of the word "confidence." Taxation, it is said, does not necessarily and unavoidably destroy. To carry it to the excess of destruction would be an abuse, to presume which would banish that confidence which is essential to all government. But is this a case of confidence? Would the people of any one state trust those of another with a power to control the most insignificant operations of their state government? We know they would not. Why, then, should we suppose that the people of any one state should be willing to trust those of another with a power to control the operations of a government to which they have confided their most important and most valuable interests? In the legislature of the Union alone are all represented. The legislature of the Union alone, therefore, can be trusted by the people with the power of controlling measures which concern all, in the confidence that it will not be abused. This, then, is not a case of confidence, and we must consider it as it really is.

If we apply the principle for which the state of Maryland contends to the constitution generally, we shall find it capable of changing totally the character of that instrument. We shall find it capable of arresting all the measures of the government, and of prostrating it at the foot of the states. The American people have declared their constitution, and the laws made in pursuance thereof, to be supreme; but this principle would transfer the supremacy, in fact, to the states. If the states may tax one instrument employed by the government in the execution of its powers, they may tax any and every other instrument. They may tax the mail; they may tax the mint; they may tax patent rights; they may tax the papers of the custom house; they may tax judicial process; they may tax all the means employed by the government, to an excess which would defeat all the ends of government. This was not intended by the American people. They did not design to make their government dependent on the states. Gentlemen say they do not claim the right to extend state taxation to these objects. They limit their pretensions to property. But on what principle is this distinction made? Those who make it have furnished no reason for it, and the principle for which they contend denies it. They contend that the power of taxation has no other limit than is found in the tenth section of the first article of

the constitution; that, with respect to everything else, the power of the states is supreme, and admits of no control. If this be true, the distinction between property and other subjects to which the power of taxation is applicable is merely arbitrary, and can never be sustained. This is not all. If the controlling power of the states be established,—if their supremacy as to taxation be acknowledged,—what is to restrain their exercising this control in any shape they may please to give it? Their sovereignty is not confined to taxation. That is not the only mode in which it might be displayed. The question is, in truth, a question of supremacy; and if the right of the states to tax the means employed by the general government be conceded, the declaration that the constitution, and the laws made in pursuance thereof, shall be the supreme law of the land, is empty and unmeaning declamation.

In the course of the argument the Federalist has been quoted, and the opinions expressed by the authors of that work have been justly supposed to be entitled to great respect in expounding the constitution. No tribute can be paid to them which exceeds their merit; but in applying their opinions to the cases which may arise in the progress of our government, a right to judge of their correctness must be retained, and, to understand the argument, we must examine the proposition it maintains, and the objections against which it is directed. The subject of those numbers from which passages have been cited is the unlimited power of taxation which is vested in the general government. The objection to this unlimited power, which the argument seeks to remove, is stated with fullness and clearness. It is "that an indefinite power of taxation in the latter (the government of the Union) might, and probably would, in time, deprive the former (the government of the states) of the means of providing for their own necessities, and would subject them entirely to the mercy of the national legislature. As the laws of the Union are to become the supreme law of the land; as it is to have power to pass all laws that may be necessary for carrying into execution the authorities with which it is proposed to vest it,—the national government might at any time abolish the taxes imposed for state objects, upon the pretense of an interference with its own. It might allege a necessity for doing this in order to give efficacy to the national revenues; and thus all the resources of taxation might, by degrees, become the subjects of federal monopoly, to the entire exclusion and destruction of the state governments."

The objections to the constitution which are noticed in these numbers were to the undefined power of the government to tax, not to the incidental privilege of exempting its own measures from state taxation. The consequences apprehended from this undefined power were that it would absorb all the objects of taxation, "to the exclusion and destruction of the state governments." The arguments of the Federalist are intended to prove the fallacy of these apprehensions; not to prove that the government was incapable of executing any of its powers, without exposing the means it employed to the embarrassments of state taxation. Arguments urged against these objections and these apprehensions are to be understood as relating to the points they mean to prove. Had the authors of those excellent essays been asked whether they contended for that construction of the constitution, which would place within the reach of the states those measures which the government might adopt for the execution of its powers, no man who has read their instructive pages will hesitate to admit that their answer must have been in the negative.

It has also been insisted that, as the power of taxation in the general and state governments is acknowledged to be concurrent, every argument which would sustain the right of the general government to tax banks chartered by the states will equally sustain the right of the states to tax banks chartered by the general government. But the two cases are not on the same reason. The people of all the states have created the general government, and have conferred upon it the general power of taxation. The people of all the states, and the states themselves, are represented in congress, and, by their representatives, exercise this power. When they tax the chartered institutions of the states, they tax their constituents; and these taxes must be uniform. But when a state taxes the operations of the government of the United States, it acts upon institutions created, not by their own constituents, but by people over whom they claim no control. It acts upon the measures of a government created by others as well as themselves, for the benefit of others in common with themselves. The difference is that which always exists, and always must exist, between the action of the whole on a part, and the action of a part on the whole,—between the laws of the government declared to be supreme, and those of a government which, when in opposition to those laws, is not supreme. But if the full application of this argument could be admitted, it might bring into question the right

of congress to tax the state banks, and could not prove the right of the states to tax the Bank of the United States.

The court has bestowed on this subject its most deliberate consideration. The result is a conviction that the states have no power, by taxation or otherwise, to retard, impede, burthen, or in any manner control the operations of the constitutional laws enacted by congress to carry into execution the powers vested in the general government. This is, we think, the unavoidable consequence of that supremacy which the constitution has declared. We are unanimously of opinion that the law passed by the legislature of Maryland, imposing a tax on the Bank of the United States, is unconstitutional and void. This opinion does not deprive the states of any resources which they originally possessed. It does not extend to a tax paid by the real property of the bank in common with the other real property within the state, nor to a tax imposed on the interest which the citizens of Maryland may hold in this institution, in common with other property of the same description throughout the state. But this is a tax on the operations of the bank, and is consequently a tax on the operation of an instrument employed by the government of the Union to carry its powers into execution. Such a tax must be unconstitutional.

JUDICIAL OPINION IN THE CASE OF COHENS AGAINST THE STATE OF VIRGINIA, IN THE SUPREME COURT OF THE UNITED STATES, 1821.

STATEMENT.

In this case the defendants had been convicted of selling lottery tickets, in violation of the laws of Virginia. They took the case to the supreme court of the United States by a writ or error under the twenty-fifth section of the judiciary act of 1789. In that court it was claimed by counsel for Virginia that the state court had exclusive jurisdiction of the case, and a motion was made to dismiss the case for want of jurisdiction. The motion was supported by Philip P. Barbour (afterwards associate justice of the supreme court) and William Smyth; William Pinkney and D. B. Ogden opposing. The motion was denied in the following opinion. At the subsequent hearing of the case upon its merits, the conviction was sustained on the ground that the act of congress establishing a lottery in the District of Columbia, under which the defendants justified their acts, did not authorize a violation of the criminal laws of Virginia.[1]

OPINION.

This is a writ of error to a judgment rendered in the court of hustings for the borough of Norfolk, on an information for selling lottery tickets, contrary to an act of the legislature of Virginia. In the state court the defendant claimed the protection of an act of congress. A case was agreed between the parties, which states the act of assembly on which the prosecution was founded, and the act of congress on which the defendant relied, and concludes in these words: "If, upon this case, the court shall be of opinion that the acts of congress before mentioned were valid, and, on the true construction of those acts, the lottery tickets sold by the defendants as aforesaid might lawfully be sold within the state of Virginia, notwithstanding the act or statute of the general assembly of Virginia prohibiting such sale, then judgment to be entered for the defendants; and if the court should be of opinion that the statute or act of the general assembly of the state of Virginia, prohibiting such sale, is valid, notwithstanding the said acts of congress, then judgment to be entered that the defendants are guilty, and that the commonwealth recover against them one hundred dollars and costs." Judgment was rendered against the defendants; and the court in which it was rendered being the highest court in the state in which the cause was cog-

[1] 4 Wheaton, 375, 440.

nizable, the record has been brought into this court by writ of error. The defendant in error moved to dismiss this writ, for want of jurisdiction. In support of this motion, three points have been made, and argued with the ability which the importance of the question merits. These points are: (1) That a state is a defendant. (2) That no writ of error lies from this court to a state court. (3) The third point has been presented in different forms by the gentlemen who have argued it. The counsel who opened the cause said that the want of jurisdiction was shown by the subject-matter of the case. The counsel who followed him said that jurisdiction was not given by the judiciary act. The court has bestowed all its attention on the arguments of both gentlemen, and supposes that their tendency is to show that this court has no jurisdiction of the case, or, in other words, has no right to review the judgment of the state court, because neither the constitution nor any law of the United States has been violated by that judgment.

The questions presented to the court by the first two points made at the bar are of great magnitude, and may be truly said vitally to affect the Union. They exclude the inquiry whether the constitution and laws of the United States have been violated by the judgment which the plaintiffs in error seek to review, and maintain that, admitting such violation, it is not in the power of the government to apply a corrective. They maintain that the nation does not possess a department capable of restraining peaceably, and by authority of law, any attempts which may be made by a part against the legitimate powers of the whole, and that the government is reduced to the alternative of submitting to such attempts, or of resisting them by force. They maintain that the constitution of the United States has provided no tribunal for the final construction of itself, or of the laws or treaties of the nation, but that this power may be exercised in the last resort by the courts of every state in the Union; that the constitution, laws, and treaties may receive as many constructions as there are states: and that this is not a mischief, or, if a mischief, is irremediable. These abstract propositions are to be determined; for he who demands decision without permitting inquiry affirms that the decision he asks does not depend on inquiry. If such be the constitution, it is the duty of the court to bow with respectful submission to its provisions. If such be not the constitution, it is equally the duty of this court to say so, and to perform that task which the American people have assigned to the judicial department.

(1) The first question to be considered is whether the jurisdiction of this court is excluded by the character of the parties, one of them being a state, and the other a citizen of that state. The second section of the third article of the constitution defines the extent of the judicial power of the United States. Jurisdiction is given to the courts of the Union in two classes of cases. In the first, their jurisdiction depends on the character of the cause, whoever may be the parties. This class comprehends "all cases in law and equity arising under this constitution, the laws of the United States, and treaties made, or which shall be made, under their authority." This clause extends the jurisdiction of the court to all the cases described, without making, in its terms, any exception whatever, and without any regard to the condition of the party. If there be any exception, it is to be implied against the express words of the article. In the second class, the jurisdiction depends entirely on the character of the parties. In this are comprehended "controversies between two or more states, between a state and citizens of another state," "and between a state and foreign states, citizens, or subjects." If these be the parties, it is entirely unimportant what may be the subject of controversy. Be it what it may, these parties have a constitutional right to come into the courts of the Union.

The counsel for the defendant in error have stated that the cases which arise under the constitution must grow out of those provisions which are capable of self-execution, examples of which are to be found in the second section of the fourth article, and in the tenth section of the first article. A case which arises under a law of the United States must, we are likewise told, be a right given by some act which becomes necessary to execute the power given in the constitution, of which the law of naturalization is mentioned as an example. The use intended to be made of this exposition of the first part of the section, defining the extent of the judicial power, is not clearly understood. If the intention be merely to distinguish cases arising under the constitution from those arising under a law, for the sake of precision in the application of this argument, these propositions will not be controverted. If it be to maintain that a case arising under the constitution or a law must be one in which a party comes into court to demand something conferred on him by the constitution or a law, we think the construction too narrow. A case in law or equity consists of the right of the one party, as well as of the other, and may truly be said to arise under the constitution or a law of the

United States, whenever its correct decision depends on the construction of either. Congress seems to have intended to give its own construction of this part of the constitution in the twenty-fifth section of the judiciary act, and we perceive no reason to depart from that construction. The jurisdiction of the court, then, being extended by the letter of the constitution to all cases arising under it, or under the laws of the United States, it follows that those who would withdraw any case of this description from that jurisdiction must sustain the exemption they claim on the spirit and true meaning of the constitution, which spirit and true meaning must be so apparent as to overrule the words which its framers have employed. The counsel for the defendant in error have undertaken to do this, and have laid down the general proposition that a sovereign, independent state is not suable, except by its own consent. This general proposition will not be controverted. But its consent is not requisite in each particular case. It may be given in a general law. And if a state has surrendered any portion of its sovereignty, the question whether a liability to suit be a part of this portion depends on the instrument by which the surrender is made. If, upon a just construction of that instrument, it shall appear that the state has submitted to be sued, then it has parted with this sovereign right of judging in every case on the justice of its own pretensions, and has intrusted that power to a tribunal in whose impartiality it confides.

The American states, as well as the American people, have believed a close and firm union to be essential to their liberty and to their happiness. They have been taught by experience that this Union cannot exist without a government for the whole; and they have been taught by the same experience that this government would be a mere shadow, that must disappoint all their hopes, unless invested with large portions of that sovereignty which belongs to independent states. Under the influence of this opinion, and thus instructed by experience, the American people, in the conventions of their respective states, adopted the present constitution. If it could be doubted whether, from its nature, it were not supreme in all cases where it is empowered to act, that doubt would be removed by the declaration that "this constitution, and the laws of the United States which shall be made in pursuance thereof, and all treaties made, or which shall be made, under the authority of the United States, shall be the supreme law of the land; and the judges in every state shall be bound thereby, anything in the constitution or laws of any state to the contrary not-

withstanding." This is the authoritative language of the American people, and, if gentlemen please, of the American states. It marks, with lines too strong to be mistaken, the characteristic distinction between the government of the Union and those of the states. The general government, though limited as to its objects, is supreme with respect to those objects. This principle is a part of the constitution, and, if there be any who deny its necessity, none can deny its authority. To this supreme government ample powers are confided; and if it were possible to doubt the great purposes for which they were so confided, the people of the United States have declared that they are given "in order to form a more perfect union, establish justice, insure domestic tranquillity, provide for the common defense, promote the general welfare, and secure the blessings of liberty to themselves and their posterity." With the ample powers confided to this supreme government for these interesting purposes are connected many express and important limitations on the sovereignty of the states, which are made for the same purposes. The powers of the Union on the great subjects of war, peace, and commerce, and on many others, are in themselves limitations of the sovereignty of the states; but in addition to these, the sovereignty of the states is surrendered in many instances where the surrender can only operate to the benefit of the people, and where, perhaps, no other power is conferred on congress than a conservative power to maintain the principles established in the constitution. The maintenance of these principles in their purity is certainly among the great duties of the government. One of the instruments by which this duty may be peaceably performed is the judicial department. It is authorized to decide all cases of every description arising under the constitution or laws of the United States. From this general grant of jurisdiction, no exception is made of those cases in which a state may be a party. When we consider the situation of the government of the Union and of a state in relation to each other, the nature of our constitution, the subordination of the state governments to that constitution, the great purpose for which jurisdiction over all cases arising under the constitution and laws of the United States is confided to the judicial department, are we at liberty to insert in this general grant an exception of those cases in which a state may be a party? Will the spirit of the constitution justify this attempt to control its words? We think it will not. We think a case arising under the constitution or laws of the United States is cognizable in the courts of the Union,

whoever may be the parties to that case. Had any doubt existed with respect to the just construction of this part of the section, that doubt would have been removed by the enumeration of those cases to which the jurisdiction of the federal courts is extended in consequence of the character of the parties. In that enumeration we find "controversies between two or more states, between a state and citizens of another state," "and between a state and foreign states, citizens, or subjects." One of the express objects, then, for which the judicial department was established, is the decision of controversies between states and between a state and individuals. The mere circumstance that a state is a party gives jurisdiction to the court. How, then, can it be contended that the very same instrument, in the very same section, should be so construed as that this same circumstance should withdraw a case from the jurisdiction of the court, where the constitution or laws of the United States are supposed to have been violated? The constitution gave to every person having a claim upon a state a right to submit his case to the court of the nation. However unimportant his claim might be,—however little the community might be interested in its decision,—the framers of our constitution thought it necessary, for the purposes of justice, to provide a tribunal as superior to influence as possible, in which that claim might be decided. Can it be imagined that the same persons considered a case involving the constitution of our country and the majesty of the laws—questions in which every American citizen must be deeply interested—as withdrawn from this tribunal because a state is a party?

While weighing arguments drawn from the nature of government, and from the general spirit of an instrument, and urged for the purpose of narrowing the construction which the words of that instrument seem to require, it is proper to place in the opposite scale those principles, drawn from the same sources, which go to sustain the words in their full operation and natural import. One of these, which has been pressed with great force by the counsel for the plaintiffs in error, is that the judicial power of every well-constituted government must be coextensive with the legislative, and must be capable of deciding every judicial question which grows out of the constitution and laws. If any proposition may be considered as a political axiom, this, we think, may be so considered. In reasoning upon it as an abstract question there would, probably, exist no contrariety of opinion respecting it. Every argument proving the necessity of the department

proves also the propriety of giving this extent to it. We do not mean to say that the jurisdiction of the courts of the Union should be construed to be coextensive with the legislative, merely because it is fit that it should be so; but we mean to say that this fitness furnishes an argument in construing the constitution which ought never to be overlooked, and which is most especially entitled to consideration when we are inquiring whether the words of the instrument which purport to establish this principle shall be contracted for the purpose of destroying it.

The mischievous consequences of the construction contended for on the part of Virginia are also entitled to great consideration. It would prostrate, it has been said, the government and its laws at the feet of every state in the Union. And would not this be its effect? What power of the government could be executed by its own means in any state disposed to resist its execution by a course of legislation? The laws must be executed by individuals acting within the several states. If these individuals may be exposed to penalties, and if the courts of the Union cannot correct the judgments by which these penalties may be enforced, the course of the government may be at any time arrested by the will of one of its members. Each member will possess a veto on the will of the whole. The answer which has been given to this argument does not deny its truth, but insists that confidence is reposed, and may be safely reposed, in the state institutions, and that, if they shall ever become so insane or so wicked as to seek the destruction of the government, they may accomplish their object by refusing to perform the functions assigned to them.

We readily concur with the counsel for the defendant in the declaration that the cases which have been put of direct legislative resistance for the purpose of opposing the acknowledged powers of the government are extreme cases, and in the hope that they will never occur; but we cannot help believing that a general conviction of the total incapacity of the government to protect itself and its laws in such cases would contribute in no inconsiderable degree to their occurrence. Let it be admitted that the cases which have been put are extreme and improbable, yet there are gradations of opposition to the laws, far short of those cases, which might have a baneful influence on the affairs of the nation. Different states may entertain different opinions on the true construction of the constitutional powers of congress. We know that at one time the assumption of the debts contracted by the several states during the war of our Revolution was deemed unconstitu-

tional by some of them. We know, too, at other times, certain taxes, imposed by congress, have been pronounced unconstitutional. Other laws have been questioned partially, while they were supported by the great majority of the American people. We have no assurance that we shall be less divided than we have been. States may legislate in conformity to their opinions, and may enforce those opinions by penalties. It would be hazarding too much to assert that the judicatures of the states will be exempt from the prejudices by which the legislatures and people are influenced, and will constitute perfectly impartial tribunals. In many states the judges are dependent for office and for salary on the will of the legislature. The constitution of the United States furnishes no security against the universal adoption of this principle. When we observe the importance which that constitution attaches to the independence of judges, we are the less inclined to suppose that it can have intended to leave these constitutional questions to tribunals where this independence may not exist, in all cases where a state shall prosecute an individual who claims the protection of an act of congress. These prosecutions may take place even without a legislative act. A person making a seizure under an act of congress may be indicted as a trespasser, if force has been employed, and of this a jury may judge. How extensive may be the mischief if the first decisions in such cases should be final! These collisions may take place in times of no extraordinary commotion. But a constitution is framed for ages to come, and is designed to approach immortality as nearly as human institutions can approach it. Its course cannot always be tranquil. It is exposed to storms and tempests, and its framers must be unwise statesmen indeed if they have not provided it, as far as its nature will permit, with the means of self-preservation from the perils it may be destined to encounter. No government ought to be so defective in its organization as not to contain within itself the means of securing the execution of its own laws against other dangers than those which occur every day. Courts of justice are the means most usually employed; and it is reasonable to expect that a government should repose on its own courts, rather than on others. There is certainly nothing in the circumstances under which our constitution was formed—nothing in the history of the times—which would justify the opinion that the confidence reposed in the states was so implicit as to leave in them and their tribunals the power of resisting or defeating, in the form of law, the legitimate measures of the Union. The requisitions of congress,

under the confederation, were as constitutionally obligatory as the laws enacted by the present congress. That they were habitually disregarded is a fact of universal notoriety. With the knowledge of this fact, and under its full pressure, a convention was assembled to change the system. Is it so improbable that they should confer on the judicial department the power of construing the constitution and laws of the Union in every case, in the last resort, and of preserving them from all violation from every quarter, so far as judicial decisions can preserve them, that this improbability should essentially affect the construction of the new system?

We are told, and we are truly told, that the great change which is to give efficacy to the present system is its ability to act on individuals directly, instead of acting through the instrumentality of state governments. But ought not this ability, in reason and sound policy, to be applied directly to the protection of individuals employed in the execution of the laws, as well as to their coercion. Your laws reach the individual without the aid of any other power. Why may they not protect him from punishment for performing his duty in executing them? The counsel for Virginia endeavor to obviate the force of these arguments by saying that the dangers they suggest, if not imaginary, are inevitable; that the constitution can make no provision against them; and that, therefore, in construing that instrument, they ought to be excluded from our consideration. This state of things, they say, cannot arise until there shall be a disposition so hostile to the present political system as to produce a determination to destroy it, and, when that determination shall be produced, its effects will not be restrained by parchment stipulations. The fate of the constitution will not then depend on judicial decisions. But, should no appeal be made to force, the states can put an end to the government by refusing to act. They have only not to elect senators, and it expires without a struggle. It is very true that, whenever hostility to the existing system shall become universal, it will be also irresistible. The people made the constitution, and the people can unmake it. It is the creature of their will, and lives only by their will. But this supreme and irresistible power to make or to unmake resides only in the whole body of the people,—not in any subdivision of them. The attempt of any of the parts to exercise it is usurpation, and ought to be repelled by those to whom the people have delegated their power

of repelling it. The acknowledged inability of the government, then, to sustain itself against the public will, and by force or otherwise to control the whole nation, is no sound argument in support of its constitutional inability to preserve itself against a section of the nation acting in opposition to the general will. It is true that, if all the states, or a majority of them, refuse to elect senators, the legislative powers of the Union will be suspended. But if any one state shall refuse to elect them, the senate will not, on that account, be the less capable of performing all its functions. The argument founded on this fact would seem rather to prove the subordination of the parts to the whole than the complete independence of any one of them. The framers of the constitution were, indeed, unable to make any provisions which should protect that instrument against a general combination of the states, or of the people, for its destruction, and, conscious of this inability, they have not made the attempt. But they were able to provide against the operations of measures adopted in any one state, whose tendency might be to arrest the execution of the laws, and this it was the part of true wisdom to attempt. We think they have attempted it.

It has been also urged, as an additional objection to the jurisdiction of the court, that cases between a state and one of its own citizens do not come within the general scope of the constitution, and were obviously never intended to be made cognizable in the federal courts. The state tribunals might be suspected of partiality in cases between itself or its citizens and aliens, or the citizens of another state, but not in proceedings by a state against its own citizens. That jealousy which might exist in the first case could not exist in the last, and therefore the judicial power is not extended to the last. This is very true, so far as jurisdiction depends on the character of the parties; and the argument would have great force if urged to prove that this court could not establish the demand of a citizen upon his state, but is not entitled to the same force when urged to prove that this court cannot inquire whether the constitution or laws of the United States protect a citizen from a prosecution instituted against him by a state. If jurisdiction depended entirely on the character of the parties, and was not given where the parties have not an original right to come into court, that part of the second section of the third article which extends the judicial power to all cases arising under the constitution and laws of the United States would be mere surplusage. It is to give jurisdiction where the character of the parties would not give it that

this very important part of the clause was inserted. It may be true that the partiality of the state tribunals, in ordinary controversies between a state and its citizens, was not apprehended, and therefore the judicial power of the Union was not extended to such cases; but this was not the sole nor the greatest object for which this department was created. A more important —a much more interesting—object was the preservation of the constitution and laws of the United States, so far as they can be preserved by judicial authority, and therefore the jurisdiction of the courts of the Union was expressly extended to all cases arising under that constitution and those laws. If the constitution or laws may be violated by proceedings instituted by a state against its own citizens, and if that violation may be such as essentially to affect the constitution and the laws, such as to arrest the progress of government in its constitutional course, why should these cases be excepted from that provision which expressly extends the judicial power of the Union to all cases arising under the constitution and laws?

After bestowing on this subject the most attentive consideration, the court can perceive no reason founded on the character of the parties for introducing an exception which the constitution has not made; and we think that the judicial power, as originally given, extends to all cases arising under the constitution or a law of the United States, whoever may be the parties. It has been also contended that this jurisdiction, if given, is original, and cannot be exercised in the appellate form. The words of the constitution are: "In all cases affecting ambassadors, other public ministers, and consuls, and those in which a state shall be a party, the supreme court shall have original jurisdiction. In all the other cases before mentioned, the supreme court shall have appellate jurisdiction." This distinction between original and appellate jurisdiction excludes, we are told, in all cases, the exercise of the one where the other is given. The constitution gives the supreme court original jurisdiction in certain enumerated cases, and it gives it appellate jurisdiction in all others. Among those in which jurisdiction must be exercised in the appellate form are cases arising under the constitution and laws of the United States. These provisions of the constitution are equally obligatory, and are to be equally respected. If a state be a party, the jurisdiction of this court is original; if the case arise under a constitution or a law, the jurisdiction is appellate. But a case to which a state is a party may arise under the constitution or a law of the United States. What rule is applicable to such a

case? What, then, becomes the duty of the court? Certainly, we think, so to construe the constitution as to give effect to both provisions, as far as it is possible to reconcile them, and not to permit their seeming repugnancy to destroy each other. We must endeavor so to construe them as to preserve the true intent and meaning of the instrument.

In one description of cases, the jurisdiction of the court is founded entirely on the character of the parties, and the nature of the controversy is not contemplated by the constitution. The character of the parties is everything; the nature of the case nothing. In the other description of cases, the jurisdiction is founded entirely on the character of the case, and the parties are not contemplated by the constitution. In these, the nature of the case is everything; the character of the parties nothing. When, then, the constitution declares the jurisdiction, in cases where a state shall be a party, to be original, and in all cases arising under the constitution or a law, to be appellate, the conclusion seems irresistible that its framers designed to include in the first class those cases in which jurisdiction is given because a state is a party, and to include in the second those in which jurisdiction is given because the case arises under the constitution or a law. This reasonable construction is rendered necessary by other considerations.

That the constitution or a law of the United States is involved in a case, and makes a part of it, may appear in the progress of a cause, in which the courts of the Union, but for that circumstance, would have no jurisdiction, and which, of consequence, could not originate in the supreme court. In such a case the jurisdiction can be exercised only in its appellate form. To deny its exercise in this form is to deny its existence, and would be to construe a clause dividing the power of the supreme court in such manner as in a considerable degree to defeat the power itself. All must perceive that this construction can be justified only where it is absolutely necessary. We do not think the article under consideration presents that necessity. It is observable that, in this distributive clause, no negative words are introduced. This observation is not made for the purpose of contending that the legislature may "apportion the judicial power between the supreme and inferior courts, according to its will." That would be, as was said by this court in the case of Marbury v. Madison, to render the distributive clause "mere surplusage," —to make it "form without substance." This cannot, therefore, be the true construction of the article. But although the ab-

sence of negative words will not authorize the legislature to disregard the distribution of the power previously granted, their absence will justify a sound construction of the whole article, so as to give every part its intended effect. It is admitted that "affirmative words are often, in their operation, negative of other objects than those affirmed," and that, where "a negative or exclusive sense must be given to them, or they have no operation at all," they must receive that negative or exclusive sense. But where they have full operation without it,—where it would destroy some of the most important objects for which the power was created,—then we think affirmative words ought not to be construed negatively.

The constitution declares that, in cases where a state is a party, the supreme court shall have original jurisdiction, but does not say that its appellate jurisdiction shall not be exercised in cases where, from their nature, appellate jurisdiction is given, whether a state be or be not a party. It may be conceded that, where the case is of such a nature as to admit of its originating in the supreme court, it ought to originate there; but where, from its nature, it cannot originate in that court, these words ought not to be so construed as to require it. There are many cases in which it would be found extremely difficult and subversive of the spirit of the constitution to maintain the construction that appellate jurisdiction cannot be exercised where one of the parties might sue or be sued in this court.

The constitution defines the jurisdiction of the supreme court, but does not define that of the inferior courts. Can it be affirmed that a state might not sue the citizen of another state in a circuit court? Should the circuit court decide for or against its jurisdiction,—should it dismiss the suit, or give judgment against the state,—might not its decision be revised in the supreme court? The argument is that it could not; and the very clause which is urged to prove that the circuit court could give no judgment in the case is also urged to prove that its judgment is irreversible. A supervising court, whose peculiar province is to correct the errors of an inferior court, has no power to correct a judgment given without jurisdiction, because, in the same case, that supervising court has original jurisdiction. Had negative words been employed, it would be difficult to give them this construction if they would admit of any other; but, without negative words, this irrational construction can never be maintained. So, too, in the same clause, the jurisdiction of the court

is declared to be original "in cases affecting ambassadors, other public ministers, and consuls." There is, perhaps, no part of the article under consideration so much required by national policy as this, unless it be that part which extends the judicial power "to all cases arising under the constitution, laws, and treaties of the United States." It has been generally held that the state courts have a concurrent jurisdiction with the federal courts in cases to which the judicial power is extended, unless the jurisdiction of the federal courts be rendered exclusive by the words of the third article. If the words, "to all cases," give exclusive jurisdiction in cases affecting foreign ministers, they may also give exclusive jurisdiction, if such be the will of congress, in cases arising under the constitution, laws, and treaties of the United States. Now, suppose an individual were to sue a foreign minister in a state court, and that court were to maintain its jurisdiction, and render judgment against the minister, could it be contended that this court would be incapable of revising such judgment because the constitution had given it original jurisdiction in the case? If this could be maintained, then a clause inserted for the purpose of excluding the jurisdiction of all other courts than this in a particular case would have the effect of excluding the jurisdiction of this court in that very case, if the suit were to be brought in another court, and that court were to assert jurisdiction. This tribunal, according to the argument which has been urged, could neither revise the judgment of such other court nor suspend its proceedings, for a writ of prohibition, or any other similar writ, is in the nature of appellate process.

Foreign consuls frequently assert, in our prize courts, the claims of their fellow subjects. These suits are maintained by them as consuls. The appellate power of this court has been frequently exercised in such cases, and has never been questioned. It would be extremely mischievous to withhold its exercise. Yet the consul is a party on the record. The truth is that, where the words confer only appellate jurisdiction, original jurisdiction is most clearly not given; but where the words admit of appellate jurisdiction, the power to take cognizance of the suit originally does not necessarily negative the power to decide upon it on an appeal, if it may originate in a different court. It is, we think, apparent that to give this distributive clause the interpretation contended for—to give to its affirmative words a negative operation in every possible case—would, in some instances, defeat the

obvious intention of the article. Such an interpretation would not consist with those rules which, from time immemorial, have guided courts in their construction of instruments brought under their consideration. It must therefore be discarded. Every part of the article must be taken into view, and that construction adopted which will consist with its words, and promote its general intention. The court may imply a negative from affirmative words, where the implication promotes, not where it defeats, the intention. If we apply this principle, the correctness of which we believe will not be controverted, to the distributive clause under consideration, the result, we think, would be this: The original jurisdiction of the supreme court, in cases where a state is a party, refers to those cases in which, according to the grant of power made in the preceding clause, jurisdiction might be exercised in consequence of the character of the party, and an original suit might be instituted in any of the federal courts; not to those cases in which an original suit might not be instituted in a federal court. Of the last description is every case between a state and its citizens, and, perhaps, every case in which a state is enforcing its penal laws. In such cases, therefore, the supreme court cannot take original jurisdiction. In every other case—that is, in every case to which the judicial power extends, and in which original jurisdiction is not expressly given—that judicial power shall be exercised in the appellate, and only in the appellate, form. The original jurisdiction of this court cannot be enlarged, but its appellate jurisdiction may be exercised in every case cognizable under the third article of the constitution, in the federal courts in which original jurisdiction cannot be exercised; and the extent of this judicial power is to be measured, not by giving the affirmative words of the distributive clause a negative operation in every possible case, but by giving their true meaning to the words which define its extent.

The counsel for the defendant in error urge, in opposition to this rule of construction, some *dicta* of the court in the case of Marbury v. Madison. It is a maxim not to be disregarded that general expressions, in every opinion, are to be taken in connection with the case in which those expressions are used. If they go beyond the case, they may be respected, but ought not to control the judgment in a subsequent suit when the very point is presented for decision. The reason of this maxim is obvious. The question actually before the court is investigated with care, and considered in its full extent. Other principles which may serve to illustrate it are considered in their relation to the case

decided, but their possible bearing on all other cases is seldom completely investigated. In the case of Marbury v. Madison, the single question before the court, so far as that case can be applied to this, was whether the legislature could give this court original jurisdiction in a case in which the constitution had clearly not given it, and in which no doubt respecting the construction of the article could possibly be raised. The court decided, and we think very properly, that the legislature could not give original jurisdiction in such a case. But in the reasoning of the court in support of this decision some expressions are used which go far beyond it. The counsel for Marbury had insisted on the unlimited discretion of the legislature in the apportionment of the judicial power; and it is against this argument that the reasoning of the court is directed. They say that, if such had been the intention of the article, "it would certainly have been useless to proceed farther than to define the judicial power, and the tribunals in which it should be vested." The court says that such a construction would render the clause dividing the jurisdiction of the court into original and appellate totally useless; that "affirmative words are often, in their operation, negative of other objects than those which are affirmed; and, in this case [in the case of Marbury v. Madison], a negative or exclusive sense must be given to them, or they have no operation at all." "It cannot be presumed," adds the court, "that any clause in the constitution is intended to be without effect, and therefore such a construction is inadmissible, unless the words require it." The whole reasoning of the court proceeds upon the idea that the affirmative words of the clause giving one sort of jurisdiction must imply a negative of any other sort of jurisdiction, because otherwise the words would be totally inoperative, and this reasoning is advanced in a case to which it was strictly applicable. If in that case original jurisdiction could have been exercised, the clause under consideration would have been entirely useless. Having such cases only in its view, the court lays down a principle which is generally correct, in terms much broader than the decision, and not only much broader than the reasoning with which that decision is supported, but in some instances contradictory to its principle. The reasoning sustains the negative operation of the words in that case, because otherwise the clause would have no meaning whatever, and because such operation was necessary to give effect to the intention of the article. The effort now made is to apply the conclusion to which the court was conducted by that reasoning in the particular case to one in which the words

have their full operation when understood affirmatively, and in which the negative or exclusive sense is to be so used as to defeat some of the great objects of the article. To this construction the court cannot give assent. The general expressions in the case of Marbury v. Madison must be understood with the limitations which are given to them in this opinion,—limitations which in no degree affect the decision in that case, or the tenor of its reasoning. The counsel who closed the argument put several cases, for the purpose of illustration, which he supposed to arise under the constitution, and yet to be, apparently, without the jurisdiction of the court. Were a state to lay a duty on exports, to collect the money and place it in her treasury, could the citizen who paid it, he asks, maintain a suit in this court against such state to recover back the money? Perhaps not. Without, however, deciding such supposed case, we may say that it is entirely unlike that under consideration. The citizen who has paid his money to his state under a law that is void is in the same situation with every other person who has paid money by mistake. The law raises an *assumpsit* to return the money, and it is upon that *assumpsit* that the action is to be maintained. To refuse to comply with this *assumpsit* may be no more a violation of the constitution than to refuse to comply with any other; and as the federal courts never had jurisdiction over contracts between a state and its citizens, they may have none over this. But let us so vary the supposed case as to give it a real resemblance to that under consideration. Suppose a citizen to refuse to pay this export duty, and a suit to be instituted for the purpose of compelling him to pay it. He pleads the constitution of the United States in bar of the action, notwithstanding which the court gives judgment against him. This would be a case arising under the constitution, and would be the very case now before the court. We are also asked, if a state should confiscate property secured by a treaty, whether the individual could maintain an action for that property. If the property confiscated be debts, our own experience informs us that the remedy of the creditor against his debtor remains. If it be land which is secured by a treaty, and afterwards confiscated by a state, the argument does not assume that this title, thus secured, could be extinguished by an act of confiscation. The injured party, therefore, has his remedy against the occupant of the land for that which the treaty secures to him; not against the state for money which is not secured to him. The case of a state which pays off its own debts with paper money no more resembles this than do

those to which we have already adverted. The courts have no jurisdiction over the contract. They cannot enforce it, nor judge of its violation. Let it be that the act discharging the debt is a mere nullity, and that it is still due. Yet the federal courts have no cognizance of the case. But suppose a state to institute proceedings against an individual, which depended on the validity of an act emitting bills of credit; suppose a state to prosecute one of its citizens for refusing paper money, who should plead the constitution in bar of such prosecution. If his plea should be overruled, and judgment rendered against him, his case would resemble this; and, unless the jurisdiction of this court might be exercised over it, the constitution would be violated, and the injured party be unable to bring his case before that tribunal to which the people of the United States have assigned all such cases.

It is most true that this court will not take jurisdiction if it should not; but it is equally true that it must take jurisdiction if it should. The judiciary cannot, as the legislature may, avoid a measure because it approaches the confines of the constitution. We cannot pass it by because it is doubtful. With whatever doubts, with whatever difficulties, a case may be attended, we must decide it if it be brought before us. We have no more right to decline the exercise of jurisdiction which is given than to usurp that which is not given. The one or the other would be treason to the constitution. Questions may occur which we would gladly avoid; but we cannot avoid them. All we can do is to exercise our best judgment, and conscientiously to perform our duty. In doing this on the present occasion we find this tribunal invested with appellate jurisdiction in all cases arising under the constitution and laws of the United States. We find no exception to this grant, and we cannot insert one.

To escape the operation of these comprehensive words, the counsel for the defendant has mentioned instances in which the constitution might be violated without giving jurisdiction to this court. These words, therefore, however universal in their expression, must, he contends, be limited and controlled in their construction by circumstances. One of these instances is the grant by a state of a patent of nobility. The court, he says, cannot annul this grant. This may be very true, but by no means justifies the inference drawn from it. The article does not extend the judicial power to every violation of the constitution which may possibly take place, but to "a case in law or equity,"

in which a right, under such law, is asserted in a court of justice. If the question cannot be brought into a court, then there is no case in law or equity, and no jurisdiction is given by the words of the article. But if, in any controversy depending in a court, the cause should depend on the validity of such a law, that would be a case arising under the constitution, to which the judicial power of the United States would extend. The same observation applies to the other instances with which the counsel who opened the cause has illustrated this argument. Although they show that there may be violations of the constitution, of which the courts can take no cognizance, they do not show that an interpretation more restrictive than the words themselves import ought to be given to this article. They do not show that there can be "a case in law or equity," arising under the constitution, to which the judicial power does not extend. We think, then, that, as the constitution originally stood, the appellate jurisdiction of this court, in all cases arising under the constitution, laws, or treaties of the United States, was not arrested by the circumstance that a state was a party.

This leads to a consideration of the eleventh amendment. It is in these words: "The judicial power of the United States shall not be construed to extend to any suit in law or equity commenced or prosecuted against one of the United States, by citizens of another state, or by citizens or subjects of any foreign state."

It is a part of our history that, at the adoption of the constitution, all the states were greatly indebted; and the apprehension that these debts might be prosecuted in the federal courts formed a very serious objection to that instrument. Suits were instituted, and the court maintained its jurisdiction. The alarm was general, and, to quiet the apprehensions that were so extensively entertained, this amendment was proposed in congress, and adopted by the state legislatures. That its motive was not to maintain the sovereignty of a state from the degradation supposed to attend a compulsory appearance before the tribunal of the nation may be inferred from the terms of the amendment. It does not comprehend controversies between two or more states, or between a state and a foreign state. The jurisdiction of the court still extends to these cases, and in these a state may still be sued. We must ascribe the amendment, then, to some other cause than the dignity of a state. There is no difficulty in finding this cause. Those who were inhibited from com-

mencing a suit against a state, or from prosecuting one which might be commenced before the adoption of the amendment, were persons who might probably be its creditors. There was not much reason to fear that foreign or sister states would be creditors to any considerable amount, and there was reason to retain the jurisdiction of the court in those cases, because it might be essential to the preservation of peace. The amendment, therefore, extended to suits commenced or prosecuted by individuals, but not to those brought by states.

The first impression made on the mind by this amendment is that it was intended for those cases, and for those only, in which some demand against a state is made by an individual in the courts of the Union. If we consider the causes to which it is to be traced, we are conducted to the same conclusion. A general interest might well be felt in leaving to a state the full power of consulting its convenience in the adjustment of its debts, or of other claims upon it; but no interest could be felt in so changing the relations between the whole and its parts as to strip the government of the means of protecting, by the instrumentality of its courts, the constitution and laws from active violation. The words of the amendment appear to the court to justify and require this construction. The judicial power is not "to extend to any suit in law or equity commenced or prosecuted against one of the United States by citizens of another state," etc. What is a suit? We understand it to be the prosecution or pursuit of some claim, demand, or request. In law language, it is the prosecution of some demand in a court of justice. The remedy for every species of wrong is, says Judge Blackstone, "the being put in possession of that right whereof the party injured is deprived." "The instruments whereby this remedy is obtained are a diversity of suits and actions, which are defined by the Mirror to be 'the lawful demand of one's right.' Or, as Bracton and Fleta express it, in the words of Justinian, *'jus prosequendi in judicio quod alicui debetur.'*" Blackstone then proceeds to describe every species of remedy by suit, and they are all cases where the party suing claims to obtain something to which he has a right. To commence a suit is to demand something by the institution of process in a court of justice; and to prosecute the suit is, according to the common acceptation of language, to continue that demand. By a suit commenced by an individual against a state, we should understand process sued out by that individual against the state, for the purpose of establishing some

claim against it by the judgment of a court; and the prosecution of that suit is its continuance. Whatever may be the stages of its progress, the actor is still the same. Suits had been commenced in the supreme court against some of the states before this amendment was introduced into congress, and others might be commenced before it should be adopted by the state legislatures, and might be depending at the time of its adoption. The object of the amendment was not only to prevent the commencement of future suits, but to arrest the prosecution of those which might be commenced when this article should form a part of the constitution. It therefore embraces both objects; and its meaning is that the judicial power shall not be construed to extend to any suit which may be commenced, or which, if already commenced, may be prosecuted against a state by the citizen of another state. If a suit brought in one court, and carried by legal process to a supervising court, be a continuation of the same suit, then this suit is not commenced nor prosecuted against a state. It is clearly in its commencement the suit of a state against an individual, which suit is transferred to this court, not for the purpose of asserting any claim against the state, but for the purpose of asserting a constitutional defense against a claim made by a state.

A writ of error is defined to be a commission by which the judges of one court are authorized to examine a record upon which a judgment was given in another court, and, on such examination, to affirm or reverse the same, according to law. If, says my Lord Coke, by the writ of error, the plaintiff may recover, or be restored to anything, it may be released by the name of an action. In Bacon's Abridgment[1] it is laid down that "where, by a writ of error, the plaintiff shall recover, or be restored to any personal thing, as debt, damage, or the like, a release of all actions personal is a good plea, and, when land is to be recovered or restored in a writ of error, a release of actions real is a good bar; but where, by a writ of error, the plaintiff shall not be restored to any personal or real thing, a release of all actions, real or personal, is no bar." And for this we have the authority of Lord Coke, both in his Commentary on Littleton and in his Reports. A writ of error, then, is in the nature of a suit or action when it is to restore the party who obtains it to the possession of anything which is withheld from him, not when its operation is entirely defensive. This rule will apply to writs of error from the courts of the United States, as well as to those writs

[1] Tit. "Error" (L).

in England. Under the judiciary act, the effect of a writ of error is simply to bring the record into court, and submit the judgment of the inferior tribunal to re-examination. It does not in any manner act upon the parties; it acts only on the record. It removes the record into the supervising tribunal. Where, then, a state obtains a judgment against an individual, and the court rendering such judgment overrules a defense set up under the constitution or laws of the United States, the transfer of this record into the supreme court for the sole purpose of inquiring whether the judgment violates the constitution or laws of the United States can with no propriety, we think, be denominated a suit commenced or prosecuted against the state whose judgment is so far re-examined. Nothing is demanded from the state. No claim against it of any description is asserted or prosecuted. The party is not to be restored to the possession of anything. Essentially, it is an appeal on a single point; and the defendant who appeals from a judgment rendered against him is never said to commence or prosecute a suit against the plaintiff who has obtained the judgment. The writ of error is given, rather than an appeal, because it is the more usual mode of removing suits at common law, and because, perhaps, it is more technically proper where a single point of law, and not the whole case, is to be re-examined. But an appeal might be given, and might be so regulated as to effect every purpose of a writ of error. The mode of removal is form, and not substance. Whether it be by writ of error or appeal, no claim is asserted, no demand is made, by the original defendant; he only asserts the constitutional right to have his defense examined by that tribunal whose province it is to construe the constitution and laws of the Union.

The only part of the proceeding which is in any manner personal is the citation. And what is the citation? It is simply notice to the opposite party that the record is transferred into another court, where he may appear, or decline to appear, as his judgment or inclination may determine. As the party who has obtained a judgment is out of court, and may therefore not know that his cause is removed, common justice requires that notice of the fact should be given him. But this notice is not a suit, nor has it the effect of process. If the party does not choose to appear, he cannot be brought into court, nor is his failure to appear considered as a default. Judgment cannot be given against him for his nonappearance, but the judgment is to be re-exam-

ined, and reversed or affirmed, in like manner as if the party had appeared and argued his cause.

The point of view in which this writ of error, with its citation, has been considered uniformly in the courts of the Union, has been well illustrated by a reference to the course of this court in suits instituted by the United States. The universally received opinion is that no suit can be commenced or prosecuted against the United States; that the judiciary act does not authorize such suits. Yet writs of error, accompanied with citations, have uniformly issued for the removal of judgments in favor of the United States into a superior court, where they have, like those in favor of an individual, been re-examined, and affirmed or reversed. It has never been suggested that such writ of error was a suit against the United States, and therefore not within the jurisdiction of the appellate court. It is, then, the opinion of the court, that the defendant who removes a judgment rendered against him by a state court into this court for the purpose of re-examining the question, whether that judgment be in violation of the constitution or laws of the United States, does not commence or prosecute a suit against the state, whatever may be its opinion, where the effect of the writ may be to restore the party to the possession of a thing which he demands. But should we in this be mistaken, the error does not affect the case now before the court. If this writ of error be a "suit," in the sense of the eleventh amendment, it is not a suit commenced or prosecuted "by a citizen of another state, or by a citizen or subject of any foreign state." It is not then within the amendment, but is governed entirely by the constitution as originally framed, and we have already seen that, in its origin, the judicial power was extended to all cases arising under the constitution or laws of the United States, without respect to parties.

(2) The second objection to the jurisdiction of the court is that its appellate power cannot be exercised in any case over the judgment of a state court. This objection is sustained chiefly by arguments drawn from the supposed total separation of the judiciary of a state from that of the Union, and their entire independence of each other. The argument considers the federal judiciary as completely foreign to that of a state, and as being no more connected with it in any respect whatever than the court of a foreign state. If this hypothesis be just, the argument founded on it is equally so; but if the hypothesis be not supported by the constitution, the argument fails with it. This hypothesis is not founded on any words in the constitution which

might seem to countenance it, but on the unreasonableness of giving a contrary construction to words which seem to require it, and on the incompatibility of the application of the appellate jurisdiction to the judgments of state courts with that constitutional relation which subsists between the government of the Union and the governments of those states which compose it.

Let this unreasonableness—this total incompatibility—be examined. That the United States form, for many and for most important purposes, a single nation, has not yet been denied. In war we are one people. In making peace we are one people. In all commercial regulations we are one and the same people. In many other respects the American people are one; and the government which is alone capable of controlling and managing their interests in all these respects is the government of the Union. It is their government, and in that character they have no other. America has chosen to be, in many respects and to many purposes, a nation; and for all these purposes her government is complete; to all these objects it is competent. The people have declared that, in the exercise of all powers given for these objects, it is supreme. It can, then, in effecting these objects, legitimately control all individuals or governments within the American territory. The constitution and laws of a state, so far as they are repugnant to the constitution and laws of the United States, are absolutely void. These states are constituent parts of the United States. They are members of one great empire,—for some purposes sovereign, for some purposes subordinate. In a government so constituted, is it unreasonable that the judicial power should be competent to give efficacy to the constitutional laws of the legislature? That department can decide on the validity of the constitution or law of a state if it be repugnant to the constitution or to a law of the United States. Is it unreasonable that it should also be empowered to decide on the judgment of a state tribunal enforcing such unconstitutional law? Is it so very unreasonable as to furnish a justification for controlling the words of the constitution? We think it is not. We think that, in a government acknowledged supreme with respect to objects of vital interest to the nation, there is nothing inconsistent with sound reason—nothing incompatible with the nature of government—in making all its departments supreme, so far as respects those objects, and so far as is necessary to their attainment. The exercise of the appellate power over those judgments of the state tribunals which may contravene the constitu-

tion or laws of the United States is, we believe, essential to the attainment of those objects.

The propriety of intrusting the construction of the constitution, and laws made in pursuance thereof, to the judiciary of the Union, has not, we believe, as yet been drawn into question. It seems to be a corollary from this political axiom that the federal courts should either possess exclusive jurisdiction in such cases, or a power to revise the judgment rendered in them by the state tribunals. If the federal and state courts have concurrent jurisdiction in all cases arising under the constitution, laws, and treaties of the United States, and if a case of this description brought in a state court cannot be removed before judgment, nor revised after judgment, then the construction of the constitution, laws, and treaties of the United States is not confided particularly to their judicial department, but is confided equally to that department and to the state courts, however they may be constituted. "Thirteen independent courts," says a very celebrated statesman (and we have now more than twenty such courts), "of final jurisdiction over the same causes, arising upon the same laws, is a hydra in government, from which nothing but contradiction and confusion can proceed." Dismissing the unpleasant suggestion that any motives which may not be fairly avowed, or which ought not to exist, can ever influence a state or its courts, the necessity of uniformity, as well as correctness, in expounding the constitution and laws of the United States, would itself suggest the propriety of vesting in some single tribunal the power of deciding, in the last resort, all cases in which they are involved. We are not restrained, then, by the political relations between the general and state governments, from construing the words of the constitution, defining the judicial power, in their true sense. We are not bound to construe them more restrictively than they naturally import. They give to the supreme court appellate jurisdiction in all cases arising under the constitution, laws, and treaties of the United States. The words are broad enough to comprehend all cases of this description, in whatever court they may be decided. In expounding them, we may be permitted to take into view those considerations to which courts have always allowed great weight in the exposition of laws. The framers of the constitution would naturally examine the state of things existing at the time, and their work sufficiently attests that they did so. All acknowledge that they were convened for the purpose of strengthening the confedera-

tion by enlarging the powers of the government, and by giving efficacy to those which it before possessed, but could not exercise. They inform us themselves, in the instrument they presented to the American public, that one of its objects was to form a more perfect union. Under such circumstances, we certainly should not expect to find, in that instrument, a diminution of the powers of the actual government.

Previous to the adoption of the confederation, congress established courts which received appeals in prize causes decided in the courts of the respective states. This power of the government to establish tribunals for these appeals was thought consistent with, and was founded on, its political relations with the states. These courts did exercise appellate jurisdiction over those cases decided in the state courts, to which the judicial power of the federal government extended. The confederation gave to congress the power "of establishing courts for receiving and determining finally appeals in all cases of captures." This power was uniformly construed to authorize those courts to receive appeals from the sentences of state courts, and to affirm or reverse them. State tribunals are not mentioned, but this clause in the confederation necessarily comprises them. Yet the relation between the general and state governments was much weaker, much more lax, under the confederation than under the present constitution, and, the states being much more completely sovereign, their institutions were much more independent.

The convention which framed the constitution, on turning their attention to the judicial power, found it limited to a few objects, but exercised with respect to some of those objects, in its appellate form, over the judgments of the state courts. They extend it, among other objects, to all cases arising under the constitution, laws, and treaties of the United States, and in a subsequent clause declare that, in such cases, the supreme court shall exercise appellate jurisdiction. Nothing seems to be given which would justify the withdrawal of a judgment rendered in a state court, on the constitution, laws, or treaties of the United States, from this appellate jurisdiction.

Great weight has always been attached, and very rightly attached, to contemporaneous exposition. No question, it is believed, has arisen to which this principle applies more unequivocally than to that now under consideration. The opinion of the Federalist has always been considered as of great authority. It is a complete commentary on our constitution, and is appealed to

by all parties in the questions to which that instrument has given birth. Its intrinsic merit entitles it to this high rank, and the part two of its authors performed in framing the constitution put it very much in their power to explain the views with which it was framed. These essays having been published while the constitution was before the nation for adoption or rejection, and having been written in answer to objections founded entirely on the extent of its powers, and on its diminution of state sovereignty, are entitled to the more consideration where they frankly avow that the power objected to is given, and defend it. In discussing the extent of the judicial power, the Federalist says:

"Here another question occurs,—what relation would subsist between the national and state courts in these instances of concurrent jurisdiction? I answer that an appeal would certainly lie from the latter to the supreme court of the United States. The constitution in direct terms gives an appellate jurisdiction to the supreme court in all the enumerated cases of federal cognizance in which it is not to have an original one, without a single expression to confine its operation to the inferior federal courts. The objects of appeal—not the tribunals from which it is to be made—are alone contemplated. From this circumstance, and from the reason of the thing, it ought to be construed to extend to the state tribunals. Either this must be the case, or the local courts must be excluded from a concurrent jurisdiction in matters of national concern, else the judicial authority of the Union may be eluded at the pleasure of every plaintiff or prosecutor. Neither of these consequences ought, without evident necessity, to be involved. The latter would be entirely inadmissible, as it would defeat some of the most important and avowed purposes of the proposed government, and would essentially embarrass its measures. Nor do I perceive any foundation for such a supposition. Agreeably to the remark already made, the national and state systems are to be regarded as one whole. The courts of the latter will of course be natural auxiliaries to the execution of the laws of the Union, and an appeal from them will as naturally lie to that tribunal which is destined to unite and assimilate the principles of natural justice and the rules of national decision. The evident aim of the plan of the national convention is that all the causes of the specified classes shall, for weighty public reasons, receive their original or final determination in the courts of the Union. To confine, therefore, the general expressions which give appellate jurisdiction to the supreme court, to appeals from the subordinate federal courts, instead of allowing their extension to the state courts, would be to abridge the latitude of the terms, in subversion of the intent, contrary to every sound rule of interpretation."

A contemporaneous exposition of the constitution, certainly of not less authority than that which has been just cited, is the judiciary act itself. We know that, in the congress which passed that act were many eminent members of the convention which formed the constitution. Not a single individual, so far as is known, supposed that part of the act which gives the supreme

court appellate jurisdiction over the judgments of the state courts in the cases therein specified to be unauthorized by the constitution. While on this part of the argument, it may be also material to observe that the uniform decisions of this court on the point now under consideration have been assented to, with a single exception, by the courts of every state in the Union whose judgments have been revised. It has been the unwelcome duty of this tribunal to reverse the judgments of many state courts in cases in which the strongest state feelings were engaged. Judges whose talents and character would grace any bench, to whom a disposition to submit to jurisdiction that is usurped, or to surrender their legitimate powers, will certainly not be imputed, have yielded without hesitation to the authority by which their judgments were reversed, while they, perhaps, disapproved the judgment of reversal. This concurrence of statesmen, of legislators, and of judges in the same construction of the constitution may justly inspire some confidence in that construction.

In opposition to it the counsel who made this point has presented, in a great variety of forms, the idea already noticed, that the federal and state courts must of necessity, and from the nature of the constitution, be in all things totally distinct and independent of each other. If this court can correct the errors of the courts of Virginia, he says, it makes them courts of the United States, or becomes itself a part of the judiciary of Virginia. But it has been already shown that neither of these consequences necessarily follows. The American people may certainly give to a national tribunal a supervising power over those judgments of the state courts which may conflict with the constitution, laws, or treaties of the United States, without converting them into federal courts, or converting the national into a state tribunal. The one court still derives its authority from the state, the other still derives its authority from the nation. If it shall be established, he says, that this court has appellate jurisdiction over the state courts in all cases enumerated in the third article of the constitution, a complete consolidation of the states, so far as respects judicial power, is produced. But, certainly, the mind of the gentleman who urged this argument is too accurate not to perceive that he has carried it too far; that the premises by no means justify the conclusion. "A complete consolidation of the states, so far as respects the judicial power," would authorize the legislature to confer on the federal courts appellate jurisdiction from the state courts in all cases whatsoever.

The distinction between such a power and that of giving appellate jurisdiction in a few specified cases, in the decision of which the nation takes an interest, is too obvious not to be perceived by all.

This opinion has been already drawn out to too great a length to admit of entering into a particular consideration of the various forms in which the counsel who made this point has, with much ingenuity, presented his argument to the court. The argument in all its forms is essentially the same. It is founded, not on the words of the constitution, but on its spirit,—a spirit extracted, not from the words of the instrument, but from his view of the nature of our Union, and of the great fundamental principles on which the fabric stands. To this argument, in all its forms, the same answer may be given. Let the nature and objects of our Union be considered, let the great fundamental principles on which the fabric stands be examined, and we think the result must be that there is nothing so extravagantly absurd in giving to the courts of the nation the power of revising the decisions of local tribunals on questions which affect the nation as to require that words which import this power should be restricted by a forced construction. The question, then, must depend on the words themselves, and on their construction we shall be the more readily excused for not adding to the observations already made, because the subject was fully discussed and exhausted in the case of Martin v. Hunter.

(3) We come now to the third objection, which, though differently stated by the counsel, is substantially the same. One gentleman has said that the judiciary act does not give jurisdiction in the case. The cause was argued in the state court on a case agreed by the parties, which states the prosecution under a law for selling lottery tickets, which is set forth, and further states the act of congress by which the city of Washington was authorized to establish the lottery. It then states that the lottery was regularly established by virtue of the act, and concludes with referring to the court the questions whether the act of congress be valid, whether, on its just construction, it constitutes a bar to the prosecution, and whether the act of assembly, on which the prosecution is founded, be not itself invalid. These questions were decided against the operation of the act of congress, and in favor of the operation of the act of the state.

If the twenty-fifth section of the judiciary act be inspected, it will at once be perceived that it comprehends expressly the case

under consideration. But it is not upon the letter of the act that the gentleman who stated this point in this form founds his argument. Both gentlemen concur substantially in their views of this part of the case. They deny that the act of congress on which the plaintiff in error relies is a law of the United States, or, if a law of the United States, is within the second clause of the sixth article. In the enumeration of the powers of congress which is made in the eighth section of the first article, we find that of exercising exclusive legislation over such district as shall become the seat of government. This power, like all others which are specified, is conferred on congress as the legislature of the Union, for, strip them of that character, and they would not possess it. In no other character can it be exercised. In legislating for the district, they necessarily preserve the character of the legislature of the Union, for it is in that character alone that the constitution confers on them this power of exclusive legislation. This proposition need not be enforced.

The second clause of the sixth article declares that "this constitution, and the laws of the United States which shall be made in pursuance thereof, shall be the supreme law of the land." The clause which gives exclusive jurisdiction is unquestionably a part of the constitution, and, as such, binds all the United States. Those who contend that acts of congress made in pursuance of this power do not, like acts made in pursuance of other powers, bind the nation, ought to show some safe and clear rule which shall support this construction, and prove that an act of congress, clothed in all the forms which attend other legislative acts, and passed in virtue of a power conferred on and exercised by congress as the legislature of the Union, is not a law of the United States, and does not bind them. One of the gentlemen sought to illustrate his proposition that congress, when legislating for the district, assumed a distinct character, and was reduced to a mere local legislature, whose laws could possess no obligation out of the ten miles square, by a reference to the complex character of this court. It is, they say, a court of common law and a court of equity. Its character, when sitting as a court of common law, is as distinct from its character when sitting as a court of equity as if the powers belonging to those departments were vested in different tribunals. Though united in the same tribunal, they are never confounded with each other. Without inquiring how far the union of different characters in one court may be applicable, in principle, to the union in congress of the power of ex-

clusive legislation in some places, and of limited legislation in others, it may be observed that the forms of proceedings in a court of law are so totally unlike the forms of proceedings in a court of equity that a mere inspection of the record gives decisive information of the character in which the court sits, and consequently of the extent of its powers. But if the forms of proceeding were precisely the same, and the court the same, the distinction would disappear.

Since congress legislates in the same forms, and in the same character, in virtue of powers of equal obligation, conferred in the same instrument, when exercising its exclusive powers of legislation, as well as when exercising those which are limited, we must inquire whether there be anything in the nature of this exclusive legislation which necessarily confines the operation of the laws made in virtue of this power to the place with a view to which they are made. Connected with the power to legislate within this district is a similar power in forts, arsenals, dock yards, etc. Congress has a right to punish murder in a fort or other place within its exclusive jurisdiction, but no general right to punish murder committed within any of the states. In the act for the punishment of crimes against the United States, murder committed within a fort, or any other place or district of country, under the sole and exclusive jurisdiction of the United States, is punished with death. Thus congress legislates in the same act under its exclusive and its limited powers. The act proceeds to direct that the body of the criminal, after execution, may be delivered to a surgeon for dissection, and punishes any person who shall rescue such body during its conveyance from the place of execution to the surgeon to whom it is to be delivered.

Let these actual provisions of the law, or any other provisions which can be made on the subject, be considered with a view to the character in which congress acts when exercising its powers of exclusive legislation. If congress is to be considered merely as a local legislature, invested, as to this object, with powers limited to the fort or other place in which the murder may be committed, if its general powers cannot come in aid of these local powers, how can the offense be tried in any other court than that of the place in which it has been committed? How can the offender be conveyed to, or tried in, any other place? How can he be executed elsewhere? How can his body be conveyed through a country under the jurisdiction of another sov-

ereign, and the individual punished who, within that jurisdiction, shall rescue the body? Were any one state of the Union to pass a law for trying a criminal in a court not created by itself, in a place not within its jurisdiction, and direct the sentence to be executed without its territory, we should all perceive and acknowledge its incompetency to such a course of legislation. If congress be not equally incompetent, it is because that body unites the powers of local legislation with those which are to operate through the Union, and may use the last in aid of the first; or because the power of exercising exclusive legislation draws after it, as an incident, the power of making that legislation effectual, and the incidental power may be exercised throughout the Union, because the principal power is given to that body as the legislature of the Union. So, in the same act, a person who, having knowledge of the commission of murder or other felony on the high seas, or within any fort, arsenal, dock yard, magazine, or other place or district of country within the sole and exclusive jurisdiction of the United States, shall conceal the same, etc., he shall be adjudged guilty of misprision of felony, and shall be adjudged to be imprisoned, etc.

It is clear that congress cannot punish felonies generally, and, of consequence, cannot punish misprision of felony. It is equally clear that a state legislature—the state of Maryland, for example—cannot punish those who, in another state, conceal a felony committed in Maryland. How, then, is it that congress, legislating exclusively for a fort, punishes those who, out of that fort, conceal a felony committed within it? The solution, and the only solution, of the difficulty, is that the power vested in congress, as the legislature of the United States, to legislate exclusively within any place ceded by a state, carries with it, as an incident, the right to make that power effectual. If a felon escape out of the state in which the act has been committed, the government cannot pursue him into another state, and apprehend him there, but must demand him from the executive power of that other state. If congress were to be considered merely as the local legislature for the fort or other place in which the offense might be committed, then this principle would apply to them as to other local legislatures, and the felon who should escape out of the fort or other place in which the felony may have been committed could not be apprehended by the marshal, but must be demanded from the executive of the state. But we know that the principle does not apply, and the reason is that

congress is not a local legislature, but exercises this particular power, like all its other powers, in its high character, as the legislature of the Union. The American people thought it a necessary power, and they conferred it for their own benefit. Being so conferred, it carries with it all those incidental powers which are necessary to its complete and effectual execution. Whether any particular law be designed to operate without the district or not depends on the words of that law. If it be designed so to operate, then the question whether the power so exercised be incidental to the power of exclusive legislation, and be warranted by the constitution, requires a consideration of that instrument. In such cases the constitution and the law must be compared and construed. This is the exercise of jurisdiction. It is the only exercise of it which is allowed in such a case. For the act of congress directs that "no other error shall be assigned or regarded as a ground of reversal, in any such case as aforesaid, than such as appears on the face of the record, and immediately respects the before-mentioned questions of validity or construction of the said constitution, treaties," etc.

The whole merits of this case, then, consist in the construction of the constitution and the act of congress. The jurisdiction of the court, if acknowledged, goes no farther. This we are required to do without the exercise of jurisdiction. The counsel for the state of Virginia have, in support of this motion, urged many arguments of great weight against the application of the act of congress to such a case as this; but those arguments go to the construction of the constitution, or of the law, or of both, and seem, therefore, rather calculated to sustain their cause upon its merits than to prove a failure of jurisdiction in the court. After having bestowed upon this question the most deliberate consideration of which we are capable, the court is unanimously of opinion that the objections to its jurisdiction are not sustained, and that the motion ought to be overruled. Motion denied.

JUDICIAL OPINION IN THE CASE OF GIBBONS AGAINST OGDEN, IN THE SUPREME COURT OF THE UNITED STATES, 1824.

STATEMENT.

This is the leading case on the construction of the third clause of section 8 of article 1 of the constitution, with respect to the regulation of commerce. At the time the constitution was adopted, commerce was confined mainly to the ocean. With the invention of the steamboat, commerce spread over all the great rivers; and finally, with the development of railroads, commerce and communication have been extended over the whole face of the country. The importance of federal control over commerce was appreciated from the very first; indeed, it was one of the principal considerations that brought about the formation of the constitution. Congress began at an early day to legislate upon the subject, and the various acts on this subject have been a fertile source of litigation in the federal courts.

This case began with a bill in the court of chancery of the state of New York by Aaron Ogden against Thomas Gibbons, in which were set forth the several acts of the legislature of that state enacted for the purpose of securing to Robert R. Livingston and Robert Fulton the exclusive navigation of all the waters within the jurisdiction of that state, with boats moved by fire or steam, for a term of years which had not then expired, and authorizing the chancellor to award an injunction to protect that grant. The bill alleged an assignment from Livingston and Fulton to John R. Livingston, and from him to the complainant, Ogden, of the right to navigate the waters between Elizabethtown and other places in New Jersey and the city of New York, and that Gibbons, the defendant, was in possession and in active operation of two steamboats running between New York and Elizabethtown, in violation of the exclusive privilege conferred on the complainant. A preliminary injunction having been awarded, Gibbons filed an answer, in which he stated that the boats employed by him were duly enrolled and licensed under the act of congress passed February 18, 1793,[1] entitled "An act for enrolling and licensing ships and vessels to be employed in the coasting trade and fisheries, and for regulating the same." By virtue of such license, the defendant insisted on his right to navigate the water between Elizabethtown and the city of New York, the said acts of the legislature of New York to the contrary notwithstanding. At the hearing, Chancellor Kent made the injunction perpetual, being of opinion that the state law was not in conflict with the constitution and laws of the United States, and was therefore valid.[2] He pointed out that the right of the legislature to pass the acts mentioned had been settled so far as the courts of that state could settle it by the decision of the court of errors in Livingston v. Van Ingen.[3] "And if those laws are to be deemed in the first instance and *per se* valid and constitutional, and as conferring valid and legal rights, a coasting license cannot surely have any effect in controlling their operation. The act of congress referred to never meant to determine a right of property or the use

[1] 1 Stat. 305.
[2] 4 Johns. Ch. 150.
[3] 9 Johns. 507.

or enjoyment of it under the laws of the state. Any person in the assumed character of the owner may obtain the enrollment and license required; but it will still remain for the laws and courts of the several states to determine the right and title of such assumed owner, or of some other person, to navigate the vessel. The license only gives to the vessel an American character, while the right of the individual procuring the license to use the vessel, as against another individual setting up a distinct and exclusive right, remains precisely as it did before. . . . . However unquestionable the right and title to a specific chattel may be, and from whatever source that title may be derived, the use and enjoyment of it must, as a general rule, be subject to the laws and regulations of the state. . . . . The only limitation upon such a general discretion and power of control is the occurrence of the case when the exercise of it would impede or defeat the operation of some lawful measure, or be absolutely repugnant to some constitutional law of the Union. When laws become repugnant to each other, the supreme and paramount law must and will prevail. There can be no doubt of the fitness and necessity of this result in every mind that entertains a just sense of its duty and loyalty. Suppose there was a provision in the act of congress that all vessels duly licensed should be at liberty to navigate, for the purpose of trade or commerce, over all the navigable bays, harbors, rivers, and lakes within the several states, any law of the states creating particular privileges as to any particular class of vessels to the contrary notwithstanding; the only question that could arise in such a case would be whether the law was constitutional. If that was to be granted or decided in favor of the validity of the law, it would certainly, in all courts and places, overrule and set aside the state grant. But at present we have no such case. . . . . There is no collision between the act of congress and the acts of this state creating the steamboat monopoly. The one requires all vessels to be licensed to entitle them to the privilege of American vessels, and the others confer on particular individuals the exclusive right to navigate steamboats, without, however, interfering with or questioning the requisitions of the license. . . . . We must be permitted to require at least the presence and clear manifestations of some constitutional law or some judicial decision of the supreme power of the Union acting upon those laws in direct collision and conflict before we can retire from the support and defense of them. We must be satisfied that

> "'*Neptunus muros, magnoque emota tridenti*
> *Fundamenta quatit.*'"

On appeal to the court of errors of New York, Chancellor Kent's decree was unanimously affirmed.[4] The case was then carried to the United States supreme court by writ of error, where it was argued for the plaintiff, Gibbons, by Daniel Webster and William Wirt; for the defendant, Ogden, by Thomas Addis Emmet and Thomas J. Oakley. The judgment of the state court was unanimously reversed[5] on the grounds given in the following opinion by Chief Justice Marshall:

OPINION.

The appellant contends that this decree is erroneous because the laws which purport to give the exclusive privilege it sustains are repugnant to the constitution and laws of the United States.

[5] 9 Wheaton, 1. [4] 17 Johns. 488.

They are said to be repugnant (1) to that clause in the constitution which authorizes congress to regulate commerce; (2) to that which authorizes congress to promote the progress of science and useful arts. The state of New York maintains the constitutionality of these laws; and their legislature, their council of revision, and their judges have repeatedly concurred in this opinion. It is supported by great names,—by names which have all the titles to consideration that virtue, intelligence, and office can bestow. No tribunal can approach the decision of this question without feeling a just and real respect for that opinion which is sustained by such authority; but it is the province of this court, while it respects, not to bow to it implicitly, and the judges must exercise, in the examination of the subject, that understanding which Providence has bestowed upon them, with that independence which the people of the United States expect from this department of the government.

As preliminary to the very able discussions of the constitution which we have heard from the bar, and as having some influence on its construction, reference has been made to the political situation of these states anterior to its formation. It has been said that they were sovereign, were completely independent, and were connected with each other only by a league. This is true. But when these allied sovereigns converted their league into a government, when they converted their congress of ambassadors, deputed to deliberate on their common concerns, and to recommend measures of general utility, into a legislature empowered to enact laws on the most interesting subjects, the whole character in which the states appear underwent a change, the extent of which must be determined by a fair consideration of the instrument by which that change was effected. This instrument contains an enumeration of powers expressly granted by the people to their government. It has been said that these powers ought to be construed strictly. But why ought they to be so construed? Is there one sentence in the constitution which gives countenance to this rule? In the last of the enumerated powers,—that which grants, expressly, the means for carrying all others into execution,—congress is authorized "to make all laws which shall be necessary and proper" for the purpose. But this limitation on the means which may be used is not extended to the powers which are conferred; nor is there one sentence in the constitution which has been pointed out by the gentlemen of the bar, or which we have been able to discern, that prescribes this rule. We do not, therefore, think our-

selves justified in adopting it. What do gentlemen mean by a strict construction. If they contend only against that enlarged construction which would extend words beyond their natural and obvious import, we might question the application of the term, but should not controvert the principle. If they contend for that narrow construction which, in support of some theory not to be found in the constitution, would deny to the government those powers which the words of the grant, as usually understood, import, and which are consistent with the general views and objects of the instrument; for that narrow construction which would cripple the government, and render it unequal to the objects for which it is declared to be instituted, and to which the powers given, as fairly understood, render it competent,—then we cannot perceive the propriety of this strict construction, nor adopt it as the rule by which the constitution is to be expounded. As men whose intentions require no concealment generally employ the words which most directly and aptly express the ideas they intend to convey, the enlightened patriots who framed our constitution, and the people who adopted it, must be understood to have employed words in their natural sense, and to have intended what they have said. If, from the imperfection of human language, there should be serious doubts respecting the extent of any given power, it is a well-settled rule that the objects for which it was given, especially when those objects are expressed in the instrument itself, should have great influence in the construction. We know of no reason for excluding this rule from the present case. The grant does not convey power which might be beneficial to the grantor if retained by himself, or which can inure solely to the benefit of the grantee, but is an investment of power for the general advantage, in the hands of agents selected for that purpose, which power can never be exercised by the people themselves, but must be placed in the hands of agents, or lie dormant. We know of no rule for construing the extent of such powers other than is given by the language of the instrument which confers them, taken in connection with the purposes for which they were conferred. The words are: "Congress shall have power to regulate commerce with foreign nations, and among the several states, and with the Indian tribes." The subject to be regulated is commerce; and our constitution being, as was aptly said at the bar, one of enumeration, and not of definition, to ascertain the extent of the power it becomes necessary to settle the meaning of the word. The counsel for the appellee would limit it to traffic, to buying and selling, or

the interchange of commodities, and do not admit that it comprehends navigation. This would restrict a general term, applicable to many objects, to one of its significations. Commerce, undoubtedly, is traffic, but it is something more,—it is intercourse. It describes the commercial intercourse between nations and parts of nations in all its branches, and is regulated by prescribing rules for carrying on that intercourse. The mind can scarcely conceive a system for regulating commerce between nations which shall exclude all laws concerning navigation, which shall be silent on the admission of the vessels of the one nation into the ports of the other, and be confined to prescribing rules for the conduct of individuals in the actual employment of buying and selling, or of barter. If commerce does not include navigation, the government of the Union has no direct power over that subject, and can make no law prescribing what shall constitute American vessels, or requiring that they shall be navigated by American seamen. Yet this power has been exercised from the commencement of the government, has been exercised with the consent of all, and has been understood by all to be a commercial regulation. All America understands, and has uniformly understood, the word "commerce" to comprehend navigation. It was so understood, and must have been so understood, when the constitution was framed. The power over commerce, including navigation, was one of the primary objects for which the people of America adopted their government, and must have been contemplated in forming it. The convention must have used the word in that sense, because all have understood it in that sense, and the attempt to restrict it comes too late. If the opinion that "commerce," as the word is used in the constitution, comprehends navigation also, requires any additional confirmation, that additional confirmation is, we think, furnished by the words of the instrument itself. It is a rule of construction, acknowledged by all, that the exceptions from a power mark its extent; for it would be absurd, as well as useless, to except from a granted power that which was not granted,—that which the words of the grant could not comprehend. If, then, there are in the constitution plain exceptions from the power over navigation,—plain inhibitions to the exercise of that power in a particular way,—it is a proof that those who made these exceptions and prescribed these inhibitions understood the power to which they applied as being granted.

The ninth section of the first article declares that "no preference shall be given, by any regulation of commerce or revenue, to the

ports of one state over those of another." This clause cannot be understood as applicable to those laws only which are passed for the purposes of revenue, because it is expressly applied to commercial regulations; and the most obvious preference which can be given to one port over another, in regulating commerce, relates to navigation. But the subsequent part of the sentence is still more explicit. It is, "nor shall vessels bound to or from one state be obliged to enter, clear, or pay duties in another." These words have a direct reference to navigation.

The universally acknowledged power of the government to impose embargoes must also be considered as showing that all America is united in that construction which comprehends navigation in the word "commerce." Gentlemen have said, in argument, that this is a branch of the war-making power, and that an embargo is an instrument of war, not a regulation of trade. That it may be, and often is, used as an instrument of war, cannot be denied. An embargo may be imposed for the purpose of facilitating the equipment or manning of a fleet, or for the purpose of concealing the progress of an expedition preparing to sail from a particular port. In these and in similar cases it is a military instrument, and partakes of the nature of war. But all embargoes are not of this description. They are sometimes resorted to without a view to war, and with a single view to commerce. In such case, an embargo is no more a war measure than a mechantman is a ship of war, because both are vessels which navigate the ocean with sails and seamen. When congress imposed that embargo which, for a time, engaged the attention of every man in the United States, the avowed object of the law was the protection of commerce, and the avoiding of war. By its friends and its enemies it was treated as a commercial, not as a war, measure. The persevering earnestness and zeal with which it was opposed in a part of our country which supposed its interest to be vitally affected by the act cannot be forgotten. A want of acuteness in discovering objections to a measure to which they felt the most deep-rooted hostility will not be imputed to those who were arrayed in opposition to this. Yet they never suspected that navigation was no branch of trade, and was therefore not comprehended in the power to regulate commerce. They did, indeed, contest the constitutionality of the act, but on a principle which admits the construction for which the appellant contends. They denied that the particular law in question was made in pursuance of the constitution, not because the power could not act directly on vessels, but because a perpetual

embargo was the annihilation, and not the regulation, of commerce. In terms, they admitted the applicability of the words used in the constitution to vessels, and that in a case which produced a degree and an extent of excitement calculated to draw forth every principle on which legitimate resistance could be sustained. No example could more strongly illustrate the universal understanding of the American people on this subject. The word used in the constitution, then, comprehends, and has been always understood to comprehend, navigation, within its meaning, and a power to regulate navigation is as expressly granted as if that term had been added to the word "commerce." To what commerce does this power extend? The constitution informs us, to commerce "with foreign nations, and among the several states, and with the Indian tribes." It has, we believe, been universally admitted that these words comprehend every species of commercial intercourse between the United States and foreign nations. No sort of trade can be carried on between this country and any other to which this power does not extend. It has been truly said that "commerce," as the word is used in the constitution, is a unit, every part of which is indicated by the term. If this be the admitted meaning of the word in its application to foreign nations, it must carry the same meaning throughout the sentence, and remain a unit, unless there be some plain, intelligible cause which alters it.

The subject to which the power is next applied is to commerce "among the several states." The word "among" means intermingled with. A thing which is among others is intermingled with them. Commerce among the states cannot stop at the external boundary line of each state, but may be introduced into the interior. It is not intended to say that these words comprehend that commerce which is 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. Such a power would be inconvenient, and is certainly unnecessary. Comprehensive as the word "among" is, it may very properly be restricted to that commerce which concerns more states than one. The phrase is not one which would probably have been selected to indicate the completely interior traffic of a state, because it is not an apt phrase for that purpose; and the enumeration of the particular classes of commerce to which the power was to be extended would not have been made had the intention been to extend the power to every description. The enumeration presupposes something not enumerated, and that something, if we re-

gard the language or the subject of the sentence, must be the exclusively internal commerce of a state. The genius and character of the whole government seem to be that its action is to be applied to all the external concerns of the nation, and to those internal concerns which affect the states generally, but not to those which are completely within a particular state, which do not affect other states, and with which it is not necessary to interfere for the purpose of executing some of the general powers of the government. The completely internal commerce of a state, then, may be considered as reserved for the state itself. But in regulating commerce with foreign nations, the power of congress does not stop at the jurisdictional lines of the several states. It would be a very useless power if it could not pass those lines. The commerce of the United States with foreign nations is that of the whole United States. Every district has a right to participate in it. The deep streams which penetrate our country in every direction pass through the interior of almost every state in the Union, and furnish the means of exercising this right. If congress has the power to regulate it, that power must be exercised whenever the subject exists. If it exists within the states,—if a foreign voyage may commence or terminate at a port within a state,—then the power of congress may be exercised within a state. This principle is, if possible, still more clear when applied to commerce "among the several states." They either join each other, in which case they are separated by a mathematical line, or they are remote from each other, in which case other states lie between them. What is commerce "among" them, and how is it to be conducted? Can a trading expedition between two adjoining states commence and terminate outside of each? And if the trading intercourse be between two states remote from each other, must it not commence in one, terminate in the other, and probably pass through a third? Commerce among the states must, of necessity, be commerce with the states. In the regulation of trade with the Indian tribes, the action of the law, especially when the constitution was made, was chiefly within a state. The power of congress, then, whatever it may be, must be exercised within the territorial jurisdiction of the several states. The sense of the nation on this subject is unequivocally manifested by the provisions made in the laws for transporting goods by land, between Baltimore and Providence, between New York and Philadelphia, and between Philadelphia and Baltimore.

We are now arrived at the inquiry, what is this power? It is the power to regulate,—that is, to prescribe the rule by which commerce is to be governed. This power, like all others vested in congress, is complete in itself, may be exercised to its utmost extent, and acknowledges no limitations other than are prescribed in the constitution. These are expressed in plain terms, and do not affect the questions which arise in this case, or which have been discussed at the bar. If, as has always been understood, the sovereignty of congress, though limited to specified objects, is plenary as to those objects, the power over commerce with foreign nations and among the several states is vested in congress as absolutely as it would be in a single government, having in its constitution the same restrictions on the exercise of the power as are found in the constitution of the United States. The wisdom and the discretion of congress, their identity with the people, and the influence which their constituents possess at elections are in this, as in many other instances,—as that, for example, of declaring war,—the sole restraints on which they have relied to secure them from its abuse. They are the restraints on which the people must often rely solely in all representative governments.

The power of congress, then, comprehends navigation within the limits of every state in the Union, so far as that navigation may be in any manner connected with "commerce with foreign nations, or among the several states, or with the Indian tribes." It may, of consequence, pass the jurisdictional line of New York, and act upon the very waters to which the prohibition now under consideration applies. But it has been urged with great earnestness that, although the power of congress to regulate commerce with foreign nations and among the several states be coextensive with the subject itself, and have no other limits than are prescribed in the constitution, yet the states may severally exercise the same power within their respective jurisdictions. In support of this argument, it is said that they possessed it as an inseparable attribute of sovereignty before the formation of the constitution, and still retain it, except so far as they have surrendered it by that instrument; that this principle results from the nature of the government, and is secured by the tenth amendment; that an affirmative grant of power is not exclusive unless in its own nature it be such that the continued exercise of it by the former possessor is inconsistent with the grant, and that this is not of that description. The appellant, conceding these postulates, except the last, contends that full power to regulate a particular subject implies the

whole power, and leaves no residuum; that a grant of the whole is incompatible with the existence of a right in another to any part of it. Both parties have appealed to the constitution, to legislative acts, and judicial decisions, and have drawn arguments from all these sources to support and illustrate the propositions they respectively maintain.

The grant of the power to lay and collect taxes is, like the power to regulate commerce, made in general terms, and has never been understood to interfere with the exercise of the same power by the states, and hence has been drawn an argument which has been applied to the question under consideration. But the two grants are not, it is conceived, similar in their terms or their nature. Although many of the powers formerly exercised by the states are transferred to the government of the Union, yet the state governments remain, and constitute a most important part of our system. The power of taxation is indispensable to their existence, and is a power which, in its own nature, is capable of residing in, and being exercised by, different authorities at the same time. We are accustomed to see it placed, for different purposes, in different hands. Taxation is the simple operation of taking small portions from a perpetually accumulating mass, susceptible of almost infinite division; and a power in one to take what is necessary for certain purposes is not, in its nature, incompatible with a power in another to take what is necessary for other purposes. Congress is authorized to lay and collect taxes, etc., to pay the debts, and provide for the common defense and general welfare of the United States. This does not interfere with the power of the states to tax for the support of their own governments, nor is the exercise of that power by the states an exercise of any portion of the power that is granted to the United States. In imposing taxes for state purposes, they are not doing what congress is empowered to do. Congress is not empowered to tax for those purposes which are within the exclusive province of the states. When, then, each government exercises the power of taxation, neither is exercising the power of the other. But when a state proceeds to regulate commerce with foreign nations, or among the several states, it is exercising the very power that is granted to congress, and is doing the very thing which congress is authorized to do. There is no analogy, then, between the power of taxation and the power of regulating commerce.

In discussing the question whether this power is still in the states in the case under consideration, we may dismiss from it the inquiry whether it is surrendered by the mere grant to congress,

or is retained until congress shall exercise the power. We may dismiss that inquiry because it has been exercised, and the regulations which congress deemed it proper to make are now in full operation. The sole question is, can a state regulate commerce with foreign nations and among the states while congress is regulating it? The counsel for the respondent answer this question in the affirmative, and rely very much on the restrictions in the tenth section as supporting their opinion. They say, very truly, that limitations of a power furnish a strong argument in favor of the existence of that power, and that the section which prohibits the states from laying duties on imports or exports proves that this power might have been exercised had it not been expressly forbidden, and, consequently, that any other commercial regulation, not expressly forbidden, to which the original power of the state was competent, may still be made. That this restriction shows the opinion of the convention that a state might impose duties on exports and imports, if not expressly forbidden, will be conceded; but that it follows, as a consequence, from this concession, that a state may regulate commerce with foreign nations and among the states, cannot be admitted.

We must first determine whether the act of laying "duties or imposts on imports or exports" is considered in the constitution as a branch of the taxing power or of the power to regulate commerce. We think it very clear that it is considered as a branch of the taxing power. It is so treated in the first clause of the eighth section: "Congress shall have power to lay and collect taxes, duties, imposts, and excises," and, before commerce is mentioned, the rule by which the exercise of this power must be governed is declared. It is that all duties, imposts, and excises shall be uniform. In a separate clause of the enumeration, the power to regulate commerce is given, as being entirely distinct from the right to levy taxes and imposts, and as being a new power, not before conferred. The constitution, then, considers these powers as substantive and distinct from each other, and so places them in the enumeration it contains. The power of imposing duties on imports is classed with the power to levy taxes, and that seems to be its natural place. But the power to levy taxes could never be considered as abridging the right of the states on that subject, and they might, consequently, have exercised it by levying duties on imports or exports, had the constitution contained no prohibition on this subject. This prohibition, then, is an exception from the acknowledged power of the states to levy taxes, not from the questionable power to regulate commerce. "A duty of tonnage" is as much a tax as

a duty on imports or exports; and the reason which induced the prohibition of those taxes extends to this also. This tax may be imposed by a state with the consent of congress; and it may be admitted that congress cannot give a right to a state, in virtue of its own powers. But a duty of tonnage being part of the power of imposing taxes, its prohibition may certainly be made to depend on congress, without affording any implication respecting a power to regulate commerce. It is true that duties may often be, and in fact often are, imposed on tonnage, with a view to the regulation of commerce; but they may be also imposed with a view to revenue, and it was, therefore, a prudent precaution to prohibit the states from exercising this power. The idea that the same measure might, according to circumstances, be arranged with different classes of power, was no novelty to the framers of our constitution. Those illustrious statesmen and patriots had been, many of them, deeply engaged in the discussions which preceded the war of our Revolution, and all of them were well read in those discussions. The right to regulate commerce, even by the imposition of duties, was not controverted; but the right to impose a duty for the purpose of revenue produced a war as important, perhaps, in its consequences to the human race, as any the world has ever witnessed.

These restrictions, then, are on the taxing power, not on that to regulate commerce, and presuppose the existence of that which they restrain, not of that which they do not purport to restrain. But the inspection laws are said to be regulations of commerce, and are certainly recognized in the constitution as being passed in the exercise of a power remaining with the states. That inspection laws may have a remote and considerable influence on commerce will not be denied, but that a power to regulate commerce is the source from which the right to pass them is derived cannot be admitted. The object of inspection laws is to improve the quality of articles produced by the labor of a country; to fit them for exportation, or, it may be, for domestic use. They act upon the subject before it becomes an article of foreign commerce, or of commerce among the states, and prepare it for that purpose. They form a portion of that immense mass of legislation which embraces everything within the territory of a state, not surrendered to the general government, all of which can be most advantageously exercised by the states themselves. Inspection laws, quarantine laws, health laws of every description, as well as laws for regulating the internal commerce of a state, and those which respect turnpike roads, ferries, etc., are competent parts of this

mass. No direct general power over these objects is granted to congress; and consequently they remain subject to state legislation. If the legislative power of the Union can reach them, it must be for national purposes. It must be where the power is expressly given for a special purpose, or is clearly incidental to some power which is expressly given. It is obvious that the government of the Union, in the exercise of its express powers,—that, for example, of regulating commerce with foreign nations and among the states,—may use means that may also be employed by a state in the exercise of its acknowledged powers,—that, for example, of regulating commerce within the state. If congress 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 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. So, if a state, in passing laws on subjects acknowledged to be within its control, and with a view to those subjects, shall adopt a measure of the same character with one which congress may adopt, it does not derive its authority from the particular power which has been granted, but from some other, which remains with the state, and may be executed by the same means. All experience shows that the same measures, or measures scarcely distinguishable from each other, may flow from distinct powers; but this does not prove that the powers themselves are identical. Although the means used in their execution may sometimes approach each other so nearly as to be confounded, there are other situations in which they are sufficiently distinct to establish their individuality.

In our complex system, presenting the rare and difficult scheme of one general government, whose action extends over the whole, but which possesses only certain enumerated powers, and of numerous state governments, which retain and exercise all powers not delegated to the Union, contests respecting power must arise. Were it even otherwise, the measures taken by the respective governments to execute their acknowledged powers would often be of the same description, and might sometimes interfere. This, however, does not prove that the one is exercising, or has a right to exercise, the powers of the other.

The acts of congress passed in 1796 and 1799,[1] empowering and directing the officers of the general government to conform to and assist in the execution of the quarantine and health laws of a state,

[1] 1 Stat. 474, 619.

proceed, it is said, upon the idea that these laws are constitutional. It is undoubtedly true that they do proceed upon that idea, and the constitutionality of such laws has never, so far as we are informed, been denied. But they do not imply an acknowledgment that a state may rightfully regulate commerce with foreign nations or among the states, for they do not imply that such laws are an exercise of that power, or enacted with a view to it. On the contrary, they are treated as quarantine and health laws, are so denominated in the acts of congress, and are considered as flowing from the acknowledged power of a state to provide for the health of its citizens. But as it was apparent that some of the provisions made for this purpose, and in virtue of this power, might interfere with, and be affected by, the laws of the United States, made for the regulation of commerce, congress, in that spirit of harmony and conciliation which ought always to characterize the conduct of governments standing in the relation which that of the Union and those of the states bear to each other, has directed its officers to aid in the execution of these laws, and has, in some measure, adapted its own legislation to this object by making provisions in aid of those of the states. But, in making these provisions, the opinion is unequivocally manifested that congress may control the state laws, so far as it may be necessary to control them, for the regulation of commerce. The act passed in 1803,[2] prohibiting the importation of slaves into any state which shall itself prohibit their importation, implies, it is said, an admission that the states possessed the power to exclude or admit them, from which it is inferred that they possess the same power with respect to other articles. If this inference were correct,—if this power was exercised, not under any particular clause in the constitution, but in virtue of a general right over the subject of commerce, to exist as long as the constitution itself,—it might now be exercised. Any state might now import African slaves into its own territory. But it is obvious that the power of the states over this subject, previous to the year 1808, constitutes an exception to the power of congress to regulate commerce, and the exception is expressed in such words as to manifest clearly the intention to continue the pre-existing right of the states to admit or exclude for a limited period. The words are: "The migration or importation of such persons as any of the states, now existing, shall think proper to admit, shall not be prohibited by the congress prior to the year 1808." The whole object of the exception is to preserve the power to those states which might be disposed to exercise it, and its lan-

[2] 2 Stat. 205.

guage seems to the court to convey this idea unequivocally. The possession of this particular power, then, during the time limited in the constitution, cannot be admitted to prove the possession of any other similar power.

It has been said that the act of August 7, 1789, acknowledges a concurrent power in the states to regulate the conduct of pilots, and hence is inferred an admission of their concurrent right with congress to regulate commerce with foreign nations and amongst the states. But this inference is not, we think, justified by the fact. Although congress cannot enable a state to legislate, congress may adopt the provisions of a state on any subject. When the government of the Union was brought into existence, it found a system for the regulation of its pilots in full force in every state. The act which has been mentioned adopts this system, and gives it the same validity as if its provisions had been specially made by congress. But the act, it may be said, is prospective also, and the adoption of laws to be made in future presupposes the right in the maker to legislate on the subject. The act unquestionably manifests an intention to leave this subject entirely to the states until congress should think proper to interpose; but the very enactment of such a law indicates an opinion that it was necessary; that the existing system would not be applicable to the new state of things, unless expressly applied to it by congress. But this section is confined to pilots within the "bays, inlets, rivers, harbors, and ports of the United States," which are, of course, in whole or in part, also within the limits of some particular state. The acknowledged power of a state to regulate its police, its domestic trade, and to govern its own citizens may enable it to legislate on this subject to a considerable extent; and the adoption of its system by congress, and the application of it to the whole subject of commerce, does not seem to the court to imply a right in the states so to apply it of their own authority. But the adoption of the state system being temporary—being only "until further legislative provision shall be made by congress"—shows conclusively an opinion that congress could control the whole subject, and might adopt the system of the states, or provide one of its own.

A state, it is said, or even a private citizen, may construct lighthouses. But gentlemen must be aware that, if this proves a power in a state to regulate commerce, it proves that the same power is in the citizen. States or individuals who own lands may, if not forbidden by law, erect on those lands what buildings they please; but this power is entirely distinct from that of regulating

commerce, and may, we presume, be restrained if exercised so as to produce a public mischief. These acts were cited at the bar for the purpose of showing an opinion in congress that the states possess, concurrently with the legislature of the Union, the power to regulate commerce with foreign nations and among the states. Upon reviewing them, we think they do not establish the proposition they were intended to prove. They show the opinion that the states retain powers enabling them to pass the laws to which allusion has been made; not that those laws proceed from the particular power which has been delegated to congress. It has been contended by the counsel for the appellant that, as the verb "to regulate" implies, in its nature, full power over the thing to be regulated, it excludes, necessarily, the action of all others that would perform the same operation on the same thing. That regulation is designed for the entire result, applying to those parts which remain as they were, as well as to those which are altered. It produces a uniform whole, which is as much disturbed and deranged by changing what the regulating power designs to leave untouched as that on which it has operated. There is great force in this argument, and the court is not satisfied that it has been refuted. Since, however, in exercising the power of regulating their own purely internal affairs, whether of trading or police, the states may sometimes enact laws, the validity of which depends on their interfering with, and being contrary to, an act of congress passed in pursuance of the constitution, the court will enter upon the inquiry whether the laws of New York, as expounded by the highest tribunal of that state, have, in their application to this case, come into collision with an act of congress, and deprived a citizen of a right to which that act entitles him. Should this collision exist, it will be immaterial whether those laws were passed in virtue of a concurrent power "to regulate commerce with foreign nations and among the several states," or in virtue of a power to regulate their domestic trade and police. In one case and the other, the acts of New York must yield to the law of congress; and the decision sustaining the privilege they confer, against a right given by a law of the Union, must be erroneous. This opinion has been frequently expressed in this court, and is founded as well on the nature of the government as on the words of the constitution. In argument, however, it has been contended that, if a law passed by a state in the exercise of its acknowledged sovereignty comes into conflict with a law passed by congress in pursuance of the constitution, they affect the subject and each other like equal op-

posing powers. But the framers of our constitution foresaw this state of things, and provided for it by declaring the supremacy not only of itself, but of the laws made in pursuance of it. The nullity of any act inconsistent with the constitution is produced by the declaration that the constitution is the supreme law. The appropriate application of that part of the clause which confers the same supremacy on laws and treaties is to such acts of the state legislatures as do not transcend their powers, but, though enacted in the execution of acknowledged state powers, interfere with, or are contrary to, the laws of congress made in pursuance of the constitution, or some treaty made under the authority of the United States. In every such case, the act of congress or the treaty is supreme; and the law of the state, though enacted in the exercise of powers not controverted, must yield to it.

In pursuing this inquiry at the bar, it has been said that the constitution does not confer the right of intercourse between state and state. That right derives its source from those laws whose authority is acknowledged by civilized man throughout the world. This is true. The constitution found it an existing right, and gave to congress the power to regulate it. In the exercise of this power, congress has passed "an act for enrolling or licensing ships or vessels to be employed in the coasting trade and fisheries, and for regulating the same." The counsel for the respondent contend that this act does not give the right to sail from port to port, but confines itself to regulating a pre-existing right so far only as to confer certain privileges on enrolled and licensed vessels in its exercise. It will at once occur that, when a legislature attaches certain privileges and exemptions to the exercise of a right over which its control is absolute, the law must imply a power to exercise the right. The privileges are gone if the right itself be annihilated. It would be contrary to all reason, and to the course of human affairs, to say that a state is unable to strip a vessel of the particular privileges attendant on the exercise of a right, and yet may annul the right itself; that the state of New York cannot prevent an enrolled and licensed vessel, proceeding from Elizabethtown, in New Jersey, to New York, from enjoying in her course, and on her entrance into port, all the privileges conferred by the act of congress, but can shut her up in her own port, and prohibit altogether her entering the waters and ports of another state. To the court it seems very clear that the whole act on the subject of the coasting trade, according to those principles which govern the construction of statutes, im-

plies, unequivocally, an authority to licensed vessels to carry on the coasting trade.

But we will proceed briefly to notice those sections which bear more directly on the subject. The first section declares that vessels enrolled by virtue of a previous law, and certain other vessels enrolled as described in that act, and having a license in force, as is by the act required, "and no others, shall be deemed ships or vessels of the United States, entitled to the privileges of ships or vessels employed in the coasting trade." This section seems to the court to contain a positive enactment that the vessels it describes shall be entitled to the privileges of ships or vessels employed in the coasting trade. These privileges cannot be separated from the trade, and cannot be enjoyed unless the trade may be prosecuted. The grant of the privilege is an idle, empty form, conveying nothing, unless it convey the right to which the privilege is attached, and in the exercise of which its whole value consists. To construe these words otherwise than as entitling the ships or vessels described to carry on the coasting trade would be, we think, to disregard the apparent intent of the act. The fourth section directs the proper officer to grant to a vessel qualified to receive it "a license for carrying on the coasting trade," and prescribes its form. After reciting the compliance of the applicant with the previous requisites of the law, the operative words of the instrument are: "License is hereby granted for the said steamboat, Bellona, to be employed in carrying on the coasting trade for one year from the date hereof, and no longer." These are not the words of the officer; they are the words of the legislature, and convey as explicitly the authority the act intended to give, and operate as effectually, as if they had been inserted in any other part of the act than in the license itself.

The word "license" means permission or authority; and a license to do any particular thing is a permission or authority to do that thing, and, if granted by a person having power to grant it, transfers to the grantee the right to do whatever it purports to authorize. It certainly transfers to him all the right which the grantor can transfer to do what is within the terms of the license. Would the validity or effect of such an instrument be questioned by the respondent if executed by persons claiming regularly under the laws of New York? The license must be understood to be what it purports to be,—a legislative authority to the steamboat Bellona "to be employed in carrying on the coasting trade for one year from this date." It has been denied that these words authorize a voyage from New Jersey to New York. It is

true that no ports are specified; but it is equally true that the words used are perfectly intelligible, and do confer such authority as unquestionably as if the ports had been mentioned. The "coasting trade" is a term well understood. The law has defined it, and all know its meaning perfectly. The act describes with great minuteness the various operations of a vessel engaged in it; and it cannot, we think, be doubted that a voyage from New Jersey to New York is one of those operations.

Notwithstanding the decided language of the license, it has also been maintained that it gives no right to trade, and that its sole purpose is to confer the American character. The answer given to this argument, that the American character is conferred by the enrollment, and not by the license, is, we think, founded too clearly in the words of the law to require the support of any additional observations. The enrollment of vessels designed for the coasting trade corresponds precisely with the registration of vessels designed for the foreign trade, and requires every circumstance which can constitute the American character. The license can be granted only to vessels already enrolled, if they be of the burthen of twenty tons and upwards, and requires no circumstance essential to the American character. The object of the license, then, cannot be to ascertain the character of the vessel, but to do what it professes to do,—that is, to give permission to a vessel, already proved by her enrollment to be American, to carry on the coasting trade. But if the license be a permit to carry on the coasting trade, the respondent denies that these boats were engaged in that trade, or that the decree under consideration has restrained them from prosecuting it. The boats of the appellant were, we are told, employed in the transportation of passengers; and this is no part of that commerce which congress may regulate. If, as our whole course of legislation on this subject shows, the power of congress has been universally understood in America to comprehend navigation, it is a very persuasive, if not a conclusive, argument to prove that the construction is correct, and, if it be correct, no clear distinction is perceived between the power to regulate vessels employed in transporting men for hire and property for hire. The subject is transferred to congress, and no exception to the grant can be admitted which is not proved by the words or the nature of the thing. A coasting vessel employed in the transportation of passengers is as much a portion of the American marine as one employed in the transportation of a cargo; and no reason is perceived why such

vessel should be withdrawn from the regulating power of that government which has been thought best fitted for the purpose generally. The provisions of the law respecting native seamen and respecting ownership are as applicable to vessels carrying men as to vessels carrying manufactures, and no reason is perceived why the power over the subject should not be placed in the same hands. The argument urged at the bar rests on the foundation that the power of congress does not extend to navigation as a branch of commerce, and can only be applied to that subject incidentally and occasionally. But if that foundation be removed, we must show some plain, intelligible distinction, supported by the constitution or by reason, for discriminating between the power of congress over vessels employed in navigating the same seas. We can perceive no such distinction. If we refer to the constitution, the inference to be drawn from it is rather against the distinction. The section which restrains congress from prohibiting the migration or importation of such persons as any of the states may think proper to admit until the year 1808 has always been considered as an exception from the power to regulate commerce, and certainly seems to class migration with importation. Migration applies as appropriately to voluntary, as importation does to involuntary, arrivals; and, so far as an exception from a power proves its existence, this section proves that the power to regulate commerce applies equally to the regulation of vessels employed in transporting men who pass from place to place voluntarily, and to those who pass involuntarily. If the power reside in congress as a portion of the general grant to regulate commerce, then acts applying that power to vessels generally must be construed as comprehending all vessels. If none appear to be excluded by the language of the act, none can be excluded by construction. Vessels have always been employed to a greater or less extent in the transportation of passengers, and have never been supposed to be, on that account, withdrawn from the control or protection of congress. Packets which ply along the coast, as well as those which make voyages between Europe and America, consider the transportation of passengers as an important part of their business. Yet it has never been suspected that the general laws of navigation did not apply to them.

The duty act—sections twenty-three and forty-six—contains provisions respecting passengers, and shows that vessels which transport them have the same rights, and must perform the same duties, with other vessel. They are governed by the general

laws of navigation. In the progress of things, this seems to have grown into a particular employment, and to have attracted the particular attention of government. Congress was no longer satisfied with comprehending vessels engaged specially in this business, within those provisions which were intended for vessels generally, and on the 2d of March, 1819, passed "An act regulating passenger ships and vessels." This wise and humane law provides for the safety and comfort of passengers, and for the communication of everything concerning them which may interest the government to the department of state, but makes no provision concerning the entry of the vessel, or her conduct in the waters of the United States. This, we think, shows conclusively the sense of congress (if, indeed, any evidence to that point could be required) that the pre-existing regulations comprehended passenger ships among others, and, in prescribing the same duties, the legislature must have considered them as possessing the same rights.

If, then, it were even true that the Bellona and the Stoudinger were employed exclusively in the conveyance of passengers between New York and New Jersey, it would not follow that this occupation did not constitute a part of the coasting trade of the United States, and was not protected by the license annexed to the answer. But we cannot perceive how the occupation of these vessels can be drawn into question in the case before the court. The laws of New York, which grant the exclusive privilege set up by the respondent, take no notice of the employment of vessels, and relate only to the principle by which they are propelled. Those laws do not inquire whether vessels are engaged in transporting men or merchandise, but whether they are moved by steam or wind. If by the former, the waters of New York are closed against them, though their cargoes be dutiable goods, which the laws of the United States permit them to enter and deliver in New York. If by the latter, those waters are free to them, though they should carry passengers only. In conformity with the law is the bill of the plaintiff in the state court. The bill does not complain that the Bellona and the Stoudinger carry passengers, but that they are moved by steam. This is the injury of which he complains, and is the sole injury against the continuance of which he asks relief. The bill does not even allege, specially, that those vessels were employed in the transportation of passengers, but says, generally, that they were employed "in the transportation of passengers, or otherwise." The answer

avers only that they were employed in the coasting trade, and insists on the right to carry on any trade authorized by the license. No testimony is taken, and the writ of injunction and decree restrain these licensed vessels, not from carrying passengers, but from being moved through the waters of New York by steam, for any purpose whatever.

The questions, then, whether the conveyance of passengers be a part of the coasting trade, and whether a vessel can be protected in that occupation by a coasting license, are not, and cannot be, raised in this case. The real and sole question seems to be whether a steam machine, in actual use, deprives the vessel of the privileges conferred by a license. In considering this question, the first idea which presents itself is that the laws of congress for the regulation of commerce do not look to the principle by which vessels are moved. That subject is left entirely to individual discretion; and in that vast and complex system of legislative enactment concerning it, which embraces everything that the legislature thought it necessary to notice, there is not, we believe, one word respecting the peculiar principle by which vessels are propelled through the water, except what may be found in a single act, granting a particular privilege to steamboats. With this exception, every act, either prescribing duties or granting privileges, applies to every vessel, whether navigated by the instrumentality of wind or fire, of sails or machinery. The whole weight of proof, then, is thrown upon him who would introduce a distinction to which the words of the law give no countenance.

If a real difference could be admitted to exist between vessels carrying passengers and others, it has already been observed that there is no fact in this case which can bring up that question; and if the occupation of steamboats be a matter of such general notoriety that the court may be presumed to know it, although not specially informed by the record, then we deny that the transportation of passengers is their exclusive occupation. It is a matter of general history that, in our western waters, their principal employment is the transportation of merchandise; and all know that, in the waters of the Atlantic, they are frequently so employed. But all inquiry into this subject seems to the court to be put completely at rest by the act already mentioned, entitled, "An act for the enrolling and licensing of steamboats." This act authorizes a steamboat employed, or intended to be employed, only in a river or bay of the United States, owned wholly or in part by an alien, resident within the United States, to be

enrolled and licensed as if the same belonged to a citizen of the United States. This act demonstrates the opinion of congress that steamboats may be enrolled and licensed, in common with vessels using sails. They are, of course, entitled to the same privileges, and can no more be restrained from navigating waters and entering ports which are free to such vessels than if they were wafted on their voyage by the winds, instead of being propelled by the agency of fire. The one element may be as legitimately used as the other for every commercial purpose authorized by the laws of the Union; and the act of a state inhibiting the use of either to any vessel having a license under the act of congress comes, we think, in direct collision with that act. As this decides the cause, it is unnecessary to enter into an examination of that part of the constitution which empowers congress to promote the progress of science and the useful arts.

The court is aware that, in stating the train of reasoning by which we have been conducted to this result, much time has been consumed in the attempt to demonstrate propositions which may have been thought axioms. It is felt that the tediousness inseparable from the endeavor to prove that which is already clear is imputable to a considerable part of this opinion. But it was unavoidable. The conclusion to which we have come depends on a chain of principles which it was necessary to preserve unbroken; and, although some of them were thought nearly self-evident, the magnitude of the question, the weight of character belonging to those from whose judgment we dissent, and the argument at the bar demanded that we should assume nothing. Powerful and ingenious minds, taking as postulates that the powers expressly granted to the government of the Union are to be contracted by construction into the narrowest possible compass, and that the original powers of the states are retained, if any possible construction will retain them, may, by a course of well-digested, but refined and metaphysical, reasoning, founded on these premises, explain away the constitution of our country, and leave it, a magnificent structure, indeed, to look at, but totally unfit for use. They may so entangle and perplex the understanding as to obscure principles which were before thought quite plain, and induce doubts where, if the mind were to pursue its own course, none would be perceived. In such a case it is peculiarly necessary to recur to safe and fundamental principles to sustain those principles, and, when sustained, to make them the tests of the arguments to be examined.

JUDICIAL OPINION IN THE CASE OF OGDEN AGAINST SAUNDERS, IN THE SUPREME COURT OF THE UNITED STATES, 1824.

STATEMENT.

The constitutional doctrine with respect to the obligation of contracts which was brought into great prominence by the case of Dartmouth College v. Woodward soon came before the supreme court of the United States in various aspects. One of the most important of these was the validity of state bankruptcy laws. In Sturges v. Crowninshield,[1] this subject was exhaustively considered, and such state laws were held to be valid, in the absence of federal legislation on the subject, provided such state laws do not impair the obligation of contracts by discharging the debtor. The case of Ogden v. Saunders involved another phase of this controversy. It was an action brought by Saunders, a citizen of Kentucky, against Ogden, a citizen of Louisiana, in the circuit court of Louisiana, on certain bills of exchange drawn in 1806 by one Jordan, at Lexington, Ky., upon the defendant Ogden, in the city of New York, where he then resided, which had been then accepted by him, but were afterwards protested for nonpayment. Among several pleas filed by the defendant was a certificate of discharge under the New York act of April 3, 1801, for the relief of insolvent debtors. On the special verdict returned by the jury the court rendered judgment for the plaintiff, whereupon the defendant carried the case to the supreme court by a writ of error. The question of the validity of the New York act, thus raised by the defendant's plea, was twice argued in the supreme court by distinguished counsel, among whom were Henry Clay, D. B. Ogden, William Wirt, E. Livingston, and Walter Jones for, and Daniel Webster and Henry Wheaton against, the constitutionality of the state law.

It was held by a majority of the court that the municipal law in force when a contract is made is part of the contract itself, and if such a law provides for the discharge of the contract upon prescribed conditions, its enforcement upon those conditions does not impair the obligation of the contract of which that law was part. Chief Justice Marshall, dissenting from the majority for the first time on a question of constitutional law, but supported in his view by Justices Story and Duvall, maintained that, however an existing law may act upon contracts when they come to be enforced, it does not enter into them as part of the original agreement, and that an insolvent law which released the debtor upon conditions not in effect agreed to by the parties themselves, whether operating upon past or future contracts, impaired their obligation. Nevertheless, it was also held by the majority, Chief Justice Marshall concurring, that the state law, if part of the contract, was such only as between citizens of that state, and, since the creditor in this case was a citizen of Louisiana, he was not bound by the New York involvent law, and the debtor was not discharged.[2]

[1] 4 Wheat. 122.

[2] 12 Wheat. 213.

OPINION.

It is well known that the court has been divided in opinion on this case. Three judges—Mr. Justice Duvall, Mr. Justice Story, and myself—do not concur in the judgment which has been pronounced. We have taken a different view of the very interesting question which has been discussed with so much talent, as well as labor, at the bar, and I am directed to state the course of reasoning on which we have formed the opinion that the discharge pleaded by the defendant is no bar to the action.

The single question for consideration is whether the act of the state of New York is consistent with or repugnant to the constitution of the United States. This court has so often expressed the sentiments of profound and respectful reverence with which it approaches questions of this character as to make it unnecessary now to say more than that, if it be right that the power of preserving the constitution from legislative infraction should reside anywhere, it cannot be wrong—it must be right—that those upon whom the delicate and important duty is conferred should perform it according to their best judgment. Much, too, has been said concerning the principles of construction which ought to be applied to the constitution of the United States. On this subject, also, the court has taken such frequent occasion to declare its opinion as to make it unnecessary, at least, to enter again into an elaborate discussion of it. To say that the intention of the instrument must prevail; that this intention must be collected from its words; that its words are to be understood in that sense in which they are generally used by those for whom the instrument was intended; that its provisions are neither to be restricted into insignificance nor extended to objects not comprehended in them nor contemplated by its framers,—is to repeat what has been already said more at large, and is all that can be necessary.

As preliminary to a more particular investigation of the clause in the constitution on which the case now under consideration is supposed to depend, it may be proper to inquire how far it is affected by the former decisions of this court. In Sturges v. Crowninshield it was determined that an act which discharged the debtor from a contract entered into previous to its passage was repugnant to the constitution. The reasoning which conducted the court to that conclusion might, perhaps, conduct it farther, and with that reasoning (for myself alone this expression is used), I have never yet seen cause to be dissatisfied. But that decision is not supposed to be a precedent for Ogden v. Saun-

ders, because the two cases differ from each other in a material fact; and it is a general rule, expressly recognized by the court in Sturges v. Crowninshield, that the positive authority of a decision is coextensive only with the facts on which it is made. In Sturges v. Crowninshield the law acted on a contract which was made before its passage; in this case the contract was entered into after the passage of the law. In McMillan v. McNeill, the contract, though subsequent to the passage of the act, was made in a different state, by persons residing in that state, and, consequently, without any view to the law, the benefit of which was claimed by the debtor. Farmers' & Mechanics' Bank of Pennsylvania v. Smith differed from Sturges v. Crowninshield only in this: that the plaintiff and defendant were both residents of the state in which the law was enacted, and in which it was applied. The court was of opinion that this difference was unimportant.

It has, then, been decided that an act which discharges the debtor from pre-existing contracts is void, and that an act which operates on future contracts is inapplicable to a contract made in a different state, at whatever time it may have been entered into. Neither of these decisions comprehends the question now presented to the court. It is consequently open for discussion. The provision of the constitution is that "no state shall pass any law impairing the obligation of contracts." The plaintiff in error contends that this provision inhibits the passage of retrospective laws only,—of such as act on contracts in existence at their passage. The defendant in error maintains that it comprehends all future laws, whether prospective or retrospective, and withdraws every contract from state legislation, the obligation of which has become complete.

That there is an essential difference in principle between laws which act on past, and those which act on future, contracts,—that those of the first description can seldom be justified, while those of the last are proper subjects of ordinary legislative discretion, —must be admitted. A constitutional restriction, therefore, on the power to pass laws of the one class, may very well consist with entire legislative freedom respecting those of the other. Yet, when we consider the nature of our Union,—that it is intended to make us, in a great measure, one people as to commercial objects; that, so far as respects the intercommunication of individuals, the lines of separation between states are, in many respects, obliterated,—it would not be matter of surprise if, on the delicate

subject of contracts once formed, the interference of state legislation should be greatly abridged or entirely forbidden. In the nature of the provision, then, there seems to be nothing which ought to influence our construction of the words; and, in making that construction, the whole clause, which consists of a single sentence, is to be taken together, and the intention is to be collected from the whole.

The first paragraph of the tenth section of the first article, which comprehends the provision under consideration, contains an enumeration of those cases in which the action of the state legislature is entirely prohibited. The second enumerates those in which the prohibition is modified. The first paragraph, consisting of total prohibitions, comprehends two classes of powers. Those of the first are political and general in their nature, being an exercise of sovereignty without affecting the rights of individuals. These are the powers "to enter into any treaty, alliance, or confederation; grant letters of marque or reprisal, coin money, emit bills of credit." The second class of prohibited laws comprehends those whose operation consists in their action on individuals. These are laws which make anything but gold and silver coin a tender in payment of debts, bills of attainder, *ex post facto* laws, or laws impairing the obligation of contracts, or which grant any title of nobility. In all these cases, whether the thing prohibited be the exercise of mere political power, or legislative action on individuals, the prohibition is complete and total. There is no exception from it. Legislation of every description is comprehended within it. A state is as entirely forbidden to pass laws impairing the obligation of contracts as to make treaties or coin money. The question recurs, what is a law impairing the obligation of contracts? In solving this question, all the acumen which controversy can give to the human mind has been employed in scanning the whole sentence, and every word of it. Arguments have been drawn from the context, and from the particular terms in which the prohibition is expressed, for the purpose, on the one part, of showing its application to all laws which act upon contracts, whether prospectively or retrospectively, and, on the other, of limiting it to laws which act on contracts previously formed. The first impression which the words make on the mind would probably be that the prohibition was intended to be general. A contract is commonly understood to be the agreement of the parties, and, if it be not illegal, to bind them to the extent of their stipulations. It requires reflection—it requires some intellectual effort—to efface this impression and to come to the

conclusion that the words "contract" and "obligation," as used in the constitution, are not used in this sense. If, however, the result of this mental effort, fairly made, be the correction of this impression, it ought to be corrected.

So much of this prohibition as restrains the power of the states to punish offenders in criminal cases, the prohibition to pass bills of attainder and *ex post facto* laws is, in its very terms, confined to pre-existing cases. A bill of attainder can be only for crimes already committed; and a law is not *ex post facto* unless it looks back to an act done before its passage. Language is incapable of expressing in plainer terms that the mind of the convention was directed to retroactive legislation. The thing forbidden is retroaction. But that part of the clause which relates to the civil transactions of individuals is expressed in more general terms,—in terms which comprehend, in their ordinary signification, cases which occur after, as well as those which occur before, the passage of the act. It forbids a state to make anything but gold and silver coin a tender in payment of debts, or to pass any law impairing the obligation of contracts. These prohibitions relate to kindred subjects. They contemplate legislative interference with private rights, and restrain that interference. In construing that part of the clause which respects tender laws, a distinction has never been attempted between debts existing at the time the law may be passed and debts afterwards created. The prohibition has been considered as total; and yet the difference in principle between making property a tender in payment of debts, contracted after the passage of the act, and discharging those debts without payment, or by the surrender of property, between an absolute right to tender in payment and a contingent right to tender in payment, or in discharge of the debt, is not clearly discernible. Nor is the difference in language so obvious as to denote plainly a difference of intention in the framers of the instrument. "No state shall make anything but gold and silver coin a tender in payment of debts." Does the word "debts" mean, generally, those due when the law applies to the case, or is it limited to debts due at the passage of the act? The same train of reasoning which would confine the subsequent words to contracts existing at the passage of the law would go far in confining these words to debts existing at that time. Yet this distinction has never, we believe, occurred to any person. How soon it may occur is not for us to determine. We think it would unquestionably defeat the object of the clause.

The counsel for the plaintiff insist that the word "impairing," in the present tense, limits the signification of the provision to the operation of the act at the time of its passage; that no law can be accurately said to impair the obligation of contracts unless the contracts exist at the time. The law cannot impair what does not exist. It cannot act on nonentities. There might be weight in this argument if the prohibited laws were such only as operated of themselves, and immediately on the contract. But insolvent laws are to operate on a future, contingent, unforeseen event. The time to which the word "impairing" applies is not the time of the passage of the act, but of its action on the contract,—that is, the time present in contemplation of the prohibition. The law, at its passage, has no effect whatever on the contract. Thus, if a note be given in New York for the payment of money, and the debtor removes out of that state into Connecticut, and becomes insolvent, it is not pretended that his debt can be discharged by the law of New York. Consequently, that law did not operate on the contract at its formation. When, then, does its operation commence? We answer, when it is applied to the contract. Then, if ever, and not till then, it acts on the contract, and becomes a law impairing its obligation. Were its constitutionality with respect to previous contracts to be admitted, it would not impair their obligation until an insolvency should take place, and a certificate of discharge be granted. Till these events occur, its impairing faculty is suspended. A law, then, of this description, if it derogates from the obligation of a contract when applied to it, is, grammatically speaking, as much a law impairing that obligation, though made previous to its formation, as if made subsequently.

A question of more difficulty has been pressed with great earnestness. It is, what is the original obligation of a contract made after the passage of such an act as the insolvent law of New York? Is it unconditional to perform the very thing stipulated, or is the condition implied that, in the event of insolvency, the contract shall be satisfied by the surrender of property? The original obligation, whatever that may be, must be preserved by the constitution. Any law which lessens must impair it. All admit that the constitution refers to and preserves the legal, not the moral, obligation of a contract. Obligations purely moral are to be enforced by the operation of internal and invisible agents, not by the agency of human laws. The restraints imposed on states by the constitution are intended for those objects which

would, if not restrained, be the subject of state legislation. What, then, was the original legal obligation of the contract now under the consideration of the court?

The plaintiff insists that the law enters into the contract so completely as to become a constituent part of it; that it is to be construed as if it contained an express stipulation to be discharged, should the debtor become insolvent, by the surrender of all his property for the benefit of his creditors, in pursuance of the act of the legislature. This is, unquestionably, pressing the argument very far; and the establishment of the principle leads inevitably to consequences which would affect society deeply and seriously. Had an express condition been inserted in the contract, declaring that the debtor might be discharged from it at any time by surrendering all his property to his creditors, this condition would have bound the creditor. It would have constituted the obligation of his contract, and a legislative act annulling the condition would impair the contract. Such an act would, as is admitted by all, be unconstitutional, because it operates on pre-existing agreements. If a law authorizing debtors to discharge themselves from their debts by surrendering their property enters into the contract, and forms a part of it, if it is equivalent to a stipulation between the parties, no repeal of the law can affect contracts made during its existence. The effort to give it that effect would impair their obligation. The counsel for the plaintiff perceive and avow this consequence, in effect, when they contend that to deny the operation of the law on the contract under consideration is to impair its obligation. Are gentlemen prepared to say that an insolvent law, once enacted, must to a considerable extent be permanent? That the legislature is incapable of varying it so far as respects existing contracts? So, too, if one of the conditions of an obligation for the payment of money be that, on the insolvency of the obligor, or on any event agreed on by the parties, he should be at liberty to discharge it by the tender of all, or part of, his property, no question could exist respecting the validity of the contract, or respecting its security from legislative interference. If it should be determined that a law authorizing the same tender, on the same contingency, enters into and forms a part of the contract, then a tender law, though expressly forbidden, with an obvious view to its prospective as well as retrospective operation, would, by becoming the contract of the parties, subject all contracts made after its passage to its control. If it be said that such a law would be obviously unconstitutional

and void, and therefore could not be a constituent part of the contract, we answer that, if the insolvent law be unconstitutional, it is equally void, and equally incapable of becoming, by mere implication, a part of the contract. The plainness of the repugnancy does not change the question. That may be very clear to one intellect which is far from being so to another. The law now under consideration is, in the opinion of one party, clearly consistent with the constitution, and, in the opinion of the other, as clearly repugnant to it. We do not admit the correctness of that reasoning which would settle this question by introducing into the contract a stipulation not admitted by the parties.

This idea admits of being pressed still further. If one law enters into all subsequent contracts, so does every other law which relates to the subject. A legislative act, then, declaring that all contracts should be subject to legislative control, and should be discharged as the legislature might prescribe, would become a component part of every contract, and be one of its conditions. Thus, one of the most important features in the constitution of the United States—one which the state of the times most urgently required; one on which the good and the wise reposed confidently for securing the prosperity and harmony of our citizens—would lie prostrate, and be construed into an inanimate, inoperative, unmeaning clause. Gentlemen are struck with the enormity of this result, and deny that their principle leads to it. They distinguish, or attempt to distinguish, between the incorporation of a general law, such as has been stated, and the incorporation of a particular law, such as the insolvent law of New York, into the contract. But will reason sustain this distinction? They say that men cannot be supposed to agree to so indefinite an article as such a general law would be, but may well be supposed to agree to an article reasonable in itself, and the full extent of which is understood. But the principle contended for does not make the insertion of this new term or condition into the contract to depend upon its reasonableness. It is inserted because the legislature has so enacted. If the enactment of the legislature becomes a condition of the contract because it is an enactment, then it is a high prerogative, indeed, to decide that one enactment shall enter the contract, while another, proceeding from the same authority, shall be excluded from it. The counsel for the plaintiff illustrates and supports this position by several legal principles, and by some decisions of this court, which have been relied on as being applicable to it.

The first case put is interest on a bond payable on demand, which does not stipulate interest. This, he says, is not a part of the remedy, but a new term in the contract. Let the correctness of this averment be tried by the course of proceeding in such cases. The failure to pay according to stipulation is a breach of the contract, and the means used to enforce it constitute the remedy which society affords the injured party. If the obligation contains a penalty, this remedy is universally so regulated that the judgment shall be entered for the penalty, to be discharged by the payment of the principal and interest. But the case on which counsel has reasoned is a single bill. In this case, the party who has broken his contract is liable for damages. The proceeding to obtain those damages is as much a part of the remedy as the proceeding to obtain the debt. They are claimed in the same declaration, and as being distinct from each other. The damages must be assessed by a jury; whereas, if interest formed a part of the debt, it would be recovered as part of it. The declaration would claim it as a part of the debt; and yet, if a suitor were to declare on such a bond as containing this new term for the payment of interest, he would not be permitted to give a bond in evidence in which this supposed term was not written. Any law regulating the proceedings of courts on this subject would be a law regulating the remedy.

The liability of the drawer of a bill of exchange stands upon the same principle with every other implied contract. He has received the money of the person in whose favor the bill is drawn, and promises that it shall be returned by the drawee. If the drawee fail to pay the bill, then the promise of the drawer is broken, and for this breach of contract he is liable. The same principle applies to the indorser. His contract is not written, but his name is evidence of his promise that the bill shall be paid, and of his having received value for it. He is, in effect, a new drawer, and has made a new contract. The law does not require that this contract shall be in writing, and, in determining what evidence shall be sufficient to prove it, does not introduce new conditions not actually made by the parties. The same reasoning applies to the principle which requires notice. The original contract is not written at large. It is founded on the acts of the parties, and its extent is measured by those acts. A. draws on B. in favor of C. for value received. The bill is evidence that he has received value, and has promised that it shall be paid. He has funds in the hands of the drawer, and has a right to expect

that his promise will be performed. He has also a right to expect notice of its nonperformance, because his conduct may be materially influenced by this failure of the drawee. He ought to have notice that his bill is disgraced, because this notice enables him to take measures for his own security. It is reasonable that he should stipulate for this notice, and the law presumes that he did stipulate for it.

A great mass of human transactions depends upon implied contracts,—upon contracts which are not written, but which grow out of the acts of the parties. In such cases, the parties are supposed to have made those stipulations which, as honest, fair, and just men, they ought to have made. When the law assumes that they have made these stipulations, it does not vary their contract, or introduce new terms into it, but declares that certain acts, unexplained by compact, impose certain duties, and that the parties had stipulated for their performance. The difference is obvious between this and the introduction of a new condition into a contract drawn out in writing, in which the parties have expressed everything that is to be done by either. The usage of banks, by which days of grace are allowed on notes payable and negotiable in bank, is of the same character. Days of grace, from their very term, originate partly in convenience, and partly in the indulgence of the creditor. By the terms of the note, the debtor has to the last hour of the day on which it becomes payable to comply with it, and it would often be inconvenient to take any steps after the close of day. It is often convenient to postpone subsequent proceedings till the next day. Usage has extended this time of grace generally to three days, and in some banks to four. This usage is made a part of the contract, not by the interference of the legislature, but by the act of the parties. The case cited from 9 Wheat. 581, is a note discounted in bank. In all such cases the bank receives, and the maker of the note pays, interest for the days of grace. This would be illegal and usurious if the money was not lent for these additional days. The extent of the loan, therefore, is regulated by the act of the parties, and this part of the contract is founded on their act. Since, by contract, the maker is not liable for his note until the days of grace are expired, he has not broken his contract until they expire. The duty of giving notice to the indorser of his failure does not arise until the failure has taken place, and, consequently, the promise of the bank to give such notice is performed, if it be given when the event has happened.

The case of Bank of Columbia v. Okely[1] was one in which the legislature had given a summary remedy to the bank for a broken contract, and had placed that remedy in the hands of the bank itself. The case did not turn on the question whether the law of Maryland was introduced into the contract, but whether a party might not, by his own conduct, renounce his claim to the trial by jury in a particular case. The court likened it to submissions to arbitration, and to stipulation and forthcoming bonds. The principle settled in that case is that a party may renounce a benefit, and that Okely had exercised this right. The cases from Strange and East turn upon a principle which is generally recognized, but which is entirely distinct from that which they are cited to support. It is that a man who is discharged by the tribunals of his own country, acting under its laws, may plead that discharge in any other country. The principle is that laws act upon a contract, not that they enter into it, and become a stipulation of the parties. Society affords a remedy for breaches of contract. If that remedy has been applied, the claim to it is extinguished. The external action of law upon contracts, by administering the remedy for their breach, or otherwise, is the usual exercise of legislative power. The interference with those contracts, by introducing conditions into them not agreed to by the parties, would be a very unusual and a very extraordinary exercise of the legislative power, which ought not to be gratuitously attributed to laws that do not profess to claim it. If the law becomes a part of the contract, change of place would not expunge the condition. A contract made in New York would be the same in any other state as in New York, and would still retain the stipulation originally introduced into it,—that the debtor should be discharged by the surrender of his estate.

It is not, we think, true that contracts are entered into in contemplation of the insolvency of the obligor. They are framed with the expectation that they will be literally performed. Insolvency is undoubtedly a casualty which is possible, but is never expected. In the ordinary course of human transactions, if even suspected, provision is made for it by taking security against it. When it comes unlooked for, it would be entirely contrary to reason to consider it as a part of the contract. We have, then, no hesitation in saying that, however law may act upon contracts, it does not enter into them, and become a part of the agreement. The effect of such a principle would be a mischievous abridg-

[1] 4 Wheat. 235.

ment of legislative power over subjects within the proper jurisdiction of states, by arresting their power to repeal or modify such laws with respect to existing contracts. But although the argument is not sustainable in this form, it assumes another, in which it is more plausible. Contract, it is said, being the creature of society, derives its obligation from the law; and although the law may not enter into the agreement so as to form a constituent part of it, still it acts externally upon the contract, and determines how far the principle of coercion shall be applied to it, and, this being universally understood, no individual can complain justly of its application to himself in a case where it was known when the contract was formed. This argument has been illustrated by references to the statutes of frauds, of usury, and of limitations. The construction of the words in the constitution respecting contracts, for which the defendants contend, would, it has been said, withdraw all these subjects from state legislation. The acknowledgment that they remain within it is urged as an admission that contract is not withdrawn by the constitution, but remains under state control, subject to this restriction only: that no law shall be passed impairing the obligation of contracts in existence at its passage.

The defendants maintain that an error lies at the very foundation of this argument. It assumes that contract is the mere creature of society, and derives all its obligation from human legislation. That it is not the stipulation an individual makes which binds him, but some declaration of the supreme power of a state to which he belongs that he shall perform what he has undertaken to perform. That, though this original declaration may be lost in remote antiquity, it must be presumed as the origin of the obligation of contracts. This postulate the defendants deny, and, we think, with great reason. It is an argument of no inconsiderable weight against it that we find no trace of such an enactment. So far back as human research carries us, we find the judicial power as a part of the executive, administering justice by the application of remedies to violated rights or broken contracts. We find that power applying these remedies on the idea of a pre-existing obligation on every man to do what he has promised on consideration to do; that the breach of this obligation is an injury for which the injured party has a just claim to compensation, and that society ought to afford him a remedy for that injury. We find allusions to the mode of acquiring property, but we find no allusion, from the earliest time, to any supposed act of the govern-

ing power giving obligation to contracts. On the contrary, the proceedings respecting them of which we know anything evince the idea of a pre-existing intrinsic obligation which human law enforces. If, on tracing the right to contract, and the obligations created by contract, to their source, we find them to exist anterior to and independent of society, we may reasonably conclude that those original and pre-existing principles are, like many other natural rights, brought with man into society, and, although they may be controlled, are not given by human legislation.

In the rudest state of nature a man governs himself, and labors for his own purposes. That which he acquires is his own, at least while in his possession, and he may transfer it to another. This transfer passes his right to that other. Hence the right to barter. One man may have acquired more skins than are necessary for his protection from the cold; another, more food than is necessary for his immediate use. They agree each to supply the wants of the other from his surplus. Is this contract without obligation? If one of them, having received and eaten the food he needed, refuses to deliver the skin, may not the other rightfully compel him to deliver it? Or two persons agree to unite their strength and skill to hunt together for their mutual advantage, engaging to divide the animal they shall master. Can one of them rightfully take the whole? or, should he attempt it, may not the other force him to a division? If the answer to these questions must affirm the duty of keeping faith between these parties, and the right to enforce it if violated, the answer admits the obligation of contracts, because, upon that obligation depends the right to enforce them. Superior strength may give the power, but cannot give the right. The rightfulness of coercion must depend on the pre-existing obligation to do that for which compulsion is used. It is no objection to the principle that the injured party may be the weakest. In society, the wrongdoer may be too powerful for the law. He may deride its coercive power, yet his contracts are obligatory, and, if society acquire the power of coercion, that power will be applied without previously enacting that his contract is obligatory.

Independent nations are individuals in a state of nature. Whence is derived the obligation of their contracts? They admit the existence of no superior legislative power which is to give them validity, yet their validity is acknowledged by all. If one of these contracts be broken, all admit the right of the injured party to demand reparation for the injury, and to enforce that reparation if it be withheld. He may not have the power to enforce it,

but the whole civilized world concurs in saying that the power, if possessed, is rightfully used. In a state of nature, these individuals may contract, their contracts are obligatory, and force may rightfully be employed to coerce the party who has broken his engagement. What is the effect of society upon these rights? When men unite together and form a government, do they surrender their right to contract, as well as their right to enforce the observance of contracts? For what purpose should they make this surrender? Government cannot exercise this power for individuals. It is better that they should exercise it for themselves. For what purpose, then, should the surrender be made? It can only be that government may give it back again. As we have no evidence of the surrender, or of the restoration of the right, —as this operation of surrender and restoration would be an idle and useless ceremony,—the rational inference seems to be that neither has ever been made; that individuals do not derive from government their right to contract, but bring that right with them into society; that obligation is not conferred on contracts by positive law, but is intrinsic, and is conferred by the act of the parties. This results from the right which every man retains to acquire property, to dispose of that property according to his own judgment, and to pledge himself for a future act. These rights are not given by society, but are brought into it. The right of coercion is necessarily surrendered to government, and this surrender imposes on government the correlative duty of furnishing a remedy.

The right to regulate contracts, to prescribe rules by which they shall be evidenced, to prohibit such as may be deemed mischievous, is unquestionable, and has been universally exercised. So far as this power has restrained the original right of individuals to bind themselves by contract, it is restrained, but beyond these actual restraints the original power remains unimpaired. This reasoning is undoubtedly much strengthened by the authority of those writers on natural and national law whose opinions have been viewed with profound respect by the wisest men of the present and of past ages. Supposing the obligation of the contract to be derived from the agreement of the parties, we will inquire how far law acts externally on it, and may control that obligation. That law may have, on future contracts, all the effect which the counsel for the plaintiff in error claim, will not be denied. That it is capable of discharging the debtor under the circumstances, and on the conditions prescribed in the statute which has been pleaded in this case, will not be controverted.

But as this is an operation which was not intended by the parties nor contemplated by them, the particular act can be entitled to this operation only when it has the full force of law. A law may determine the obligation of a contract on the happening of a contingency, because it is the law. If it be not the law, it cannot have this effect. When its existence as law is denied, that existence cannot be proved by showing what are the qualities of a law. Law has been defined by a writer, whose definitions especially have been the theme of almost universal panegyric, "to be a rule of civil conduct prescribed by the supreme power in a state." In our system, the legislature of a state is the supreme power in all cases where its action is not restrained by the constitution of the United States. Where it is so restrained, the legislature ceases to be the supreme power, and its acts are not law. It is, then, begging the question to say that, because contracts may be discharged by a law previously enacted, this contract may be discharged by this act of the legislature of New York; for the question returns upon us, is this act a law? Is it consistent with, or repugnant to, the constitution of the United States? This question is to be solved only by the constitution itself. In examining it, we readily admit that the whole subject of contracts is under the control of society, and that all the power of society over it resides in the state legislatures, except in those special cases where restraint is imposed by the constitution of the United States. The particular restraint now under consideration is on the power to impair the obligation of contracts. The extent of this restraint cannot be ascertained by showing that the legislature may prescribe the circumstances on which the original validity of a contract shall be made to depend. If the legislative will be that certain agreements shall be in writing, that they shall be sealed, that they shall be attested by a certain number of witnesses, that they shall be recorded, or that they shall assume any prescribed form before they become obligatory, all these are regulations which society may rightfully make, and which do not come within the restrictions of the constitution, because they do not impair the obligation of the contract. The obligation must exist before it can be impaired; and a prohibition to impair it, when made, does not imply an inability to prescribe those circumstances which shall create its obligation. The statutes of frauds, therefore, which have been enacted in the several states, and which are acknowledged to flow from the proper exercise of state sovereignty, prescribe regulations which must precede the obligation of the con-

tract, and consequently cannot impair that obligation. Acts of this description, therefore, are most clearly not within the prohibition of the constitution. The acts against usury are of the same character. They declare the contract to be void in the beginning. They deny that the instrument ever became a contract. They deny it all original obligation, and cannot impair that which never came into existence.

Acts of limitations approach more nearly to the subject of consideration, but are not identified with it. They defeat a contract once obligatory, and may therefore be supposed to partake of the character of laws which impair its obligation. But a practical view of the subject will show us that the two laws stand upon distinct principles. In the case of Sturges v. Crowninshield it was observed by the court that these statutes relate only to the remedies which are furnished in the courts, and their language is generally confined to the remedy. They do not purport to dispense with the performance of a contract, but proceed on the presumption that a certain length of time, unexplained by circumstances, is reasonable evidence of a performance. It is on this idea alone that it is possible to sustain the decision that a bare acknowledgment of the debt, unaccompanied with any new promise, shall remove the bar created by the act. It would be a mischief not to be tolerated if contracts might be set up at any distance of time, when the evidence of payment might be lost, and the estates of the dead, or even of the living, he subjected to these stale obligations. The principle is, without the aid of a statute, adopted by the courts as a rule of justice. The legislature has enacted no statute of limitations as a bar to suits on sealed instruments. Yet twenty years of unexplained silence on the part of the creditor is evidence of payment. On parol contracts, as on written contracts not under seal, which are considered in a less solemn point of view than sealed instruments, the legislature has supposed that a shorter time might amount to evidence of performance, and has so enacted. All have acquiesced in these enactments, but have never considered them as being of that class of laws which impair the obligation of contracts. In prescribing the evidence which shall be received in its courts, and the effect of that evidence, the state is exercising its acknowledged powers. It is likewise in the exercise of its legitimate powers when it is regulating the remedy and mode of proceeding in its courts. The counsel for the plaintiff in error insist that the right to regulate the remedy and to modify the obligation of the contract are the same; that obligation

and remedy are identical, that they are synonymous,—two words conveying the same idea. The answer given to this proposition by the defendant's counsel seems to be conclusive. They originate at different times. The obligation to perform is coeval with the undertaking to perform. It originates with the contract itself, and operates anterior to the time of performance. The remedy acts upon a broken contract, and enforces a pre-existing obligation.

If there be anything in the observations made in a preceding part of this opinion respecting the source from which contracts derive their obligation, the proposition we are now considering cannot be true. It was shown, we think, satisfactorily, that the right to contract is the attribute of a free agent, and that he may rightfully coerce performance from another free agent who violates his faith. Contracts have, consequently, an intrinsic obligation. When men come into society, they can no longer exercise this original and natural right of coercion. It would be incompatible with general peace, and is therefore surrendered. Society prohibits the use of private individual coercion, and gives in its place a more safe and more certain remedy. But the right to contract is not surrendered with the right to coerce performance. It is still incident to that degree of free agency which the laws leave to every individual, and the obligation of the contract is a necessary consequence of the right to make it. Laws regulate this right, but, where not regulated, it is retained in its original extent. Obligation and remedy, then, are not identical; they originate at different times, and are derived from different sources. But although the identity of obligation and remedy be disproved, it may be and has been urged that they are precisely commensurate with each other, and are such sympathetic essences, if the expression may be allowed, that the action of law upon the remedy is immediately felt by the obligation,—that they live, languish, and die together. The use made of this argument is to show the absurdity and self-contradiction of the construction which maintains the inviolability of obligation, while it leaves the remedy to the state governments. We do not perceive this absurdity or self-contradiction. Our country exhibits the extraordinary spectacle of distinct, and, in many respects, independent, governments over the same territory and the same people. The local governments are restrained from impairing the obligation of contracts, but they furnish the remedy to enforce them, and administer that remedy in tribunals constituted by themselves. It has been shown

that the obligation is distinct from the remedy, and it would seem to follow that law might act on the remedy without acting on the obligation. To afford a remedy is certainly the high duty of those who govern to those who are governed. A failure in the performance of this duty subjects the government to the just reproach of the world. But the constitution has not undertaken to enforce its performance. That instrument treats the states with the respect which is due to intelligent beings, understanding their duties, and willing to perform them; not as insane beings, who must be compelled to act for self-preservation. Its language is the language of restraint, not of coercion. It prohibits the states from passing any law impairing the obligation of contracts; it does not enjoin them to enforce contracts. Should a state be sufficiently insane to shut up or abolish its courts, and thereby withhold all remedy, would this annihilation of remedy annihilate the obligation also of contracts? We know it would not. If the debtor should come within the jurisdiction of any court of another state, the remedy would be immediately applied, and the inherent obligation of the contract enforced. This cannot be ascribed to a renewal of the obligation, for passing the line of a state cannot re-create an obligation which was extinguished. It must be the original obligation derived from the agreement of the parties, and which exists unimpaired, though the remedy was withdrawn.

But we are told that the power of the state over the remedy may be used to the destruction of all beneficial results from the right; and hence it is inferred that the construction which maintains the inviolability of the obligation must be extended to the power of regulating the remedy. The difficulty which this view of the subject presents does not proceed from the identity or connection of right and remedy, but from the existence of distinct governments acting on kindred subjects. The constitution contemplates restraint as to the obligation of contracts, not as to the application of remedy. If this restraint affects a power which the constitution did not mean to touch, it can only be when that power is used as an instrument of hostility to invade the inviolability of contract, which is placed beyond its reach. A state may use many of its acknowledged powers in such manner as to come in conflict with the provisions of the constitution. Thus the power over its domestic police—the power to regulate commerce purely internal—may be so exercised as to interfere with regulations of commerce with foreign nations or between the states. In such cases, the power which is supreme must control that which is not supreme when they come in conflict. But this principle does not

involve any self-contradiction, or deny the existence of the several powers in the respective governments. So, if a state shall not merely modify or withhold a particular remedy, but shall apply it in such manner as to extinguish the obligation without performance, it would be an abuse of power which could scarcely be misunderstood, but which would not prove that remedy could not be regulated without regulating obligation.

The counsel for the plaintiff in error put a case of more difficulty, and urge it as a conclusive argument against the existence of a distinct line dividing obligation from remedy. It is this: the law affords remedy by giving execution against the person or the property, or both. The same power which can withdraw the remedy against the person can withdraw that against the property, or that against both, and thus effectually defeat the obligation. The constitution, we are told, deals not with form, but with substance, and cannot be presumed, if it designed to protect the obligation of contracts from state legislation, to have left it thus obviously exposed to destruction. The answer is that, if the law goes further, and annuls the obligation without affording the remedy which satisfies it,—if its action on the remedy be such as palpably to impair the obligation of the contract,—the very case arises which we suppose to be within the constitution. If it leaves the obligation untouched, but withholds the remedy, or affords one which is merely nominal, it is like all other cases of misgovernment, and leaves the debtor still liable to his creditor, should he be found, or should his property be found, where the laws afford a remedy. If that high sense of duty which men selected for the government of their fellow citizens must be supposed to feel furnishes no security against a course of legislation which must end in self-destruction; if the solemn oath taken by every member to support the constitution of the United States furnishes no security against intentional attempts to violate its spirit while evading its letter,—the question how far the constitution interposes a shield for the protection of an injured individual, who demands from a court of justice that remedy which every government ought to afford, will depend on the law itself, which shall be brought under consideration. The anticipation of such a case would be unnecessarily disrespectful, and an opinion on it would be at least premature. But, however the question might be decided, should it be even determined that such a law would be a successful evasion of the constitution, it does not follow that an act which operates directly on the contract after it is made is not

within the restriction imposed on the states by that instrument. The validity of a law acting directly on the obligation is not proved by showing that the constitution has provided no means for compelling the state to enforce it.

We perceive, then, no reason for the opinion that the prohibition "to pass any law impairing the obligation of contracts" is incompatible with the fair exercise of that discretion, which the state legislatures possess in common with all governments, to regulate the remedies afforded by their own courts. We think that obligation and remedy are distinguishable from each other; that the first is created by the act of the parties; the last is afforded by government. The words of the restriction we have been considering countenance, we think, this idea. No state shall "pass any law impairing the obligation of contracts." These words seem to us to import that the obligation is intrinsic; that it is created by the contract itself, not that it is dependent on the laws made to enforce it. When we advert to the course of reading generally pursued by American statesmen in early life, we must suppose that the framers of our constitution were intimately acquainted with the writings of those wise and learned men whose treatises on the laws of nature and nations have guided public opinion on the subjects of obligations and contract. If we turn to those treatises, we find them to concur in the declaration that contracts possess an original intrinsic obligation derived from the acts of free agents, and not given by government. We must suppose that the framers of our constitution took the same view of the subject, and the language they have used confirms this opinion. The propositions we have endeavored to maintain, of the truth of which we are ourselves convinced, are these: That the words of the clause in the constitution which we are considering, taken in their natural and obvious sense, admit of a prospective, as well as of a retrospective, operation. That an act of the legislature does not enter into the contract, and become one of the conditions stipulated by the parties; nor does it act externally on the agreement, unless it have the full force of law. That contracts derive their obligation from the act of the parties, not from the grant of government, and that the right of government to regulate the manner in which they shall be formed, or to prohibit such as may be against the policy of the state, is entirely consistent with their inviolability after they have been formed. That the obligation of a contract is not identified with the means which government may furnish to enforce it, and that a prohibition to pass any law im-

pairing it, does not imply a prohibition to vary the remedy; nor does a power to vary the remedy imply a power to impair the obligation derived from the act of the parties.

We cannot look back to the history of the times when the august spectacle was exhibited of the assemblage of a whole people by their representatives in convention, in order to unite thirteen independent sovereignties under one government, so far as might be necessary for the purposes of union, without being sensible of the great importance which was at that time attached to the tenth section of the first article. The power of changing the relative situation of debtor and creditor, of interfering with contracts,—a power which comes home to every man, touches the interest of all, and controls the conduct of every individual in those things which he supposes to be proper for his own exclusive management,—had been used to such an excess by the state legislatures as to break in upon the ordinary intercourse of society, and destroy all confidence between man and man. The mischief had become so great, so alarming, as not only to impair commercial intercourse, and threaten the existence of credit, but to sap the morals of the people, and destroy the sanctity of private faith. To guard against the continuance of the evil was an object of deep interest with all the truly wise, as well as the virtuous, of this great community, and was one of the important benefits expected from a reform of the government. To impose restraints on state legislation as respected this delicate and interesting subject was thought necessary by all those patriots who could take an enlightened and comprehensive view of our situation, and the principle obtained an early admission into the various schemes of government which were submitted to the convention. In framing an instrument which was intended to be perpetual, the presumption is strong that every important principle introduced into it is intended to be perpetual also; that a principle expressed in terms to operate in all future time is intended so to operate. But if the construction for which the plaintiff's counsel contend be the true one, the constitution will have imposed a restriction in language indicating perpetuity, which every state in the Union may elude at pleasure. The obligation of contracts in force at any given time is but of short duration, and, if the inhibition be of retrospective laws only, a very short lapse of time will remove every subject on which the act is forbidden to operate, and make this provision of the constitution so far useless. Instead of introducing a great principle prohibiting all laws of this obnoxious character, the constitution

will only suspend their operation for a moment, or except from it pre-existing cases. The object would scarcely seem to be of sufficient importance to have found a place in that instrument. This construction would change the character of the provision, and convert an inhibition to pass retrospective laws. Had this been the intention of the convention, is it not reasonable to believe that it would have been so expressed? Had the intention been to confine the restriction to laws which were retrospective in their operation, language could have been found, and would have been used, to convey this idea. The very word would have occurred to the framers of the instrument, and we should have probably found it in the clause. Instead of the general prohibition to pass any "law impairing the obligation of contracts," the prohibition would have been to the passage of any retrospective law. Or, if the intention had been, not to embrace all retrospective laws, but those only which related to contracts, still the word would have been introduced, and the state legislatures would have been forbidden "to pass any retrospective law impairing the obligation of contracts," or "to pass any law impairing the obligation of contracts previously made." Words which directly and plainly express the cardinal intent always present themselves to those who are preparing an important instrument, and will always be used by them. Undoubtedly there is an imperfection in human language which often exposes the same sentence to different constructions. But it is rare, indeed, for a person of clear and distinct perceptions, intending to convey one principal idea, so to express himself as to leave any doubt respecting that idea. It may be uncertain whether his words comprehend other things not immediately in his mind; but it can seldom be uncertain whether he intends the particular thing to which his mind is specially directed. If the mind of the convention, in framing this prohibition, had been directed, not generally to the operation of laws upon the obligation of contracts, but particularly to their retrospective operation, it is scarcely conceivable that some word would not have been used indicating this idea. In instruments prepared on great consideration, general terms, comprehending a whole subject, are seldom employed to designate a particular—we might say a minute—portion of that subject. The general language of the clause is such as might be suggested by a general intent to prohibit state legislation on the subject to which that language is applied,—the obligation of contracts; not such as would be suggested by a particular intent to prohibit retrospective legislation.

It is also worthy of consideration that those laws which had effected all that mischief the constitution intended to prevent were prospective, as well as retrospective, in their operation. They embraced future contracts, as well as those previously formed. There is the less reason for imputing to the convention an intention, not manifested by their language, to confine a restriction intended to guard against the recurrence of those mischiefs to retrospective legislation. For these reasons, we are of opinion that on this point the district court of Louisiana has decided rightly.

LORD BROUGHAM.

[Henry Peter Brougham, Baron Brougham and Vaux, was born in Edinburgh, 1778. He was educated at the University of Edinburgh, where he distinguished himself as a student of science and as a debater. He was graduated in 1795. In 1800 he was admitted as an advocate. He was one of the founders of the Edinburgh Review, in 1802, and had then attained a high position in Edinburgh literary circles. In 1803 he was admitted a member of Lincoln's Inn, and two years later settled in London, where he supported himself for a time by writing for the Review. Under the patronage of Lord Holland he became an active Whig politician, but on the defeat of the Whigs he returned to the study of the law as a pupil of Tindal, afterwards chief justice. In 1808 he was called to the English bar, and joined the northern circuit, then led by Scarlett. In 1810 he entered parliament. Thereafter he became a conspicuous figure in public and in professional life. In 1811 his professional reputation was materially increased by his successful defense of the Hunts, indicted for libel for publishing an article in the Examiner on military flogging. He became an adviser of the Princess of Wales, and, when she became queen, Brougham was appointed her attorney general. His elaborate speech in defense of the queen in 1820 was one of his greatest efforts. In the following year he made a learned argument before the privy council on the queen's right to coronation. In 1825 he was elected lord rector of Glasgow University. Meantime, from 1816, he had been vigorously engaged in the cause of law reform. In 1830 he received the great seal, and was elevated to the peerage. After the resignation of Lord Melbourne he continued for a long time his extraordinary activities in politics and in the law. He took a large share in the hearing of appeals, and carried on an immense amount of literary work. He was one of the founders and the first president of the Social Science Association. In 1859 he was elected chancellor of the University of Edinburgh. He was an honorary D. C. L. of Oxford, and a fellow of the Royal Society. He died at Cannes in 1868. His life and times, from his own correspondence, and his collected works, have been published in England.]

Few men have been endowed with more versatile natural powers than Lord Brougham. Whatever he did—and few men have done more things—was well done. A great orator, he attained a considerable position as a man of letters. A clever, rather than a profound, lawyer, he won the highest official honor of his profes-

sion. As a scientific investigator, though rash and empirical, he nevertheless accomplished some valuable results. He had brilliant talents in abundance; but he wanted the stability of character, the moderation and patience, which characterize the highest genius. "His mind ranged over so wide an area that he never acquired a thorough knowledge of any particular division of learning."

His contemporary reputation has become dim. He supported himself while studying law mainly by writing for the Edinburgh Review. His versatility and power of dispatch were extraordinary. In the first twenty numbers he had eighty articles. But his reviews were slashing and often superficial, and are now seldom read. What Sir Leslie Stephen says of his contributions to the Edinburgh Review may be said to characterize much of his work: "It was a forcible exposition of the arguments common at the time, but it has nowhere the stamp of originality in thought or brilliance in expression which could confer upon it a permanent vitality." His style is generally careless, inelegant, and involved. His facts are often huddled and heaped together without any regard to method. Indeed, his Sketches of Statesmen, which required little research, is generally considered his best performance.

As a law reformer Brougham was energetic and comprehensive, but his proposals for reform were marked by crudeness and imperfections. His efforts towards reform began as early as 1816, with his proposed amendment to the libel law. In 1828 he brought forward a comprehensive scheme of law reform, which he supported in one of his greatest speeches. His extraordinary energy in this laudable cause bore ample fruit. It caused a vast improvement in common-law procedure, and overthrew the cumbrous and antiquated machinery of fines and recoveries. As chancellor he effected considerable improvements in the court of chancery, secured the substitution of the judicial committee of the privy council for the court of delegates, and the institution of the central criminal court; the bankruptcy statute was founded on his bill. It was in the spirit and tendency of his efforts, rather than in actual results, that Brougham rendered his greatest service. He entered upon the cause of reform when no political capital was to be found in it; when the path was rugged and unpopular; when colleagues and opponents alike passed by topics which seemed only to impede professional advancement; when Eldon and Ellenborough held up their hands in horror at the suggestion of changes in the supposed perfection of the governmental system.

Brougham viewed the institutions of his country with an open mind, and he entered upon the task of reform with entire singleness of purpose. The broad map of modern English legislation is everywhere dotted by measures which received their first impetus from his vigorous mind.

As a judge he rendered substantial service. It was remarked by a sarcastic critic that, if Brougham had known a little law, he would have known a little of everything. Yet his work in the judicial committee of the privy council was of considerable importance, both in upholding liberal principles in ecclesiastical law, and in creating a body of precedents which have served as a sort of foundation of Indian law. As chancellor he worked with extraordinary energy, and expedited the work of his court beyond all his predecessors,

It is, however, as a parliamentary and forensic orator that he is best remembered. Any detailed account of his parliamentary efforts would require a sketch of the political history of his time. His speech of October 7, 1832, in the house of lords on the reform bill is one of his ablest efforts. He ended his speech with a prayer; fell upon his knees, and remained kneeling. He had kept up his energy with draughts of mulled port, and his friends, who thought that he was unable to rise, picked him up and set him on the woolsack. His speech of February 2, 1824, in opposition to the dictation of the Holy Alliance, also attracted much attention.

As an advocate he had no considerable success until after he had succeeded in politics; and throughout his practice he was most successful in political causes. He was lacking in the tact necessary to success in *nisi prius* practice, and his own intellectual power and irritable temper made him impatient with juries. He seemed to aim more at displaying his own powers than to secure verdicts for his clients. The result is well shown in the anecdote, quoted in the introduction, in connection with his astute rival Scarlett. He attained considerable reputation in 1811 by his successful defense of the Hunts, who were indicted for libel in publishing an article in the Examiner on military flogging. His most prominent appearances as an advocate were in connection with his ardent championship of Queen Caroline. He defended the queen in an able and elaborate argument, which brought him immense popularity. In 1821 he made a learned but unsuccessful argument before the privy council on behalf of the queen's right to be crowned. His speech in defense of Wil-

liams, arising collaterally from the same subject-matter, he considered his most satisfactory argument.

His characteristics as an orator were intellectual force, and a power of sarcasm and irony that have never been surpassed. For withering invective, almost always carried on under the forms of logic, he has never had an equal in power of attack. Although his health was never strong, he had amazing energy, which was the source of his weakness, as well as his strength. His delivery was always intense and vehement; there was no repose. His arguments, likewise, are a continual stream of impassioned reasoning and bitter sarcasm. The mind has no relief, and the strain becomes too great. But the vigor of his mind and the energy of his feelings gave his style a hearty robustness which does much to atone for its tendency to slovenliness. His diction is copious, but seldom simple; and his perorations in particular, which were always prepared with the greatest care, are generally overwrought. The oft-quoted peroration of his speech on law reform shows him at his best: "How much nobler will be the sovereign's boast," he said, "when he shall have it to say that he found law dear, and left it cheap; found it a sealed book, left it a living letter; found it a patrimony of the rich, left it the inheritance of the poor; found it the two-edged sword of a craft and oppression, left it the staff of honesty and the shield of innocence."

His irritable and jealous disposition, overwhelming egotism, and continual thirst for applause did much towards limiting the influence which his commanding intellect and constant advocacy of the cause of humanity and freedom would otherwise have exerted.

ARGUMENT IN DEFENSE OF JOHN AMBROSE WILLIAMS, AT THE DURHAM ASSIZES, BEFORE BARON WOOD AND A SPECIAL JURY, 1822.

STATEMENT.

This was an action of criminal libel against John Ambrose Williams for publishing in his newspaper an article reflecting on the clergy of Durham for omitting to cause the church bells to be tolled on the occasion of the death of Queen Caroline. The article imputed, generally, brutal enmity, hypocrisy, and officiousness in political matters. Williams had been an ardent supporter of the queen. He believed that she had been persecuted, and that the clergy of Durham, in failing to observe the customary sign of mourning, had openly added insult to injury. The omission plainly indicated, wrote Williams, the kind of spirit that predominated among the clergy. "Yet these men profess to be followers of Jesus Christ, to walk in His footsteps, to teach His precepts, to inculcate His spirit, to promote harmony, charity, and Christian love! Out upon such hypocrisy! It is such conduct which renders the very name of our established clergy odious till it stinks in the nostrils; that makes our churches look like deserted sepulchers, rather than temples of the living God; that raises up conventicles in every corner, and increases the brood of wild fanatics and enthusiasts; that causes our beneficed dignitaries to be regarded as usurpers of their possessions; that deprives them of all pastoral influence and respect; that, in short, has left them no support or prop in the attachment or veneration of the people. . . . . It is impossible that such a system can last. It is at war with the spirit of the age, as well as with justice and reason, and the beetles who crawl about amidst its holes and crevices act as if they were striving to provoke and accelerate the blow which, sooner or later, will inevitably crush the whole fabric, and level it with the dust." Williams was charged, by the information, with an intent to bring into contempt the established church and its clergy generally in and near Durham and its suburbs, and alleged the publication of a libel of and concerning the established church, and of and concerning the clergy of the United Church, and the clergy residing in and near Durham and its suburbs. The case was argued by Scarlett for the crown, and by Brougham for the defense. Baron Wood instructed the jury that, "when anything is printed and published for the purpose of bringing into hatred and contempt any of the establishments of the country, it is a libel," and that, if the article was a libel either on the clergy generally, or on the clergy of Durham, the defendant was liable to conviction. Furthermore, he expressed the opinion that the article was a gross libel. The defendant was found guilty of a libel on the clergy residing in and near Durham and its suburbs, and the verdict was entered as a verdict of guilty of so much of the first count as charged a libel on the clergy residing in and near Durham and its suburbs. A rule *nisi* to arrest judgment was afterwards granted, on the grounds that: (1) The charge as laid in the information was an indivisible charge of libeling the clergy as a general body, and the clergy of Durham only as part of that body; but the verdict negatived the charge of libel as to the general body, and was therefore not a verdict of guilty

of the indivisible offense charged. (2) The clergy in respect of whom the offense was committed were not sufficiently ascertained by the information or verdict. Cause was shown against this rule, but judgment was never given, and the defendant went free, as if he had been acquitted by the jury.[1]

ARGUMENT.

Gentlemen of the Jury: My learned friend [Mr. Scarlett], the attorney general for the Bishop of Durham, having at considerable length offered to you various conjectures as to the line of defense which he supposed I should pursue upon this occasion; having nearly exhausted every topic which I was not very likely to urge, and elaborately traced, with much fancy, all the ground on which I could hardly be expected to tread,—perhaps it may be as well that I should now, in my turn, take the liberty of stating to you what really is the defendant's case, and that you should know from myself what I do intend to lay before you. As my learned friend has indulged in so many remarks upon what I shall not say, I may take leave to offer a single observation on what he has said; and I think I may appeal to any one of you who ever served upon a jury or witnessed a trial, and ask if you ever before this day saw a public prosecutor who stated his case with so much art and ingenuity, wrought up his argument with such pains, wandered into so large a field of declamation, or altogether performed his task in so elaborate and eloquent a fashion as the attorney general has done upon the present occasion. I do not blame this course. I venture not even to criticise the discretion he has exercised in the management of his cause; and I am far, indeed, from complaining of it. But I call upon you to declare that inference which I think you must already have drawn in your own minds, and come to that conclusion at which I certainly have arrived,—that he felt what a laboring case he had, that he was aware how very different his situation to-day is from any he ever before knew in a prosecution for libel, and that the extraordinary pressure of the difficulties he had to struggle with drove him to so unusual a course. He has called the defendant "that unhappy man." Unhappy he will be, indeed, but not the only unhappy man in this country, if the doctrines laid down by my learned friend are sanctioned by your verdict; for those doctrines, I fearlessly tell you, must, if established, inevitably destroy the whole liberties of us all. Not that he has ventured to deny the right of discussion generally upon all sub-

[1] 1 St. Trials (N. S.) 1291.

jects, even upon the present, or to screen from free inquiry the foundations of the established church, and the conduct of its ministers as a body (which I shall satisfy you are not even commented on in the publication before you). Far from my learned friend is it to impugn those rights in the abstract; nor, indeed, have I ever yet heard a prosecutor for libel,—an attorney general (and I have seen a good many in my time),—whether of our lord the king or our lord of Durham, who, while in the act of crushing everything like unfettered discussion, did not preface his address to the jury with "God forbid that the fullest inquiry should not be allowed." But then the admission had invariably a condition following close behind which entirely retracted the concession,—"provided, always, the discussion be carried on harmlessly, temperately, calmly,"—that is to say, in such a manner as to leave the subject untouched, and the reader unmoved; to satisfy the public prosecutor, and to please the persons attacked.

My learned friend has asked if the defendant knows that the church is established by law. He knows it, and so do I. The church is established by law, as the civil government, as all the institutions of the country, are established by law, as all the offices under the crown are established by law, and all who fill them are by the law protected. It is not more established nor more protected than those institutions, officers, and office bearers, each of which is recognized and favored by the law as much as the church; but I never yet have heard, and I trust I never shall,—least of all do I expect, in the lesson which your verdict this day will read, to hear,—that those officers and office bearers, and all those institutions, sacred and secular, and the conduct of all, whether laymen or priests, who administer them, are not the fair subjects of open, untrammeled, manly, zealous, and even vehement discussion, as long as this country pretends to liberty, and prides herself on the possession of a free press.

In the publication before you, the defendant has not attempted to dispute the high character of the church; on that establishment, or its members generally, he has not endeavored to fix any stigma. Those topics, then, are foreign to the present inquiry, and I have no interest in discussing them; yet, after what has fallen from my learned friend, it is fitting that I should claim for this defendant, and for all others, the right to question,—freely to question,—not only the conduct of the ministers of the established church, but even the foundations of the church itself. It is, indeed, unnecessary for my present purpose, because I shall

demonstrate that the paper before you does not touch upon those points; but unnecessary though it be, as my learned friend has defied me, I will follow him to the field and say that, if there is any one of the institutions of the country which, more emphatically than all the rest, justifies us in arguing strongly, feeling powerfully, and expressing our sentiments as well as urging our reasons with vehemence, it is that branch of the state which, because it is sacred, because it bears connection with higher principles than any involved in the mere management of worldly concerns, —for that very reason, entwines itself with deeper feelings, and must needs be discussed, if discussed at all, with more warrant and zeal than any other part of our system is fitted to rouse. But if any hierarchy in all the world is bound on every principle of consistency; if any church should be forward, not only to suffer, but provoke discussion, to stand upon that title and challenge the most unreserved inquiry,—it is the Protestant Church of England, first, because she has nothing to dread from it; secondly, because she is the very creature of free inquiry, the offspring of repeated revolutions, and the most reformed of the reformed churches of Europe. But surely if there is any one corner of Protestant Europe where men ought not to be rigorously judged in ecclesiastical controversy; where a large allowance should be made for the conflict of irreconcilable opinions; where the harshness of jarring tenets should be patiently borne, and strong, or even violent, language be not too narrowly watched,—it is this very realm in which we live under three different ecclesiastical orders, and owe allegiance to a sovereign who in one of his kingdoms is the head of the church, acknowledged as such by all men, while, in another, neither he nor any earthly being is allowed to assume that name,—a realm composed of three great divisions, in one of which prelacy is favored by law and approved in practice by an Episcopalian people; while in another it is protected, indeed, by law, but abjured in practice by a nation of sectaries, Catholic and Presbyterian; and in a third it is abhorred alike by law and in practice, repudiated by the whole institutions of the country, scorned and detested by the whole of its inhabitants. His majesty, almost at the time in which I am speaking, is about to make a progress through the northern provinces of this island, accompanied by certain of his chosen counselors,—a portion of men who enjoy, unenvied, and in an equal degree, the admiration of other countries and the wonder of their own,—and there the prince will see much loyalty,

great learning, some splendor, the remains of an ancient monarchy, and of the institutions which made it flourish. But one thing he will not see. Strange as it may seem, and to many who hear me incredible, from one end of the country to the other, he will see no such thing as a bishop; not such a thing is to be found from the Tweed to John O'Groats; not a mitre; no, nor so much as a minor canon, or even a rural dean; and in all the land not one single curate, so entirely rude and barbarous are they in Scotland. In such outer darkness do they sit that they support no cathedrals, maintain no pluralists, suffer nonresidence; nay, the poor benighted creatures are ignorant even of tithes! Not a sheaf, or a lamb, or a pig, or the value of a plow-penny do the hapless mortals render from year's end to year's end! Piteous as their lot is, what makes it infinitely more touching is to witness the return of good for evil in the demeanor of this wretched race. Under all this cruel neglect of their spiritual concerns, they are actually the most loyal, contented, moral, and religious people anywhere, perhaps, to be found in the world. Let us hope (many indeed there are, not afar off, who will, with unfeigned devotion, pray) that his majesty may return safe from the dangers of his excursion into such a country,—an excursion most perilous to a certain portion of the church should his royal mind be infected with a taste for cheap establishments, a working clergy, and a pious congregation!

But compassion for our brethren in the north has drawn me aside from my purpose, which was merely to remind you how preposterous it is in a country of which the ecclesiastical polity is framed upon plans so discordant, and the religious tenets themselves are so various, to require any very measured expressions of men's opinions upon questions of church government. And if there is any part of England in which an ample license ought more especially to be admitted in handling such matters, I say, without hesitation, it is this very bishopric, where, in the nineteenth century, you live under a palatine prince, the lord of Durham; where the endowment of the hierarchy—I may not call it enormous, but I trust I shall be permitted, without offense, to term splendid; where the establishment—I dare not whisper—proves grinding to the people, but I will rather say is an incalculable, an inscrutable, blessing—only it is prodigiously large—showered down in a profusion somewhat overpowering, and laying the inhabitants under a load of obligation overwhelming by its weight. It is in Durham, where the church is endowed with a splendor and a power unknown in monkish times and popish

countries, and the clergy swarm in every corner an' it were the patrimony of St. Peter,—it is here, where all manner of conflicts are at each moment inevitable between the people and the priests, that I feel myself warranted, on their behalf and for their protection—for the sake of the establishment, and as the discreet advocate of that church and that clergy; for the defense of their very existence,—to demand the most unrestrained discussion for their title, and their actings under it. For them in this age to screen their conduct from investigation is to stand self-convicted; to shrink from the discussion of their title is to confess a flaw. He must be the most shallow, the most blind, of mortals who does not at once perceive that, if that title is protected only by the strong arm of the law, it becomes not worth the parchment on which it is engrossed, or the wax that dangles to it for a seal. I have hitherto all along assumed that there is nothing impure in the practice under the system. I am admitting that every person engaged in its administration does every one act which he ought, and which the law expects him to do; I am supposing that, up to this hour, not one unworthy member has entered within its pale. I am even presuming that, up to this moment, not one of those individuals has stepped beyond the strict line of his sacred functions, or given the slightest offense or annoyance to any human being. I am taking it for granted that they all act the part of good shepherds, making the welfare of their flock their first care, and only occasionally bethinking them of shearing, in order to prevent the too-luxuriant growth of the fleece proving an incumbrance, or to eradicate disease. If, however, those operations be so constant that the flock actually live under the knife; if the shepherds are so numerous, and employ so large a troop of the watchful and eager animals that attend them (some of them, too, with a cross of the fox, or even the wolf, in their breed), can it be wondered at if the poor creatures thus fleeced and hunted and barked at and snapped at, and from time to time worried, should now and then bleat, dream of preferring the rot to the shears, and draw invidious, possibly disadvantageous, comparisons between the wolf without and the shepherd within the fold,—it cannot be helped; it is in the nature of things that suffering should beget complaint. But for those who have caused the pain to complain of the outcry, and seek to punish it—for those who have goaded to scourge and to gag—is the meanest of all injustice. It is, moreover, the most pitiful folly for the clergy to think of retaining their power, privileges, and enormous wealth

without allowing free vent for complaints against abuses in the establishment and delinquency in its members, and in this prosecution they have displayed that folly in its supreme degree. I will even put it that there has been an attack on the hierarchy itself. I do so for argument's sake only; denying all the while that anything like such an attack is to be found within the four corners of this publication.

But suppose it had been otherwise. I will show you the sort of language in which the wisest and the best of our countrymen have spoken of that establishment. I am about to read a passage in the immortal writings of one of the greatest men—I may say the greatest genius—which this country or Europe has in modern times produced. You shall hear what the learned and pious Milton has said of prelacy. He is arguing against an Episcopalian antagonist, whom, from his worldly and unscriptural doctrines, he calls a "Carnal Textman." And it signifies not that we may differ widely in opinion with this illustrious man. I only give his words as a sample of the license with which he was permitted to press his argument, and which in those times went unpunished: "That which he imputes as sacrilege to his country is the only way left them to purge that abominable sacrilege out of the land which none but the prelates are guilty of; who, for the discharge of one single duty, receive and keep that which might be enough to satisfy the labors of many painful ministers better deserving than themselves; who possess huge benefices for lazy performances, great promotions only for the exercise of a cruel disgospelling jurisdiction; who engross many pluralities under a nonresident and slumbering dispatch of souls; who let hundreds of parishes famish in one diocese, while they (the prelates) are mute, and yet enjoy that wealth that would furnish all those dark places with able supply. And yet they eat, and yet they live at the rate of earls, and yet hoard up. They who chase away all the faithful shepherds of the flock, and bring in a dearth of spiritual food, robbing thereby the church of her dearest treasure, and sending herds of souls starving to hell, while they feast and riot upon the labors of hireling curates, consuming and purloining even that which, by their foundation, is allowed and left to the poor, and the reparation of the church. These are they who have bound the land with the sin of sacrilege, from which mortal engagement we shall never be free till we have totally removed with one labor, as one individual thing, prelaty and sacrilege." "Thus have ye heard, readers," he continues, after some

advice to the sovereign to check the usurpations of the hierarchy, "how many shifts and wiles the prelates have invented to save their ill-got booty. And if it be true, as in Scripture it is foretold, that pride and covetousness are the sure marks of those false prophets which are to come, then boldly conclude these to be as great seducers as any of the latter times. For between this and the judgment day do not look for any arch-deceivers, who, in spite of reformation, will use more craft or less shame to defend their love of the world and their ambition than these prelates have done."[1]

If Mr. Williams had dared to publish the tithe part of what I have just read; if anything in sentiment or in language approaching to it were to be found in his paper,—I should not stand before you with the confidence which I now feel; but what he has published forms a direct contrast to the doctrines contained in this passage. Nor is such language confined to the times in which Milton lived, or to a period of convulsion when prelacy was in danger. I will show you that in tranquil, Episcopal times, when the church existed peacefully and securely as by law established, some of its most distinguished members, who have added to its stability as well as its fame by the authority of their learning and the purity of their lives,—the fathers and brightest ornaments of that church,—have used expressions nearly as free as those which I have cited from Milton, and ten-fold stronger than anything attributed to the defendant. I will read you a passage from Bishop Burnet, one of those Whig founders of the constitution whom the attorney general has so lavishly praised. He says: "I have lamented during my whole life that I saw so little true zeal among our clergy. I saw much of it in the clergy of the Church of Rome, though it is both ill directed and ill conducted. I saw much zeal, likewise, throughout the foreign churches." Now, comparisons are hateful, to a proverb; and it is for making a comparison that the defendant is to-day prosecuted, for his words can have no application to the church generally, except in the way of comparison. And with whom does the venerable bishop here compare the clergy? Why, with anti-Christ,—with the Church of Rome,—casting the balance in her favor, giving the advantage to our ghostly adversary. Next comes he to give the Dissenters the preference over our own clergy,—a still more invidious topic, for it is one of the laws which govern theological controversy, almost as regularly as gravitation governs the universe,

[1] Apology for Smectymnus, 1642.

that the mutual rancor of conflicting sects is inversely as their distance from each other; and with such hatred do they regard those who are separated by the slightest shade of opinion that your true intolerant priest abhors a pious sectary far more devoutly than a blasphemer or an atheist; yet to the sectary also does the good bishop give a decided preference: "The Dissenters have a great deal [that is, of zeal] among them, but I must own that the main body of our clergy has always appeared dead and lifeless to me, and, instead of animating one another, they seem rather to lay one another asleep." "I say it with great regret," adds the Bishop, "I have observed the clergy in all the places through which I have traveled,—Papists, Lutherans, Calvinists, and Dissenters; but of them all our clergy is much the most remiss in their labors in private, and the least severe in their lives. And let me say this freely to you, now I am out of the reach of envy and censure" (he bequeathed his work to be given to the world after his death), "unless a better spirit possess the clergy, arguments, and, which is more, laws and authority, will not prove strong enough to preserve the church."[2]

I will now show you the opinion of a very learned and virtuous writer, who was much followed in his day, and whose book, at that time, formed one of the manuals by which our youth were taught the philosophy of morals to prepare them for their theological studies,—I mean Dr. Hartley: "I choose to speak of what falls under the observation of all serious, attentive persons in the kingdom. The superior clergy are, in general, ambitious, and eager in the pursuit of riches, flatterers of the great, and subservient to party interest; negligent of their own particular charges, and also of the inferior clergy. The inferior clergy imitate their superiors, and, in general, take little more care of their parishes than barely what is necessary to avoid the censure of the law; and the clergy of all ranks are, in general, either ignorant, or, if they do apply, it is rather to profane learning, to philosophical or political matters, than in the study of the Scriptures, of the oriental languages, and the Fathers. I say this is, in general, the case,—that is, far the greater part of the clergy of all ranks in the kingdom are of this kind."

I here must state that the passage I have just read is very far from meeting my approval, any more than it speaks the defendant's sentiments, and especially in its strictures upon the inferior clergy; for certainly it is impossible to praise too highly those

[2] History of My Own Time, ii., 641.

pious and useful men, the resident, working parish priests of this country. I speak not of the dignitaries, the pluralists, and sinecurists, but of men neither possessing the higher preferments of the church nor placed in that situation of expectancy so dangerous to virtue; the hard-working, and I fear too often hard-living, resident clergy of this kingdom, who are an ornament to their station, and who richly deserve that which in too many instances is almost all the reward they receive,—the gratitude and veneration of the people committed to their care. But I read this passage from Dr. Hartley, not as a precedent followed by the defendant, for he has said nothing approaching to it,—not as propounding doctrine authorized by the fact, or which, in reasoning, he approves,—but only for the purpose of showing to what lengths such discussion of ecclesiastical abuses (which, it seems, we are now, for the first time, to hold our peace about) was carried near a century ago, when the freedom of speech, now to be stifled as licentiousness, went not only unpunished, but unquestioned and unblamed.

To take a much later period, I hold in my hand an attack upon the hierarchy by one of their own body,—a respectable and beneficed clergyman in the sister county Palatine of Chester, who undertook to defend the Christian religion, itself the basis, I presume I may venture to call it, of the church, against Thomas Paine. In the course of so pious a work, which he conducted most elaborately, as you may perceive by the size of this volume, he inveighs in almost every page against the abuses of the establishment, but in language which I am very far from adopting. In one passage is the following energetic, and, I may add, somewhat violent, invective, which I will read, that you may see how a man, unwearied in the care of souls, and so zealous a Christian that he is in the act of confuting infidels and putting scoffers to silence, may yet, in the very course of defending the church and its faith, use language, any one word of which, if uttered by the defendant, would make my learned friend shudder at the license of the modern press upon sacred subjects: "We readily grant, therefore, you see, my countrymen, that the corruptions of Christianity shall be purged and done away; and we are persuaded the wickedness of Christians, so called, the lukewarmness of professors, and the reiterated attacks of infidels upon the Gospel shall all, under the guidance of Infinite Wisdom, contribute to accomplish this end." I have read this sentence to show you the spirit of piety in which the work is composed; now see what follows: "The lofty

looks of lordly prelates shall be brought low; the supercilious airs of downy doctors and perjured pluralists shall be humbled; the horrible sacrilege of nonresidents, who shear the fleece, and leave the flock thus despoiled to the charge of uninterested hirelings, that care not for them, shall be avenged on their impious heads. Intemperate priests, avaricious clerks, and buckish parsons, those curses of Christendom, shall be confounded. All secular hierarchies in the church shall be tumbled into ruin; lukewarm formalists of every denomination shall call to the rocks and mountains to hide them from the wrath of the Lamb." This is the language, these are the lively descriptions, these the warm, and, I will not hesitate to say, exaggerated, pictures which those reverend authors present of themselves; these are the testimonies which they bear to the merits of one another; these are opinions coming, not from the enemy without, but from the true, zealous, and even intemperate friend within. And can it be matter of wonder that laymen should sometimes raise their voices tuned to the discords of the sacred choir? And are they to be punished for what secures to clergymen followers, veneration, and—preferment? But I deny that Mr. Williams is of the number of followers. I deny that he has taken a leaf or a line out of such books. I deny that there is any sentiment of this cast, or any expression approaching to those of Dr. Simpson, in the publication before you. But I do contend that if the real friends of the church—if its own members—can safely indulge in such language, it is ten thousand times more lawful for a layman, like the defendant, to make the harmless observations which he has published, and in which I defy any man to show me one expression hostile to our ecclesiastical establishment.

[Mr. Brougham then read the following passage from the libel:] "We know not whether any actual orders were issued to prevent this customary sign of mourning; but the omission plainly indicates the kind of spirit which predominates among our clergy. Yet these men profess to be followers of Jesus Christ, to walk in His footsteps, to teach His precepts, to inculcate His spirit, to promote harmony, charity, and Christian love! Out upon such hypocrisy!" That you may understand the meaning of this passage, it is necessary for me to set before you the picture my learned friend was pleased to draw of the clergy of the diocese of Durham, and I shall recall it to your minds almost in his own words. According to him, they stand in a peculiarly unfortunate situation. They are, in truth, the most injured of men. They all, it seems, entertained the same generous sentiment with the rest of their

countrymen, though they did not express them in the old, free, English manner, by openly condemning the proceedings against the late queen; and after the course of unexampled injustice against which she victoriously struggled had been followed by the needless infliction of inhuman torture, to undermine a frame whose spirit no open hostility could daunt, and extinguish a life so long embittered by the same foul arts,—after that great princess had ceased to harass her enemies (if I may be allowed thus to speak, applying, as they did, by the perversion of all language, those names to the victim which belong to the tormentor), after her glorious but unhappy life had closed, and that princely head was at last laid low by death, which, living, all oppression had only the more illustriously exalted,—the venerable the clergy of Durham, I am now told for the first time, though less forward in giving vent to their feelings than the rest of their fellow citizens; though not so vehement in their indignation at the matchless and unmanly persecution of the queen; though not so unbridled in their joy at her immortal triumph, nor so loud in their lamentations over her mournful and untimely end,—did, nevertheless, in reality, all the while deeply sympathize with her sufferings in the bottom of their reverend hearts! When all the resources of the most ingenious cruelty hurried her to a fate without parallel, if not so clamorous as others, they did not feel the least of all the members of the community; their grief was in truth too deep for utterance,—sorrow clung round their bosoms, weighed upon their tongues, stifled every sound, and, when all the rest of mankind, of all sects and of all nations, freely gave vent to feelings of our common nature, their silence—the contrast which they displayed to the rest of their species—proceeded from the greater depth of their affliction. They said the less because they felt the more! Oh! talk of hypocrisy after this! Most consummate of all the hypocrites! After instructing your chosen official advocate to stand forward with such a defense,—such an exposition of your motives,—to dare utter the word "hypocrisy," and complain of those who charged you with it! This is indeed to insult common sense and outrage the feelings of the whole human race! If you were hypocrites before, you were downright, frank, honest hypocrites to what you have now made yourselves; and surely, for all you have ever done, or ever been charged with, your worst enemies must be satiated with the humiliation of this day, its just atonement, and ample retribution!

If Mr. Williams had known the hundredth part of this at the time of her majesty's demise,—if he had descried the least twink-

ling of the light which has now broke upon us as to the real motives of their actions,—I am sure this cause would never have been tried; because to have made any one of his strictures upon their conduct would have been not only an act of the blackest injustice, it would have been perfectly senseless. But can he be blamed for his ignorance, when such pains were taken to keep him in the dark? Can it be wondered at that he was led astray when he had only so false a guide to their motives as their conduct, unexplained, afforded? When they were so anxious to mislead by facts and deeds, is his mistake to be so severely criticised? Had he known the real truth, he must have fraternized with them; embraced them cordially; looked up with admiration to their superior sensibility; admitted that he who feels most, by an eternal law of our nature, is least disposed to express his feelings; and lamented that his own zeal was less glowing than theirs; but, ignorant and misguided as he was, it is no great marvel that he did not rightly know the real history of their conduct until about three-quarters of an hour ago, when the truth burst in upon us that all the while they were generously attached to the cause of weakness and misfortune!

Gentlemen, if the country, as well as Mr. Williams, has been all along so deceived, it must be admitted that it is not from the probabilities of the case. Judging beforehand, no doubt, any one must have expected the Durham clergy, of all men, to feel exactly as they are now, for the first time, ascertained to have felt. They are Christians; outwardly, at least, they profess the gospel of charity and peace; they beheld oppression in its foulest shape; malignity and all uncharitableness putting on their most hideous forms; measures pursued to gratify prejudices in a particular quarter, in defiance of the wishes of the people and the declared opinions of the soundest judges of each party; and all with the certain tendency to plunge the nation in civil discord. If for a moment they had been led away, by a dislike of cruelty and of civil war, to express displeasure at such perilous doings, no man could have charged them with political meddling; and when they beheld truth and innocence triumph over power, they might, as Christian ministers, calling to mind the original of their own church, have indulged, without offense, in some little appearance of gladness. A calm, placid satisfaction on so happy an event would not have been unbecoming their sacred station. When they found that her sufferings were to have no end; that new pains were inflicted in revenge for her escape from destruction, and new

tortures devised to exhaust the vital powers of her whom open, lawless violence had failed to subdue,—we might have expected some slight manifestation of disapproval from holy men who, professing to inculcate loving kindness, tender mercy, and good will to all, offer up their daily prayers for those who are desolate and oppressed. When at last the scene closed, and there was an end of that persecution which death alone could stay, but when not even her unhappy fate could glut the revenge of her enemies, and they who had harassed her to death now exhausted their malice in reviling the memory of their victim,—if among them had been found, during her life, some miscreant under the garb of a priest, who, to pay his court to power, had joined in trampling upon the defenseless,—even such a one, bear he the form of a man, with a man's heart throbbing in his bosom, might have felt even his fawning, sordid, calculating malignity assuaged by the hand of death; even he might have left the tomb to close upon the sufferings of the victim. All probability certainly favored the supposition that the clergy of Durham would not take part against the injured because the oppressor was powerful; and that the prospect of emolument would not make them witness with dry eyes and hardened hearts the close of a life which they had contributed to embitter and destroy. But I am compelled to say that their whole conduct has falsified those expectations. They sided openly, strenuously, forwardly, officiously, with power, in the oppression of a woman whose wrongs this day they, for the first time, pretend to bewail in their attempt to cozen you out of a verdict, behind which they may skulk from the inquiring eyes of the people. Silent and subdued in their tone as they were on the demise of the unhappy queen, they could make every bell in all their chimes peal when gain was to be expected by flattering present greatness. Then they could send up addresses, flock to public meetings, and load the press with their libels, and make the pulpit ring with their sycophancy, filling up to the brim the measure of their adulation to the reigning monarch, head of the church, and dispenser of its patronage. In this contrast originated the defendant's feelings, and hence the strictures which form the subject of these proceedings.

I say the publication refers exclusively to the clergy of this city and its suburbs, and especially to such parts of that clergy as were concerned in the act of disrespect toward her late majesty which forms the subject of the alleged libel; but I deny that it has any reference whatever to the rest of the clergy, or

evinces any designs hostile either to the stability of the church or the general character and conduct of its ministers. My learned friend has said that Mr. Williams had probably been bred a sectary, and retained sectarian prejudices. No argument is necessary to refute this supposition. The passage which has been read to you carries with it the conviction that he is no sectary, and entertains no schismatical views against the church; for there is a more severe attack upon the sectaries themselves than upon the clergy of Durham. No man can have the least hesitation in saying that the sentiments breathed in it are anything but those of a sectary. For myself, I am far from approving the contemptuous terms in which he has expressed himself of those who dissent from the establishment; and I think he has not spoken of them in the tone of decent respect that should be observed to so many worthy persons, who, though they differ from the church, differ from it on the most conscientious grounds. This is the only part of the publication of which I cannot entirely approve, but it is not for this that he is prosecuted. Then, what is the meaning of the obnoxious remarks? Are they directed against the establishment? Are they meant to shake or degrade it? I say that no man who reads them can entertain a moment's doubt in his mind that they were excited by the conduct of certain individuals, and the use which he makes of that particular conduct, the inference which he draws from it, is not invective against the establishment, but a regret that it should, by such conduct, be lowered. He says no more than this: "These are the men who do the mischief. Ignorant and wild fanatics are crowding the tabernacles, while the church is deserted;" and he traces, not with exultation, but with sorrow, the cause of the desertion of the church, and the increase of conventicles. "Here," says he, "I have a fact which accounts for the clergy sinking in the estimation of the community, and I hold up this mirror, not to excite hostility toward the established church, nor to bring its ministers into contempt among their flocks, but to teach and to reclaim those particular persons who are the disgrace and danger of the establishment, instead of being, as they ought, its support and its ornament." He holds up to them that mirror in which they may see their own individual misconduct, and calculate its inevitable effects upon the security and honor of the establishment which they disgrace. This is no lawyer-like gloss upon the passage,—no special pleading construction, or far-fetched refinement of explanation,—I give the plain and obvious sense which every man of ordinary understanding

must affix to it. If you say that such a one disgraces his profession, or that he is a scandal to the cloth he wears (a common form of speech, and one never more in men's mouths than within the last fortnight, when things have happened to extort a universal expression of pain, sorrow, and shame), do you mean by such lamentations to undermine the establishment? In saying that the purity of the cloth is defiled by individual misconduct, it is clear that you cast no imputation on the cloth generally; for an impure person could not contaminate a defiled cloth. Just so has the defendant expressed himself; and in this light I will put his case to you. If he had thought that the whole establishment was bad; that all its ministers were time servers, who, like the spaniel, would crouch and lick the hand that fed it, but snarl and bite at one which had nothing to bestow, fawning upon rich and liberal patrons, and slandering all that were too proud or too poor to bribe them; if he painted the church as founded upon imposture, reared in time serving, cemented by sordid interest, and crowned with spite and insolence and pride,—to have said that the Durham clergy disgraced such a hierarchy would have been not only gross inconsistency, but stark nonsense. He must rather have said that they were worthy members of a base and groveling establishment; that the church was as bad as its ministers, and that it was hard to say whether they more fouled it or were defiled by it. But he has said nothing that can bring into jeopardy or discredit an institution which every one wishes to keep pure, and which has nothing to dread so much as the follies and crimes of its supporters.

Gentlemen, you have to-day a great task committed to your hands. This is not the age—the spirit of the times is not such—as to make it safe, either for the country or for the government, or for the church itself, to veil its mysteries in secrecy; to plant in the porch of the temple a prosecutor brandishing his flaming sword, the process of the law, to prevent the prying eyes of mankind from wandering over the structure. These are times when men will inquire, and the day most fatal to the established church —the blackest that ever dawned upon its ministers—will be that which consigns this defendant, for these remarks, to the horrors of a jail, which its false friends, the chosen objects of such lavish favor, have far more richly deserved. I agree with my learned friend, that the Church of England has nothing to dread from external violence. Built upon a rock, and lifting its head towards another world, it aspires to an imperishable existence, and defies any force that may rage from without. But let it beware of the

corruption engendered within and beneath its massive walls; and let all its well-wishers—all who, whether for religious or political interests, desire its lasting stability—beware how they give encouragement by giving shelter to the vermin bred in that corruption, who "stink and sting" against the hand that would brush the rottenness away. My learned friend has sympathized with the priesthood, and innocently enough lamented that they possess not the power of defending themselves through the public press. Let him be consoled. They are not so very defenseless; they are not so entirely destitute of the aid of the press as through him they have represented themselves to be. They have largely used that press (I wish I could say "as not abusing it"), and against some persons very near me, I mean especially against the defendant, whom they have scurrilously and foully libeled through that great vehicle of public instruction, over which, for the first time, among the other novelties of the day, I now hear they have control. Not that they wound deeply or injure much,—but that is no fault of theirs,—without hurting, they give trouble and discomfort. The insect brought into life by corruption, and nestled in filth, though its flight be lowly and its sting puny, can swarm and buzz, and irritate the skin and offend the nostril, and altogether give nearly as much annoyance as the wasp, whose nobler nature it aspires to emulate. These reverend slanderers,—these pious backbiters,—devoid of force to wield the sword, snatch the dagger, and, destitute of wit to point or to barb it, and make it rankle in the wound, steep it in venom to make it fester in the scratch. The much-venerated personages whose harmless and unprotected state is now deplored have been the wholesale dealers in calumny, as well as largest consumers of the base article,—the especial promoters of that vile traffic, of late the disgrace of the country,—both furnishing a constant demand for the slanders by which the press is polluted, and prostituting themselves to pander for the appetites of others; and now they come to demand protection from retaliation, and shelter from just exposure, and, to screen themselves, would have you prohibit all scrutiny of the abuses by which they exist, and the malpractices by which they disgrace their calling. After abusing and well-nigh dismantling, for their own despicable purposes, the great engine of instruction, they would have you annihilate all that they have left of it to secure their escape. They have the incredible assurance to expect that an English jury will conspire with them in this wicked design. They expect in vain! If all existing institutions and all public functionaries must hence-

forth be sacred from question among the people; if at length the free press of this country, and with it the freedom itself, is to be destroyed,—at least let not the heavy blow fall from your hands. Leave it to some profligate tyrant; leave it to a mercenary and effeminate parliament,—a hireling army, degraded by the lash, and the readier instrument for enslaving its country; leave it to a pampered house of lords, a venal house of commons, some vulgar minion, servant-of-all-work to an insolent court, some unprincipled soldier, unknown, thank God, in our times, combining the talents of a usurper with the fame of a captain; leave to such desperate hands, and such fit tools, so horrid a work! But you, an English jury, parent of the press, yet supported by it, and doomed to perish the instant its health and strength are gone, lift not you against it an unnatural hand! Prove to us that our rights are safe in your keeping; but maintain, above all things, the stability of our institutions by well guarding their corner-stone. Defend the church from her worst enemies, who, to hide their own misdeeds, would veil her solid foundations in darkness; and proclaim to them, by your verdict of acquittal, that henceforward, as heretofore, all the recesses of the sanctuary must be visited by the continual light of day, and by that light its abuses be explored!

HORACE BINNEY.

[Horace Binney was born in Philadelphia, Pa., 1780. He was educated at Harvard College, where he was graduated in 1797 at the head of his class. He at once began the study of law in the office of Jared Ingersoll, one of the leaders of the Philadelphia bar, and was admitted to practice in 1800. In 1806 he served a single term in the state legislature. Between 1807 and 1814 he published six volumes of reports of the decisions of the supreme court of Pennsylvania. By 1815 his scholarly tastes and profound acquirements had placed him in the front rank of the profession. In 1830 his health began to fail, and he was compelled to retire from active practice. Only once after 1836 did he appear in the courts. He was elected and served as a member of the twenty-third congress. In 1827, at the invitation of the Philadelphia bar, he delivered a scholarly address on the life and character of Chief Justice Tilghman, and in 1835, by request of the common council of Philadelphia, an address on Chief Justice Marshall. In 1858 he published a sketch of Justice Bushrod Washington; in the same year he published his much-admired sketches of the leaders of the old Philadelphia bar. His well-known "Inquiry into the Formation of Washington's Farewell Address" is a model of critical scholarship, and his three pamphlets in support of the power of the president to suspend the writ of *habeas corpus*, published in 1862 and 1863, are among his ablest efforts. He died in Philadelphia, August 12, 1875.]

Horace Binney's long and distinguished career connects the era of the Revolution with the era of the Civil War. When he was admitted to the bar, John Adams was president, Ellsworth chief justice of the supreme court, and Marshall secretary of state; Hamilton was practicing law, Story was preparing for the bar, and Webster was in college. Although he virtually retired from practice in 1840, the subsequent years embrace his argument in the Girard will case, and his scholarly efforts as eulogist, biographer, and controversialist.

Binney began his work at the Philadelphia bar in the palmy days of William Lewis, Edward Tilghman, William Rawle, and A. J. Dallas. The service he rendered, while waiting for clients,

in publishing his reports of the decisions of the supreme court of Pennsylvania, has been freely acknowledged. Binney's reports not only preserved the learning of Tilghman and Gibson, but served as a model before the days of official reporting. He argued his first case in the supreme court of Pennsylvania in 1808. His practice in the supreme court of the United States began with the case of Bank of United States v. Deveaux.[1] Among the cases which enlisted his best efforts are Commonwealth v. Eberle,[2] on the use of the English language in the German Lutheran Church, and Ingersoll v. Sergeant,[3] on the nature of Philadelphia ground rents. He participated largely in litigation concerning titles to real estate, and in questions of maritime law arising out of the war of 1812. When, in later years, he confined himself to consulting practice, his opinions came to have almost the value of judicial decisions. Before he reached the age of fifty he had twice refused a seat on the supreme bench of his state, and in 1843 he declined an appointment as associate justice of the United States supreme court, tendered by President Tyler.

The secret of Binney's success as a lawyer was his habit of careful and exhaustive preparation. His argument in the Girard will case is a conspicuous example of legal scholarship. For nearly a quarter of a century the opinion of Chief Justice Marshall in the case of Baptist Association v. Hart's Executors, which had almost totally subverted the law of charitable uses in two states, had everywhere produced uncertainty and confusion. When at length it was sought to subvert the foundation of Girard's College with this decision, Binney showed conclusively, by a careful comparison of the various and conflicting reports of the early decisions upon which Marshall had relied, that that great jurist had erred in the sources of his information; and he produced more than fifty instances of chancery jurisdiction in cases of charitable uses prior to the statute of 43 Elizabeth, which Marshall had supposed to be the source of that jurisdiction. This complete mastery of his subject was the basis of the calm, close and logical presentation which distinguished all his work. Fluent, without the least volubility, concise to a degree that left every one's patience and attention unimpaired, his arguments on the most technical subjects are perspicuous to the lowest order of understanding. On occasion, his usually severe and unimpassioned style becomes glowing and sympathetic. His appeal

[1] 5 Cranch, 61.
[2] 3 Serg. & R. 9.
[3] 1 Whart. 336.

for religious toleration, in the Girard case, in vindication of the testator's right to guard his trust from narrow and sectarian interpretation, is one of the masterpieces of forensic eloquence.

Mr. Hampton L. Carson has sympathetically summed up Binney's character in the following terms:

"As a lawyer [he was] accomplished and profound, never disappointing, and often surpassing expectation; as an advocate, eloquent, earnest, and self-possessed, ... winning the confidence of courts by entire freedom from tricks and the low arts of cunning, disdaining strategy and artifice, and truckling to no prejudices; a man of intuitive judgment; a wise and safe counselor. . . . Shadows there were upon his character, which, without them, would be more than human; but they are trifling, and serve but to give tone to the picture. He was cold, reserved, and unsympathetic. He had not impulsive warmth or impetuous generosity of temperament. He viewed everything dispassionately and calmly, and sought nothing but the legal truth by methods which seemed impersonal. Thus he became more admirable as a lawyer, while less lovable and popular as a citizen. Here fair criticism must end. His exalted rank in the profession was won by merit and hard work; and the veneration in which he was held by all who knew him, and the reputation which his name enjoys, constitute a monument to his integrity and virtues."[4]

[4] Green Bag, October, 1893.

ARGUMENT IN THE GIRARD WILL CASE, IN THE SUPREME COURT OF THE UNITED STATES, 1844.

STATEMENT.

Stephen Girard, a native of France, came to this country shortly before the Declaration of Independence, and some time during the Revolutionary War settled in the city of Philadelphia, where he amassed a fortune of not less than five million dollars. He died in December, 1831, a widower, and without issue, leaving, as his nearest collateral relatives, a brother, a niece who was the daughter of a deceased sister, and three other nieces who were daughters of a deceased brother. By his will, dated December 25, 1830, after making sundry bequests to his relatives and friends, to the city of New Orleans, and to certain specified charities, he devised to the mayor, aldermen, and citizens of the city of Philadelphia the entire residue of his estate, real and personal, upon certain trusts. The first or leading trust, as to two millions of dollars, was the erection of a college for the accommodation of at least three hundred orphan scholars, of the description and character set forth in the will; with a dedication of the income of the whole of his remaining estate, after deducting two further legacies, to the extension of the college, if it should be necessary in certain events.

The testator then proceeded to give, in minute detail, the plan and structure of the college, certain rules and regulations for the government thereof, and the studies to be pursued therein, "comprehending reading, writing, grammar, arithmetic, geography, navigation, surveying, practical mathematics, astronomy, natural, chemical and experimental philosophy, the French and Spanish languages (not forbidding, but not recommending, the Greek and Latin languages), and such other learning and science as the capacities of the several scholars shall merit or warrant." He then added: "I would have them taught facts and things, rather than words and signs; and especially I desire that, by every proper means, a pure attachment to our republican institutions, and to the sacred rights of conscience as guarantied by our happy constitution, shall be formed and fostered in the minds of the scholars." The persons designated as beneficiaries of the institution were "poor white male orphans between the ages of six and ten years; and no orphan should be admitted until the guardians or directors of the poor, or other proper guardian, or other competent authorities, have given, by indenture, relinquishment, or otherwise, adequate power to the mayor, aldermen, and citizens of Philadelphia, or to directors or others by them appointed, to enforce, in relation to each orphan, every proper restraint, and to prevent relatives and others from interfering with or withdrawing such orphan from the institution." The testator then provided for a preference, "first, to orphans born in the city of Philadelphia; second, to those born in any other part of Pennsylvania; third, to those born in the city of New York; and last, those born in the city of New Orleans." It was further provided that the orphan "scholars who shall merit it shall remain in the college until they shall respectively arrive at between fourteen and eighteen years of age." Then, after suggesting that, in relation to the organization of the college and its appendages, he necessarily left many details to the mayor and aldermen of Philadelphia and their successors, the testator proceeded to say:

"There are, however, some restrictions which I consider it my duty to prescribe, and to be, amongst others, conditions on which my bequest for said college is made and to be enjoyed, namely: First. I enjoin and require that if, at the close of any year, the income of the fund devoted to the purposes of the said college shall be more than sufficient for the maintenance of the institution during that year, then the balance of the said income, after defraying such maintenance, shall be forthwith invested in good securities, thereafter to be and remain a part of the capital; but in no event shall any part of the said capital be sold, disposed of, or pledged to meet the current expenses of the said institution, to which I devote the interest, income, and dividends thereof, exclusively. Secondly. I enjoin and require that no ecclesiastic, missionary, or minister of any sect whatsoever shall ever hold or exercise any station or duty whatever in the said college; nor shall any such person ever be admitted for any purpose, or as a visitor, within the premises appropriated to the purposes of the said college. In making this restriction I do not mean to cast any reflection upon any sect or person whatsoever, but, as there is such a multitude of sects, and such a diversity of opinion amongst them, I desire to keep the tender minds of the orphans who are to derive advantage from this bequest free from the excitement which clashing doctrines and sectarian controversy are so apt to produce. My desire is that all the instructors and teachers in the college shall take pains to instil into the minds of the scholars the purest principles of morality, so that, on their entrance into active life, they may, from inclination and habit, evince benevolence towards their fellow creatures, and a love of truth, sobriety, and industry, adopting, at the same time, such religious tenets as their matured reason may enable them to prefer."

The second trust of the will was in regard to the sum of five hundred thousand dollars, given to the city to lay out and pave a street fronting the Delaware river, to pull down all the wooden buildings erected within the city, and to prohibit the erection of any such thereafter, and to regulate, widen, and pave Water street, and to distribute the Schuylkill water therein, upon a plan minutely detailed by the testator. The third bequest to be charged upon the residuary bequest to the city was a legacy of three hundred thousand dollars to the state of Pennsylvania for the purpose of internal improvement by canal navigation. The last trust was for the city of Philadelphia in its corporate character, for the improvement of the city property, and the general appearance of the city, and to diminish the burden of taxation.

"To all which objects," the testator concluded, "the prosperity of the city, and the health and comfort of its inhabitants, I devote the said fund as aforesaid, and direct the income thereof to be applied yearly, and every year forever, after providing for the college as hereinbefore directed, as my primary object. But if the said city shall knowingly and willfully violate any of the conditions hereinbefore and hereinafter mentioned, then I give and bequeath the said remainder and accumulations to the commonwealth of Pennsylvania, for the purposes of internal navigation; excepting, however, the rents, issues, and profits of my real estate in the city and county of Philadelphia, which shall forever be reserved and applied to maintain the aforesaid college, in the manner specified in the last paragraph of the twenty-first clause of this will. And if the commonwealth of Pennsylvania shall fail to apply this or the preceding bequest to the purposes before mentioned, or shall apply any part thereof to any other use, or shall, for the term of one year from the time of my decease, fail or omit to pass the laws herein-

before specified for promoting the improvement of the city of Philadelphia, then I give, devise, and bequeath the said remainder and accumulations (the rents aforesaid always excepted and reserved for the college as aforesaid) to the United States of America, for the purposes of internal navigation, and no other."

A bill was filed by the heirs at law of the testator to have the devise of the residue and remainder of the real estate to the mayor, aldermen, and citizens of Philadelphia, in trust as aforesaid, declared void for want of capacity of the devisees to take land by devise, or, if capable of taking generally by devise for their own use and benefit, for want of capacity to take such land as devisees in trust; and because the objects of the charity for which the lands were so devised in trust were altogether vague, indefinite, and uncertain, and so no trust was created by the will which was capable of execution or cognizance at law or in equity, nor any trust estate devised that could vest at law or in equity in any existing or possible *cestui que trust;* and, finally, that the charity was contrary to Christianity, and therefore void. Therefore the complainants insisted that, as the trust was void, there was a resulting trust thereof to the heirs at law of the testator. The supreme court of the United States held that the corporation of the city of Philadelphia had the power, under its charter, to take the bequest of real and personal estate, inasmuch as the act of 32 & 34 Henry VIII., which excepts corporations from taking by devise, was not in force in Pennsylvania, and that the uses were charitable uses, valid in their nature, and capable of being carried into effect consistently with the laws of the state of Pennsylvania. It was also held that not only were the provisions of the statute of 43 Elizabeth in force in Pennsylvania, but even the more extensive range of charitable uses which chancery supported before that statute and beyond it was applicable. To the objection that the restrictions contained in the bequest were inconsistent with the Christian religion, Judge Story, who delivered the opinion of the court, said:

"The testator does not say that Christianity shall not be taught in the college, but only that no ecclesiastic of any sect shall hold or exercise any station or duty in the college. Suppose, instead of this, he had said that no person but a layman shall be an instructor or officer or visitor in the college. What legal objection could have been made to such a restriction? And yet the actual prohibition is in effect the same in substance. But it is asked: Why are ecclesiastics excluded, if it is not because they are the stated and appropriate preachers of Christianity? The answer may be given in the very words of the testator: 'In making this restriction,' says he, 'I do not mean to cast any reflection upon any sect or person whatsoever; but as there is such a multitude of sects, and such a diversity of opinion amongst them, I desire to keep the tender minds of the orphans who are to derive advantage from this bequest free from the excitement which clashing doctrines and sectarian controversy are so apt to produce.' "[1]

The case was argued by Daniel Webster and Walter Jones for the complainants, and by Horace Binney and John Sergeant for the city of Philadelphia and the executors.

ARGUMENT.

May it please the Court: With a perfect disposition to respect the recent injunction of the court to the bar, I shall proceed to the argument for the defendants without any preliminary re-

[1] 2 How. 127.

marks. The great accumulation of business upon the calendar is an unquestionable motive for the recommendation, so forcibly addressed to the counsel a few days since by the presiding judge, to study economy of time, and to aim at all practicable condensation and brevity in their arguments. I shall not be inattentive to their suggestion. But a very liberal expenditure is at times demanded by the wisest economy; and if it shall be found, as I fear it may, from the influence of a former decision of this court, from the immense magnitude of the interests at stake, and from the almost elementary manner in which, to meet all exigencies, the questions must be discussed, that my own outlay offends against the letter of the recommendation, I hope it will also be found that it is in harmony with its spirit.

The proposition of the complainants is that the trusts of Mr. Girard's will for the erection and endowment of the college of orphans are absolutely void; and they claim the benefit of resulting trusts to the heirs and next of kin of all that is so devoted, as a necessary consequence of the invalidity of the trusts declared. The consequence is drawn too hastily. I shall endeavor to prove that they do not promote their claim in the slightest degree by establishing the nullity of the trusts for the college. I shall, of course, endeavor also to show that the trusts for the college are perfectly valid both in law and equity; and the support of these two positions will be the object of my argument, namely: (1) That if the trusts for the orphan college are void, the legal result from other clauses in Mr. Girard's will is that the property, real and personal, devoted to the college, inures to the exclusive use of the city of Philadelphia for city purposes. (2) That the charitable uses declared in his will for the education and maintenance of poor white male orphans are perfectly valid in all respects. Under either aspect, the bill was properly dismissed by the circuit court.

This instrument is divided into twenty-six sections or clauses, distinguished by Roman numerals from I to XXVI. The first eighteen sections contain the testator's bequests to local corporations, associations, or trustees for charitable purposes, to his relations, friends, and dependents,—to all, it may be said, who had either the slightest claim upon his justice or the feeblest expectation of his bounty. He was a widower, and childless. He had devoted himself, through a long life, principally to what is called "business,"—to the engrossing concerns of commerce, navigation, building, and banking. He must needs have devoted himself, to have amassed his princely fortune. The influence

of such a life upon a solitary man might have ended at last, without surprising us, in the death of all the social affections, and in a sullen intestacy, distinguishing nothing by his remembrance, loving nothing that he left behind him. There were not wanting persons of that large class who are liberal with other men's money, and equally liberal of their censures to such as will not permit them to dispose of it, who thought proper to think and speak of him while he lived as of a man in whom the love of money had deadened all the kindly affections. They did not know him. There were many proofs to the contrary during his life. His death has published an irrefragable proof to the contrary in his will. To the Pennsylvania Hospital, the institution of the deaf and dumb, the orphan asylum, the comptrollers of the public schools, the poor house-keepers and room-keepers in the city, whose provision for fuel in the winter is the severest tax upon their small resources, his brethren of the society of Free Masons, the poor children in the township in which his country seat was situated, the captains of his ships, his apprentices, his house-keepers, the members of their family, his old negro slave, all are remembered, and remembered in such a way as to show the acuteness of his mind, as well as the strength of his feelings, in the kind of provision he makes for them. It is a striking, and to myself personally a most grateful, evidence of the tenacity of his regard to those who deserved well of him, that he gives a liberal annuity for life to the venerable widow of his faithful counselor and friend, my honored master, Mr. Ingersoll, who had departed many years before him. A memory so retentive of good offices could not have been the companion of an insensible heart. The amount of these legacies, including the value of life annuities, does not fall short of one hundred and seventy thousand dollars, all of them tokens of regard, and of the most provident concern for the welfare of the legatees.

Among the complainants and certain of the defendants, who comprehend all his heirs and next of kin that survived him, there is not one whom he has forgotten, nor one in whom he ever raised an expectation that he has not more than answered. He distributed among them, in addition to his real estate in France, the sum of one hundred and forty thousand dollars in money; a munificent gift if relation be had to anything but that which was no merit of theirs,—his own larger acquisitions. To one of three daughters of a brother he gives sixty thousand dollars; to another and her child, thirty; to another, ten,—estimating their several claims, and making distinctions between them, as he had

an unquestionable right to do. All these legacies were paid, as the record shows, even before they were payable by law; and the complainants have taken, by the judgment of the law, a further sum of sixty thousand dollars in the testator's after-purchased lands, of which, by accident or intention, he died intestate. Having thus received and enjoyed all that the will gives them, and all that the testator did not take away from them by a republication of his will, the complainants now claim the decree of this court to defeat the great purpose of his life, and, by an assault upon the very principles of charity, most unfairly accompanied by an assault upon the character of their benefactor, to frustrate the two nearest and dearest wishes of his heart, and the two noblest objects upon earth that, living or dying, can fill the heart of any man,—the instruction and succor of the fatherless poor, and the security, comfort, and embellishment of a great city. It is a high moral, as well as a professional, gratification to assist in frustrating such a design.

[After reading the will, Mr. Binney presented his first point: That if the trusts for the orphan college are void, the legal result from other clauses in Mr. Girard's will is that the property, real and personal, devoted to the college, inures to the exclusive use of the city of Philadelphia for city purposes. He then proceeded to his second point:]

The charitable uses declared in the testator's will for the education and maintenance of poor white male orphans are perfectly valid in all respects.

This great question, involving the largest pecuniary amount that has perhaps ever depended upon a single judicial decision, and affecting some of the most widely diffused and precious interests, religious, literary, and charitable, of all our communities, is now to be brought to the test of legal research and reasoning. There was a period of time, covering the whole colonial existence of these states, when the validity of such uses as these was taken for granted and acquiesced in by the people everywhere. There was probably never a colony of English origin that did not regard them as both morally and legally good, and hold them to be matters of conscientious duty, as well as of public policy. An Englishman of adult age could not have left the land of his Christian forefathers without bringing with him a reverential regard for charitable uses, and an inbred deference for all who desired to extend and to perpetuate them, whatever might have been his personal practice. The great scope of their design—in the sustenance of the poor, the instruction of the young, and the succor of the afflicted, under the vicissitudes that

man is everywhere subject to, in the cultivation of learning, and the advancement of Christian knowledge, their tendencies to consolidate and to adorn society in its progress, and their being, moreover, under every shape and form, an acknowledgment, express or implied, of our duty to God and to our neighbor, and, directly or indirectly, acts of religious worship and gratitude—obtained for them in some form, and frequently in all forms, the consent of all the colonists. But they rested upon the habits and the feelings of the people, or upon adjudications elsewhere, and not upon principles investigated and declared by our courts; and hence it has happened that, after more than a century and a half of general adoption, the legality of charitable uses has of recent times been regarded by some persons among us as a prejudice, rather than a principle of law or equity, and as a well-meaning weakness, that neither law nor equity is strong enough to support without the sanction of legislative enactment.

The complainants' bill not only proceeds upon this assumption, but relies upon nothing else. If we look to it for such discriminations between charitable uses as will leave the public in the enjoyment of some, and deprive them only of others, we find nothing of the kind. It would have been some relief to ascertain, if those in the testator's will were thought to be defective, that, by adding or subtracting some particular characteristics, we might, with the complainants' consent, fall upon at least one class of charities that had enough of suspended animation to be resuscitated by a court of equity. But the complainants leave no such hope or expectation to the public. They give us no principle or rule by which we can discover that in their judgment there are any redeeming characteristics of a good charitable use. They allege, as fatal defects in the uses declared by Mr. Girard, properties that are not only common to all charities, but are inseparable from their very nature. They treat the whole institution of charities as an irremissible offense against the laws of property, whether legal or equitable, except so far, and only so far, as the legislature may have made a special enactment for the case. It must be obvious to the court that such an assault upon charitable uses, especially if it derives support from the judicial decisions of Virginia or Maryland, or from anything that has ever fallen from any of the learned judges of this court, throws upon the counsel of the city of Philadelphia an almost elementary investigation of this head of the law. The object is certainly of sufficient value to deserve it all; but it is quite remarkable that, at this time of day, we should have to maintain in this court

that a statute in England, or an act of the legislature in Pennsylvania, is not indispensably necessary to the existence of a charitable use. I may be permitted, then, at the outset, to endeavor to clear away a part of the prejudice that seems to have embarrassed this subject, even in the minds of some enlightened judges.

One of the great objects of law in the transfer or transmission of property from man to man is, no doubt, certainty of ownership, and, except within well-defined limits, immediate control over the entire absolute estate or interest in it. Whatever is not certainly owned by somebody, and is not, within the limits referred to, disposable by its owner in full property, seems to be obnoxious to the objection of not being property at all. It is not merely a postulate of a court of law, it is equally so of a court of equity, that rights of property should be asserted only by ascertained owners, or on behalf of ascertained owners,—owners both for title and enjoyment. In the case of descent or transmission by law, the law provides for the certainty that it requires, and, if there is neither heir nor next of kin, it substitutes the representatives of the nation through the process of escheat. In the case of transmission by act of the party, it denies all effect to the act, unless, within the prescribed limits, certainty of ownership is attained in both the respects alluded to.

The complainants' bill, taking up these general principles, and applying them to the charitable uses in the testator's will, avers "that the objects of the charity are altogether indefinite, vague, and uncertain, and no trust is created by the said will that is capable of being executed, or of being cognizable at law or equity, nor any estate devised that can vest, at law or equity, in any existing or possible *cestui que trust*"; and it asserts a resulting trust of the whole residue of the real and personal estate of the testator to the heirs and next of kin "by reason of the same defect of definite and certain objects of the charities, for benefit of which the said devise was supposed to be made." The bill further avers that "the devise of the residue and remainder of the said real estate to the mayor, aldermen, and citizens of Philadelphia in trust is void for want of capacity in such supposed devisees to take lands by devise, or, if capable of taking generally by devise for their own use and benefit, for want of capacity to take such lands as devisees in trust." The amended bill repeats both averments, with only a slight variation of language:

"And your complainants maintain that the mayor, aldermen, and citizens of Philadelphia were, at the death of the testator, incapable of ex-

ecuting any such trust, or of taking and holding a legal estate for the benefit of others, and that, whatever may be the capacity of said mayor, aldermen, and citizens of Philadelphia to hold property for the use of others, or to execute a trust, the objects for whose benefits the said devise in trust is supposed to have been made are indefinite, vague, and uncertain, as will appear from an examination of said will, so that no trust is created that is capable of being executed, or cognizable either at law or in equity, and no estate passed by said supposed devise that can vest in any existing or ascertainable *cestui que trust;* that if the objects or persons for whose benefit the said devise is supposed to have been made were susceptible of ascertainment, yet such beneficiaries, when ascertained, would be wholly incapable of transmitting their equitable title in perpetual succession."

The allegation that the objects of the charity are indefinite, vague, and uncertain, that no trust is created that can vest in any existing or ascertainable *cestui que trust*, and that, if the objects or persons were susceptible of ascertainment, yet such beneficiaries, when ascertained, would be wholly incapable of transmitting their equitable title in perpetual succession, are so many appeals to the principle of certain ownership, and to the popular prejudice that charitable uses offend against it. It is not against present vesting that the objection is directed, but against the vesting of the charitable use at any time. It would be absurd to object to a use that does not vest at the moment of its creation, since nothing is better settled than that the whole beneficial interest of any estate may be suspended, and, by a clause of accumulation, placed beyond the reach of human enjoyment, as to both capital and income, for twenty-one years after the extinction of all lives in being.[1] The objection means to deny that such charitable uses as the present can ever vest.

So as to the uncertainty of the objects of the trust, the bill cannot mean to allege that poor white male orphan children, between the ages of six and ten, are generally uncertain, so that it cannot be ascertained from evidence whether a male child comes within that general description or not, but it means to allege, as a fatal defect in the use, that no particular orphan child can at any time make good a personal claim to the benefit of the trust, as an individual intended by the testator. In like manner, when the bill treats it as a fatal defect that the beneficiaries, when ascertained, will be wholly incapable of transmitting their equitable title in succession, it cannot mean that this transmissibility is necessary to all private estates, since it is notorious that the estates are never so transmissible, nor any estate less than estates for life, if the continuance of enjoyment is dependent upon life;

[1] Thellusson v. Woodford, 4 Ves. 226.

but it must mean that there is a universal and inflexible rule of property that in all estates and uses, charitable uses as well as others, there is a period when the whole interest must be concentrated in one or more persons, and be transmissible to heirs or representatives.

Now, I hold it to be demonstrable that the statement of such objections against charitable uses, and especially those in Mr. Girard's will, implies a misapprehension of the nature of such uses, and an equal or greater misapprehension of some of the best-settled rules for the limitation of private property.

[Mr. Binney argued this topic under two heads. (1) As to the uncertainty of the objects to take, and the mode of ascertaining them: (2) as to the vesting of interests in a charitable use. He then proceeded:]

It is worthy of remark, then, that of three objections made by the bill and amended bill against the charitable uses in this case, two of them—that the interests do not vest, and that the objects are uncertain—are, as general propositions in regard to all powers of appointment, unfounded in law; and the third, "that the beneficiaries are incapable of transmitting their title in succession," is an indispensable characteristic of every charitable use, and that which Lord Redesdale, in Mahon v. Savage, states as discriminating charities from all other uses. I am, however, compelled still further to ask the court's attention to the elements of this doctrine of charitable uses. There is not a charitable society, nor an object of charity in Pennsylvania, nor an institution for the promotion of religion or literature, that is not to be affected by this decision. The magnitude of the estate in controversy disappears before the magnitude of the public interests involved. It is indispensable that we look to our foundations with more than usual care.

We are told that these uses are vague and indefinite, and the attempt is made to press upon the court the adoption of the popular notion of them by means of popular language. In an argument before a learned court, the effort should be to speak of legal things in legal terms,—to speak of that which has been adjudicated in the language of adjudication, and not to confound all differences by rejecting all established distinctions. Even a bequest to charity, without more, though it is general, is in no legal sense "vague or indefinite." It is good in England, and, I trust, in Pennsylvania, too. The mode of administering it may be different from that of a gift to trustees for charity generally, or a gift to a more precise charity, without trustees; but it is not vague, it is not indefinite. It is comprehensive, but it comprehends noth-

ing that has not the specific traits of charity, which I shall endeavor hereafter to point out. General charity, if there are no trustees, is administered in one way; if there are trustees, it is administered in another way; but nothing that is vague and indefinite can be administered at all.[2] A bequest to the poor is one degree less general than charity at large; but it is neither better nor worse for that. The difference merely affects the administration of it.[3] To the poor of a particular parish is still less general than a bequest to the poor; but it is still no better, nor, if the mode of administration be excepted, is there any legal difference between them.[4]

If, however, any charitable use is precise, and not vague, limited, and not indefinite, it is the charity founded by Stephen Girard,—an orphan college for the maintenance and education of poor white male orphan children from the ages of six and ten to the ages of fourteen and eighteen, in the manner and to the intents and purposes declared in his will. It is almost perfect precision. But it must not be understood that we claim the least protection for it on the ground of this precision, or shall offer a single suggestion to the court that will distinguish it in point of favor above a charity to poor orphans generally, to poor children, to poor seamen, to poor widows, or to the members of any class of the helpless, necessitous, or afflicted of mankind, however general may be the description. A distinction upon any such ground mistakes the source, motive, end, and objects of charity, mixes up with its pure principle the grosser elements of exclusive rights, endeavors to individuate the equitable interest, to fasten it in some way to the landmarks of private property, to make it the selfish thing that private property is, to require for it some characteristic that will give it the cast of personal possession, and a lawful title, by which one man may say to another, even of the same bereaved family, "It is mine, and not yours." The argument of the complainants demands for all charities that certainty and definiteness which are the badges of private right, and it probably will not be surrendered until, by rising up to the source of charity, it is shown that certainty in their sense is its bane; that uncertainty, in the sense of the law of charities, is its daily bread; and that the greatest of all solecisms in law, morals, or religion is to talk of a charity to individuals, personally known to and selected by the giver. There is not, there never was,

[2] Legge v. Asgill, 1 Turn. & R. 265, note; Vezey v. Jamson, 1 Sim. & S. 69; Moggridge v. Thackwell, 7 Ves. 36.
[3] Attorney General v. Peacock, Finch, 245; Attorney General v. Matthews, 2 Lev. 167.
[4] Woodford v. Parkhurst, Duke, 378.

and there never can be such a thing as charity to the known, except as "unknown." Uncertainty of person, until appointment or selection, is, in the case of a charitable trust for distribution, a never-failing attendant. If the trust be committed to a corporation for charitable uses, it makes no difference. Corporations for charitable uses are but bodies of trustees for uncertain beneficiaries, and their charities have no attribute of greater certainty than if the trust were given to unincorporated trustees, or given for the object generally, without trustees, when chancery, if necessary, would supply them.

It has been said that the law of England derived the doctrine of charitable uses from the Roman civil law. Lord Thurlow has said it, and there are others who have said the same thing. It is by no means clear. It may very well be doubted. It is not worth the time necessary for the investigation. One of the worst doctrines, as formerly understood in England,—the doctrine of *cy pres*,—has been derived from the Roman law, and perhaps little else. Constantine certainly sanctioned what are called "pious" ones. A successor—Valentinian—restrained donations to churches, without disturbing donations to the poor; and Justinian abolished the restraint, and confirmed and established such uses generally and forever. But where did the Roman law get them? We might infer the source from the fact that Constantine was the first Christian emperor; that Valentinian was an Arian, a sagacious, bold, and cruel soldier, but the tolerant friend of Jews and Pagans, and a persecutor of the Christians; and that Justinian, "the vain titles of whose victories are crumbled into dust, while the name of the legislator is inscribed on a fair and everlasting monument," obtains, with this praise from the historian of the "Decline and Fall," the more enviable sneer of being at all times the "pious," and, at least in his youth, the "orthodox, Justinian." We might infer it still better from that section of the code which, after liberating gifts to orphan houses and other religious and charitable institutions, *"a lucrativorum inscriptionibus,"* and confining the effect of these charges to other persons, concludes with the inquiries: *"Cur enim non faciamus discrimen inter res divinas et humanas? Et quare non competens prerogativa celesti favori conservetur?"*

What are pious uses? They are uses destined to some work of benevolence. Whether they relate to spiritual or temporal concerns; whether their object be to propagate the doctrines of religion, to relieve the sufferings of humanity, or to promote those grave and sober interests of the public which concern the

well-being of the people at all times,—all of them come under the name of *"dispositiones pii testatoris."*[5] They come, then, from that religion to which Constantine was converted, which Valentinian persecuted, and which Justinian more completely established; and from the same religion they would have come to England, and to these states, though the Pandects had still slumbered at Amalfi, or Rome had remained forever trodden down by the barbarians of Scythia and Germany. I say the legal doctrine of pious uses comes from the Bible. I do not say that the principle and duty of charity are not derived from natural religion also. Individuals may have taken it from this source. The law has taken it in all cases from the revealed will of God. What is a charitable or pious gift, according to that religion? It is whatever is given for the love of God, or for the love of your neighbor, in the catholic and universal sense; given from these motives, and to these ends, free from the stain or taint of every consideration that is personal, private, or selfish.

The domestic relations, it is not to be doubted, are most frequently a bond of virtue, as they are also the source of some of the most delightful as well as ennobling emotions of the heart. In the same class, both for purity and influence on human happiness, we may generally place the relations of kindred by blood or alliance, our friends and benefactors, those of whom we are a part, or who are an acknowledged part of ourselves. There is nothing in the Bible to sever any of these relations, if cultivated wisely and in due subordination to greater duties; nor much, with perhaps an exception or two, to enjoin a special observance of them. One of them has the sanction of a commandment in the second table, to make children remember their parents, who need no command to remember them; and another is defended by injunctions against infirmities, which, while they are its cement, are often its ruin. All of them are deeply rooted in our nature. Instances are not wanting of their vivid influence between men whose nature is disclosed by the darkest stains; and without any emphatic sanction in the revealed Word, they are perhaps more than sufficiently invigorated by natural impulses, which, for good or evil, rarely or never sleep. The feelings which attend them are not unmixed with benevolence,—nay, they are often deeply tinctured with it; but benevolence does not bear supreme rule among them, nor is it their sole guide and governor. It is not to be forgotten by the Christian moralist that, although the ties which bind men together in these narrow rela-

[5] 2 Domat, 168, bk. 4, tit. 2, § vi., 1.

tions are necessary to their happiness, and therefore to their virtue, the due observance of the relations themselves is not that which the Gospel meant chiefly to inculcate upon man. Father and mother, son and daughter, husband and wife, master and servant, kinsmen, friends, benefactors, and dependents,—while such relations bind individuals together, they often break society into sections, and deny the larger claims of human brotherhood. They are an expansion, and sometimes little else, of the love of self. This is in many instances their center and their circumference. The Gospel was designed to give man a truer center and a larger circumference; to wean him from self and selfish things, even from selfish virtues, which are "of the earth, earthy"; to make the intensity of his self-love the standard of his love of human kind, and to build him up for Heaven upon that which is the foundation of the law and the prophets,—the love of God and the love of his neighbor.

Here are the two great principles upon which charitable or pious uses depend. The love of God is the basis of all that are bestowed for His honor, the building up of His church, the support of His ministers, the religious instruction of mankind. The love of his neighbor is the principle that prompts and consecrates all the rest. The currents of these two great affections finally run together, and they are at all times so near that they can hardly be said to be separated. The love of one's neighbor leads the heart upward to the common Father of all, and the love of God leads it, through Him, to all His children. The distinction between the two descriptions of charities—the doctrinal and the practical, or, as they may with more propriety be called, the religious and the social—is one, however, that Christianity can hardly be said to enforce, since all its doctrines are practical, and all the charities it enjoins are religious; but it is of some moment in the law, as may hereafter be perceived.

But who is my neighbor? It was perhaps difficult to make a Jew, a Jewish lawyer especially, whose profession was not the best in the world, to enlarge his heart,—it might have been difficult for some teachers to make such a Jew understand that he was neighbor to a Samaritan, a schismatic, with whom the Jews "had no dealings," but it was not at all difficult to make him confess, by the voice of his own self-love, that a Samaritan was neighbor to a Jew. A Jew whose brother had fallen among thieves, who had stripped him of his raiment, and wounded him, and left him half dead, was not slow to confess that he that

showed mercy on him was his neighbor even though he was a Samaritan.

Even the disciples of the Great Teacher, the fisherman from the strand of Genesareth, who, from their station and the vicissitudes of their calling, would seem to have been more than others in sympathy with the unprotected and unprovided of the earth, were not quick to learn this great lesson. An outcast from the coast of Israel, a Canaanite, who sought relief from her demoniac daughter, though she came with the strongest claim that humanity ever makes for sympathy and succor,—a wretched mother imploring aid for her afflicted child,—received from them nothing but "Send her away, for she crieth after us." The sentiment in their hearts, their Master, preparing the lesson for them, seems to have put into words: "It is not meet to take the children's bread and to cast it to dogs." But when the reply came, —"Truth, Lord; yet the dogs eat of the crumbs which fall from their master's table,"—the reproof of the misjudging disciples and the restoration of the wretched demoniac were conveyed by the same answer: "Oh, woman, great is thy faith; be it unto thee even as thou wilt." Lesson after lesson was designed to lead the Jew from the prejudices of his narrow family to "all the kindreds upon earth," and to open his heart to even the proscribed Gentile, instead of suffering none to enter but those who held to him the personal relations by which his own infirmities were cherished and confirmed; to lead him to imitate that celestial mercy which sends the rain upon the unjust, and "is kind to the unthankful and to the evil"; to impel him, in fine, to love his enemies, and to do good unto all men, as his brethren of one descent from the same Father in heaven. "He that loveth father and mother more than Me is not worthy of Me; and he that loveth son or daughter more than Me is not worthy of Me." "My mother and My brethren are these which hear the word of God, and do it." Such was the language of Christ to those who were prone to think that the love of their own blood, or of their own nation, was the highest attainment of virtue. The great final illustration of the principle of charity is given as almost the last act of the ministry of Christ, when he prefigured the gathering of all nations, and the separation of one from another, as a shepherd divides the sheep from the goats. To those on his right hand the King shall say: "I was an hungered, and ye gave me meat. I was thirsty, and ye gave me drink. I was a stranger, and ye took me in; naked, and ye clothed me; sick, and ye visited me. I was in prison, and ye came unto me." And when the

righteous, unconscious of this personal ministration to his wants, say "Lord, when?" the answer consummates the lesson, and leaves it for the instruction of the living upon earth, as it is to be pronounced for their beatitude in heaven: "Inasmuch as ye have done it to one of the least of these, My brethren, ye have done it unto Me."

It is not, therefore, in gifts to the beloved relation, the faithful friend, the personal benefactor, the personal dependent, the known, the individuated, whether beloved for merit, from gratitude, by personal association, or in reciprocation of good offices, that we are to look for acts of charity. These have their personal motives and their personal ends. We must go out of this narrow circle, where sometimes self-love is all that kindles our emotions, and perhaps always gives to them the warmth which we mistake for a nobler fire, into the larger circle of human brotherhood,—the unrelated by any nearer affinity, the naked, the hungry, the sick, the stranger, and the captive,—and must give to them, in humble reverence, and in faint imitation of that divine beneficence that gives everything to us. This alone, in the sense of Scripture, and in the sense of law also, is a charitable gift. Nor is the extension of the hand to the wayside mendicant or the administration of succor to the traveler who has just fallen among thieves near our path, or that occasional relief which feeling, rather than principle, prompts to the distressed who meet our eyes, a compliance with the duty which the Gospel enjoins. Provision for the day of need, accumulation for future necessity, a provident forecast for those who can have none for themselves, a preparation for our brethren under the Gospel, such as we should make for our children and brothers by blood,—all these are not more the suggestion of reason than they are the command of religion. The apostolical direction to the churches was distinct and reiterated: "Upon the first day of the week let every one of you lay by him in store, as God hath prospered him, that there be no gatherings when I come; and when I come, whomsoever ye shall approve by your letters, then will I send to bring your liberality unto Jerusalem, and, if it be meet that I go also, they shall go with me." St. Paul himself was a trustee for charitable uses, and by his injunction and example gave the highest sanctity to both the charity and the trust.

It is by no means in the Gospel that this provision for the helpless and unknown is first announced, though it is there that the precept has its greatest expansion and emphasis. For whose benefit was the Jewish command: "When thou cuttest down

thine harvest in the field, and hast forgot a sheaf in the field, thou shalt not go again to fetch it"? When the olive tree was beaten, for whose sake was the husbandman commanded not to go over the boughs again? For whom was the gleaning of the grapes after the vintage was gathered? They were all for the unknown, the unrelated, the unfriended,—the stranger, the fatherless, and the widow. "Thou shalt remember that thou wast a bondman in the land of Egypt. Therefore I command thee to do this thing." "Thou shalt not glean thy vineyard; neither shalt thou gather every grape of thy vineyard. Thou shalt leave them for the poor and the stranger. I am the Lord, your God." "For ye know the heart of a stranger, seeing ye were strangers in the land of Egypt." The appeals are constant, reiterated, urgent; they are more than appeals,—they are commands directly addressed to the Jews by the highest authority, and in the dread Name itself, to extend their gifts and their protection to the unknown stranger, the unfathered orphan, and the widow. It is this command, so clear, and sustained by such sanctions, to the Jews first, and afterwards to the people of all nations, that makes charitable uses a matter of religious duty, so that, to deny the performance or the enjoyment of them to any man during his life or at his death, or to withhold from them the sanction and protection of the law, is to deny him the exercise of one of the most sacred rights of conscience. Next to the worship of Almighty God, and as a part even of that worship itself, they are esteemed, and ever have been, as both a duty and a blessing. They were so promulgated to the Jews before the coming of Christ, and they were so taught and enjoined under the new covenant; and it is a miserable mistake, both of their origin and of their end, to question them for that uncertainty of particular object which is of their very substance and essence.

It has not been my intention, in these remarks, to pronounce a homily to the court or to the counsel. It is with some repugnance that I have blended themes of this nature with questions of law, in a strife for the recovery or defense of property. But they bear directly upon questions of law, and especially upon the great question which I am now to discuss; for they disclose the foundation of charitable uses, and one of their inseparable attributes, in the manner most effectual to answer not only the main argument of the complainants' counsel, but the judicial arguments which, in one or two cases in our own country, have unfortunately been used to defeat them.

In the civil law, and in the law of England, all that I have said has been justified in repeated instances. "The name of 'legacies to pious uses' is properly given only to those legacies which are destined to some work of piety or charity, and which have their motives independent of the consideration which the merit of the legatees might procure them; whereas other sorts of legacies have their motives confined to the consideration of some particular person, or are destined to some other use than to a work of piety or charity."[6] The author adds: "It is in this motive," namely, a motive independent of the consideration of the merit of the legatees, "that the essential part of legacies to pious uses does consist." A gift intended exclusively as a personal gift to a minister is not a charity; but if it is intended for him *qua minister,* as one of the class holding that office, or is not totally separated from the general object in reference to which he is personally to be benefited, it is a charity.[7] A beneficed English clergyman bequeathed £600 to the eminent Richard Baxter, to be distributed by him to sixty pious, ejected ministers; and added that he did not give it to them for the sake of their nonconformity, but because he knew many of them to be pious and good men, and in great want. It was held by Lord Keeper North that this was a charity, but superstitious and void.[8] The decree was reversed in 1 William & Mary by the lord commissioners, for a reason that, for a long time, was not generally known.[9] In Moggridge v. Thackwell, Lord Eldon quotes Lord Hardwicke's note book: "The case of Mr. Baxter upon Mayo's will, the decree reversed; not upon anything contradicting the general principle reported to have been stated, but because really a legacy to sixty particular ejected ministers, to be named by Baxter, and as of a legacy to those sixty individuals,"[10] and therefore not a charity. A gift to poor relations, if to be dissipated among such as are living, is not a charity; but if it contemplates a succession of them, and thus contains the element of uncertainty by comprehending the unborn, it is a charity.[11] A gift to the poor of the parish is not a gift even to the certain poor on the poor rates, but to the uncertain poor, not receiving parish relief. The principle of the decision is not, it is true, that a gift to the poor on the poor rates is not a charity; but the courts have not availed themselves

[6] 2 Domat, 169, bk. 4, tit. 2, § vi. 2.
[7] Grieves v. Case, 1 Ves. Jr. 548, 2 Cox, 301; Attorney General v. Cock, 2 Ves. Sr. 273.
[8] Attorney General v. Baxter, 1 Eq. Cas. Abr. 96.
[9] Attorney General v. Hughes, 2 Vern. 105.
[10] 7 Ves. 76.
[11] Attorney General v. Price, 17 Ves. 371, Boyle, 37.

of certainty, even where they had it before them, but have established the trust for the least certain of the two descriptions.[12] A testamentary gift *pro anima* is a charitable use of a very extensive nature, as will hereafter be shown; and yet a gift to a father or mother *pro anima* is not so unless they are poor,—that is to say, unless they come within the description of an uncertain class.[13] Mutually beneficial societies, whose members help each other in sickness or adversity, are not charitable societies. The motives and the ends are personal.[14]

The only cases in which English judges of eminence have been thought to fail in discerning the true principle of charitable uses are Morice v. Bishop of Durham,[15] and Browne v. Yeall.[16] The first, decided by both Sir W. Grant and Lord Eldon, is, it appears to me, perfectly defensible. It was a gift in trust for such objects of "benevolence and liberality" as the Bishop of Durham should approve; and the objection to it was, not that it did not include objects of charity, but that it included more, and was therefore bad for uncertainty of purpose. The trust was indivisible, and in part not a charity. Liberality, it was said, might include an exhibition of pictures, the establishment of a cabinet of natural history, or an anatomical exhibition, as formerly the combats of gladiators were so considered. I do not admit that a trust for objects of benevolence and liberality would be sustained in Pennsylvania. Brown v. Yeale arose upon a trust for purchasing and disposing of such books as might have a tendency to promote "the interests of virtue and religion, and the happiness of mankind," to be executed under the superintendency of such persons, and under such rules and regulations, as chancery should decree or order. It is difficult to see why this was not a charity of religion, in the established English sense. Lord Thurlow thought otherwise; but it is clear that neither Sir W. Grant nor Lord Eldon concurred with him.

In fine, the true characteristic of charity is the certain purpose of relieving the poor and distressed, upon the principle of duty, the celebration or propagation of religious worship, or the promotion of grave public interests, such as education, the suppression of crime and immorality, and the advancement of the general public weal, in modes and forms that embrace all classes of so-

[12] Attorney General v. Clarke, Amb. 422; Bishop of Hereford v. Adams, 7 Ves. 324; Attorney General v. City of Exeter, 3 Russ. 395; Attorney General v. Gutch, Shelf. Mortm. 628.
[13] Lindwode, 180, d; 3 Reeve, Hist. Eng. Law, 80.
[14] Babb v. Reed, 5 Rawle, 151; Blenon's Case, Sup. Ct. Pa. April, 1843.
[15] 9 Ves. 399, 10 Ves. 522.
[16] 7 Ves. 50, note (5).

ciety. Uncertainty of individual object at the time of the gift is a characteristic of charity, so that the personal or individual certainty which the bill requires is fatal to it; and, if there be anything in the form of the donation to direct the gift to an individual, that individual must be bound up with a general class, so as to prove that the aim of the giver is general, and not personal, or the gift becomes an ordinary disposition of property, and not charity.

Having thus refuted the general principles, or, rather, the popular prejudices, which the complainants have stated in their bill, as objections to charities in general, I come now to the particular consideration of the uses for the Girard orphan college. The complainants assail them on two grounds: (1) That the city has not capacity to take by devise, or to take such a trust in any way, and therefore that the use fails for want of a competent grantee; (2) that the uses themselves are bad.

[Mr. Binney then argued that the city was capable of taking by devise. Having thus turned aside the assaults upon the legal estate, he proceeded to the main question,—the validity of the charitable uses,—and the positions he maintained were stated as follows:

[1. That such uses as these in Mr. Girard's will are good and lawful uses by the common law of England, which is the common law of Pennsylvania.

[2. That the city being in complete possession, nothing more is necessary. The city wants no remedy, either at law or in equity; and it is of no present importance, therefore, whether such a remedy can or cannot be had when it is wanted.

[3. That such trusts are, however, entitled to protection in equity, upon the general principles of equity jurisdiction, which protect all lawful trusts, whether there be a trustee or not.

[4. That they in fact enjoyed this protection in chancery before the 43d of Queen Elizabeth, by the original jurisdiction of that court, and have enjoyed it ever since.

[5. That the 43d of Elizabeth is an ancillary remedy only, long since disused in England by reason of its inconveniences, and supplied by chancery, not as a usurper upon the statute, but as the rightful original tribunal for such trusts.

[6. That whatever the 43d of Elizabeth imparted to the law of charities, be it more or be it less, except the mere remedy by commission from the lord chancellor or lord keeper, has been thoroughly adopted in Pennsylvania from her earliest day, together with the great body of the equity code of England; and that the same is true of nearly all the states of this Union, which have adopted the same principles, and abide by them in their adjudications.

[Under the first point, Mr. Binney presented a very elaborate and learned argument, based upon historical proofs, opinions of learned jurists, and judicial decisions. Under this head he answered the objection of the complainants' counsel that the charitable use of the orphan college, as established by Mr. Girard's will, was opposed to Christianity, to rights of conscience, and to the constitution and law of Pennsylvania,

of which Christianity was claimed to be a part. The remainder of the selection is confined to this point.]

The direction which excludes all ecclesiastics from holding any station or performing any duty in the college, and from being visitors within the premises, gives, it is said, the death blow to this charity; in what way, under what interpretation, by what principle of the law of charities, or of any law has not been developed,—has not even been stated by the opening counsel. It is foreshadowed to us by solemnity of manner, by awful forebodings of a race of coming atheists, who are to dishonor their Creator, and by a pungent allusion to the marble palace, and the infidel training, as unfatherly gifts of a stone for bread, and of a serpent for a fish. But, except as their metaphors may teach us, we know nothing—absolutely nothing—of the way or manner in which it is intended, from this direction of the testator, to frame or state or point a single legal proposition against the charity which the counsel for the city are expected to meet, or which the learned court are seriously to consider. We are to conjecture, to anticipate, to apprehend, as well as we may, and to fear even more than we may apprehend; but as to definite and plain argument, or even statement, we have not had a word, nor half a word, upon the point, so that we go into this part of the case, as indeed we go into all other parts, on an entirely new order of battle. The point, if it be a point, is a point of law, and not merely a theme for oratory, or for an eulogium upon the Christian religion, or on Christian ministers, whom no one has assailed or would assail, and for which and for whom certainly the counsel of the city do not mean to admit that they yield in true love and veneration to any counsel, here or elsewhere. If it be a point of law, with any parts or proportions, or claiming to have any such, we were entitled, in all candor, to see them, to handle them, to measure them, and, if we had fallen after such a survey, it would have been at least a fairer fall.

The question before the court is and must be altogether a question of law, for the court considers and decides no questions but questions of law. The judges will not entertain the inquiry whether Mr. Girard's directions are expedient, or respectful to the clergy, or likely to make his school as profitable as other directions might have made it. All such questions are in this place *coram non judice*. We are confined here, and righteously confined, "to the law and to the testimony; and if we speak not according to this word, there is no light in us." I have no pleasure in a public investigation of even points of law that require

me to speak upon the subject of religion. Few men who think seriously in regard to it are overready to utter what they think in mixed assemblies. Few men who think with the greatest attention upon it, and are happiest in always expressing precisely what they think, are overwilling to trust themselves with it in a debate like this. In a contest for victory, we are not always masters of our language; not always, perhaps, followers of our principles. Though the subject and the duty we owe to it require us to weigh our words "in scales of gold," yet light words, that will not bear the weighing, may thoughtlessly escape, to our own prejudice, and, what is much worse, words alloyed below the standard may be hastily uttered, to the prejudice and dishonor of religion itself. I desire, therefore, if possible, to raise myself above these dangers by treating this question, as I have a right to treat it, as a question of law, to be submitted to the court under the responsibility of my professional character, and not under the guaranty of my religious opinions. I do not mean to make any profession of them, or to speak of them. I will not suffer my own conscience or my conscientious belief to be even named by me. My remarks will be addressed to the judicial conscience of the court, and, if I satisfy that, I can easily satisfy myself that the rest belongs to a different forum. With a reasonable, reflecting, and, above all, a religious, man, I would cheerfully undertake the task of proving that, whether Mr. Girard was wise or unwise in the direction he has given, he did not mean either to dishonor religion or to exclude it from his school. I would undertake to prove it even to the complainants, who surely cannot be gratified by perceiving that their road to success is over the prostrate character of their kinsman and benefactor. But they would not believe me if I intercepted their victory; and I should not cheerfully assume the task with any one who would make religion a stalking horse to steal away the bread of the orphan. I must therefore make the court my judges both as to the motives of the testator and the legal effect of his acts; and it is perfectly immaterial to me whether his motive be or be not examinable, as entering or not entering into that effect. I will assume that they may be examined.

The first inquiry is, by what rules or principles of interpretation this will is to be tried. The wish and the interest and the necessity of the complainants are clear. They all demand of counsel that they shall impregnate this clause of the will with dark and deadly poison, and then re-distill each word by their own fires, to drop a darker and deadlier poison over every clause

and member of the whole instrument. They would no doubt precede the process by a sincere and eloquent tribute to the benign spirit of Christianity, and to that self-denying body of men, its ministers, who alone, by their ministrations of the Gospel, and by the grace which it promises to their labors, have made or can make the education of the poor or the rich a blessing to themselves, or consistent with the welfare of society. The court would acknowledge this tribute to be as just as it was eloquent, and they would probably wait for its application to the case. The application, if it might be so called, would at length come in this, or something like this, form: Christianity is a part of the common law, and part of the common law of Pennsylvania. The Christian religion can be taught only by ecclesiastics, missionaries, or ministers. By excluding them from the school and premises, the testator meant to hold up the Christian religion to derision, and its ministers to opprobrium. He meant to incapacitate his trustees for teaching Christianity to the pupils by denying them the use of the necessary means. Nay, more; he meant to enjoin them not to teach it, but to bring up the pupils in contempt of it, to cause infidelity to be taught in the place of it, and to send these young men into the world, at the height of their passions, not only without the least tincture of Christian morality, but with either deism or atheism as their conductor and guide. Such is the scheme which the testator meant to prosecute, and by it to establish a nursery of irreligion,—equally in defiance of heaven and in scorn of the law. That cannot be charity which has such a purpose for its end. The common law has never sanctioned such a scheme, and the law of Pennsylvania, of which Christianity is a part, must disown and reject it.

The design, if fairly imputed, would deserve all that can be said against it. It would be difficult to find an advocate for it, here or anywhere. But the right and the duty of both the court and the counsel for the will still remain, after eloquence has done its best and its worst, to inquire whether as much pains have been taken to prove the design as to denounce it. The cold question must be asked and repeated, and it must receive an answer: Where is such a design to be found in the will? Of what words is it the fair interpretation? By what rule of interpretation is such a meaning to be extracted from the words? In a case of charity, and for the overthrow of a charity, are we to banish both charity and reason from the cause, and to fly into the air to the remotest distance possible from the universal standards by which the wills of all men are to be tried? Are we to fly, and to expect that the grave judges of the court will fly with us?

Mr. Girard, in giving this direction, has used plain, familiar, and intelligible words. There is no ambiguity whatever in them. They have a clear, definite meaning, which any man, learned or unlearned, may apprehend; and it is one meaning, and neither more nor less. He enjoins and requires, and this is all that he has said, and all that he means, that no ecclesiastic, missionary, or minister, of any sect whatsoever, shall ever hold or exercise any station or duty whatever in the said college, and that no such person shall ever be admitted for any purpose, or as a visitor, within the premises appropriated for the purposes of the said college. This is a meaning as lawful as it is plain. We may think what we please of the injunction,—as uncourteous, disrespectful, inexpedient. I will speak of these presently. But we cannot think—no one, on the responsibility of his professional character, will say—that what it thus plainly means to enjoin is unlawful. In other words, no man will say that any ecclesiastic, missionary, or minister, of any sect whatever, has a lawful right to hold or exercise any station or duty in such a college, or to admission for any purpose, or as a visitor, within the premises, against the will or injunction of the founder of it. If this exclusion be its meaning and end, and its whole meaning and end, there never was, and never can be, a more lawful injunction by the founder of a school or college, be the consequences what they may. To infer it to mean a command to the trustees to do or to omit something within the school, and upon the premises, and in regard to the pupils, in reference to all of which he has not said one word, and to infer, moreover, that this something which he has not enjoined or required is against law and decency, and so unlawful and indecent as to vitiate the very foundation of the school, is, in my judgment, an exposition as manifestly against the express words as it is possible to imagine, and offends against common sense, as much as it does against all the convervative principles which the wisdom of ages has adopted for the protection of deeds and last wills. It offends against the fundamental rule that, when there is no ambiguity in the words of a deed, there shall be no interpretation against their express meaning. It offends against that equally fundamental rule in the interpretation of wills that they shall, if possible, be so construed as to make the intention consistent with the rules of law. These plain words are, on the contrary, so construed as to make them, in the notion of the objectors, inconsistent with law, and they are so construed only because such a meaning is inconsistent with law. An interpretation so violent, unnatural, and extreme is, in

principle, subversive of all wills, and of all authorities in regard to them. Here are plain words, giving out but one sense, both by their grammatical and their legal construction; and yet conjecture, inference, subtlety of argument, are to extract from these elements some fifth essence, that will pass by derivation as a part of them, and yet possess a poison completely fatal to their lawful purpose. What will can stand a process that charges upon the material that has been tested the poison that is in the tests? Surely no analysis had ever less respectable pretensions to accuracy.

This will appear the more clearly by reference to the context, in which the motive of the restriction is assigned by the testator. He declares that, in making this restriction, he does not mean to cast any reflection upon any sect or person whatever; but, as there are such a multitude of sects, and such a diversity of opinion among them, he desires to keep the tender minds of the orphans who are to derive advantage from the bequest free from the excitement which clashing doctrines and sectarian controversy are so apt to produce. The motive was, therefore, to keep the minds of the pupils free from the influence of clashing opinions and sectarian controversy. The means adopted were the exclusion of ministers of every sect from the college. By such a motive and such means, the end or object is as clearly limited and defined as if he had expressly excluded all other ends,—it is, namely, to prevent the introduction of religious controversy into the school. The testator may have been wrong as to both the means and the end. He may have been unwise in thinking that the excitement of religious controversy was bad for the pupils, or that the indiscriminate admission of ministers would lead to it, or that their indiscriminate exclusion would prevent it. We have nothing to do with the truth or error of such opinions. He had a right to entertain them, as other men, for the government of themselves and their property, have a right to entertain the contrary. He was the only judge for himself and for his school. One thing, however, is certain, unless we read the will backwards,—that this was his meaning and purpose, and only this. Here is express, affirmative declaration of motive, in addition to express, affirmative appointment of means. He excludes ministers of all sects; he excludes nothing else. He desires to keep the pupils free from the influence of sectarian controversy; he desires nothing else. If such plain, frank, and honest avowals and provisions—honest they must be, whatever we may think of their wisdom—can be treated by counsel as deceptive and color-

able, intended to smuggle deism into his school, or to reject Christian teaching altogether, it is of no importance what a testator shall himself say in his will. The only important point would seem to be what his heirs and next of kin can induce able and eloquent men to argue concerning it. If the mere reading of the will is not an answer to all that can be said, it is a vain thing to write intelligibly, and a vain thing, most especially, to write a last will. I do not at present say whether the law of Pennsylvania compels all founders of free schools to cause Christianity to be taught in them, or does not. I do not say whether Christianity is a part of the law to the extent of being imposed upon any man or body of men, or is not. But this I say with all confidence: that if Mr. Girard's will is so interpreted by the court as to exclude from his school religious instruction in the principles of Christianity, it is not only vain, but absurd, to write a last will. All that, with any semblance of truth, can be charged against his will, is that it omits expressly to provide for the teaching of Christianity; and if this is a fatal defect, no endowment of a school for instruction in human learning only can ever be lawful, which is an absurdity. If the law, under all circumstances, requires Christianity to be taught in every school, and also that it should be expressly provided for by the founder, it is a doctrine of the first impression, here and everywhere.

I desire, however, to rescue the testator from the reproach of privately meaning anything hostile to Christianity that he has not said, or, if intending the slightest disrespect to the body of Christian ministers, contrary to what he has said. There is enough in his will to enable me to do it. What his religious opinions were we have no materials for ascertaining. Like the inhabitants of Mount Gerizim, he may have worshipped "he knew not what"; but in many parts of his life, and in the last act of it, he was a good Samaritan, and from this we may ascertain what his wishes were in regard to the feeling and happiness of others. That great example proves that even a schismatic who rejected the temple worship might do a deed of charity, in the full Christian sense, and so do it as to be a perpetual lesson to orthodoxy, if it be cold hearted and narrow minded. Mr. Girard may not have been a religious man himself, and yet he may have been both willing and desirous that the children he was about to educate should be so. It is not difficult to show this from his will, although he may not have declared it in that form which a professionally religious man might and would have adopted. He was well known to be, and his will proves it, a man of frank and

fearless spirit, doing himself, and enjoining others to do, what he thought right, with little regard to the opinions of the world. He is entitled, therefore, to credit for sincerity, if for nothing else. Had he meant to exclude religion from his school, he would have done so as distinctly and emphatically as he has excluded the ministers of religion. It is said the words which command this exclusion are underlined or italicized in the original will. It is only another proof that there was no intention to disguise any part of his purpose. It was in his power to avoid all question by declaring that none but laymen should be either instructors in the school or visitors on the premises. Some men would have adopted this language as more respectful to ministers of religion, and less liable to misconstruction on that point; but meaning, and declaring that he meant, no disrespect to them, he preferred, and supposing him to have been sincere, and to mean nothing that he does not say, he wisely preferred, the language he has used. By permitting none but laymen to instruct, he might have been understood, with less violence than has been done to his will, to prohibit any but profane or secular learning. The present language leaves the instruction without any such restraint.

He says expressly that his teachers in the college must take pains to instill into the minds of the scholars the purest principles of morality, so that, on their entrance into active life, they may evince benevolence towards their fellow creatures, and a love of truth, sobriety, and industry, adopting at the same time such religious tenets as their matured reason may enable them to prefer. Interpreting these expressions with any—the least—candor, can they be understood to prohibit the Bible, from which the purest morality is drawn, or the evidence of Christianity, or such systems of Christian morals as place them upon the sure and only sure basis of Christianity? I answer, no. I aver confidently that a contrary interpretation, if made upon the will alone, is as destitute of candor as it is of conformity with legal rules of construction. Mr. Girard has enjoined instruction in the purest morality. He has given no statement of the basis on which he requires it to be taught. He has not said a word in opposition to the universal scheme of all Christian countries and seminaries, or of uniting ethics with Christian theology, since nothing is to be made of morality without their union. He has left the basis of the science to the selection of his trustees. On what principle of common, decent justice to his will can it be averred that he meant them to exclude Christian morals, and to teach deistical or atheistical

morals? I further aver that, if any regard is paid to his language, he must be understood to express a desire that, on leaving the college, the scholars may adopt religious tenets. The structure of the sentence demands this interpretation. He desires that they may then evince certain qualities, "at the same time adopting" religious tenets. It is grammatically the same in construction as if he had said: "I desire that they may show these qualities, and at the same time adopt the tenets." The desire of the testator embraces all that follows,—the adoption of the tenets as much as the exhibition of the qualities. He supposes that the great truths of Christianity in which all Christian denominations concur will be taught in the college. From these he expects them to obtain the purest system of morality. Their religious tenets,—the dogmas, doctrines, principles which, by different interpretations, different sects derive from the Scriptures, —such of these as they may prefer he desires them to adopt by the aid of their matured reason. By religious tenets he does not mean religion generally. It is neither the accurate nor the popular understanding of the words. An inquiry concerning any man's religious tenets could not be accurately or pertinently answered by saying, "He believes the Bible to be the Word of God," or "He is a believer in the Christian religion." The rejoinder to such an answer would be, "I wish to know his tenets," and the only pertinent answer would be, "He is a Catholic, a Protestant Episcopalian, a Presbyterian, a Baptist." Mr. Girard used the words in this sense only. They follow the exclusion of clashing doctrines and sectarian controversy from the school; and he says in so many words: "I desire that the tender minds of the orphans may be kept from the excitement of clashing doctrines and sectarian controversy. I wish them to adopt their tenets on their entrance into active life, by the assistance of their matured reason, and not to be excited by the teaching of different sects while they are at school." He may have been right or wrong in his notion,—I have nothing to do with that. I think I cannot be wrong in supposing that this, and this only, is what he means.

Again, he especially desires that, by every proper means, a pure attachment to the sacred rights of conscience shall be formed and fostered in their minds. What notion of the rights of conscience are they to obtain without being instructed in the nature and office of conscience? Are they not to be taught what conscience is, and whose voice it speaks, and that it is the great demonstrative proof, irrefragable and universal, of the being of God? Are they not to learn that it is the faculty by which men

judge of their own actions, by comparing them with the law of God as it remains, faintly perhaps, written on their hearts, but stands distinctly revealed in His Word? And can they be instructed in its rights without being informed that this law is so much more obligatory than any law of man; that the duty of obeying the law of God is the foundation of all the rights of conscience; that conscience is, in fine, the expositor of the will of God? It may be said that the testator had in his view some fantastic notion of the origin and obligations of conscience, inconsistent with or independent of a belief in the being of a God or of the truth of Revelation. What proof or evidence is there of this in his will? Does he not leave to the trustees and professors the liberty of teaching these rights in that way which in their judgment they shall think the most effectual and the most approved among men? Does he not, in effect, enjoin this upon them when he enjoins them to do it by every proper means? May they not, must they not, enlighten the faculty in their pupils, improve its discriminating power, exercise them in reflecting on the moral character of their actions, on the character of their Creator and Redeemer, and in referring themselves ultimately to the supreme law derived from Revelation? Beyond all doubt he does leave it to them, without restraint, without a word or syllable to turn them from the path they shall think best. Beyond doubt it is their duty to walk in that path; and they cannot take any path that leads to a right notion of conscience that will not lead to the belief of a Supreme Judge and Sovereign, of whom conscience is the deputed governor in the human heart, and also to the desire of learning and obeying His Will, whether inscribed on the heart itself or revealed in His Word.

Whoever reads this will by its own light only, and this is all that the court have to guide them, must therefore see that there is nothing in it like an interdiction of instruction in the principles of the Christian religion; and I contend for this the more strenuously because the trust I confidently believe must be executed, and I should deprecate it as a great public evil, as well as a perversion of the will, to have a doubt remain of either the right or the duty of the trustees to give this instruction. The exclusion of Christian ministers is to be traced to a circumstance widely different from anything like an aversion to Christianity. In the establishment of a large orphan school, to be composed of children of various religious denominations, and of some without any religious training or name whatever, the testator's difficulty in this particular was not inconsiderable. It is the case not only

of a school, but of a family,—of a family by itself,—and separated for the most part from the world. If he should place it under the religious visitation of one denomination, there might be peace within, and finally, perhaps, one religious system; but the benefits of the school itself might be thereby limited to one or a few classes, and this would have defeated or impaired his design, which was catholic and universal. If he made no exclusion of any, but left the ministers of all religious denominations to claim the preference to which each thinks itself entitled, could he expect that they would unite in some common platform of religious instruction, acceptable to all? He had little reason, from any personal experience, to hope for such concord. Would the Bible itself be a point of union for every one? Do all denominations adopt the same canon,—even the same translation? With respect to the elements of Christian belief, do they concur in all of them? Will they all agree in any summary of them for the instruction of children? Do they agree in what constitutes a capacity in children to receive such instruction profitably,—to become recipients of Christian grace? A conscientious churchman might and would say, upon entering on the religious visitation of such a family: "My first duty to them, to myself, and to God is to impart the rite of baptism to the unbaptized; they cannot otherwise be made members of Christ." An equally conscientious Baptist might and would say: "Not now; postpone it to riper years." An equally conscientious Quaker, if he took part in any such community, which, for the love of peace, he commonly does not, would say: "Neither now nor then. The baptism of water is of no necessity nor efficacy at any age." No minister of Christ thinks himself a sectarian. Many of different denominations concur in many things. Many conscientiously differ in many things, and after most grave deliberation upon them. With the most conscientious and the most reflecting there are, perhaps, the fewest non-essentials among their points of belief. The distinction between what is fundamental and what is not is more frequently a distinction of laymen than of ecclesiastics; perhaps because laymen ponder the weighty subject less seriously.

We are not without public examples of these differences at the present day, which it is unnecessary to do more than point at. They are the great obstacle to the full success of our public schools. Without religious instruction, what will they be, and what will they produce? With it, if there is to be no common accord, the question may be repeated, what will they be, and

what will they produce? The law does not overcome the difficulty. Ecclesiastics, it is feared, will not. If laymen cannot, where is the evil to end? And what will the influences of the evil be, not upon pupils who have a home and a mother to supply in part the deficiencies of the school, but upon the members of an orphan family who are to find all influences upon their hearts and minds within the school, or to find them nowhere? The difficulty was too much for Mr. Girard. It would have been, perhaps, too much for any one. It lies in the universal comprehension of orphans of all religions, without imposing upon them some specific form of Christian instruction. It is, perhaps, inseparable from such a scheme. But he had a right to comprehend all, and he had a right, also, to the opinion that it was not fitting to impose upon them any specific form of Christian instruction. He chose, therefore, as the only remaining resource, to exclude from his school ministers of every denomination, and to leave the whole matter to laymen. He may have been wrong, —he may not have chosen the least of two evils in the administration of his school; but if the law left him free, he had a right to choose for himself, and it is not for any tribunal of law to limit or to question his choice, or to denounce it as a scheme to dishonor and to exclude religion itself.

And has not the law left him free? Without doubt it has. There is no law that says Christianity shall be taught in our schools by Christian ministers. Is there any law that says it shall be taught at all? The constitution is at the remotest distance possible from doing the mischief to Christianity of imposing its faith upon any one. It stands, and will stand, by its own principles and sanctions. The constitution removes and prohibits restraints. It imposes none. "All men have a natural and indefeasible right to worship Almighty God according to the dictates of their own consciences. No man can, of right, be compelled to attend, erect, or support any place of worship or to maintain any ministry against his consent. No human authority can in any case whatever control or interfere with the rights of conscience, and no preference shall ever be given by law to any religious establishments or modes of worship."[17] "No person who acknowledges the being of a God and a future state of rewards and punishments shall, on account of his religious sentiments, be disqualified to hold any office or place of trust or profit under this commonwealth."[18] Christianity is a part of the law

[17] Article 9, § 3.

[18] Article 9, § 4.

of Pennsylvania, it is true; but what Christianity, and to what intent? It is Christianity without particular tenets,—Christianity with liberty of conscience to all, and to the intent that its doctrines shall not be villified, profaned, or exposed to ridicule. It is Christianity for the defense and protection of those who believe, not for the persecution of those who do not. This is the utmost reach of Updegraph v. Commonwealth.[19] If the teaching of Christianity is enjoined by the law, what are the principles? What the creed? What has the legislature of Pennsylvania done for our public schools,—what can it do? We may lament this, and we may be wise or unwise in lamenting it; but we have formed our political community upon principles that do not permit us to do anything but to lament it.

The notion, however, that the Christian religion cannot be taught by laymen is pure extravagance. It is taught by laymen in the most efficient of our schools for Christian instruction,—our universal Sunday schools, the greatest and best of modern institutions. In the Liverpool Blue Coat School, even the doctrines of the Church of England, its creeds and articles, are taught by laymen,—no clergyman whatever either officiating or superintending the school,—the pupils themselves reading by turns, and as a reward of merit, such parts of the service as the laity can repeat. It is equally extravagant to assert that any Protestant denomination in this country prohibits such lay teaching of religion,—lay teaching in schools. It is sufficient, however, that Mr. Girard has not prohibited it. He has not prohibited the institution of a Sunday school upon the premises. Nay, he has not prohibited his trustees from sending the pupils to their respective churches, if they or their friends have any, without the walls; and this they may do without hearing of clashing doctrines or sectarian controversy, unless the ministers respectively shall think they are fit themes for the edification of their flocks. There is nothing even in the suggestion that religious offices cannot be performed by ministers to the sick or dying orphans within the walls. In point of law there is nothing, because the pupils enter voluntarily, and, when they enter, they must do so by express direction of the testator, under the sanction of the law, and the law will protect all their legal rights. But there is nothing in the will to offend even a scruple; for the power of the trustees, for the accommodation of the pupils, to erect an infirmary without the walls, is left by the will without restraint, either expressed or implied

[19] 11 Serg. & R. 400.

The sum of the objections, then, may be condensed into these propositions:

(1) That the clause of exclusion is opprobrious to Christianity, and is entitled to no favor. If it be opprobrious, so is the constitution of New York, which prohibits all ecclesiastics from holding any office or place, civil or military, within the state; and, if the post of a schoolmaster in a public school be a place, excludes him from teaching in such a school. So is the law of the English parliament which excludes a clergyman from a seat in the house of commons. So is every public and private measure that, for any cause, even for the preservation of the due influence of this honored class of men, separates them from secular cares and charges of any kind. It is the great distress of their case that compels the complainants' counsel to rely on such an objection. We ask no favor; we stand upon the law, which is the same for all who obey it, and for all lawful cases, whether of charity or contract.

(2) That Christian instruction is inseparable in law from a charity school. Charity has no foundation but in Christianity. The law will not acknowledge a charity that Christianity rejects. This is in direct conflict with settled and incontrovertible law. A charity school for Jews would, upon this principle, be illegal; whereas it is perfectly settled in England that, although a legacy to propagate the Jewish religion is invalid, a charity for the maintenance and education of poor Jews is good,[20] even though a Jewish priest be a distributor of the bounty.[21] The last decisions in England give the true distinction. The law of charity has its origin in the precepts of Christianity. Christianity rejects no charity that brings knowledge to the ignorant or succor to the poor. But there are charities for propagating the doctrines of religion, and charities for education and other objects, with which the doctrines of religion have no necessary connection. They are two streams of charity from the same source They may be made to unite and run together, at the option of the giver, but the law does not compel the union. A charity to propagate a religion not tolerated by law is void; but if a Protestant in England shall found a grammar school, although "the court, in the absence of other evidence, can only establish it on the principle of religious education forming part of the plan, and of that religious education being according to the law of

[20] Da Costa v. De Pas, Amb. 228, 2 Swanst. 487, note; Mocatta v. Lousado, cited 7 Ves. 423.

[21] Isaac v. Gompertz, 1 Amb. 228, notes.

the land," yet, if there is other evidence, it will be established in conformity with the evidence,—even for Jews, who reject Christianity, and whose religion the law of England does not tolerate.[22] Boyle regards the opinion of Sir Thomas Sewell in Isaac v. Gomperts to have been, in point of law, that "religious instruction is not a necessary part of education," and that, if the purpose of the testator does not require it, it may be carried into effect "without regard to religion at all"; and he says also, with perfect truth, that Sir Thomas Plumer, in the case last cited, supports the same opinion.[23] This, it must be observed, is the law in a land where there is an established church, and where there is no toleration except for Christians of a certain faith. It is English toleration of schools for Jews, who reject Christianity; and less is extended by the complainants and their counsel, in this land of universal toleration, to the school of Mr. Girard, who does not reject it, but only omits expressly to require it.

(3) That the conscience of parents and pupils is violated by the exclusion of the Christian ministry. And have the founders of schools no conscience to be respected? Is the conscience of the giver to pass for nothing? Can those who may refuse the bounty altogether, on the terms on which it is given, set up their conscience to destroy the gift? Or, rather, are the rights of conscience to be made a pretext for destroying the charity, that none may enjoy it, even when their conscience consents?

Finally, I submit to the court that, if this exclusion or restriction in the testator's will is illegal, it is for that reason null and absolutely void, and the consequence is, not that the charity fails, but that the restraint—the condition—is defeated, and the court must establish the charity according to their sense of the law. It is a condition subsequent to the gift. The estate has vested in the trustees, and this restraint or condition is a restraint upon its use. If the restraint is illegal, the use is not bound by it. The complainants gain nothing by the objection but the unenviable satisfaction of holding up their benefactor to judicial censure, and possibly to more general reprehension.

[22] Attorney General v. Dean and Canons of Christ Church, Jac. 485.
[23] Boyle, 43, 44.

PROFESSIONAL OPINION ON THE JURISDICTION OF CORONERS IN PENNSYLVANIA, 1840.

STATEMENT.

The board of managers of the Pennsylvania Hospital, of Philadelphia, requested Mr. Binney's opinion on certain questions raised in correspondence between the board of managers and the coroner, and also on the duties and rights of the coroner generally. They desired particularly to know the utmost extent of the coroner's right to hold inquests,—whether it was his duty, as he asserted, to hold inquests over all cases of accidental death, or whether this duty was bounded by some decision or principle. In response to this request, Mr. Binney prepared the following opinion, which he "begged them to accept as a contribution towards their work of benevolence:"

OPINION.

I have considered the matter submitted to me. The extent of the coroner's claim of jurisdiction is indicated by two paragraphs in his letters of September 28 and October 3, 1840. In the former he says: "The responsibility of an oath makes it an imperative duty on my part to call your attention to the fact that many persons who die in the hospital, the victims of accident, are buried without my knowledge. Now, I believe that the law makes it a duty of the coroner to hold an inquest over the bodies of persons who die from casualties." In his letter of the 3d of October he says: "I will now refer you to such authorities as I trust will satisfy you that all deaths from accidents or casualties fall under the notice of the coroner;" and there follows a list of authorities hereafter to be noticed. The correspondence between the coroner and the board of managers of the hospital appears to have grown out of the case of a girl named Elizabeth Taylor, who had been brought into the hospital badly burned (by accident), and died at the end of the week from the time of the injury, having had perfect possession of her senses the whole time, and having herself declared the cause of the accident. Upon this, the coroner's remark in the last-mentioned letter is as follows: "The case to which you call my attention, of the girl who died in consequence of burns, is one which falls under the notice of the coroner." "You will find in the various authors that the coroner is bound to inquire into all deaths from murder, suicide, drowning, poisoning, sudden deaths, accidents, or casualties. You will find in these authors no exceptions as to

the nature of the casualties, or the time that may elapse preceding death."

The point at issue is, therefore, very distinctly shown, and the coroner's jurisdiction asserted by him in all cases of death by casualty, without regard to the nature of the casualty or the length of time that may intervene before death. I will hereafter give my reasons for entertaining a different opinion from that expressed by the coroner; but as his letter communicates to the board a number of authorities to support his claim, it is but a proper respect to this officer, who evidently entertains those views of his duty which he has expressed in his letters, to advert to these authorities in the first instance. He has cited them by book and page, without giving the particular import of any of them. I have examined them all, with an immaterial exception, and think that they do not support his claim, but, on the contrary, show it to be invalid. With the interpretation of their general language by judicial decisions, or commentaries of the highest order of excellence, such of the authorities as apply show that the qualification of the coroner's position is necessary as to the nature of the casualty and as to the time of death. The cited authorities are as follows: 1 Blackstone's Commentaries, 347; Fitzherbert's Abridgment, "Coroner," pl. 107, 329, 339, 421; Hawkins' Pleas of the Crown, 170; 2 Hawkins' Pleas of the Crown, c. 9, § 23; Stamford's Pleas of the Crown, 51; 2 Levinz, 141; Latch, 166; St. 4 Edw. I.

1 Blackstone's Commentaries, 347. The language of the commentator is this: The judicial power of the coroner "is in great measure ascertained by St. 4 Edw. I., *de officio coronatoris,* and consists, first, in inquiring, when any person is slain, or dies suddenly, or in prison, concerning the manner of his death." Blackstone then adverts to other judicial powers of the coroner, as in cases of shipwreck and treasure trove, and as to his ministerial powers as the sheriff's substitute, but says nothing of death after casualties or accidents, nor does he explain what is meant by the phrase "dies suddenly."

Fitzherbert's Abridgment, pl. 329. This *placitum* shows the necessity of an inquest in the case of sudden death. A ville was amerced because a man was buried before the coroner had held a view,—a sudden death by starving, to which I will advert hereafter with an authority from Lord Hale's Pleas of the Crown. Here, also, the characteristic is sudden death, and the particular cause given. *Placitum* 339 concerns the case of a man found dead in a field,—a cause of suspicion that he had come to his

death by violence, and therefore proper for an inquest. *Placitum* 421 concerns a person who had died in prison,—a case for the jurisdiction of the coroner at common law, even though the death was a natural one. *Placitum* 107 only shows that the coroner's inquest must be upon view of the body.

Hawkins' Pleas of the Crown, 170. This page, which is an erroneous reference, for the octavo edition of Hawkins,[1] treats of the court of the coroner, and contains pretty much that is apposite to the subject. At page 207 the author treats of the point, "how far a coroner is empowered," and he considers the authority under two heads,—first, in relation to death, and, secondly, in relation to other matters. It is under the first division that it is alone necessary to advert to what he says, which consists of a copious recital of St. 4 Edw. I., and then of the following commentary:[2]

"It is observable that this statute, being wholly directory, and in affirmance of the common law, doth neither restrain the coroner from any branch of his power nor excuse him from the execution of any part of his duty not mentioned in it which was incidental to his office before; and from hence it follows that, although the statute mentions only his taking inquiries of the death of persons slain or drowned or suddenly dead, yet he may and ought to inquire of the death of all persons whatsoever who die in prison, to the end that the public may be satisfied whether such persons came to their end by the common course of nature, or by some unlawful violence or unreasonable hardships put upon them by those under whose power they were confined."

Sergeant Hawkins therefore adds to the cases of death enumerated in the statute only that of death in prison, for which he cites Fitzherbert, 421, the *placitum* before referred to, and Stamford's Pleas of the Crown, 51, the same authority which the coroner's letter cites. I do not possess Stamford, and it is not in the catalogue of the Law Association, nor, that I know of, in the city, but as it is the authority cited by Hawkins for the coroner's jurisdiction in the case of all deaths in prison, it is unnecessary to examine it, as this point is not doubted, nor is it in question.

2 Levinz, 141. The case at this page of Levinz is The King v. Parker, and does not relate at all to the coroner's power. It is the case of a coroner's inquest quashed because it found that a man *felonice* threw himself into the river, *et seipsum emergit*, which means to rise out of and not to drown himself in the water.

Latch, 166. This is an anonymous case, which merely decides

[1] Volume 3, c. 9, pp. 101, 180. [2] Section 201, p. 109.

that it is the coroner's duty to take his inquest upon view of the body, which is not the point in controversy.

2 Hawkins' Pleas of the Crown, c. 9, § 23. This section relates to precisely the same point as the anonymous case in Latch and the *placitum* in Fitzherbert, *viz.*, that the inquest must be *super visum corporis.*

The last of the authorities to be considered among the references of the coroner is the statute itself, 4 Edw. I., *de officio coronatoris,* which, in setting forth the things which a coroner ought to inquire of, "if he be certified by the king's bailiffs or other honest men of the country," adverts to cases of houses broken, treasure trove, and certain appeals of wounding, rape, and mayhem, not necessary to be noticed. In regard to deaths, its language is as follows: "He shall go to the places where any be slain or suddenly dead," and then, if it be the case of a person slain, the coroner is to inquire where the person was slain, who were culpable of the act or force, who were present, and other particulars to bring the perpetrators of the deed to light. "In like manner it is to be inquired of them that be drowned or suddenly dead," and, after such bodies are to be seen, whether they were so drowned or slain or strangled by the sign of a cord tied straight about their necks, or about any of their members, or upon any other hurt found upon their bodies. These are all the statutory heads of inquiry in the case of certain deaths, namely, persons slain, drowned, or suddenly dead. There is not a word as if death by casualty, and death happening at any time after a casualty, were heads of the coroner's jurisdiction. On the contrary, the deaths enumerated are of persons slain,—that is, killed by weapons, drowned, or suddenly dead; and with regard to the last description of deaths, the inquiries of the coroner are to be whether *submersi, occisi, jugulati,* or *strangulati,*—all of them implying violence in the manner of the death. When I say there is nothing in the statute to give the coroner jurisdiction in every case of death by casualty, or death happening at any time after casualty, I must be understood, not as meaning that the coroner has no jurisdiction of a death by casualty, or a death happening some time after a casualty, for there may be circumstances to give him jurisdiction when the fact upon inquiry shall turn out to be death by casualty or happening after it, but as meaning that there are no such heads of jurisdiction in the statute of casualty or death, without regard to suddenness; and this I understand to be the purpose for which the citation of authorities has been made by the coroner.

I conceive the coroner's position, announced to the board of managers, to be that any casualty or accident followed by, or, rather, ending at any time afterwards in, death, makes it his duty to hold an inquest upon the body before interment. It is this position that I am of opinion is not sustained by any of the authorities he has cited, and to show what they are I have referred to them at some length. I have before remarked that the interpretation of the general language of these authorities by judicial decisions, or by commentaries of the highest order of excellence, shows that a qualification of the coroner's position is necessary; and in regard to the description of cases to which he has referred as occurring in the hospital, it will be found to be a most material qualification. I proceed to show it.

The office of the coroner, it may be remarked, derives its name from the circumstance that it has principally to do with pleas of the crown, or such in which the king is more immediately concerned. The judicial powers belonging to the office have altogether, perhaps, a reference to the rights and duties of the crown. If the death of a person involves a homicide, the crown intervenes to hold an inquest, that those who are culpable may be brought to justice in the king's court; and if the case is one in which the party is *felo de se,* the inquest is necessary or expedient to secure the forfeiture which follows the act; and if it be a case neither of homicide nor suicide, it is the coroner's duty to inquire whether there be not a deodand, in consequence of the death, to the king, or to the lord of the franchise under him. These objects and ends of the office may be regarded as limitations of its judicial power in England, except in the case of persons dying in prison, where, from a salutary suspicion that the death of all persons who are in the custody of a gaoler may be brought about by violence or oppression, the law requires an inquiry by the coroner in every case, without regard to its circumstances. With respect to prisons, general suspicion supplies the place of particular suspicion. In other cases it would seem reasonable to require the existence of some particular grounds of suspicion that the case is one which it concerns the office of the coroner to inquire into for some of the purposes I have mentioned.

In regard to those cases where the whole end of the coroner's inquiry is to ascertain whether there be a forfeiture by suicide or a deodand from a death by casualty, it is worthy of grave consideration whether the powers of a coroner have not been materially modified in Pennsylvania by those provisions of our constitution which take away all forfeitures in such cases. I do not

mean to consider that question at this time; but I may remark that, since the proper functions of a coroner under the statute of 4 Edw. I. and at the common law have not been enlarged in this state, and probably have been restricted, no reasonable objection can be urged against their being limited here at least as much as they are in England, and that, I think, will be sufficient for the present inquiry. I regard the English authorities as settling the point that, except in cases of prisoners, the coroner should hold an inquest only where there has been a violent and unnatural death, or reasonable suspicion of such a death, and that an accident superinducing disease and death at the end of days and weeks is not a case for an inquest.

In Sir Edward Hyde East's Crown Law, his commentary upon the duties of the coroner is as follows:

"First, the [coroner's] inquiry is to be made, when commanded by the king's bailiffs, or by honest men of the country, upon such as be slain or suddenly dead or wounded. This power is, however, to be exercised within the limits of a sound discretion. There ought at least to be a reasonable suspicion that the party came to his death by violent and unnatural means, for if the death, however sudden, were from fever or other apparent visitation from God, there is no occasion [with the exception before mentioned in the case of prisoners] for the coroner's interference. And the court of king's bench, on two several occasions within my own memory, blamed the coroners of Norfolk and Anglesey for holding repeated and unnecessary inquests, for the sake of enhancing their fees, on bodies and parts of bodies of persons unknown, which were cast upon the seashore without the smallest probability or suspicion of the deaths having happened in any other manner than by the unfortunate perils of the sea."[8]

Now, from this paragraph it is obvious that death by drowning is not of itself a case for the coroner, without more; that is to say, without suspicion of violent and unnatural means, namely, by the party himself or by some other person. Violent and unnatural means imply force, not of the elements, but of other agency; and when sudden death is the consequence, the case calls for inquiry, although in the end it may turn out to have been a death by misadventure only. Sir Edward East cites the cases by name in which the king's bench blamed the coroners for exceeding their authority; and he then proceeds with a more apposite case, as follows:

"One Harrison, coroner of the county of Cumberland, was convicted of extortion in his office in taking a sum of money for not holding an inquest on the body of a young woman, which he had no authority for doing. On the defendant's being brought up for judgment, the circumstances of the case appeared to be that the party had, by accident, broken

[8] 1 East, P. C. c. 6, § 7, p. 382.

her leg, which was afterwards amputated; and, after some weeks, she died in consequence of the fever attending it, and was buried. Some days after, the coroner threatened to have the body taken up, and an inquisition taken upon it, unless a certain sum were paid, for which offense the court sentenced him to pay a fine of £100, to be imprisoned six months, and to be removed from his office. And Mr. Justice Grose, in passing sentence, said that the coroner, under these circumstances, had no pretense of authority for taking any inquisition at all, but, if the case had warranted his doing so, he was equally criminal in having extorted money to refrain from doing his office."[4]

I need not remark how full this authority (and it is the authority of the highest criminal court in England) is against the coroner's claim of jurisdiction asserted in his letters, where he admits no exception from "the nature of the casualty, or the time that may elapse preceding death"; nor need I show how perfectly analogous is the description of the case where Harrison unlawfully asserted his authority to that of the girl who was accidentally burned, and died a week after in the hospital. This is not modern law. The doctrine is Lord Hale's, also, whose name is of itself authority. His language is as follows: "Regularly, the coroner hath no power to take inquisitions but touching the death of a man, and persons *subito mortuis,* and some special incidents thereunto."[5] Lord Hale then cites the following case: "If any person dies suddenly, though it be of a fever, and the township bury him before the coroner be sent for, the whole township shall be amerced."[6] And upon this case he remarks: "*Nota,* this case is misprinted. I have seen an ancient transcript at large of the Iter of Northampton, and perused this very case, which *in libro meo,* f. 52b, is *morust de feyme, viz.,* starved by hunger; for though a man dies suddenly of a fever, or apoplexy, or other visitation of God, the township shall not be amerced, for then the coroner should be sent for in every case; but if it be an unnatural or violent death, then, indeed, if the coroner be not sent for to view the body, the town shall be amerced."[7] He proceeds, at page 62: "Now, sudden deaths, which are all within the coroner's office to inquire, are of three kinds: (1) *Ex visitatione Dei;* (2) *per infortunium,* where no other had a hand in it, as if a man falls from a house or a car; (3) by his own hand, as *felo de se;* (4) by the hand of another man, where the offender is not known; (5) by the hand of another, where he is known, whether by murder, manslaughter, *se defendendo,* or *per infortunium.*" There may be thought to be some inconsistency be-

[4] Rex v. Harrison, 40 Geo. III., 1 East, P. C. c. 6, § 7, p. 382.
[5] 2 Hale, P. C. 57.
[6] Iten. North. Coron. 329.
[7] 2 Hale, P. C. 57.

tween these two citations, as visitations of God are excluded by the first and included by the second; but there is no inconsistency. In the first, Lord Hale speaks of deaths in the known course of nature, as fever or apoplexy; in the second, he speaks of sudden, violent deaths, which are out of the usual course of nature. The sudden deaths within the coroner's jurisdiction may be inferred from another authority cited by Hale [8] to this effect: "If the coroner have notice, and comes not in convenient time to view the body and take his inquisition upon the death of him that dies suddenly, and therefore upon a presentment by the grand inquest of a death by misadventure, if the like presentment be not found in the coroner's roll, he shall be fined and imprisoned." So that the sudden deaths cognizable by the coroner must be at least death by misadventure, *per infortunium*, which is one of the classes of sudden, violent deaths enumerated by Lord Hale. The same limitation is expressed in 1 Burns' Justice, 432, tit. "Coroner": "When it happens that any person comes to an unnatural death, the township shall give justice thereof to the coroner; otherwise, if the body be interred before he come, the township shall be amerced." And by Chief Justice Holt: "It is a matter indictable to bury a man, that dies a violent death, before the coroner's inquest have sat upon him." I have already remarked how all the directions of St. 4 Edw. I. imply the suspicion of violence, not only in the case of the slain, but of the drowned and suddenly dead.

The only real difficulty which attends the inquiry is what constitutes in the eye of the law a sudden death by such means. A death from wounds inflicted by another, though it may not immediately follow, may be a fit case for a coroner's inquest; and the statute 4 Edw. I. expressly requires that the coroner "shall go to the places where any be slain or suddenly dead or wounded," which, in this part of the statute, may mean the dead who have been wounded, without regard to the suddenness of the death; and the violence is certainly a fit subject of investigation, though the death be not, in common apprehension, sudden. On this distinction I find nothing in the books which treat of this subject. But where the case is clear and unsuspected casualty, and the death of the party follows at the end of days or weeks by fever, by inflammation, or by other morbid derangement produced by the accident, it is one free from all claim of jurisdiction by the coroner in point of law, because it wants both the violent and unnat-

[8] Volume 2, p. 58.

ural means and the sudden death. If this ground of discrimination is not sound, then, as the coroner says, every casualty producing death, after any interval of time, and of course producing it directly or indirectly,—the prick of a pin producing lockjaw, scalding water from a teakettle producing inflammation, a broken leg producing fever, and ending in death at the end of a month or six weeks,—all these are cases for the coroner, and then, as Lord Hale remarks, the coroner must be sent for in every case.

What, I would ask, is the benefit of such a doctrine to the community? And it is for the public that the office is instituted among us, and not for the coroner or any one else. Where there is no suspicion of violent and unnatural means, why investigate the death, however sudden? Where the party lives for days, and explains the casualty, and there is no case whatever of suspicion, why burden the county with an unnecessary expense? Persons dying in prison, whom their friends cannot approach to hear their complaints, deserve the protection of a general *post mortem* inquiry for all persons in their condition. But what security do persons require who are accidentally hurt, more than they have in the access of their friends, and in their exemption from all restraint upon their complaints or communications? I am wholly unable to perceive any reasonable ground for the coroner's claim in the case of the girl accidentally burned, and I apprehend, morover, that it is directly against the case of The King v. Harrison, before cited.

What the practice of coroners in this county has been it is not easy to say, nor should I place much reliance upon it, whatever it may have been, since it has been substantially *sub silentio,* except in the few cases in which their inquests have implicated living persons criminally (none else receiving judicial notice), and in such cases the coroner's jurisdiction is undoubted. It is an office particularly liable to irregularities from the fact that few persons care to investigate the claim of jurisdiction, since the county pays for its exercise. I do not entertain the opinion, however, that the coroner can have any jurisdiction by practice that he has not by the settled principles of the law.

Having a view, then, to the class of cases occurring, or likely to occur, in the Pennsylvania Hospital, and adverting to the wish of the managers to have an expression of my opinion upon the coroner's jurisdiction in such cases generally, I state it as follows:

(1) In regard to persons who have suffered recent injury from violence, and are brought at once to the hospital, and die

there "suddenly," in the plain sense of that expression, I advise them that the coroner has jurisdiction, and that they should give him notice of the death a reasonable time before interment.

(2) In regard to such as may be brought there who have been wounded,—that is to say, stabbed or shot or cut or beaten by another,—and shall afterwards die, I advise the hospital in like manner to give the notice, and to submit to the coroner's jurisdiction, without regard to the time that may elapse before death.

(3) But in regard to the cases of accidental injury, broken limbs, burns, bruises, and the like, where the patient does not suffer suddenly, but lies days or weeks, and then dies from fever, inflammation, or other morbid affection caused by the injury, and where there is no ground of reasonable suspicion that the injury involves any person in criminality, I advise that the hospital is under no obligation to give notice of the death to the coroner, and that the coroner has no right to hold an inquest on the body.

(4) In cases of sudden death by apoplexy and the like among the patients in the house, there being no cause whatever to suspect violent and unnatural means, the coroner has clearly no right to hold an inquest, and I do not understand him to assert such a right.

DANIEL WEBSTER.

[Daniel Webster was born in Salisbury, N. H., 1782. He was educated at Exeter Academy and at Dartmouth College. After graduating from college, in 1801, he began the study of law under Thos. W. Thompson, afterwards United States senator. In 1804 he went to Boston, and completed his studies in the office of the celebrated Christopher Gore. In the following year he was admitted to the bar, and soon afterwards began practice in Boscawen. In 1807 he moved to Portsmouth, where he soon acquired an extensive practice. In 1813 he entered congress as a Federalist, where he busied himself principally with financial legislation. For reasons of economy he retired from official life at the expiration of his second term, and, having removed to Boston in 1816, he then devoted his energies to his profession. In the Massachusetts constitutional convention of 1820, Webster rendered conspicuous service. In the same year, at the celebration of the second centennial of the landing of the Pilgrims, he delivered his first great commemorative oration. In 1825 came his Bunker Hill oration, and one year later his celebrated eulogy of Adams and Jefferson. Meantime, in 1822, he had been elected to congress from Boston, where, as chairman of the judiciary committee, he prepared and carried through the Crimes Act, and other important legislation. In 1824 he delivered his speech on the revolution in Greece, and also his powerful argument in favor of free trade. In 1827 he was elected United States senator from Massachusetts. Having completely abandoned his former views on the tariff question, he advocated the case of protection, in 1828, in a memorable speech. In 1830 he made his famous speech in reply to Hayne, which marks the culmination of his power as an orator. Three years later he supplemented that argument with a great speech in reply to the nullification doctrines of Calhoun. He was a vigorous opponent of President Jackson's policy with respect to the national bank. In 1836 he was nominated for the presidency by the legislature of Massachusetts, and received the electoral vote of that state. In 1839 he visited England. Upon the election of Harrison, Webster became secretary of state, where he added materially to his reputation by his able conduct of diplomatic controversies. By the Ashburton Treaty of 1842, the northeastern boundary question was finally settled. In 1843 he resigned from President Tyler's cabinet, and returned to his law practice in Boston. On Rufus Choate's resignation from the United States senate in 1845, Webster succeeded him. On the 7th of March, 1850, he made his last great speech in support of Clay's elaborate compromise of the slavery question. This speech led to much bitter feeling in New England, and

throughout the North generally, and cost Webster much of his influence. In 1850 he became secretary of state in President Fillmore's cabinet. His candidacy for the presidency was again unsuccessful in 1852. His health failed rapidly after this disappointment, and he died at his home in Marshfield, October 24, 1852. His life has been written by Mr. Geo. Ticknor Curtis and others. His collected works were published by Little, Brown & Co., Boston, 1851, by whose permission the following arguments are reproduced.]

Daniel Webster's distinguished public career has contributed, in some degree, to dwarf his professional reputation. His public life is part of the nation's history; but it may be well to recall the leading features of his life at the bar. He commenced in a good school. As a student in the office of Christopher Gore, in Boston, in 1804, he had the advantage of observing such lawyers as Theophilus Parsons, Samuel Dexter, and Harrison Gray Otis, and his impressions, recorded in his diary, show a perception quite remarkable in one of his years. In Portsmouth, N. H., where he practiced from his admission as a counselor, in 1807, until his removal to Boston, in 1816, he laid the foundations of his professional acquirements, and developed his powers in contact with such men as Jeremiah Mason, Jeremiah Smith, and William Plumer. To Jeremiah Mason, whom he always regarded as the greatest lawyer of his acquaintance, he freely acknowledged his indebtedness. Webster observes that at the outset of his career his style was florid, and his sentences long and involved. "The plain, conversational style of Mason led me to examine my own style, and I reformed it altogether." Although he made a distinguished mark among such able associates, his local practice in New Hampshire was never worth more than $2,000 a year. With his entrance into congress, in 1813, he began to look for a wider field. After some hesitation between Albany, New York, and Boston, he finally chose the latter place, whither he moved in 1816. From this time until his return to congress, in 1823, he devoted himself assiduously to the law. The bulk of his purely professional work is comprised within this period. His fee book shows that he earned over $15,000 in his second year at the Boston bar. His practice during these years was immense, and covered a great variety of work. In addition to a large *nisi prius* practice, the Massachusetts reports of the time[1] show that he was constantly engaged in appeals in the state court. In the United States circuit court for the first circuit he argued more cases than any other lawyer. One of the most prominent of the latter was the case of La Jeune Eugenie[2] in which he maintained

[1] 13-17 Mass.; 1 Pickering. [2] 2 Mason, 409.

that the slave trade was a violation of the law of nations. In 1817 he added materially to his reputation by his successful defense of the Kennistons; in the same year he defended Judge Prescott; in this year, also, he argued the Dartmouth College case, his first important constitutional cause, before the supreme court of New Hampshire.

In 1818 he began his distinguished career in the supreme court of the United States with his great argument in the Dartmouth College case. During his brief congressional experience he had been engaged in some unimportant prize cases, and had been associated as counsel in the case of McCulloch v. Maryland,[3] but he had argued only five cases in the United States supreme court when his effort in the Dartmouth College case placed him, at the age of thirty-five, in the front rank of the national bar. From this time until his death he was actively engaged in that tribunal. The United States reports from his first case, in 1814,[4] to his last appearance, in 1851,[5] show that he argued more than one hundred and fifty cases. The extent of his public services after his return to congress, in 1823, necessarily made his attendance irregular. The twelfth volume of Wheaton's Reports shows that he was engaged in fourteen cases at that term, and from the third volume of Wheaton to his last cause, in the thirteenth volume of Howard, there are but three volumes of reports that fail to record his services. A list of these cases comprises a large proportion of the most important litigation during this period. Among others may be mentioned The Santissima Trinidad,[6] Gibbons v. Ogden,[7] The Marianna Flora,[8] The Bank of the United States v. Dandridge,[9] Ogden v. Saunders,[10] Hunt v. Rousmaniere,[11] American Ins. Co. v. Canter,[12] Foster v. Neilson, [13] Wilkinson v. Leland,[14] Inglis v. Trustees of Sailor's Snug Harbour,[15] Carver v. Jackson,[16] Grant v. Raymond,[17] Wheaton v. Peters,[18] Charles River Bridge v. Warren Bridge,[19] Rhode Island v. Massachusetts,[20] Bank of Augusta v. Earle,[21] Groves v. Slaughter,[22] Vidal v. Girard,[23] The License Cases,[24] Luther v. Borden,[25] The Passen-

[3] 4 Wheaton.
[4] 8 Cranch.
[5] 13 Howard.
[6] 7 Wheaton.
[7] 9 Wheaton.
[8] 11 Wheaton.
[9] 12 Wheaton.
[10] 12 Wheaton.
[11] 1 Peters.
[12] 1-3 Peters.
[13] 2 Peters.
[14] 2 Peters.
[15] 3 Peters.
[16] 4 Peters.
[17] 6 Peters.
[18] 8 Peters.
[19] 11 Peters.
[20] 12, 14, and 15 Peters, and 4 Howard.
[21] 13 Peters.
[22] 15 Peters.
[23] 2 Howard.
[24] 5 Howard.
[25] 7 Howard.

ger Cases,[26] Barnard v. Adams.[27] In most of these cases the report gives a fair outline of Webster's argument; indeed, this is quite as much as we have of any of his arguments in that tribunal. The speeches contained in his collected works[28] do not pretend to be *verbatim* reports. We have sufficient material, however, to arouse speculation as to what his legal reputation might have been had he devoted his powers exclusively to his profession. For it is plain that, with the burden of his public labors, he was not always at his best in court. Charles Sumner, who visited Washington in 1836, heard an argument by Webster which was conspicuously ineffective from lack of preparation. And we find in Webster's letters such reflections as this (at the end of a memorandum of fees for the year ending September 9, 1833, aggregating $8,212): "A very poor year's work. Nullification kept me out of the supreme court all last winter." The double burden of public and professional work has ever been too much for even the most powerful intellects.

Webster's professional capacity, as he himself recognized, was forensic, rather than judicial. "For my own part," he wrote in 1840, "I never could be a judge. I believe the truth may be that I have mixed so much study of politics with my study of law that, though I have some respect for myself as an advocate, and some estimate of my knowledge of general principles, yet I am not confident of possessing all the accuracy and precision of knowledge which the bench requires." His learning was never, in fact, extensive. After he finally embarked in politics, in 1823, he seldom consulted authorities at first hand. The slow processes of investigation and inquiry were distasteful to him. He was accustomed to rely extensively on the learning of a scholarly Massachusetts lawyer named Parker Noyes; and he also received considerable assistance, which, however, was less freely acknowledged, from Judge Story. The extent of his obligation to Jeremiah Mason for his celebrated argument in the Dartmouth College case will be appreciated by comparing it with Mason's argument in the state court as preserved in Farrar's report of that case. Not only is the framework the same, but they are almost exactly similar in length, and in the relative proportion of the parts. As Webster wrote of Farrar's proposed publication: "If the book should not be published, the world would not know where I borrowed my plumes." In the course of his extensive practice he

[26] 7 Howard 283. [27] 10 Howard.

[28] Dartmouth College v. Woodward, Gibbons v. Ogden, Ogden v. Saunders, Luther v. Borden, Vidal v. Girard, and Bank of Augusta v. Earle.

undoubtedly acquired, as he said, a considerable knowledge of general principles. The power of assimilation in a mind of as high an order as Webster's is very great. He was also entirely capable of intense application. Called upon unexpectedly to argue the case of Gibbons v. Ogden, he prepared his celebrated argument in that case in thirty-six hours of continuous work. Without, therefore, extraordinary profundity of thought or depth of learning, he had a wide, sure, and ready knowledge both of principles and cases, combined with quick apprehension, and unerring sagacity in grasping the vital points of a controversy.

The foundation of his professional and public reputation alike was his oratorical power. An almost unequaled power of statement, backed by reasoning at once close and lucid, a real genius for organizing an argument around a fundamental principle, so as to convey a forcible and concentrated impression, a perfect sense of propriety and proportion, a style of expression which placed him among the masters of English speech, and "the front of Jove himself,"—these are the qualities which united to make Webster the greatest orator that this country has produced. In his physical gifts nature had marked him for an orator. His very presence was commanding. The look of his face and the sound of his voice are said to have been as eloquent as anything he ever uttered.

His majestic brow was but the outward sign of the mind within. His massive intellect, like a heavy body in the physical world, required an incentive, but, once started, it moved with irresistible force and weight. Comprehensive and penetrating as his mind was, it nevertheless fell short of creative power. He had not the inventive genius of Hamilton and Marshall. His power was rather organizing and constructive. He had little of Hamilton's bold aggressiveness. His temperament was conservative; his judgment calm and serene. In pure reasoning power he has probably never been surpassed at the bar. If his arguments do not show the concentrated clearness which characterizes the arguments of Marshall and Curtis, it is because Webster had what they had not,—a powerful imagination. At the end of the simplest statement of facts, his imagination slips in to vitalize the results of his understanding. It is this imaginative faculty which gives his deepest thoughts their warmth and glow; the dry forms of logic are suffused with life. In a word, he had, in combination, the logical, imaginative, and constructive power—the capacity for limiting, proportioning, and correlating the various elements of a discourse so as to present to the mind, with force

and concentration, a distinct and palpable product—which makes literature. The best specimen of this artistic effect in his professional work is his argument in prosecution of Knapp. Witness how swiftly, after a brief, but dignified and impressive, exordium, he covers the whole ground in an imaginative picture of the actual murder, and the remorseful struggles of the conscience stricken murderer. Observe how the evidence is welded into the outline of this picture, without repetition, and simply, without exaggeration, and how, when the argument is closed, the impressive peroration reverts to and enforces the sentiments with which he opened.

To observe these characteristics at the best, we must resort, for the most part, to his public speeches. Of his legal arguments, only two—those in the Dartmouth College and Girard cases—were revised by him. Two others—his speech to the jury on the trial of Knapp, and his address on the impeachment of Judge Prescott—were fully reported. Of others we have little more than a general outline. The bare outline of his great argument in the case of Gibbons v. Ogden is not to be compared with the finished opinion of Chief Justice Marshall, which is, however, but a restatement of his points. Although he revised his argument in the Dartmouth College case, it is plain that we have by no means the speech as delivered. Webster himself said that "something was left out." We know that most of this omitted portion dealt with the general political considerations which, it has always been suspected, to some extent influenced the decision of the case. His peroration, however, as restored by Prof. Goodrich, who witnessed its effect, serves to indicate what has been lost in these speeches. When he had finished his argument he stood silent for some moments, until every eye was fixed upon him; then, addressing the chief justice, he said: "This, sir, is my case. It is the case not merely of that humble institution, it is the case of every college in our land. Sir, you may destroy this little institution; it is weak; it is in your hands. I know it is one of the lesser lights in the literary horizon of our country. You may put it out. But, if you do so, you must carry through your work. You must extinguish, one after another, all those greater lights of science, which, for more than a century, have thrown their radiance over our land. It is, sir, as I have said, a small college; and yet there are those who love it." Here his feelings mastered him, —his eyes filled with tears, his lips quivered, his voice was choked. In broken words of tenderness he spoke of his attachment to the college, and his tones seemed filled with memories of youthful affections and early privations and struggles. The court room,

during these few minutes, presented an extraordinary spectacle. Chief Justice Marshall, with his gaunt figure bent over as if to catch the slightest whisper, the deep furrows of his face expanded with emotion; the remainder of the court at the two extremities pressing, as it were, to a single point. Webster had now recovered his composure, and, fixing his keen eye on the chief justice, said, in that deep tone with which he sometimes thrilled the heart of an audience: "Sir, I know not how others may feel [glancing at his opponents], but as for myself, when I see my *alma mater* surrounded, like Caesar in the senate house, by those who are reiterating stab after stab, I would not, for this right hand, have her turn to me and say: *'Et tu quoque, mi fili.'*"

His formal public speeches were revised for publication with great care. He was accustomed to have them reported by Henry J. Raymond, afterwards editor of the New York Times, in whose skill as a reporter he had great confidence; and Mr. Raymond says that Webster's conversation, when they would subsequently revise a speech, was a lesson in rhetoric. His main effort in revision, according to Mr. Raymond, was to strike out Latin words. This indicates the merit of his style. It is simple, straighforward Anglo-Saxon. His aim was to secure the greatest effort of power in the fewest and tersest words. "My style," he once said, "was not formed without great care and earnest study of the best orators. I have labored hard upon it, for I early felt the importance of expression to thought. I have rewritten sentence after sentence, and pondered long upon each alteration. For, depend upon it, it is with our thoughts as with our persons,—their intrinsic value is mostly undervalued unless outwardly expressed in an attractive garb." His imagery was boundless; appealing now to the taste, now sentiment, often to both. His impressive peroration in the speech for Judge Prescott, a good specimen of his style, has been often admired:

"Mr. President, the case is closed. The fate of the respondent is in your hands. It is for you now to say whether, from the law and the facts as they have appeared before you, you will proceed to disgrace and disfranchise him. If your duty calls on you to convict him, let justice be done, and convict him; but, I adjure you, let it be a clear, undoubted case. Let it be so for his sake, for you are robbing him of that for which, with all your high powers, you can yield him no compensation. Let it be so for your own sakes, for the responsibility of this day's judgment is one which you must carry with you through life. . . . .

"Sir, the prejudices of the day will soon be forgotten; the passions, if any there be, which have excited or favored this prosecution, will subside; but the consequence of the judgment you are about to render will outlive both them and you. The respondent is now brought, a single, unprotected individual, to this formidable bar of judgment, to stand against

the power and authority of the state. I know you can crush him, as he stands before you, and clothed as you are with the sovereignty of the state. You have the power 'to change his countenance, and to send him away.' Nor do I remind you that your judgment is to be rejudged by the community; and, as you have summoned him for trial to this high tribunal, that you are soon to descend yourselves from these seats of justice, and stand before the higher tribunal of the world. I would not fail so much in respect to this honorable court as to hint that it could pronounce a sentence which the community will reverse. No, sir, it is not the world's revision which I would call on you to regard, but that of your own consciences, when years have gone by, and you shall look back on the sentence you are about to render. If you send away the respondent, condemned and sentenced, from your bar, you are yet to meet him in the world on which you cast him out. You will be called to behold him a disgrace to his family, a sorrow and a shame to his children, a living fountain of grief and agony to himself. If you shall then be able to behold him only as an unjust judge, whom vengeance has overtaken, and justice has blasted, you will be able to look upon him, not without pity, but yet without remorse. But if, on the other hand, you shall see, whenever and wherever you meet him, a victim of prejudice or of passion, a sacrifice to a transient excitement; if you shall see in him a man for whose condemnation any provision of the constitution has been violated or any principle of law broken down,—then will he be able, humble and low as may be his condition, then will he be able to turn the current of compassion backward, and to look with pity on those who have been his judges. If you are about to visit this respondent with a judgment which shall blast his house; if the bosoms of the innocent and the amiable are to be made to bleed under your infliction,—I beseech you to be able to state clear and strong grounds for your proceeding. Prejudice and excitement are transitory, and will pass away. Political expediency, in matters of judicature, is a false and hollow principle, and will never satisfy the conscience of him who is fearful that he may have given a hasty judgment. I earnestly entreat you, for your own sakes, to possess yourselves of solid reasons, founded in truth and justice, for the judgment you pronounce, which you can carry with you till you go down into your graves; reasons which it will require no argument to revive; no sophistry, no excitement, no regard to popular favor to render satisfactory to your consciences; reasons which you can appeal to in every crisis of your lives, and which shall be able to assure you, in your own great extremity, that you have not judged a fellow creature without mercy."

He drew often, consciously or unconsciously, upon the imagery and simple phraseology of the Bible. His impressive peroration in the Knapp case is expressed in the very terms of the 139th Psalm. In the Girard case he uses, with great power, the admonition of Jesus to suffer little children to come unto Him. With Webster, moreover, the style was truly the man. If his style was simple and forcible, his manner was quiet and restrained. "His mind," it has been well said, "is never exhibited in a state of eruption. A majestic self-possession presides over all the operations of his mind, and the impulses of his sensibility. He has his reason, his imagination, his passions, under full control."

Webster's moral character was not equal to his intellect. With endowments seldom vouchsafed to man, he stood in the front rank of the senate and the bar for thirty years; yet he died a disappointed man. He aimed for the bauble of official power, and failed to realize its mockery. "I have given my life to law and politics," he wrote in 1852. "Law is uncertain, and politics utterly vain." Nevertheless, the influence of his public service lives after him. That which Hamilton created he defended. And his grand and stirring appeals to the sentiment of nationality, echoed from generation to generation by youthful lips and warm hearts, are an influence still for liberty and union.

ARGUMENT IN THE CASE OF THE TRUSTEES OF DARTMOUTH COLLEGE AGAINST WOODWARD, IN THE SUPREME COURT OF THE UNITED STATES, 1818.

STATEMENT.

Probably no case ever heard in the supreme court of the United States has attracted so much discussion as the case of the trustees of Dartmouth College against Woodward. The actual controversy turned upon the question whether the charter of the college was a grant of political power, which the state could resume or modify at pleasure, or a contract for the security and disposition of property bestowed in trust for charitable purposes. The corporation of Dartmouth College existed under a charter granted by the British crown to its trustees in New Hampshire in 1769. This charter conferred upon the trustees the entire governing power of the college, among which was that of filling all vacancies occurring in their own body, and of removing and appointing tutors. It also declared that the number of trustees should forever consist of twelve. In 1816, the legislature of New Hampshire passed certain acts to amend the charter, to improve and enlarge the corporation, to increase the number of trustees, giving the appointment of the additional members to the governor of the state, and creating a board of overseers of twenty-five persons, of whom twenty-one were also to be appointed by the governor. These overseers were given power to inspect and control the most important acts of the trustees. The operation of this statute raised the general issue involved in the case.

The form of the actual proceeding was a declaration in trover for the books of record, original charter, common seal, and other corporate property of the college, which were alleged to have been converted on October 7, 1816. The facts in the case were drawn up in the form of a special verdict for submission to the supreme court of New Hampshire. The question made was whether the acts of the legislature of New Hampshire were valid and binding upon the corporation, without their acceptance and consent, and were not repugnant to the constitution of the United States. If so, the verdict found for the defendants; otherwise, it found for the plaintiffs. The case was argued in the state court with distinguished ability by Jeremiah Mason, Jeremiah Smith, and Daniel Webster, on one side, and by Ichabod Bartlett and Geo. Sullivan, on the other. The line of argument pursued by the plaintiff was largely drawn from an argument made by Theophilus Parsons, of Massachusetts, in regard to the visitorial powers at Harvard College,—that the college was an institution founded by private persons for particular uses, which the charter had been given to perpetuate, and that the legislature, by its interference, transcended its powers. On these general principles, strengthened by particular clauses in the state constitution, the argument mainly rested. The supreme court of New Hampshire decided in favor of the validity of the acts of the legislature, and judgment was accordingly entered for the defendant. The plaintiffs thereupon appealed to the supreme court of the United States.[1]

[1] Where the case was argued by Francis Hopkinson and Mr. Webster for the plaintiffs in error, and by Attorney General Wirt and Mr. Holmes for the defendant.

Of course the plaintiffs could get their case before this tribunal only on the constiutional question, but their main reliance was again placed on the general principle that the state legislature could not divest vested rights. The fact is that the constitutional point with respect to the impairment of the obligation of contracts originated with a layman was regarded by Webster as a forlorn hope, and was very briefly discussed by him in the argument.

The decision of the supreme court of the United States was in favor of the plaintiffs. Chief Justice Marshall, delivering the opinion of the court (Mr. Justice Duvall alone dissenting), held that the charter of the college was a contract, and therefore inviolable under section 10 of article 1 of the constitution, which declares that "no state shall make any law impairing the obligation of contracts."[2] This decision has met at once with the highest praise and the most severe criticism. It has been insisted that, even if a legislative grant be a contract, this corporation existed under a charter granted by the British crown, and was therefore a royal charter, not a legislative grant. On the other hand, Mr. Binney said, in his eulogy on Marshall: "If I were to select in any particular, from the mass of judgments, for the purpose of showing what we derived from the constitution, and from the noble faculties which have been applied to its interpretation, it would be that in which the protection of chartered rights has been deduced from its provisions." Certainly no other decision has ever had such an influence over legislation. The supreme court has since been compelled, where relief has been sought against subsequent legislation, to insist upon the existence of an express contract by the state with the corporation; but the main features of the decision, to the effect that a state may make a contract by legislation which no subsequent legislation can annul, is as firmly fixed as any principle of our federal jurisprudence.

ARGUMENT.

May it please your honors, the general question is whether the acts of the legislature of New Hampshire of the 27th of June, and of the 18th and 26th of December, 1816, are valid and binding on the plaintiffs, without their acceptance or assent. The charter of 1769 created and established a corporation, to consist of twelve persons, and no more, to be called the "Trustees of Dartmouth College." The preamble to the charter recites that it is granted on the application and request of the Reverend Eleazer Wheelock. That Dr. Wheelock, about the year 1754, established a charity school, at his own expense, and on his own estate and plantation. That for several years, through the assistance of well-disposed persons in America, granted at his solicitation, he had clothed, maintained, and educated a number of native Indians, and employed them afterwards as missionaries and schoolmasters among the savage tribes. That, his design promising to be useful, he had constituted the Reverend Mr. Whitaker to be his attorney, with power to solicit contributions, in England, for

[2] 4 Wheaton, 518.

the further extension and carrying on of his undertaking, and that he had requested the Earl of Dartmouth, Baron Smith, Mr. Thornton, and other gentlemen to receive such sums as might be contributed in England towards supporting his school, and to be trustees thereof, for his charity, which these persons had agreed to do. That thereupon Dr. Wheelock had executed to them a deed of trust; in pursuance of such agreement between him and them, and, for divers good reasons, had referred it to these persons to determine the place in which the school should be finally established, and, to enable them to form a proper decision on this subject, had laid before them the several offers which had been made to him by the several governments in America, in order to induce him to settle and establish his school within the limits of such governments for their own emolument, and the increase of learning in their respective places, as well as for the furtherance of his general original design. And inasmuch as a number of the proprietors of lands in New Hampshire, animated by the example of the governor himself and others, and in consideration that, without any impediment to its original design, the school might be enlarged and improved, to promote learning among the English, and to supply ministers to the people of that province, had promised large tracts of land, provided the school should be established in that province, the persons before mentioned, having weighed the reasons in favor of the several places proposed, had given the preference to this province, and these offers. That Dr. Wheelock therefore represented the necessity of a legal incorporation, and proposed that certain gentlemen in America, whom he had already named and appointed in his will to be trustees of his charity after his decease, should compose the corporation. Upon this recital, and in consideration of the laudable original design of Dr. Wheelock, and willing that the best means of education be established in New Hampshire for the benefit of the province, the king granted the charter, by the advice of his provincial council. The substance of the facts thus recited is that Dr. Wheelock had founded a charity on funds owned and procured by himself; that he was at that time the sole dispenser and sole administrator, as well as the legal owner, of these funds; that he had made his will, devising this property in trust, to continue the existence and uses of the school, and appointed trustees; that, in this state of things, he had been invited to fix his school permanently in New Hampshire, and to extend the design of it to the education of the youth of that province; that before he removed his school, or accepted this invitation,

which his friends in England had advised him to accept, he applied for a charter, to be granted, not to whomsoever the king or government of the province should please, but to such persons as he named and appointed, namely, the persons whom he had already appointed to be the future trustees of his charity by his will. The charter or letters patent then proceed to create such a corporation, and to appoint twelve persons to constitute it, by the name of the "Trustees of Dartmouth College"; to have perpetual existence as such corporation, and with power to hold and dispose of lands and goods for the use of the college, with all the ordinary powers of corporations. They are, in their discretion, to apply the funds and property of the college to the support of the president, tutors, ministers, and other officers of the college, and such missionaries and schoolmasters as they may see fit to employ among the Indians. There are to be twelve trustees forever, and no more; and they are to have the right of filling vacancies occurring in their own body. The Reverend Mr. Wheelock is declared to be the founder of the college, and is, by the charter, appointed first president, with power to appoint a successor by his last will. All proper powers of government, superintendence, and visitation are vested in the trustees. They are to appoint and remove all officers at their discretion; to fix their salaries, and assign their duties; and to make all ordinances, orders, and laws for the government of the students. To the end that the persons who had acted as depositaries of the contributions in England, and who had also been contributors themselves, might be satisfied of the good use of their contributions, the president was annually, or when required, to transmit to them an account of the progress of the institution and the disbursements of its funds, so long as they should continue to act in that trust. These letters patent are to be good and effectual, in law, against the king, his heirs and successors forever, without further grant or confirmation; and the trustees are to hold all and singular these privileges, advantages, liberties, and immunities to them and to their successors forever. No funds are given to the college by this charter. A corporate existence and capacity are given to the trustees, with the privileges and immunities which have been mentioned, to enable the founder and his associates the better to manage the funds which they themselves had contributed, and such others as they might afterwards obtain.

After the institution thus created and constituted had existed, uninterruptedly and usefully, nearly fifty years, the legislature of

New Hampshire passed the acts in question. The first act makes the twelve trustees under the charter, and nine other individuals, to be appointed by the governor and council, a corporation, by a new name; and to this new corporation transfers all the property, rights, powers, liberties, and privileges of the old corporation, with further power to establish new colleges and an institute, and to apply all or any part of the funds to these purposes, subject to the power and control of a board of twenty-five overseers, to be appointed by the governor and council. The second act makes further provisions for executing the objects of the first, and the last act authorizes the defendant, the treasurer of the plaintiffs, to retain and hold their property, against their will. If these acts are valid, the old corporation is abolished, and a new one created. The first act does, in fact, if it can have any effect, create a new corporation, and transfer to it all the property and franchises of the old. The two corporations are not the same in anything which essentially belongs to the existence of a corporation. They have different names, and different powers, rights, and duties. Their organization is wholly different. The powers of the corporation are not vested in the same or similar hands. In one, the trustees are twelve, and no more; in the other, they are twenty-one. In one, the power is in a single board; in the other, it is divided between two boards. Although the act professes to include the old trustees in the new corporation, yet that was without their assent, and against their remonstrance, and no person can be compelled to be a member of such a corporation against his will. It was neither expected nor intended that they should be members of the new corporation. The act itself treats the old corporation as at an end, and, going on the ground that all its functions have ceased, it provides for the first meeting and organization of the new corporation. It expressly provides, also, that the new corporation shall have and hold all the property of the old,—a provision which would be quite unnecessary upon any other ground than that the old corporation was dissolved. But if it could be contended that the effect of these acts was not entirely to abolish the old corporation, yet it is manifest that they impair and invade the rights, property, and powers of the trustees under the charter, as a corporation, and the legal rights, privileges, and immunities which belong to them as individual members of the corporation. The twelve trustees were the sole legal owners of all the property acquired under the charter. By the acts, others are admitted, against their will, to be joint owners. The twelve individuals who are trustees were pos-

sessed of all the franchises and immunities conferred by the charter. By the acts, nine other trustees and twenty-five overseers are admitted, against their will, to divide these franchises and immunities with them. If, either as a corporation or as individuals, they have any legal rights, this forcible intrusion of others violates those rights as manifestly as an entire and complete ouster and dispossession. These acts alter the whole constitution of the corporation. They affect the rights of the whole body as a corporation, and the rights of the individuals who compose it. They revoke corporate powers and franchises. They alienate and transfer the property of the college to others. By the charter, the trustees had a right to fill vacancies in their own number. This is now taken away. They were to consist of twelve, and, by express provision, of no more. This is altered. They and their successors, appointed by themselves, were forever to hold the property. The legislature has found successors for them before their seats are vacant. The powers and privileges which the twelve were to exercise exclusively are now to be exercised by others. By one of the acts they are subjected to heavy penalties if they exercise their offices, or any of those powers and privileges granted them by charter, and which they had exercised for fifty years. They are to be punished for not accepting the new grant and taking its benefits. This, it must be confessed, is rather a summary mode of settling a question of constitutional right. Not only are new trustees forced into the corporation, but new trusts and uses are created. The college is turned into a university. Power is given to create new colleges, and, to authorize any diversion of the funds which may be agreeable to the new boards, sufficient latitude is given by the undefined power of establishing an institute. To these new colleges and this institute the funds contributed by the founder, Dr. Wheelock, and by the original donors, the Earl of Dartmouth and others, are to be applied, in plain and manifest disregard of the uses to which they were given. The president, one of the old trustees, had a right to his office, salary, and emoluments, subject to the twelve trustees alone. His title to these is now changed, and he is made accountable to new masters. So, also, all the professors and tutors. If the legislature can, at pleasure, make these alterations and changes in the rights and privileges of the plaintiffs, it may, with equal propriety, abolish these rights and privileges altogether. The same power which can do any part of this work can accomplish the whole. And, indeed, the argument on which these acts have been hitherto defended goes altogether on the

ground that this is such a corporation as the legislature may abolish at pleasure, and that its members have no rights, liberties, franchises, property, or privileges which the legislature may not revoke, annul, alienate, or transfer to others whenever it sees fit.

It will be contended by the plaintiffs that these acts are not valid and binding on them without their assent: (1) Because they are against common right and the constitution of New Hampshire; (2) because they are repugnant to the constitution of the United States. I am aware of the limits which bound the jurisdiction of the court in this case, and that, on this record, nothing can be decided but the single question whether these acts are repugnant to the constitution of the United States. Yet it may assist in forming an opinion of their true nature and character to compare them with those fundamental principles introduced into the state governments for the purpose of limiting the exercise of the legislative power, and which the constitution of New Hampshire expresses with great fullness and accuracy.

It is not too much to assert that the legislature of New Hampshire would not have been competent to pass the acts in question, and to make them binding on the plaintiffs without their assent, even if there had been, in the constitution of New Hampshire, or of the United States, no special restriction on their power, because these acts are not the exercise of a power properly legislative.[1] Their effect and object are to take away from one rights, property, and franchises, and to grant them to another. This is not the exercise of a legislative power. To justify the taking away of vested rights there must be a forfeiture, to adjudge upon and declare which is the proper province of the judiciary. Attainder and confiscation are acts of sovereign power, not acts of legislation. The British parliament, among other unlimited powers, claims that of altering and vacating charters; not as an act of ordinary legislation, but of uncontrolled authority. It is theoretically omnipotent. Yet, in modern times, it has very rarely attempted the exercise of this power. In a celebrated instance, those who asserted this power in parliament vindicated its exercise only in a case in which it could be shown (1) that the charter in question was a charter of political power; (2) that there was a great and overruling state necessity, justifying the violation of the charter; (3) that the charter had been abused and justly forfeited.[2] The bill affecting this charter did not pass.

[1] Calder et ux. v. Bull, 3 Dallas, 386.

[2] Annual Register, 1784, p. 160; Parl. Reg. 1783; Mr. Burke's Speech on Mr. Fox's East India Bill, Burke's Works, vol. 2, pp. 414, 417, 467, 468, 486.

Its history is well known. The act which afterwards did pass passed with the assent of the corporation. Even in the worst times, this power of parliament to repeal and rescind charters has not often been exercised. The illegal proceedings in the reign of Charles the Second were under color of law. Judgments of forfeiture were obtained in the courts. Such was the case of the *quo warranto* against the city of London, and the proceedings by which the charter of Massachusetts was vacated. The legislature of New Hampshire has no more power over the rights of the plaintiffs than existed somewhere, in some department of government, before the Revolution. The British parliament could not have annulled or revoked this grant as an act of ordinary legislation. If it had done it at all, it could only have been in virtue of that sovereign power, called omnipotent, which does not belong to any legislature in the United States. The legislature of New Hampshire has the same power over this charter which belonged to the king who granted it, and no more. By the law of England, the power to create corporations is a part of the royal prerogative.[3] By the Revolution, this power may be considered as having devolved on the legislature of the state, and it has accordingly been exercised by the legislature. But the king cannot abolish a corporation, or new model it, or alter its powers, without its assent. This is the acknowledged and well-known doctrine of the common law. "Whatever might have been the notion in former times," says Lord Mansfield, "it is most certain now 'that the corporations of the universities are lay corporations; and that the crown cannot take away from them any rights that have been formerly subsisting in them under old charters or prescriptive usage.' "[4] After forfeiture duly found, the king may regrant the franchises; but a grant of franchises already granted, and of which no forfeiture has been found, is void. Corporate franchises can only be forfeited by trial and judgment.[5] In case of a new charter or grant to an existing corporation, it may accept or reject it as it pleases.[6] It may accept such part of the grant as it chooses, and reject the rest.[7] In the very nature of things, a charter cannot be forced upon anybody. No one can be compelled to accept a grant, and, without acceptance, the grant is necessarily void.[8] It cannot be pretended that the legislature, as

[3] 1 Black, 472, 473.
[4] 3 Burrow, 1656.
[5] Rex v. Pasmore, 3 Term R. 244.
[6] Rex v. Vice Chancellor of Cambridge, 3 Burrow, 1656; 3 Term R. 240,—Lord Kenyon.
[7] 3 Burrow, 1661, and Rex v. Pasmore, ubi supra.
[8] Ellis v. Marshall, 2 Mass. 277; 1 Kyd, Corporations, 65, 66.

successor to the king in this part of his prerogative, has any power to revoke, vacate, or alter this charter. If, therefore, the legislature has not this power by any specific grant contained in the constitution, nor as included in its ordinary legislative powers, nor by reason of its succession to the prerogatives of the crown in this particular, on what ground would the authority to pass these acts rest, even if there were no prohibitory clauses in the constitution and the bill of rights? But there are prohibitions in the constitution and bill of rights of New Hampshire, introduced for the purpose of limiting the legislative power and protecting the rights and property of the citizens. One prohibition is "that no person shall be deprived of his property, immunities, or privileges, put out of the protection of the law, or deprived of his life, liberty, or estate, but by judgment of his peers or the law of the land." In the opinion, however, which was given in the court below, it is denied that the trustees under the charter had any property, immunity, liberty, or privilege in this corporation, within the meaning of this prohibition in the bill of rights. It is said that it is a public corporation and public property; that the trustees have no greater interest in it than any other individuals; that it is not private property, which they can sell or transmit to their heirs, and that therefore they have no interest in it; that their office is a public trust, like that of the governor or a judge, and that they have no more concern in the property of the college than the governor in the property of the state, or than the judges in the fines which they impose on the culprits at their bar; that it is nothing to them whether their powers shall be extended or lessened, any more than it is to their honors whether their jurisdiction shall be enlarged or diminished. It is necessary, therefore, to inquire into the true nature and character of the corporation which was created by the charter of 1769.

There are divers sorts of corporations; and it may be safely admitted that the legislature has more power over some than others.[9] Some corporations are for government and political arrangement,—such, for example, as cities, counties, and towns in New England. These may be changed and modified as public convenience may require, due regard being always had to the rights of property. Of such corporations, all who live within the limits are, of course, obliged to be members, and to submit to the duties which the law imposes on them as such. Other civil corporations are for the advancement of trade and business, such

[9] 1 Wooddeson, 474; 1 Black, 467.

as banks, insurance companies, and the like. These are created, not by general law, but usually by grant. Their constitution is special. It is such as the legislature sees fit to give, and the grantees to accept. The corporation in question is not a civil, although it is a lay, corporation. It is an eleemosynary corporation. It is a private charity, originally founded and endowed by an individual, with a charter obtained for it at his request, for the better administration of his charity. "The eleemosynary sort of corporations are such as are constituted for the perpetual distributions of the free alms or bounty of the founder of them, to such persons as he has directed. Of this are all hospitals for the maintenance of the poor, sick, and impotent, and all colleges both in our universities and out of them."[10] Eleemosynary corporations are for the management of private property according to the will of the donors. They are private corporations. A college is as much a private corporation as a hospital; especially a college founded, as this was, by private bounty. A college is a charity. "The establishment of learning," says Lord Hardwicke, "is a charity, and so considered in the statute of Elizabeth. A devise to a college generally for their benefit . . . . is a laudable charity, and deserves encouragement."[11] The legal signification of a charity is derived chiefly from St. 43 Eliz. c. 4. "Those purposes," says Sir William Grant, "are considered charitable which that statute enumerates."[12] Colleges are enumerated as charities in that statute. The government, in these cases, lends its aid to perpetuate the beneficent intention of the donor, by granting a charter under which his private charity shall continue to be dispensed after his death. This is done either by incorporating the objects of the charity, as, for instance, the scholars in a college, or the poor in a hospital, or by incorporating those who are to be governors or trustees of the charity.[13] In cases of the first sort, the founder is, by the common law, visitor. In early times it became a maxim that he who gave the property might regulate it in future. *Cujus est dare, ejus est disponere.* This right of visitation descended from the founder to his heir as a right of property, and precisely as his other property went to his heir, and, in default of heirs, it went to the king, as all other property goes to the king for want of heirs. The right of visitation arises from the property. It grows out of the endowment. The founder may, if he please, part with it at the time when he establishes the charity, and may

[10] 1 Black 471.
[11] 1 Ves. Sr. 537.
[12] 9 Ves. 405.
[13] 1 Wooddeson, 474.

vest it in others. Therefore, if he chooses that governors, trustees, or overseers should be appointed in the charter, he may cause it to be done, and his power of visitation may be transferred to them, instead of descending to his heirs. The persons thus assigned or appointed by the founder will be visitors, with all the powers of the founder, in exclusion of his heir.[14] The right of visitation, then, accrues to them, as a matter of property, by the gift, transfer, or appointment of the founder. This is a private right, which they can assert in all legal modes, and in which they have the same protection of the law as in all other rights. As visitors they may make rules, ordinances, and statutes, and alter and repeal them, as far as permitted so to do by the charter.[15] Although the charter proceeds from the crown or the government, it is considered as the will of the donor. It is obtained at his request. He imposes it as the rule which is to prevail in the dispensation of his bounty in all future times. The king or government which grants the charter is not thereby the founder, but he who furnishes the funds. The gift of the revenues is the foundation.[16]

The leading case on this subject is Philips v. Bury.[17] This was an ejectment brought to recover the rectory house, etc., of Exeter College, in Oxford. The question was whether the plaintiff or defendant was legal rector. Exeter College was founded by an individual, and incorporated by a charter granted by Queen Elizabeth. The controversy turned upon the power of the visitor, and, in the discussion of the cause, the nature of college charters and corporations was very fully considered. Lord Holt's judgment, copied from his own manuscript, is found in 2 Term Reports, 346. The following is an extract:

"That we may the better apprehend the nature of a visitor, we are to consider that there are, in law, two sorts of corporations aggregate,—such as are for public government, and such as are for private charity. Those that are for the public government of a town, city, mystery, or the like, being for public advantage, are to be governed according to the laws of the land. If they make any particular private laws and constitutions, the validity and justice of them is examinable in the king's courts. Of these there are no particular private founders, and consequently no particular visitor; there are no patrons of these; therefore, if no provision be in the charter how the succession shall continue, the law supplieth the defect of that constitution, and saith it shall be by election, as mayor, aldermen, common council, and the like. But private and particular corporations for charity, founded and endowed

[14] 1 Black, 471.
[15] 2 Term R. 350, 351.
[16] 1 Black, 480.
[17] 1 Ld. Raym. 5; Comb. 265; Holt, 715; 1 Shower, 360; 4 Mod. 106; Skin. 447.

by private persons, are subject to the private government of those who erect them; and therefore, if there be no visitor appointed by the founder, the law appoints the founder and his heirs to be visitors, who are to act and proceed according to the particular laws and constitutions assigned them by the founder. It is now admitted on all hands that the founder is patron, and, as founder, is visitor, if no particular visitor be assigned; so that patronage and visitation are necessary consequents one upon another. For this visitatorial power was not introduced by any canons or constitutions ecclesiastical (as was said by a learned gentleman whom I have in my eye, in his argument of this case); it is an appointment of law. It ariseth from the property which the founder had in the lands assigned to support the charity; and as he is the author of the charity, the law gives him and his heirs a visitatorial power,—that is, an authority to inspect the actions and regulate the behavior of the members that partake of the charity. For it is fit the members that are endowed, and that have the charity bestowed upon them, should not be left to themselves, but pursue the intent and design of him that bestowed it upon them. Now, indeed, where the poor, or those that receive the charity, are not incorporated, but there are certain trustees who dispose of the charity, there is no visitor, because the interest of the revenue is not vested in the poor that have the benefit of the charity, but they are subject to the orders and directions of the trustees. But where they who are to enjoy the benefit of the charity are incorporated, there to prevent all perverting of the charity, or to compose differences that may happen among them, there is by law a visitatorial power; and it being a creature of the founder's own, it is reason that he and his heirs should have that power, unless by the founder it is vested in some other. Now, there is no manner of difference between a college and a hospital, except only in degree. A hospital is for those that are poor, and mean, and low, and sickly. A college is for another sort of indigent persons; but it hath another intent,—to study in, and breed up persons in the world that have no otherwise to live. But still it is as much within the reasons as hospitals. And if, in a hospital, the master and poor are incorporated, it is a college having a common seal to act by, although it hath not the name of a college (which always supposeth a corporation), because it is of an inferior degree; and in the one case and in the other there must be a visitor, either the founder and his heirs, or one appointed by him, and both are eleemosynary."

Lord Holt concludes his whole argument by again repeating that that college was a private corporation, and that the founder had a right to appoint a visitor, and to give him such power as he saw fit.[18] The learned Bishop Stillingfleet's argument in the same cause as a member of the house of lords, when it was there heard, exhibits very clearly the nature of colleges and similar corporations. It is to the following effect:

"That this absolute and conclusive power of visitors is no more than the law hath appointed in other cases, upon commissions of charitable uses. That the common law, and not any ecclesiastical canons, do place the power of visitation in the founder and his heirs, unless he settle it upon others. That, although corporations for public government be

[18] 1 Ld. Raym. 9.

subject to the courts of Westminster Hall, which have no particular or special visitors, yet corporations for charity, founded and endowed by private persons, are subject to the rule and government of those that erect them; but where the persons to whom the charity is given are not incorporated, there is no such visitatorial power, because the interest of the revenue is not invested in them; but where they are, the right of visitation ariseth from the foundation, and the founder may convey it to whom and in what manner he pleases, and the visitor acts as founder, and by the same authority which he had, and consequently is no more accountable than he had been. That the king, by his charter, can make a society to be incorporated so as to have the rights belonging to persons, as to legal capacities. That colleges, although founded by private persons, are yet incorporated by the king's charter; but although the kings, by their charters, made the colleges to be such in law,—that is, to be legal corporations,—yet they left to the particular founders authority to appoint what statutes they thought fit for the regulation of them. And not only the statutes, but the appointment of visitors, was left to them, and the manner of government, and the several conditions on which any persons were to be made or continue partakers of their bounty."[19]

These opinions received the sanction of the house of lords, and they seem to be settled and undoubted law. Where there is a charter, vesting proper powers in trustees or governors, they are visitors, and there is no control in anybody else, except only that the courts of equity or of law will interfere so far as to preserve the revenues, and prevent the perversion of the funds, and to keep the visitors within their prescribed bounds. "If there be a charter with proper powers, the charity must be regulated in the manner prescribed by the charter. There is no ground for the controlling interposition of the courts of chancery. The interposition of the courts, therefore, in those instances in which the charities were founded on charters or by act of parliament, and a visitor or governor and trustees appointed, must be referred to the general jurisdiction of the courts in all cases in which a trust conferred appears to have been abused, and not to an original right to direct the management of the charity, or the conduct of the governors or trustees."[20] "The original of all visitatorial power is the property of the donor, and the power every one has to dispose, direct, and regulate his own property; like the case of patronage, *cujus est dare*, etc. Therefore, if either the crown or the subject creates an eleemosynary foundation, and vests the charity in the persons who are to receive the benefit of it, since a contest might arise about the government of it, the law allows the founder or his heirs, or the person specially appointed by him to be visitor, to determine concerning his own creature. If the

[19] 1 Burn's Eccles. Law, 443, Appendix, No. 3.
[20] 2 Fonb. 205, 206.

charity is not vested in the persons who are to partake, but in trustees for their benefit, no visitor can arise by implication, but the trustees have that power."[21]

"There is nothing better established," says Lord Commissioner Eyre, "than that this court does not entertain a general jurisdiction, or regulate and control charities established by charter. There the establishment is fixed and determined, and the court has no power to vary it. If the governors established for the regulation of it are not those who have the management of the revenue, this court has no jurisdiction, and, if it is ever so much abused, as far as it respects the jurisdiction of this court it is without remedy; but if those established as governors have also the management of the revenues, this court does assume a jurisdiction of necessity, so far as they are to be considered as trustees of the revenue."[22]

"The foundations of colleges," says Lord Mansfield, "are to be considered in two views, namely, as they are corporations, and as they are eleemosynary. As eleemosynary, they are the creatures of the founder; he may delegate his power, either generally or specially; he may prescribe particular modes and manners as to the exercise of part of it. If he makes a general visitor (as by the general words *visitator sit*), the person so constituted has all incidental power; but he may be restrained as to particular instances. The founder may appoint a special visitor for a particular purpose, and no further. The founder may make a general visitor, and yet appoint an inferior particular power, to be executed without going to the visitor in the first instance."[23] And even if the king be founder, if he grant a charter, incorporating trustees and governors, they are visitors, and the king cannot visit.[24] A subsequent donation or ingrafted fellowship falls under the same general visitatorial power, if not otherwise specially provided.[25]

In New England, and perhaps throughout the United States, eleemosynary corporations have been generally established in the latter mode,—that is, by incorporating governors or trustees, and vesting in them the right of visitation. Small variations may have been in some instances adopted, as in the case of Harvard College, where some power of inspection is given to the over-

[21] Green v. Rutherforth, 1 Ves. Sr. 472, per Lord Hardwicke.
[22] Attorney General v. Foundling Hospital, 2 Ves. Jr. 47. See, also, 2 Kyd, Corporations, 195; Cooper, Equity Pleading, 292.
[23] St. John's College v. Todington, 1 Burrow, 200.
[24] Attorney General v. Middleton, 2 Ves. Sr. 328.
[25] Green v. Rutherforth, ubi supra; St. John's College v. Todington, ubi supra.

seers, but not, strictly speaking, a visitatorial power, which still belongs, it is apprehended, to the fellows or members of the corporation. In general, there are many donors. A charter is obtained comprising them all, or some of them, and such others as they choose to include, with the right of appointing successors. They are thus the visitors of their own charity, and appoint others, such as they may see fit, to exercise the same office in time to come. All such corporations are private. The case before the court is clearly that of an eleemosynary corporation. It is, in the strictest legal sense, a private charity. In Rex v. St. Catherine's Hall,[26] that college is called a private eleemosynary lay corporation. It was endowed by a private founder, and incorporated by letters patent. And in the same manner was Dartmouth College founded and incorporated. Dr. Wheelock is declared by the charter to be its founder. It was established by him on funds contributed and collected by himself. As such founder, he had a right of visitation, which he assigned to the trustees, and they received it by his consent and appointment, and held it under the charter. He appointed these trustees visitors, and in that respect to take place of his heir, as he might have appointed devisees to take his estate instead of his heir. Little, probably, did he think, at that time, that the legislature would ever take away this property and these privileges, and give them to others. Little did he suppose that this charter secured to him and his successors no legal rights. Little did the other donors think so. If they had, the college would have been what the university is now, —a thing upon paper, existing only in name. The numerous academies in New England have been established substantially in the same manner. They hold their property by the same tenure, and no other. Nor has Harvard College any surer title than Dartmouth College. It may to-day have more friends, but to-morrow it may have more enemies. Its legal rights are the same. So, also, of Yale College, and, indeed, of all the others. When the legislature gives to these institutions, it may and does accompany its grants with such conditions as it pleases. The grant of lands by the legislature of New Hampshire to Dartmouth College, in 1789, was accompanied with various conditions. When donations are made, by the legislature or others, to a charity already existing, without any condition, or the specification of any new use, the donation follows the nature of the charity; hence the doctrine that all eleemosynary corporations are private bodies.

[26] 4 Term R. 233.

They are founded by private persons, and on private property. The public cannot be charitable in these institutions. It is not the money of the public, but of private persons, which is dispensed. It may be public—that is, general—in its uses and advantages, and the state may very laudably add contributions of its own to the funds; but it is still private in the tenure of the property, and in the right of administering the funds.

If the doctrine laid down by Lord Holt and the house of lords in Philips v. Bury,[27] and recognized and established in all the other cases, be correct, the property of this college was private property; it was vested in the trustees by the charter, and to be administered by them, according to the will of the founder and donors, as expressed in the charter. They were also visitors ot the charity, in the most ample sense. They had therefore, as they contend, privileges, property, and immunities, within the true meaning of the bill of rights. They had rights, and still have them, which they can assert against the legislature, as well as against other wrongdoers. It makes no difference that the estate is holden for certain trusts. The legal estate is still theirs. They have a right in the property, and they have a right of visiting and superintending the trust, and this is an object of legal protection, as much as any other right. The charter declares that the powers conferred on the trustees are "privileges, advantages, liberties, and immunities," and that they shall be forever holden by them and their successors. The New Hampshire bill of rights declares that no one shall be deprived of his "property, privileges, or immunities" but by judgment of his peers, or the law of the land. The argument on the other side is that, although these terms may mean something in the bill of rights, they mean nothing in this charter. But they are terms of legal signification, and very properly used in the charter. They are equivalent with "franchises." Blackstone says that "franchise" and "liberty" are used as synonymous terms; and after enumerating other liberties and franchises, he says: "It is likewise a franchise for a number of persons to be incorporated and subsist as a body politic, with a power to maintain perpetual succession and do other corporate acts, and each individual member of such a corporation is also said to have a franchise or freedom."[28] "Liberties" is the term used in Magna Charta as including franchises, privileges, immunities, and all the rights which belong to that class. Professor Sullivan says the term signifies the "privileges that some

[27] Black, ubi supra. [28] 2 Bl. Comm. 37.

of the subjects, whether single persons or bodies corporate, have above others by the lawful grant of the king; as the chattels of felons or outlaws, and the lands and privileges of corporations."[29] The privilege, then, of being a member of a corporation, under a lawful grant, and of exercising the rights and powers of such member, is such a privilege, liberty, or franchise as has been the object of legal protection, and the subject of a legal interest, from the time of Magna Charta to the present moment. The plaintiffs have such an interest in this corporation, individually, as they could assert and maintain in a court of law, not as agents of the public, but in their own right. Each trustee has a franchise, and, if he be disturbed in the enjoyment of it, he would have redress, on appealing to the law, as promptly as for any other injury. If the other trustees should conspire against any one of them to prevent his equal right and voice in the appointment of a president or professor, or in the passing of any statute or ordinance of the college, he would be entitled to his action for depriving him of his franchise. It makes no difference that this property is to be holden and administered, and these franchises exercised, for the purpose of diffusing learning. No principle and no case establishes any such distinction. The public may be benefited by the use of this property; but this does not change the nature of the property or the rights of the owners. The object of the charter may be public good. So it is in all other corporations; and this would as well justify the resumption or violation of the grant in any other case as in this. In the case of an advowson, the use is public, and the right cannot be turned to any private benefit or emolument. It is nevertheless a legal private right, and the property of the owner, as emphatically as his freehold. The rights and privileges of trustees, visitors, or governors of incorporated colleges stand on the same foundation. They are so considered, both by Lord Holt and Lord Hardwicke.[30]

To contend that the rights of the plaintiffs may be taken away because they derive from them no pecuniary benefit or private emolument, or because they cannot be transmitted to their heirs, or would not be assets to pay their debts, is taking an extremely narrow view of the subject. According to this notion, the case would be different if, in the charter, they had stipulated for a commission on the disbursement of the funds; and they have ceased to have any interest in the property because they have undertaken to administer it gratuitously. It cannot be necessary to

[29] Sull. 41st Lect.
[30] Philips v. Bury, and Green v. Rutherforth, ubi supra. See, also, 2 Black, 21.

say much in refutation of the idea that there cannot be a legal interest or ownership in anything which does not yield a pecuniary profit, as if the law regarded no rights but the rights of money, and of visible, tangible property. Of what nature are all rights of suffrage? No elector has a particular personal interest; but each has a legal right, to be exercised at his own discretion, and it cannot be taken away from him. The exercise of this right directly and very materially affects the public; much more so than the exercise of the privileges of a trustee of this college. Consequences of the utmost magnitude may sometimes depend on the exercise of the right of suffrage by one or a few electors. Nobody was ever yet heard to contend, however, that, on that account, the public might take away the right or impair it. This notion appears to be borrowed from no better source than the repudiated doctrine of the three judges in the Aylesbury case.[81] That was an action against a returning officer for refusing the plaintiff's vote in the election of a member of parliament. Three of the judges of the king's bench held that the action could not be maintained because, among other objections, "it was not any matter of profit, either *in praesenti* or *in futuro*." It would not enrich the plaintiff *in praesenti*, nor would it *in futuro* go to his heirs, or answer to pay his debts. But Lord Holt and the house of lords were of another opinion. The judgment of the three judges was reversed, and the doctrine they held, having been exploded for a century, seems now for the first time to be revived. Individuals have a right to use their own property for purposes of benevolence, either towards the public or towards other individuals. They have a right to exercise this benevolence in such lawful manner as they may choose; and when the government has induced and excited it by contracting to give perpetuity to the stipulated manner of exercising it, it is not law, but violence, to rescind this contract, and seize on the property. Whether the state will grant these franchises, and under what conditions it will grant them, it decides for itself; but when once granted, the constitution holds them to be sacred till forfeited for just cause. That all property of which the use may be beneficial to the public belongs, therefore, to the public, is quite a new doctrine. It has no precedent, and is supported by no known principle. Dr. Wheelock might have answered his purposes, in this case, by executing a private deed of trust. He might have conveyed his property to

[81] Ashby v. White, 2 Ld. Raym. 938.

trustees for precisely such uses as are described in this charter. Indeed, it appears that he had contemplated the establishing of his school in that manner, and had made his will, and devised the property to the same persons who were afterwards appointed trustees in the charter. Many literary and other charitable institutions are founded in that manner, and the trust is renewed, and conferred on other persons, from time to time, as occasion may require. In such a case, no lawyer would or could say that the legislature might divest the trustees, constituted by deed or will, seize upon the property, and give it to other persons, for other purposes. And does the granting of a charter, which is only done to perpetuate the trust in a more convenient manner, make any difference? Does or can this change the nature of the charity, and turn it into a public political corporation? Happily, we are not without authority on this point. It has been considered and adjudged. Lord Hardwicke says, in so many words: "The charter of the crown cannot make a charity more or less public, but only more permanent than it would otherwise be."[32] The granting of the corporation is but making the trust perpetual, and does not alter the nature of the charity. The very object sought in obtaining such charter, and in giving property to such a corporation, is to make and keep it private property, and to clothe it with all the security and inviolability of private property. The intent is that there shall be a legal private ownership, and that the legal owners shall maintain and protect the property, for the benefit of those for whose use it was designed. Who ever endowed the public? Who ever appointed a legislature to administer his charity? Or who ever heard, before, that a gift to a college or a hospital or an asylum was, in reality, nothing but a gift to the state? The state of Vermont is a principal donor to Dartmouth College. The lands given lie in that state. This appears in the special verdict. Is Vermont to be considered as having intended a gift to the state of New Hampshire in this case, as, it has been said, is to be the reasonable construction of all donations to the college? The legislature of New Hampshire affects to represent the public, and therefore claims a right to control all property destined to public use. What hinders Vermont from considering herself equally the representative of the public, and from resuming her grants at her own pleasure? Her right to do so is less doubtful than the power of New Hampshire to pass the laws in question.

[32] Attorney General v. Pearce, 2 Atk. 87.

In University v. Foy,[33] the supreme court of North Carolina pronounced unconstitutional and void a law repealing a grant to the University of North Carolina, although that university was originally erected and endowed by a statute of the state. That case was a grant of lands, and the court decided that it could not be resumed. This is the grant of a power and capacity to hold lands. Where is the difference of the cases, upon principle?

In Terrett v. Taylor[34] this court decided that a legislative grant or confirmation of lands, for the purposes of moral and religious instruction, could no more be rescinded than other grants. The nature of the case was not holden to make any difference. A grant to a parish or church for the purposes which have been mentioned cannot be distinguished, in respect to the title it confers, from a grant to a college for the promotion of piety and learning. To the same purpose may be cited the case of Town of Pawlet v. Clark. The state of Vermont, by statute, in 1794, granted to the respective towns in that state certain glebe lands lying within those towns for the sole use and support of religious worship. In 1799, an act was passed to repeal the act of 1794; but this court declared that the act of 1794, "so far as it granted the glebes to the towns, could not afterwards be repealed by the legislature, so as to divest the rights of the towns under the grant."[35]

It will be for the other side to show that the nature of the use decides the question whether the legislature has power to resume its grants. It will be for those who maintain such a doctrine to show the principles and cases upon which it rests. It will be for them, also, to fix the limits and boundaries of their doctrine, and to show what are and what are not such uses as to give the legislature this power of resumption and revocation. And to furnish an answer to the cases cited, it will be for them further to show that a grant for the use and support of religious worship stands on other ground than a grant for the promotion of piety and learning.

I hope enough has been said to show that the trustees possessed vested liberties, privileges, and immunities, under this charter, and that such liberties, privileges, and immunities, being once lawfully obtained and vested, are as inviolable as any vested rights of property whatever. Rights to do certain acts, such, for instance, as the visitation and superintendence of a college, and the appointment of its officers, may surely be vested rights, to all legal intents, as completely as the right to possess property. A late learned judge

[33] 2 Haywood 310.
[34] 9 Cranch, 43.
[35] 2 Hayw.

of this court has said: "When I say that a right is vested in a citizen, I mean that he has the power to do certain actions, or to possess certain things, according to the law of the land."[36] If such be the true nature of the plaintiffs' interests under this charter, what are the articles in the New Hampshire bill of rights which these acts infringe?

They infringe the second article, which says that the citizens of the state have a right to hold and possess property. The plaintiffs had a legal property in this charter, and they had acquired property under it. The acts deprive them of both. They impair and take away the charter, and they appropriate the property to new uses, against their consent. The plaintiffs cannot now hold the property acquired by themselves, and which this article says they have a right to hold.

They infringe the twentieth article. By that article it is declared that, in questions of property, there is a right to trial. The plaintiffs are divested without trial or judgment.

They infringe the twenty-third article. It is therein declared that no retrospective laws shall be passed. This article bears directly on the case. These acts must be deemed to be retrospective, within the settled construction of that term. What a retrospective law is has been decided, on the construction of this very article, in the circuit court for the first circuit. The learned judge of that circuit says: "Every statute which takes away or impairs vested rights, acquired under existing laws, must be deemed retrospective."[37] That all such laws are retrospective was decided also in the case of Dash v. Van Kleeck,[38] where a most learned judge quotes this article from the constitution of New Hampshire, with manifest approbation, as a plain and clear expression of those fundamental and unalterable principles of justice which must lie at the foundation of every free and just system of laws. Can any man deny that the plaintiffs had rights, under the charter, which were legally vested, and that, by these acts, those rights are impaired?

"It is a principle in the English law," (says Chief Justice Kent, in the case last cited), "as ancient as the law itself, that a statute, even of its omnipotent parliament, is not to have a retrospective effect. *Nova constitutio futuris formam imponere debet, et non praeteritis.*[39] The maxim in Bracton was taken from the civil law, for we find in that system the same principle, expressed substantially in the same words, that the lawgiver cannot alter his mind to the prejudice of a vested right. *Nemo potest mutare concilium suum in alterius injuriam.*[40] This maxim of Papinian is general in its terms, but Dr. Taylor[41] applies it directly as

[36] 3 Dallas, 394.
[37] Society v. Wheeler, 2 Gall. 105.
[38] 7 Johns. 477.
[39] Bracton, Lib. 4, fol. 228; 2 Inst. 292.
[40] Dig. 50. 17. 75.
[41] Elements of the Civil Law, p. 168.

a restriction upon the lawgiver, and a declaration in the Code leaves no doubt as to the sense of the civil law. *Leges et constitutiones futuris certum est dare formam negotiis, non ad facta praeterita revocari, nisi nominatim, et de praeterito tempore, et adhuc pendentibus negotiis cautum sit.*[42] This passage, according to the best interpretation of the civilians, relates not merely to future suits, but to future, as contradistinguished from past, contracts and vested rights.[43] It is, indeed, admitted that the prince may enact a retrospective law, provided it be done expressly; for the will of the prince under the despotism of the Roman emperors was paramount to every obligation. Great latitude was anciently allowed to legislative expositions of statutes, for the separation of the judicial from the legislative power was not then distinctly known or prescribed. The prince was in the habit of interpreting his own laws for particular occasions. This was called the *'Interlocutio Principis,'* and this, according to Huber's definition, was, *Quando principes, inter partes loquuntur et jus dicunt.*[44] No correct civilian, and especially no proud admirer of the ancient republic (if any such then existed), could have reflected on this interference with private rights and pending suits without disgust and indignation; and we are rather surprised to find that, under the violent and arbitrary genius of the Roman government, the principle before us should have been acknowledged and obeyed to the extent in which we find it. The fact shows that it must be founded in the clearest justice. Our case is happily very different from that of the subjects of Justinian. With us the power of the lawgiver is limited and defined; the judicial is regarded as a distinct, independent power; private rights are better understood and more exalted in public estimation, as well as secured by provisions dictated by the spirit of freedom, and unknown to the civil law. Our constitutions do not admit the power assumed by the Roman prince, and the principle we are considering is now to be regarded as sacred."

These acts infringe also the thirty-seventh article of the constitution of New Hampshire, which says that the powers of government shall be kept separate. By these acts the legislature assumes to exercise a judicial power. It declares a forfeiture, and resumes franchises, once granted, without trial or hearing. If the constitution be not altogether waste paper, it has restrained the power of the legislature in these particulars. If it has any meaning, it is that the legislature shall pass no act directly and manifestly impairing private property and private privileges. It shall not judge by act; it shall not decide by act; it shall not deprive by act; but it shall leave all these things to be tried and adjudged by the law of the land.

The fifteenth article has been referred to before. It declares that no one shall be "deprived of his property, immunities, or privileges but by the judgment of his peers or the law of the land." Notwithstanding the light in which the learned judges in New Hampshire viewed the rights of the plaintiffs under the

[42] Cod. 1. 14. 7.
[43] Perezii Prælect. h. t.
[44] Prælect. Juris. Civ., vol. II., p. 545.

charter, and which has been before adverted to, it is found to be admitted, in their opinion, that those rights are privileges, within the meaning of this fifteenth article of the bill of rights. Having quoted that article, they say: "That the right to manage the affairs of this college is a privilege, within the meaning of this clause of the bill of rights, is not to be doubted." In my humble opinion, this surrenders the point. To resist the effect of this admission, however, the learned judges add: "But how a privilege can be protected from the operation of the law of the land by a clause in the constitution, declaring that it shall not be taken away but by the law of the land, is not very easily understood." This answer goes on the ground that the acts in question are laws of the land, within the meaning of the constitution. If they be so, the argument drawn from this article is fully answered. If they be not so, it being admitted that the plaintiffs' rights are "privileges," within the meaning of the article, the argument is not answered, and the article is infringed by the acts.

Are, then, these acts of the legislature, which affect only particular persons and their particular privileges, laws of the land? Let this question be answered by the text of Blackstone. "And first it (*i. e.*, law) is a rule; not a transient, sudden order from a superior to or concerning a particular person, but something permanent, uniform, and universal. Therefore, a particular act of the legislature to confiscate the goods of Titius, or to attaint him of high treason, does not enter into the idea of a municipal law; for the operation of this act is spent upon Titius only, and has no relation to the community in general. It is rather a sentence than a law."[45] Lord Coke is equally decisive and emphatic. Citing and commenting on the celebrated twenty-ninth chapter of Magna Charta he says: "No man shall be disseised, etc., unless it be by the lawful judgment,—that is, verdict of equals,—or by the law of the land,—that is (to speak it once for all), by the due course and process of law."[46] Have the plaintiffs lost their franchises by "due course and process of law"? On the contrary, are not these acts "particular acts of the legislature, which have no relation to the community in general, and which are rather sentences than laws"? By the law of the land is most clearly intended the general law,—a law which hears before it condemns; which proceeds upon inquiry, and renders judgment only after trial. The meaning is that every citizen shall hold his life, liberty, property, and immunities under the protection of the general

[45] 1 Bl. Comm. 44. [46] Coke, 2 Inst. 46.

rules which govern society. Everything which may pass under the form of an enactment is not, therefore, to be considered the law of the land. If this were so, acts of attainder, bills of pains and penalties, acts of confiscation, acts reversing judgments, and acts directly transferring one man's estate to another, legislative judgments, decrees and forfeitures in all possible forms, would be the law of the land. Such a strange construction would render constitutional provisions of the highest importance completely inoperative and void. It would tend directly to establish the union of all powers in the legislature. There would be no general, permanent law for courts to administer or men to live under. The administration of justice would be an empty form,—an idle ceremony. Judges would sit to execute legislative judgments and decrees; not to declare the law or to administer the justice of the country. "Is that the law of the land," said Mr. Burke, "upon which, if a man go to Westminster Hall, and ask counsel by what title or tenure he holds his privilege or estate according to the law of the land, he should be told that the law of the land is not yet known; that no decision or decree has been made in his case; that, when a decree shall be passed, he will then know what the law of the land is? Will this be said to be the law of the land by any lawyer who has a rag of a gown left upon his back, or a wig with one tie upon his head?"

That the power of electing and appointing the officers of this college is not only a right of the trustees as a corporation, generally, and in the aggregate, but that each individual trustee has also his own individual franchise in such right of election and appointment, is according to the language of all the authorities. Lord Holt says: "It is agreeable to reason and the rules of law that a franchise should be vested in the corporation aggregate, and yet the benefit of it to redound to the particular members, and to be enjoyed by them in their private capacity. Where the privilege of election is used by particular persons, it is a particular right, vested in every particular man."[47] It is also to be considered that the president and professors of this college have rights to be affected by these acts. Their interest is similar to that of fellows in the English colleges, because they derive their living, wholly or in part, from the founders' bounty. The president is one of the trustees or corporators. The professors are not necessarily members of the corporation, but they are appointed by the trustees, are removable only by them, and have fixed salaries payable out of the general funds of

[47] 2 Ld. Raym. 952.

the college. Both president and professors have freeholds in their offices, subject only to be removed by the trustees, as their legal visitors, for good cause. All the authorities speak of fellowships in colleges as freeholds, notwithstanding the fellows may be liable to be suspended or removed, for misbehavior, by their constituted visitors. Nothing could have been less expected, in this age, than that there should have been an attempt, by acts of the legislature, to take away these college livings, the inadequate, but the only, support of literary men who have devoted their lives to the instruction of youth. The president and professors were appointed by the twelve trustees. They were accountable to nobody else, and could be removed by nobody else. They accepted their offices on this tenure. Yet the legislature has appointed other persons, with power to remove these officers and to deprive them of their livings, and those other persons have exercised that power. No description of private property has been regarded as more sacred than college livings. They are the estates and freeholds of a most deserving class of men,—of scholars who have consented to forego the advantages of professional and public employments, and to devote themselves to science and literature and the instruction of youth in the quiet retreats of academic life. Whether to dispossess and oust them; to deprive them of their office, and to turn them out of their livings; to do this, not by the power of their legal visitors or governors, but by acts of the legislature, and to do it without forfeiture and without fault,—whether all this be not in the highest degree an indefensible and arbitrary proceeding is a question of which there would seem to be but one side fit for a lawyer or a scholar to espouse.

Of all the attempts of James the Second to overturn the law and the rights of his subjects, none was esteemed more arbitrary or tyrannical than his attack on Magdalen College, Oxford; and yet that attempt was nothing but to put out one president and put in another. The president of that college, according to the charter and statutes, is to be chosen by the fellows, who are the corporators. There being a vacancy, the king chose to take the appointment out of the hands of the fellows, the legal electors of a president, into his own hands. He therefore sent down his mandate, commanding the fellows to admit for president a person of his nomination, and, inasmuch as this was directly against the charter and constitution of the college, he was pleased to add a *non obstante* clause of sufficiently comprehensive import. The fellows were commanded to admit the person mentioned in the

mandate, "any statute, custom, or constitution to the contrary notwithstanding, wherewith we are graciously pleased to dispense in this behalf." The fellows refused obedience to this mandate, and Dr. Hough, a man of independence and character, was chosen president by the fellows, according to the charter and statutes. The king then assumed the power, in virtue of his prerogative, to send down certain commissioners to turn him out, which was done accordingly, and Parker, a creature suited to the times, put in his place. Because the president, who was rightfully and legally elected, would not deliver the keys, the doors were broken open. "The nation, as well as the university," says Bishop Burnet,[48] "looked on all these proceedings with just indignation. It was thought an open piece of robbery and burglary when men, authorized by no legal commission, came and forcibly turned men out of their possession and freehold." Mr. Hume, although a man of different temper, and of other sentiments, in some respects, than Dr. Burnet, speaks of this arbitrary attempt of prerogative in terms not less decisive. "The president and all the fellows," says he, "except two, who complied, were expelled from the college, and Parker was put in possession of the office. This act of violence, of all those which were committed during the reign of James, is perhaps the most illegal and arbitrary. When the dispensing power was the most strenuously insisted on by court lawyers, it had still been allowed that the statutes which regard private property could not legally be infringed by that prerogative. Yet, in this instance, it appeared that even these were not now secure from invasion. The privileges of a college are attacked. Men are illegally dispossessed of their property for adhering to their duty, to their oaths, and to their religion." This measure King James lived to repent, after repentance was too late. When the charter of London was restored, and other measures of violence were retracted, to avert the impending revolution, the expelled president and fellows of Magdalen College were permitted to resume their rights. It is evident that this was regarded as an arbitrary interference with private property; yet private property was no otherwise attacked than as a person was appointed to administer and enjoy the revenues of a college in a manner and by persons not authorized by the constitution of the college. A majority of the members of the corporation would not comply with the king's wishes. A minority would. The object was, therefore, to make this minority a majority. To this

[48] History of My Own Times, vol. 3, p. 119.

end the king's commissioners were directed to interfere in the case, and they united with the two complying fellows, and expelled the rest, and thus effected a change in the government of the college. The language in which Mr. Hume and all other writers speak of this abortive attempt of oppression shows that colleges were esteemed to be, as they truly are, private corporations, and the property and privileges which belong to them private property and private privileges. Court lawyers were found to justify the king in dispensing with the laws,—that is, in assuming and exercising a legislative authority; but no lawyer, not even a court lawyer, in the reign of King James the Second, as far as appears, was found to say that, even by this high authority, he could infringe the franchises of the fellows of a college, and take away their livings. Mr. Hume gives the reason. It is that such franchises were regarded, in a most emphatic sense, as private property.[49]

If it could be made to appear that the trustees and the president and professors held their offices and franchises during the pleasure of the legislature, and that the property holden belonged to the state, then, indeed, the legislature have done no more than they had a right to do. But this is not so. The charter is a charter of privileges and immunities, and these are holden by the trustees expressly against the state forever.

It is admitted that the state, by its courts of law, can enforce the will of the donor, and compel a faithful execution of the trust. The plaintiffs claim no exemption from legal responsibility. They hold themselves at all times answerable to the law of the land for their conduct in the trust committed to them. They ask only to hold the property of which they are owners, and the franchises which belong to them, until they shall be found, by due course and process of law, to have forfeited them. It can make no difference whether the legislature exercise the power it has assumed by removing the trustees and the president and professors, directly and by name, or by appointing others to expel them. The principle is the same, and, in point of fact, the result has been the same. If the entire franchise cannot be taken away, neither can it be essentially impaired. If the trustees are legal owners of the property, they are sole owners. If they are visitors, they are sole visitors. No one will be found to say that, if the legislature may do what it has done, it may not do anything and everything which it may choose to do relative to the property of the corporation, and the privileges of its members and officers

[49] See a full account of this case in 4 State Tr. (4th Ed.) p. 262.

If the view which has been taken of this question be at all correct, this was an eleemosynary corporation,—a private charity. The property was private property. The trustees were visitors, and the right to hold the charter, administer the funds, and visit and govern the college was a franchise and privilege solemnly granted to them. The use being public in no way diminishes their legal estate in the property, or their title to the franchise. There is no principle, nor any case, which declares that a gift to such a corporation is a gift to the public. The acts in question violate property. They take away privileges, immunities, and franchises. They deny to the trustees the protection of the law, and they are retrospective in their operation; in all which respects they are against the constitution of New Hampshire.

The plaintiffs contend, in the second place, that the acts in question are repugnant to the tenth section of the first article of the constitution of the United States. The material words of that section are: "No state shall pass any bill of attainder, *ex post facto* law, or law impairing the obligation of contracts." The object of these most important provisions in the national constitution has often been discussed, both here and elsewhere. It is exhibited with great clearness and force by one of the distinguished persons who framed that instrument:

"Bills of attainder, *ex post facto* laws, and laws impairing the obligation of contracts are contrary to the first principles of the social compact, and to every principle of sound legislation. The two former are expressly prohibited by the declarations prefixed to some of the state constitutions, and all of them are prohibited by the spirit and scope of these fundamental charters. Our own experience has taught us, nevertheless, that additional fences against these dangers ought not to be omitted. Very properly, therefore, have the convention added this constitutional bulwark in favor of personal security and private rights, and I am much deceived if they have not, in so doing, as faithfully consulted the genuine sentiments as the undoubted interests of their constituents. The sober people of America are weary of the fluctuating policy which has directed the public councils. They have seen with regret and with indignation that sudden changes and legislative interferences in cases affecting personal rights become jobs in the hands of enterprising and influential speculators, and snares to the more industrious and less informed part of the community. They have seen, too, that one legislative interference is but the link of a long chain of repetitions; every subsequent interference being naturally produced by the effects of the preceding."[50]

It has already been decided in this court that a grant is a contract, within the meaning of this provision; and that a grant

[50] The Federalist, No. 44, by Mr. Madison.

by a state is also a contract, as much as the grant of an individual. In the case of Fletcher v. Peck[51] this court says:

"A contract is a compact between two or more parties, and is either executory or executed. An executory contract is one in which a party binds himself to do, or not to do, a particular thing. Such was the law under which the conveyance was made by the government. A contract executed is one in which the object of contract is performed, and this, says Blackstone, differs in nothing from a grant. The contract between Georgia and the purchasers was executed by the grant. A contract executed, as well as one which is executory, contains obligations binding on the parties. A grant, in its own nature, amounts to an extinguishment of the right of the grantor, and implies a contract not to reassert that right. If, under a fair construction of the constitution, grants are comprehended under the term 'contracts,' is a grant from the state excluded from the operation of the provision? Is the clause to be considered as inhibiting the state from impairing the obligation of contracts between two individuals, but as excluding from that inhibition contracts made with itself? The words themselves contain no such distinction. They are general, and are applicable to contracts of every description. If contracts made with the state are to be exempted from their operation, the exception must arise from the character of the contracting party, not from the words which are employed. Whatever respect might have been felt for the state sovereignties, it is not to be disguised that the framers of the constitution viewed with some apprehension the violent acts which might grow out of the feelings of the moment, and that the people of the United States, in adopting that instrument, have manifested a determination to shield themselves and their property from the effects of those sudden and strong passions to which men are exposed. The restrictions on the legislative power of the states are obviously founded in this sentiment, and the constitution of the United States contains what may be deemed a bill of rights for the people of each state."

It has also been decided that a grant by a state before the Revolution is as much to be protected as a grant since.[52] But the case of Terrett v. Taylor, before cited, is, of all others, most pertinent to the present argument. Indeed, the judgment of the court in that case seems to leave little to be argued or decided in this. "A private corporation," say the court, "created by the legislature, may lose its franchises by a misuser or a nonuser of them, and they may be resumed by the government under a judicial judgment upon a *quo warranto* to ascertain and enforce the forfeiture. This is the common law of the land, and is a tacit condition annexed to the creation of every such corporation. Upon a change of government, too, it may be admitted that such exclusive privileges attached to a private corporation as are inconsistent with the new government may be abolished. In respect, also, to public corporations which exist only for public purposes, such as coun-

[51] 6 Cranch, 87. [52] New Jersey v. Wilson, 7 Cranch, 164.

ties, towns, cities, and so forth, the legislature may, under proper limitations, have a right to change, modify, enlarge, or restrain them, securing, however, the property for the uses of those for whom and at whose expense it was originally purchased. But that the legislature can repeal statutes creating private corporations, or confirming to them property already acquired under the faith of previous laws, and by such repeal can vest the property of such corporations exclusively in the state, or dispose of the same to such purposes as they please, without the consent or default of the corporators, we are not prepared to admit; and we think ourselves standing upon the principles of natural justice, upon the fundamental laws of every free government, upon the spirit and letter of the constitution of the United States, and upon the decisions of most respectable judicial tribunals, in resisting such a doctrine."

This court, then, does not admit the doctrine that a legislature can repeal statutes creating private corporations. If it cannot repeal them altogether, of course it cannot repeal any part of them, or impair them, or essentially alter them, without the consent of the corporators. If, therefore, it has been shown that this college is to be regarded as a private charity, this case is embraced within the very terms of that decision. A grant of corporate powers and privileges is as much a contract as a grant of land. What proves all charters of this sort to be contracts is that they must be accepted to give them force and effect. If they are not accepted, they are void. And in the case of an existing corporation, if a new charter is given it, it may even accept part and reject the rest. In Rex v. Vice Chancellor of Cambridge,[53] Lord Mansfield says: "There is a vast deal of difference between a new charter granted to a new corporation (who must take it as it is given) and a new charter given to a corporation already in being, and acting either under a former charter or under prescriptive usage. The latter, a corporation already existing, are not obliged to accept the new charter *in toto*, and to receive either all or none of it,—they may act partly under it, and partly under their old charter or prescription. . . . . The validity of these new charters must turn upon the acceptance of the university." In the same case Mr. Justice Wilmot says: "It is the concurrence and acceptance of the university that give the force to the charter of the crown." In Rex v. Pasmore[54] Lord Kenyon observes: "Some things are clear. When a corporation exists

[53] 3 Burrow, 1656.

[54] 3 Term R. 240.

capable of discharging its functions, the crown cannot obtrude another charter upon them; they may either accept or reject it."[55]

In all cases relative to charters, the acceptance of them is uniformly alleged in the pleadings. This shows the general understanding of the law that they are grants or contracts, and that parties are necessary to give them force and validity. In Rex v. Dr. Askew[56] it is said: "The crown cannot oblige a man to be a corporator without his consent; he shall not be subject to the inconveniences of it without accepting it and assenting to it." These terms, "acceptance" and "assent," are the very language of contract. In Ellis v. Marshall,[57] it was expressly adjudged that the naming of the defendant, among others, in an act of incorporation, did not of itself make him a corporator, and that his assent was necessary to that end. The court speak of the act of incorporation as a grant, and observe: "That a man may refuse a grant, whether from the government or an individual, seems to be a principle too clear to require the support of authorities." But Justice Buller, in Rex v. Pasmore, furnishes, if possible, a still more direct and explicit authority. Speaking of a corporation for government, he says: "I do not know how to reason on this point better than in the manner urged by one of the relator's counsel, who considered the grant of incorporation to be a compact between the crown and a certain number of the subjects, the latter of whom undertake, in consideration of the privileges which are bestowed, to exert themselves for the good government of the place." This language applies with peculiar propriety and force to the case before the court. It was in consequence of the "privileges bestowed" that Dr. Wheelock and his associates undertook to exert themselves for the instruction and education of youth in this college, and it was on the same consideration that the founder endowed it with his property. And because charters of incorporation are of the nature of contracts, they cannot be altered or varied but by consent of the original parties. If a charter be granted by the king, it may be altered by a new charter granted by the king, and accepted by the corporators. But if the first charter be granted by parliament, the consent of parliament must be obtained to any alteration. In Rex v. Miller[58] Lord Kenyon says: "Where a corporation takes its rise from the king's charter, the king by granting, and the corporation by accepting, another charter, may alter it, because it is

[55] See, also, 1 Kyd, Corporations, 65.
[56] 4 Burrow, 2200.
[57] 2 Mass. 269.
[58] 6 Term R. 277.

done with the consent of all the parties who are competent to consent to the alteration."[59]

There are in this case all the essential constituent parts of a contract. There is something to be contracted about, there are parties, and there are plain terms in which the agreement of the parties on the subject of the contract is expressed. There are mutual considerations and inducements. The charter recites that the founder, on his part, has agreed to establish his seminary in New Hampshire, and to enlarge it beyond its original design, among other things, for the benefit of that province; and thereupon a charter is given to him and his associates, designated by himself, promising and assuring to them, under the plighted faith of the state, the right of governing the college and administering its concerns in the manner provided in the charter. There is a complete and perfect grant to them of all the power of superintendence, visitation, and government. Is not this a contract? If lands or money had been granted to him and his associates for the same purposes, such grant could not be rescinded. And is there any difference, in legal contemplation, between a grant of corporate franchises and a grant of tangible property? No such difference is recognized in any decided case, nor does it exist in the common apprehension of mankind. It is therefore contended that this case falls within the true meaning of this provision of the constitution, as expounded in the decisions of this court; that the charter of 1769 is a contract, a stipulation or agreement, mutual in its considerations, express and formal in its terms, and of a most binding and solemn nature. That the acts in question impair this contract has already been sufficiently shown. They repeal and abrogate its most essential parts.

A single observation may not be improper on the opinion of the court of New Hampshire, which has been published. The learned judges who delivered that opinion have viewed this question in a very different light from that in which the plaintiffs have endeavored to exhibit it. After some general remarks, they assume that this college is a public corporation, and on this basis their judgment rests. Whether all colleges are not regarded as private and eleemosynary corporations, by all law writers and all judicial decisions; whether this college was not founded by Dr. Wheelock; whether the charter was not granted at his request, the better to execute a trust which he had already created; whether he and his associates did not become visitors by the charter; and whether

[59] See, also, Ex parte Bolton School, 2 Brown, Ch. Rep. 662.

Dartmouth College be not, therefore, in the strictest sense, a private charity,—are questions which the learned judges do not appear to have discussed. It is admitted in that opinion that, if it be a private corporation, its rights stand on the same ground as those of an individual. The great question, therefore, to be decided is, to which class of corporations do colleges thus founded belong? And the plaintiffs have endeavored to satisfy the court that, according to the well-settled principles and uniform decisions of law, they are private, eleemosynary corporations.

Much has heretofore been said on the necessity of admitting such a power in the legislature as has been assumed in this case. Many cases of possible evil have been imagined which might otherwise be without remedy. Abuses, it is contended, might arise in the management of such institutions, which the ordinary courts of law would be unable to correct. But this is only another instance of that habit of supposing extreme cases, and then of reasoning from them, which is the constant refuge of those who are obliged to defend a cause which, upon its merits, is indefensible. It would be sufficient to say in answer that it is not pretended that there was here any such case of necessity. But a still more satisfactory answer is that the apprehension of danger is groundless, and therefore the whole argument fails. Experience has not taught us that there is danger of great evils or of great inconvenience from this course. Hitherto, neither in our own country nor elsewhere have such cases of necessity occurred. The judicial establishments of the state are presumed to be competent to prevent abuses and violations of trust in cases of this kind, as well as in all others. If they be not, they are imperfect, and their amendment would be a most proper subject for legislative wisdom. Under the government and protection of the general laws of the land, these institutions have always been found safe, as well as useful. They go on, with the progress of society, accommodating themselves easily, without sudden change or violence, to the alterations which take place in its condition, and in the knowledge, the habits, and pursuits of men. The English colleges were founded in Catholic ages. Their religion was reformed with the general reformation of the nation, and they are suited perfectly well to the purpose of educating the Protestant youth of modern times. Dartmouth College was established under a charter granted by the provincial government; but a better constitution for a college, or one more adapted to the condition of things under the present government, in all material respects, could not now be framed. Nothing in it was found to need alteration at the Revolution.

The wise men of that day saw in it one of the best hopes of future times, and commended it as it was, with parental care, to the protection and guardianship of the government of the state. A charter of more liberal sentiments, of wiser provisions, drawn with more care, or in a better spirit could not be expected at any time or from any source. The college needed no change in its organization or government. That which it did need was the kindness, the patronage, the bounty of the legislature; not a mock elevation to the character of a university, without the solid benefit of a shilling's donation to sustain the character; not the swelling and empty authority of establishing institutes and other colleges. This unsubstantial pageantry would seem to have been in derision of the scanty endowment and limited means of an unobtrusive, but useful and growing, seminary. Least of all was there a necessity, or pretense of necessity, to infringe its legal rights, violate its franchises and privileges, and pour upon it these overwhelming streams of litigation. But this argument, from necessity, would equally apply in all other cases. If it be well founded, it would prove that, whenever any inconvenience or evil is experienced from the restrictions imposed on the legislature by the constitution, these restrictions ought to be disregarded. It is enough to say that the people have thought otherwise. They have, most wisely, chosen to take the risk of occasional inconvenience from the want of power, in order that there might be a settled limit to its exercise, and a permanent security against its abuse. They have imposed prohibitions and restraints, and they have not rendered these altogether vain and nugatory by conferring the power of dispensation. If inconvenience should arise which the legislature cannot remedy under the power conferred upon it, it is not answerable for such inconvenience. That which it cannot do within the limits prescribed to it, it cannot do at all. No legislature in this country is able, and may the time never come when it shall be able, to apply to itself the memorable expression of a Roman pontiff: *Licet hoc de jure non possumus, volumus tamen de plenitudine potestatis.*

The case before the court is not of ordinary importance, nor of every-day occurrence. It affects not this college only, but every college and all the literary institutions of the country. They have flourished hitherto, and have become in a high degree respectable and useful to the community. They have all a common principle of existence,—the inviolability of their charters. It will be a dangerous—a most dangerous—experiment to hold these institutions subject to the rise and fall of popular parties, and the

fluctuations of political opinions. If the franchise may be at any time taken away or impaired, the property also may be taken away or its use perverted. Benefactors will have no certainty of effecting the object of their bounty, and learned men will be deterred from devoting themselves to the service of such institutions from the precarious title of their offices. Colleges and halls will be deserted by all better spirits, and become a theater for the contentions of politics. Party and faction will be cherished in the places consecrated to piety and learning. These consequences are neither remote nor possible only. They are certain and immediate.

When the court in North Carolina declared the law of the state, which repealed a grant to its university, unconstitutional and void, the legislature had the candor and the wisdom to repeal the law. This example, so honorable to the state which exhibited it, is most fit to be followed on this occasion. And there is good reason to hope that a state which has hitherto been so much distinguished for temperate counsels, cautious legislation, and regard to law will not fail to adopt a course which will accord with her highest and best interests, and in no small degree elevate her reputation.

It was for many and obvious reasons most anxiously desired that the question of the power of the legislature over this charter should have been finally decided in the state court. An earnest hope was entertained that the judges of the court might have viewed the case in a light favorable to the rights of the trustees. That hope has failed. It is here that those rights are now to be maintained, or they are prostrated forever. *Omnia alia perfugia bonorum, subsidia, consilia, auxilia, jura ceciderunt. Quem enim alium appellem? quem obtester? quem implorem? Nisi hoc loco, nisi apud vos, nisi per vos, judices, salutem nostram, quæ spe exigua extremaque pendet, tenuerimus; nihil est præterea quo confugere possimus.*

ARGUMENT IN PROSECUTION OF JOHN FRANCIS KNAPP FOR THE MURDER OF JOSEPH WHITE, AT SALEM, MASSACHUSETTS, 1830.

STATEMENT.

On the morning of April 7, 1830, Joseph White, a respectable and wealthy merchant of Salem, Mass., eighty-two years of age, was found in his bed, murdered. The bed clothes were turned down, and the dead man's night clothes and bed were drenched with blood from thirteen deep stabs, apparently made by a sharp dirk or poniard, and a heavy blow on the left temple, which had fractured the skull. The body was cold, and appeared to have been lifeless many hours. On examining the house it did not appear that any valuable articles had been taken. The crime excited great public alarm, which was further increased by reports of highway robbery in the neighborhood. Large rewards were offered, and a committee of vigilance was appointed for the detection of the offenders. For several weeks not the slightest clue was found to the mystery. At length a rumor reached the vigilance committee that a prisoner named Hatch, who had been committed, before the murder, to the jail at New Bedford, seventy miles from Salem, for shoplifting, could make important disclosures. On communication with Hatch, he stated that, some months before the murder, while he was at large, he had heard Richard Crowninshield, Jr., of Danvers, a young man of bad reputation, who had for several years frequented the haunts of vice in Salem, express his intention of killing Mr. White. On this testimony an indictment was found against Crowninshield. Other witnesses testified that, on the night of the murder, Crowninshield's brother George, Col. Benjamin Selman, of Marblehead, and Daniel Chase, of Lynn, were together in Salem at a gambling house frequented by Richard, and on May 2d these persons were indicted as accomplices in the crime. A fortnight afterwards, Capt. Joseph J. Knapp, a respectable shipmaster and merchant of Salem, received by mail a letter dated Belfast, May 12th, and signed, "Charles Grant, Jr., of Prospect, Me.," demanding a loan of three hundred dollars, and threatening, in the event of noncompliance, to ruin him. "I will merely tell you," the writer added, "that I am acquainted with your brother Franklin, and also the business that was transacted for you on the 2d of April last, and that I think that you was very extravagant in giving one thousand dollars to the person that would execute the business for you." Capt. Knapp knew no one named Charles Grant, and had no acquaintance in Belfast. Unable to solve the enigma, Capt. Knapp and his son Phippen rode to Wenham, seven miles distant, and showed the letter to Capt. Knapp's other two sons, Joseph J. Knapp, Jr., and John Francis Knapp, who were then residing at Wenham with Mrs. Beckford, the niece and late housekeeper of Mr. White, and mother-in-law of Joseph J. Knapp, Jr. The latter, upon reading the letter, told his father that it contained "a devilish lot of trash," and advised him to hand it to the vigilance committee. The following day Joseph J. Knapp, Jr., went to Salem, and requested one of his friends to drop into the Salem post office the two following letters, saying that his father had received an anonymous

letter, and that he wanted to send these letters to "nip this silly affair in the bud":

"May 13, 1830.

"Gentlemen of the Committee of Vigilance: Hearing that you have taken up four young men on suspicion of being concerned in the murder of Mr. White, I think it time to inform you that Steven White came to me one night and told me, if I would remove the old gentleman, he would give me five thousand dollars. He said he was afraid he would alter his will if he lived any longer. I told him I would do it, but I was afeared to go into the house; so he said he would go with me, that he would try to get into the house in the evening and open the window, would then go home and go to bed, and meet me again about eleven. I found him, and we both went into his chamber. I struck him on the head with a heavy piece of lead, and then stabbed him with a dirk. He made the finishing strokes with another. He promised to send me the money next evening, and has not sent it yet, which is the reason that I mention this.

"Yours, etc., Grant."

This letter was directed on the outside to the "Hon. Gideon Barstow, Salem," and put into the post office on Sunday evening, May 16, 1830.

The other letter, addressed to the "Hon. Stephen White, Salem, Mass.," also put into the post office in Salem on Sunday evening, read:

"Lynn, May 12, 1830.

"Mr. White will send the $5,000, or a part of it, before to-morrow night, or suffer the painful consequences.

"N. Claxton, 4th."

The Hon. Stephen White mentioned in these letters was a nephew of Joseph White, and the legatee of the principal part of his large property. The vigilance committee promptly dispatched a messenger to Prospect. Me., who, by means of a decoy letter, soon captured the author of the letter to Joseph J. Knapp. It soon appeared that his true name was Palmer, and that he resided in the adjoining town of Belfast. He had served a term in the state's prison. While protesting his own innocence, he disclosed that he had been an associate of the Crowninshields, and that, on April 2d, from the window of the Crowninshield house, he saw Frank Knapp and a young man named Allen ride up to the house. George walked away with Frank, and Richard with Allen. On their return, George told Richard that Frank wished them to undertake to kill Mr. White, and that Joseph J. Knapp, Jr., would pay $1,000 for the job. They proposed various ways of executing it, and asked Palmer to assist, but he declined. On May 26th, Joseph J. Knapp, Jr., and John Francis Knapp were taken into custody. On the third day after his arrest, Joseph made a full confession. He stated that he knew that Mr. White had made his will, and given to Mrs. Beckford a legacy of fifteen thousand dollars, but, if he died without leaving a will, he expected she would inherit nearly two hundred thousand dollars. In February he made known to his brother his desire to make away with Mr. White, intending first to abstract and destroy the will. Frank agreed to employ an assassin, and negotiated with R. Crowninshield, Jr., who agreed to do the deed for a reward of one thousand dollars. Joseph agreed to pay that sum, and, as he had access to the house at his pleasure, he was to unbar and unfasten the back window, so that Crowninshield might gain easy entrance. Four days before the murder, while they were deliberating on the mode of compassing it, he went into

Mr. White's chamber, and, finding the key in the iron chest, unlocked it, took the will, put it in his chaise box, covered it with hay, carried it to Wenham, kept it till after the murder, and then burned it. After securing the will, he gave notice to Crowninshield that all was ready. In the evening of that day he had a meeting with Crowninshield, at the center of the common, who showed him a bludgeon and dagger, with which the murder was to be committed. Knapp asked him if he meant to do it that night. Crowninshield said he thought not, he did not feel like it. Knapp then went to Wenham. Knapp ascertained on Sunday, the 4th of April, that Mr. White had gone to take tea with a relative in Chestnut street. Crowninshield intended to stab him on his way home in the evening, but Mr. White returned before dark. It was next arranged for the night of the 6th, and Knapp was, on some pretext, to prevail on Mrs. Beckford to visit her daughters at Wenham, and to spend the night there. He said that, all preparations being thus complete, Crowninshield and Frank met about ten o'clock in the evening of the 6th, in Brown street, which passes the rear of the garden of Mr. White, and stood some time in a spot from which they could observe the movements in the house, and perceive when Mr. White and his two servants retired to bed. Crowninshield requested Frank to go home. He did so, but soon returned to the same spot. Crowninshield, in the meantime, had started and passed round through Newbury street and Essex street to the front of the house, entered the postern gate, passed to the rear of the house, placed a plank against the house, climbed to the window, opened it, entered the house alone, passed up the staircase, opened the door of the sleeping chamber, approached the bedside, gave Mr. White a heavy and mortal blow on the head with a bludgeon, and then with a dirk gave him many stabs in his body. Crowninshield said that, after he had "done for the old man," he put his fingers on his pulse to make certain he was dead. He then retired from the house, hurried back through Brown street, where he met Frank, waiting to learn the event. Crowninshield ran down Howard street, a solitary place, and hid the club under the steps of a meeting house. He then went home to Danvers.

Joseph confessed, further, that the account of the Wenham robbery, on the 27th of April, was a sheer fabrication. After the murder Crowninshield went to Wenham in company with Frank to call for the one thousand dollars. Knapp was not able to pay the whole, but gave him one hundred five-franc pieces. Crowninshield related to him the particulars of the murder, and told him where the club was concealed. Joseph sent Frank afterwards to find and destroy the club, but he said he could not find it. When Joseph made the confession, he told the place where the club was concealed, and it was there found. Joseph admitted that he wrote the two anonymous letters.

Palmer was brought to the Salem prison on June 3d, and was put in a cell directly under that in which Richard Crowninshield was confined. While several members of the committee were talking with Palmer in his cell, they heard a whistle and calls of "Palmer! Palmer!" and soon a pencil and slip of paper attached to a string were let down through a crevice which Crowninshield had picked in the mortar between the blocks of the granite floor of his cell. On June 12th, in consequence of further information from Palmer, some stolen goods were found concealed in the Crowninshield barn. On June 15th, Crowninshield committed suicide by hanging himself to the bars of his cell with a handkerchief.

At a special term of the supreme court held at Salem on the 20th of July, the prisoners were brought to trial, John Francis Knapp as principal, and Joseph J. Knapp and Geo. Crowninshield as accessories. John Francis Knapp, the principal, was first put on trial. He was defended with great ability by Franklin Dexter, but was convicted and hanged. To convict the prisoner it was necessary to prove that he was present, actually or constructively, as an aider or abettor in the murder. The evidence was strong that the prisoner was one of the conspirators, and that at the time of the murder he was in the rear of Mr. White's garden, and the jury were evidently satisfied that he was there to aid in the murder. Such, however, it appears from Joseph Knapp's confession, was not the fact. But Joseph, when put on the witness stand, declined to testify against his brother. In consequence, both were convicted and hanged. George Crowninshield proved an alibi, and was discharged.

It may be added that the crime itself was committed under a misapprehension. Joseph Knapp, who had privately read the will, and knew that Mr. White had bequeathed to Mrs. Beckford, his mother-in-law, the sole issue of a deceased sister of Mr. White, much less than one-half of the estate, had been erroneously told that, in case Mr. White died without a will, his mother-in-law would inherit half of the estate. It also appears that, although a will was abstracted, another and subsequent will was found among the murdered man's effects.

ARGUMENT.

I am little accustomed, gentlemen, to the part which I am now attempting to perform. Hardly more than once or twice has it happened to me to be concerned on the side of the government in any criminal prosecution whatever, and never, until the present occasion, in any case affecting life. But I very much regret that it should have been thought necessary to suggest to you that I am brought here to "hurry you against the law and beyond the evidence." I hope I have too much regard for justice, and too much respect for my own character, to attempt either; and were I to make such attempt, I am sure that in this court nothing can be carried against the law, and that gentlemen intelligent and just as you are, are not, by any power, to be hurried beyond the evidence. Though I could well have wished to shun this occasion, I have not felt at liberty to withhold my professional assistance, when it is supposed that I may be in some degree useful in investigating and discovering the truth respecting this most extraordinary murder. It has seemed to be a duty incumbent on me, as on every other citizen, to do my best and my utmost to bring to light the perpetrators of this crime. Against the prisoner at the bar, as an individual, I cannot have the slightest prejudice. I would not do him the smallest injury or injustice. But I do not affect to be indifferent to the discovery and the punishment of this deep guilt. I cheerfully share in the opprobrium, how-

great soever it may be, which is cast on those who feel and manifest an anxious concern that all who had a part in planning, or a hand in executing, this deed of midnight assassination, may be brought to answer for their enormous crime at the bar of public justice.

Gentlemen, it is a most extraordinary case. In some respects it has hardly a precedent anywhere; certainly none in our New England history. This bloody drama exhibited no suddenly excited, ungovernable rage. The actors in it were not surprised by any lion-like temptation springing upon their virtue, and overcoming it, before resistance could begin. Nor did they do the deed to glut savage vengeance, or satiate long-settled and deadly hate. It was a cool, calculating, money-making murder. It was all "hire and salary, not revenge." It was the weighing of money against life; the counting out of so many pieces of silver against so many ounces of blood.

An aged man, without an enemy in the world, in his own house, and in his own bed, is made the victim of a butcherly murder for mere pay. Truly, here is a new lesson for painters and poets. Whosoever shall hereafter draw the portrait of murder, if he will show it as it has been exhibited where such example was last to have been looked for,—in the very bosom of our New England society,—let him not give it the grim visage of Moloch, the brow knitted by revenge, the face black with settled hate, and the blood-shot eye emitting livid fires of malice. Let him draw, rather, a decorous, smooth-faced, bloodless demon; a picture in repose, rather than in action; not so much an example of human nature in its depravity, and in its paroxysms of crime, as an infernal being, a fiend, in the ordinary display and development of his character.

The deed was executed with a degree of self-possession and steadiness equal to the wickedness with which it was planned. The circumstances now clearly in evidence spread out the whole scene before us. Deep sleep had fallen on the destined victim, and on all beneath his roof. A healthful old man, to whom sleep was sweet, the first sound slumbers of the night held him in their soft but strong embrace. The assassin enters, through the window already prepared, into an unoccupied apartment. With noiseless foot he paces the lonely hall, half lighted by the moon. He winds up the ascent of the stairs, and reaches the door of the chamber. Of this he moves the lock, by soft and continued pressure, till it turns on its hinges without noise, and he enters, and beholds his victim before him. The room is uncommonly open to the admis-

sion of light. The face of the innocent sleeper is turned from the murderer, and the beams of the moon, resting on the gray locks of his aged temple, show him where to strike. The fatal blow is given, and the victim passes, without a struggle or a motion, from the repose of sleep to the repose of death! It is the assassin's purpose to make sure work; and he plies the dagger, though it is obvious that life has been destroyed by the blow of the bludgeon. He even raises the aged arm, that he may not fail in his aim at the heart, and replaces it again over the wounds of the poniard! To finish the picture, he explores the wrist for the pulse! He feels for it, and ascertains that it beats no longer! It is accomplished. The deed is done. He retreats, retraces his steps to the window, passes out through it as he came in, and escapes. He has done the murder. No eye has seen him; no ear has heard him. The secret is his own, and it is safe! Ah, gentlemen, that was a dreadful mistake! Such a secret can be safe nowhere. The whole creation of God has neither nook nor corner where the guilty can bestow it and say it is safe. Not to speak of the eye which pierces through all disguises, and beholds everything as in the splendor of noon, such secrets of guilt are never safe from detection, even by men. True it is, generally speaking, that "murder will out." True it is that Providence hath so ordained, and doth so govern things, that those who break the great law of Heaven by shedding man's blood seldom succeed in avoiding discovery. Especially in a case exciting so much attention as this, discovery must come, and will come, sooner or later. A thousand eyes turn at once to explore every man, every thing, every circumstance connected with the time and place; a thousand ears catch every whisper; a thousand excited minds intensely dwell on the scene, shedding all their light, and ready to kindle the slightest circumstance into a blaze of discovery. Meantime the guilty soul cannot keep its own secret. It is false to itself, or, rather, it feels an irresistible impulse of conscience to be true to itself. It labors under its guilty possession, and knows not what to do with it. The human heart was not made for the residence of such an inhabitant. It finds itself preyed on by a torment which it dares not acknowledge to God or man. A vulture is devouring it, and it can ask no sympathy or assistance, either from heaven or earth. The secret which the murderer possesses soon comes to possess him, and, like the evil spirits of which we read, it overcomes him, and leads him whithersoever it will. He feels it beating at his heart, rising to his throat, and demanding disclosure. He thinks the whole world sees it in his face, reads it in his eyes, and almost hears its workings in the

very silence of his thoughts. It has become his master. It betrays his discretion, it breaks down his courage, it conquers his prudence. When suspicions from without begin to embarrass him, and the net of circumstance to entangle him, the fatal secret struggles with still greater violence to burst forth. It must be confessed, it will be confessed; there is no refuge from confession but suicide, and suicide is confession.

Much has been said, on this occasion, of the excitement which has existed and still exists, and of the extraordinary measures taken to discover and punish the guilty. No doubt there has been, and is, much excitement, and strange, indeed, it would be had it been otherwise. Should not all the peaceable and well-disposed naturally feel concerned, and naturally exert themselves to bring to punishment the authors of this secret assassination? Was it a thing to be slept upon or forgotten? Did you, gentlemen, sleep quite as quietly in your beds after this murder as before? Was it not a case for rewards, for meetings, for committees, for the united efforts of all the good to find out a band of murderous conspirators, of midnight ruffians, and to bring them to the bar of justice and law? If this be excitement, is it an unnatural or an improper excitement?

It seems to me, gentlemen, that there are appearances of another feeling, of a very different nature and character, not very extensive, I would hope, but still there is too much evidence of its existence. Such is human nature that some persons lose their abhorrence of crime in their admiration of its magnificent exhibitions. Ordinary vice is reprobated by them; but extraordinary guilt, exquisite wickedness, the high flights and poetry of crime seize on the imagination, and lead them to forget the depths of the guilt in admiration of the excellence of the performance, or the unequaled atrocity of the purpose. There are those in our day who have made great use of this infirmity of our nature, and by means of it done infinite injury to the cause of good morals. They have affected not only the taste, but I fear also the principles, of the young, the heedless, and the imaginative, by the exhibition of interesting and beautiful monsters. They render depravity attractive, sometimes by the polish of its manners, and sometimes by its very extravagance, and study to show off crime under all the advantages of cleverness and dexterity. Gentlemen, this is an extraordinary murder, but it is still a murder. We are not to lose ourselves in wonder at its origin, or in gazing on its cool and skillful execution. We are to detect and to punish it; and while we proceed with caution against the prisoner, and are to be sure

that we do not visit on his head the offenses of others, we are yet to consider that we are dealing with a case of most atrocious crime, which has not the slightest circumstance about it to soften its enormity. It is murder; deliberate, concerted, malicious murder. Although the interest of this case may have diminished by the repeated investigation of the facts, still the additional labor which it imposes upon all concerned is not to be regretted if it should result in removing all doubts of the guilt of the prisoner.

The learned counsel for the prisoner has said truly that it is your individual duty to judge the prisoner; that it is your individual duty to determine his guilt or innocence; and that you are to weigh the testimony with candor and fairness. But much, at the same time, has been said, which, although it would seem to have no distinct bearing on the trial, cannot be passed over without some notice. A tone of complaint so peculiar has been indulged as would almost lead us to doubt whether the prisoner at the bar, or the managers of this prosecution, are now on trial. Great pains have been taken to complain of the manner of the prosecution. We hear of getting up a case; of setting in motion trains of machinery; of foul testimony; of combinations to overwhelm the prisoner; of private prosecutors; that the prisoner is hunted, persecuted, driven to his trial; that everybody is against him; and various other complaints, as if those who would bring to punishment the authors of this murder were almost as bad as they who committed it. In the course of my whole life, I have never heard before so much said about the particular counsel who happen to be employed; as if it were extraordinary that other counsel than the usual officers of the government should assist in the management of a case on the part of the government. In one of the last criminal trials in this county, that of Jackman for the "Goodridge robbery" (so called), I remember that the learned head of the Suffolk bar, Mr. Prescott, came down in aid of the officers of the government. This was regarded as neither strange nor improper. The counsel for the prisoner, in that case contented themselves with answering his arguments, as far as they were able, instead of carping at his presence.

Complaint is made that rewards were offered in this case, and temptations held out, to obtain testimony. Are not rewards always offered when great and secret offenses are committed? Rewards were offered in the case to which I have alluded, and every other means taken to discover the offenders that ingenuity or the most persevering vigilance could suggest. The learned counsel have suffered their zeal to lead them into a strain of complaint at

the manner in which the perpetrators of this crime were detected, almost indicating that they regard it as a positive injury to them to have found out their guilt. Since no man witnessed it, since they do not now confess it, attempts to discover it are half esteemed as officious intermeddling and impertinent inquiry. It is said that here even a committee of vigilance was appointed. This is a subject of reiterated remark. This committee are pointed at as though they had been officiously intermeddling with the administration of justice. They are said to have been "laboring for months" against the prisoner. Gentlemen, what must we do in such a case? Are people to be dumb and still, through fear of overdoing? Is it come to this: that an effort cannot be made, a hand cannot be lifted, to discover the guilty, without its being said there is a combination to overwhelm innocence? Has the community lost all moral sense? Certainly, a community that would not be roused to action upon an occasion such as this was—a community which should not deny sleep to their eyes, and slumber to their eyelids, till they had exhausted all the means of discovery and detection—must indeed be lost to all moral sense, and would scarcely deserve protection from the laws. The learned counsel have endeavored to persuade you that there exists a prejudice against the persons accused of this murder. They would have you understand that it is not confined to this vicinity alone, but that even the legislature have caught this spirit; that, through the procurement of the gentleman here styled "private prosecutor," who is a member of the senate, a special session of this court was appointed for the trial of these offenders; that the ordinary movements of the wheels of justice were too slow for the purposes devised. But does not everybody see and know that it was matter of absolute necessity to have a special session of the court? When or how could the prisoners have been tried without a special session? In the ordinary arrangement of the courts, but one week in a year is allotted for the whole court to sit in this county. In the trial of all capital offenses, a majority of the court, at least, is required to be present. In the trial of the present case alone, three weeks have already been taken up. Without such special session, then, three years would not have been sufficient for the purpose. It is answer sufficient to all complaints on this subect to say that the law was drawn by the late chief justice himself,[1] to enable the court to accomplish its duties, and to afford the persons accused an opportunity for trial without delay.

[1] Chief Justice Parker.

Again, it is said that it was not thought of making Francis Knapp, the prisoner at the bar, a principal till after the death of Richard Crowninshield, Jr.; that the present indictment is an afterthought; that "testimony was got up" for the occasion. It is not so. There is no authority for this suggestion. The case of the Knapps had not then been before the grand jury. The officers of the government did not know what the testimony would be against them. They could not, therefore, have determined what course they should pursue. They intended to arraign all as principals who should appear to have been principals, and all as accessories who should appear to have been accessories. All this could be known only when the evidence should be produced.

But the learned counsel for the defendant take a somewhat loftier flight still. They are more concerned, they assure us, for the law itself, than even for their client. Your decision in this case, they say, will stand as a precedent. Gentlemen, we hope it will. We hope it will be a precedent both of candor and intelligence, of fairness and of firmness; a precedent of good sense and honest purpose pursuing their investigation discreetly, rejecting loose generalities, exploring all the circumstances, weighing each, in search of truth, and embracing and declaring the truth when found. It is said that "laws are made, not for the punishment of the guilty, but for the protection of the innocent." This is not quite accurate, perhaps, but, if so, we hope they will be so administered as to give that protection. But who are the innocent whom the law would protect? Gentlemen, Joseph White was innocent. They are innocent who, having lived in the fear of God through the day, wish to sleep in His peace through the night, in their own beds. The law is established that those who live quietly may sleep quietly; that they who do no harm may feel none. The gentleman can think of none that are innocent except the prisoner at the bar, not yet convicted. Is a proved conspirator to murder innocent? Are the Crowninshields and the Knapps innocent? What is innocence? How deep stained with blood, how reckless in crime, how deep in depravity may it be, and yet retain innocence? The law is made, if we would speak with entire accuracy, to protect the innocent by punishing the guilty. But there are those innocent out of a court, as well as in; innocent citizens not suspected of crime, as well as innocent prisoners at the bar.

The criminal law is not founded in a principle of vengeance. It does not punish that it may inflict suffering. The humanity of the law feels and regrets every pain it causes, every hour of restraint it imposes, and, more deeply still, every life it forfeits. But

it uses evil as the means of preventing greater evil. It seeks to deter from crime by the example of punishment. This is its true, and only true, main object. It restrains the liberty of the few offenders, that the many who do not offend may enjoy their liberty. It takes the life of the murderer, that other murders may not be committed. The law might open the jails, and at once set free all persons accused of offenses, and it ought to do so if it could be made certain that no other offenses would hereafter be committed; because it punishes, not to satisfy any desire to inflict pain, but simply to prevent the repetition of crimes. When the guilty, therefore, are not punished, the law has so far failed of its purpose; the safety of the innocent is so far endangered. Every unpunished murder takes away something from the security of every man's life. Whenever a jury, through whimsical and ill-founded scruples, suffer the guilty to escape, they make themselves answerable for the augmented danger of the innocent.

We wish nothing to be strained against this defendant. Why, then, all this alarm? Why all this complaint against the manner in which the crime is discovered? The prisoner's counsel catch at supposed flaws of evidence, or bad character of witnesses, without meeting the case. Do they mean to deny the conspiracy? Do they mean to deny that the two Crowninshields and the two Knapps were conspirators? Why do they rail against Palmer, while they do not disprove, and hardly dispute, the truth of any one fact sworn to by him? Instead of this, it is made matter of sentimentality that Palmer has been prevailed upon to betray his bosom companions, and to violate the sanctity of friendship. Again I ask, why do they not meet the case? If the fact is out, why not meet it? Do they mean to deny that Captain White is dead? One would have almost supposed even that, from some remarks that have been made. Do they mean to deny the conspiracy? Or, admitting a conspiracy, do they mean to deny only that Frank Knapp, the prisoner at the bar, was abetting in the murder, being present, and so deny that he was a principal? If a conspiracy is proved, it bears closely upon every subsequent subject of inquiry. Why do they not come to the fact? Here the defense is wholly indistinct. The counsel neither take the ground nor abandon it. They neither fly nor light,—they hover. But they must come to a closer mode of contest. They must meet the facts, and either deny or admit them. Had the prisoner at the bar, then, a knowledge of this conspiracy or not? This is the question. Instead of laying out their strength in complaining of the manner in which the deed is discovered, of the extraordinary

pains taken to bring the prisoner's guilt to light, would it not be better to show there was no guilt? Would it not be better to show his innocence? They say, and they complain, that the community feel a great desire that he should be punished for his crimes. Would it not be better to convince you that he has committed no crime?

Gentlemen, let us now come to the case. Your first inquiry on the evidence will be, was Captain White murdered in pursuance of a conspiracy, and was the defendant one of this conspiracy? If so, the second inquiry is, was he so connected with the murder itself as that he is liable to be convicted as a principal? The defendant is indicted as a principal. If not guilty as such, you cannot convict him. The indictment contains three distinct classes of counts. In the first, he is charged as having done the deed with his own hand; in the second, as an aider and abettor to Richard Crowninshield, Jr., who did the deed; in the third, as an aider and abettor to some person unknown. If you believe him guilty on either of these counts, or in either of these ways, you must convict him. It may be proper to say, as a preliminary remark, that there are two extraordinary circumstances attending this trial. One is that Richard Crowninshield, Jr., the supposed immediate perpetrator of the murder, since his arrest, has committed suicide. He has gone to answer before a tribunal of perfect infallibility. The other is that Joseph Knapp, the supposed originator and planner of the murder, having once made a full disclosure of the facts under a promise of indemnity, is, nevertheless, not now a witness. Notwithstanding his disclosure and his promise of indemnity, he now refuses to testify. He chooses to return to his original state, and now stands answerable himself when the time shall come for his trial. These circumstances it is fit you should remember in your investigation of the case. Your decision may affect more than the life of this defendant. If he be not convicted as principal, no one can be. Nor can any one be convicted of a participation in the crime as accessory. The Knapps and George Crowninshield will be again on the community. This shows the importance of the duty you have to perform, and serves to remind you of the care and wisdom necessary to be exercised in its performance. But certainly these considerations do not render the prisoner's guilt any clearer, nor enhance the weight of the evidence against him. No one desires you to regard consequences in that light. No one wishes anything to be strained or too far pressed against the prisoner. Still, it is fit

you should see the full importance of the duty which devolves upon you.

And now, gentlemen, in examining this evidence, let us begin at the beginning, and see, first, what we know independent of the disputed testimony. This is a case of circumstantial evidence; and these circumstances, we think, are full and satisfactory. The case mainly depends upon them, and it is common that offenses of this kind must be proved in this way. Midnight assassins take no witnesses. The evidence of the facts relied on has been somewhat sneeringly denominated by the learned counsel "circumstantial stuff," but it is not such stuff as dreams are made of. Why does he not rend this stuff? Why does he not scatter it to the winds? He dismisses it a little too summarily. It shall be my business to examine this stuff, and try its cohesion. The letter from Palmer at Belfast, is that no more than flimsy stuff? The fabricated letters from Knapp to the committee and to Mr. White, are they nothing but stuff? The circumstance that the housekeeper was away at the time the murder was committed, as it was agreed she should be, is that, too, a useless piece of the same stuff? The facts that the key of the chamber door was taken out and secreted, that the window was unbarred and unbolted, are these to be so slightly and so easily disposed of?

It is necessary, gentlemen, to settle now, at the commencement, the great question of a conspiracy. If there was none, or the defendant was not a party, then there is no evidence here to convict him. If there was a conspiracy, and he is proved to have been a party, then these two facts have a strong bearing on others, and all the great points of inquiry. The defendant's counsel take no distinct ground, as I have already said, on this point, either to admit or to deny. They choose to confine themselves to a hypothetical mode of speech. They say, supposing there was a conspiracy, *non sequitur* that the prisoner is guilty as principal. Be it so. But still, if there was a conspiracy, and if he was a conspirator, and helped to plan the murder, this may shed much light on the evidence which goes to charge him with the execution of that plan. We mean to make out the conspiracy, and that the defendant was a party to it, and then to draw all just inferences from these facts. Let me ask your attention, then, in the first place, to those appearances, on the morning after the murder, which have a tendency to show that it was done in pursuance of a preconcerted plan of operation. What are they? A man was found murdered in his bed. No stranger had done the deed; no one unacquainted with the house had done it. It was apparent that

somebody within had opened, and that somebody without had entered. There had obviously and certainly been concert and co-operation. The inmates of the house were not alarmed when the murder was perpetrated. The assassin had entered without any riot or any violence. He had found the way prepared before him. The house had been previously opened. The window was unbarred from within, and its fastening unscrewed. There was a lock on the door of the chamber in which Mr. White slept, but the key was gone. It had been taken away and secreted. The footsteps of the murderer were visible, out doors, tending towards the window. The plank by which he entered the window still remained. The road he pursued had been thus prepared for him. The victim was slain, and the murderer had escaped. Everything indicated that somebody within had co-operated with somebody without. Everything proclaimed that some of the inmates, or somebody having access to the house, had had a hand in the murder. On the face of the circumstances, it was apparent, therefore, that this was a premeditated, concerted murder; that there had been a conspiracy to commit it. Who, then, were the conspirators? If not now found out, we are still groping in the dark, and the whole tragedy is still a mystery. If the Knapps and the Crowninshields were not the conspirators in this murder, then there is a whole set of conspirators not yet discovered. Because, independent of the testimony of Palmer and Leighton, independent of all disputed evidence, we know, from uncontroverted facts, that this murder was, and must have been, the result of concert and co-operation between two or more. We know it was not done without plan and deliberation. We see that whoever entered the house to strike the blow was favored and aided by some one who had been previously in the house, without suspicion, and who had prepared the way. This is concert; this is co-operation; this is conspiracy. If the Knapps and the Crowninshields, then, were not the conspirators, who were? Joseph Knapp had a motive to desire the death of Mr. White, and that motive has been shown. He was connected by marriage with the family of Mr. White. His wife was the daughter of Mrs. Beckford, who was the only child of a sister of the deceased. The deceased was more than eighty years old, and had no children. His only heirs were nephews and nieces. He was supposed to be possessed of a very large fortune, which would have descended, by law, to his several nephews and nieces in equal shares, or, if there was a will, then according to the will; but as he had but two branches of heirs,—the children of his brother, Henry White, and of Mrs. Beckford,—each of these

branches, according to the common idea, would have shared one-half of his property. This popular idea is not legally correct; but it is common, and very probably was entertained by the parties. According to this idea, Mrs. Beckford, on Mr. White's death without a will, would have been entitled to one-half of his ample fortune, and Joseph Knapp had married one of her three children. There was a will, and this will gave the bulk of the property to others; and we learn from Palmer than one part of the design was to destroy the will before the murder was committed. There had been a previous will, and that previous will was known or believed to have been more favorable than the other to the Beckford family; so that, by destroying the last will, and destroying the life of the testator at the same time, either the first and more favorable will would be set up, or the deceased would have no will, which would be, as was supposed, still more favorable. But the conspirators not having succeeded in obtaining and destroying the last will, though they accomplished the murder, that will being found in existence and safe, and that will bequeathing the mass of the property to others, it seemed at the time impossible for Joseph Knapp, as for any one else, indeed, but the principal devisee, to have any motive which should lead to the murder. The key which unlocks the whole mystery is the knowledge of the intention of the conspirators to steal the will. This is derived from Palmer, and it explains all. It solves the whole marvel. It shows the motive which actuated those against whom there is much evidence, but who, without the knowledge of this intention, were not seen to have had a motive. This intention is proved, as I have said, by Palmer; and it is so congruous with all the rest of the case—it agrees so well with all facts and circumstances —that no man could well withhold his belief, though the facts were stated by a still less credible witness. If one desirous of opening a lock turns over and tries a bunch of keys till he finds one that will open it, he naturally supposes he has found the key of that lock. So, in explaining circumstances of evidence which are apparently irreconcilable or unaccountable, if a fact be suggested which at once accounts for all, and reconciles all, by whomsoever it may be stated, it is still difficult not to believe that such fact is the true fact belonging to the case. In this respect, Palmer's testimony is singularly confirmed. If it were false, his ingenuity could not furnish us such clear exposition of strange appearing circumstances. Some truth not before known can alone do that.

When we look back, then, to the state of things immediately on the discovery of the murder, we see that suspicion would nat-

urally turn at once, not to the heirs at law, but to those principally benefited by the will. They, and they alone, would be supposed or seem to have a direct object for wishing Mr. White's life to be terminated. And, strange as it may seem, we find counsel now insisting that, if no apology, it is yet mitigation of the atrocity of the Knapps' conduct in attempting to charge this foul murder on Mr. White, the nephew and principal devisee, that public suspicion was already so directed! As if assassination of character were excusable in proportion as circumstances may render it easy! Their endeavors, when they knew they were suspected themselves, to fix the charge on others, by foul means and by falsehood, are fair and strong proof of their own guilt. But more of that hereafter.

The counsel say that they might safely admit that Richard Crowninshield, Jr., was the perpetrator of this murder. But how could they safely admit that? If that were admitted, everything else would follow. For why should Richard Crowninshield, Jr., kill Mr. White? He was not his heir nor his devisee; nor was he his enemy. What could be his motive? If Richard Crowninshield, Jr., killed Mr. White, he did it at some one's procurement, who himself had a motive; and who, having any motive, is shown to have had any intercourse with Richard Crowninshield, Jr., but Joseph Knapp, and this principally through the agency of the prisoner at the bar? It is the infirmity, the distressing difficulty, of the prisoner's case, that his counsel cannot and dare not admit what they yet cannot disprove, and what all must believe. He who believes, on this evidence, that Richard Crowninshield, Jr., was the immediate murderer, cannot doubt that both the Knapps were conspirators in that murder. The counsel, therefore, are wrong, I think, in saying they might safely admit this. The admission of so important and so connected a fact would render it impossible to contend further against the proof of the entire conspiracy, as we state it. What, then, was this conspiracy? J. J. Knapp, Jr., desirous of destroying the will, and of taking the life of the deceased, hired a ruffian, who, with the aid of other ruffians, was to enter the house, and murder him in his bed. As far back as January this conspiracy began. Endicott testifies to a conversation with J. J. Knapp at that time, in which Knapp told him that Captain White had made a will, and given the principal part of his property to Stephen White. When asked how he knew, he said: "Black and white don't lie." When asked if the will was not locked up, he said: "There is such a thing as two keys to the same lock." And, speaking of

the then late illness of Captain White, he said that Stephen White would not have been sent for if he had been there. Hence it appears that, as early as January, Knapp had a knowledge of the will, and that he had access to it by means of false keys. This knowledge of the will, and an intent to destroy it, appear also from Palmer's testimony,—a fact disclosed to him by the other conspirators. He says that he was informed of this by the Crowninshields on the 2d of April. But then it is said that Palmer is not to be credited; that, by his own confession, he is a felon; that he has been in the state prison in Maine; and, above all, that he was intimately associated with these conspirators themselves. Let us admit these facts; let us admit him to be as bad as they would represent him to be; still, in law, he is a competent witness. How else are the secret designs of the wicked to be proved but by their wicked companions, to whom they have disclosed them? The government does not select its witnesses. The conspirators themselves have chosen Palmer. He was the confidant of the prisoners. The fact, however, does not depend on his testimony alone. It is corroborated by other proof, and, taken in connection with the other circumstances, it has strong probability. In regard to the testimony of Palmer, generally, it may be said that it is less contradicted, in all parts of it, either by himself or others, than that of any other material witness, and that everything he has told is corroborated by other evidence, so far as it is susceptible of confirmation. An attempt has been made to impair his testimony as to his being at the Halfway House on the night of the murder; you have seen with what success. Mr. Babb is called to contradict him. You have seen how little he knows, and even that not certainly; for he himself is proved to have been in an error by supposing Palmer to have been at the Halfway House on the evening of the 9th of April. At that time he is proved to have been at Dustin's, in Danvers. If, then, Palmer, bad as he is, has disclosed the secrets of the conspiracy, and has told the truth, there is no reason why it should not be believed. Truth is truth, come whence it may.

The facts show that this murder had been long in agitation; that it was not a new proposition on the 2d of April; that it had been contemplated for five or six weeks. Richard Crowninshield was at Wenham in the latter part of March, as testified by Starrett. Frank Knapp was at Danvers in the latter part of February, as testified by Allen. Richard Crowninshield inquired whether Captain Knapp was about home when at Wenham. The probability is that they would open the case to Palmer as a new project.

There are other circumstances that show it to have been some weeks in agitation. Palmer's testimony as to the transaction on the 2d of April is corroborated by Allen, and by Osborn's books. He says that Frank Knapp came there in the afternoon, and again in the evening. So the book shows. He says that Captain White had gone out to his farm on that day. So others prove. How could this fact, or these facts, have been known to Palmer, unless Frank Knapp had brought the knowledge? And was it not the special object of this visit to give information of this fact, that they might meet him and execute their purpose on his return from his farm? The letter of Palmer, written at Belfast, bears intrinsic marks of genuineness. It was mailed at Belfast May 13th. It states facts that he could not have known unless his testimony be true. This letter was not an afterthought; it is a genuine narrative. In fact, it says: "I know the business your brother Frank was transacting on the 2d of April." How could he have possibly known this unless he had been there? The "one thousand dollars that was to be paid,"—where could he have obtained this knowledge? The testimony of Endicott, of Palmer, and these facts are to be taken together; and they most clearly show that the death of Captain White was caused by somebody interested in putting an end to his life.

As to the testimony of Leighton, as far as manner of testifying goes, he is a bad witness; but it does not follow from this that he is not to be believed. There are some strange things about him. It is strange that he should make up a story against Captain Knapp, the person with whom he lived; that he never voluntarily told anything,—all that he has said was screwed out of him. But the story could not have been invented by him; his character for truth is unimpeached; and he intimated to another witness, soon after the murder happened, that he knew something he should not tell. There is not the least contradiction in his testimony, though he gives a poor account of withholding it. He says that he was extremely bothered by those who questioned him. In the main story that he relates he is entirely consistent with himself. Some things are for him, and some against him. Examine the intrinsic probability of what he says. See if some allowance is not to be made for him on account of his ignorance of things of this kind. It is said to be extraordinary that he should have heard just so much of the conversation, and no more; that he should have heard just what was necessary to be proved, and nothing else. Admit that this is extraordinary; still, this does not prove it untrue. It is extraordinary that you twelve gentlemen

should be called upon, out of all the men in the county, to decide this case. No one could have foretold this three weeks since. It is extraordinary that the first clew to this conspiracy should have been derived from information given by the father of the prisoner at the bar. And in every case that comes to trial there are many things extraordinary. The murder itself is a most extraordinary one; but still we do not doubt its reality.

It is argued that this conversation between Joseph and Frank could not have been as Leighton has testified, because they had been together for several hours before; this subject must have been uppermost in their minds, whereas this appears to have been the commencement of their conversation upon it. Now this depends altogether upon the tone and manner of the expression; upon the particular word in the sentence which was emphatically spoken. If he had said, "When did you *see* Dick, Frank?" this would not seem to be the beginning of the conversation. With what emphasis it was uttered it is not possible to learn, and therefore nothing can be made of this argument. If this boy's testimony stood alone, it should be received with caution. And the same may be said of the testimony of Palmer. But they do not stand alone. They furnish a clew to numerous other circumstances, which, when known, mutually confirm what would have been received with caution without such corroboration. How could Leighton have made up this conversation? "When did you see Dick? I saw him this morning. When is he going to kill the old man? I don't know. Tell him, if he don't do it soon, I won't pay him." Here is a vast amount in a few words. Had he wit enough to invent this? There is nothing so powerful as truth, and often nothing so strange. It is not even suggested that the story was made for him. There is nothing so extraordinary in the whole matter as it would have been for this ignorant country boy to invent this story.

The acts of the parties themselves furnish strong presumption of their guilt. What was done on the receipt of the letter from Maine? This letter was signed by Charles Grant, Jr., a person not known to either of the Knapps, nor was it known to them that any other person besides the Crowninshields knew of the conspiracy. This letter, by the accidental omission of the word "Jr.," fell into the hands of the father, when intended for the son. The father carried it to Wenham, where both the sons were. They both read it. Fix your eye steadily on this part of the "circumstantial stuff" which is in the case, and see what can be made of it. This was shown to the two brothers on Saturday, the 15th of

May. Neither of them knew Palmer, and, if they had known him, they could not have known him to have been the writer of this letter. It was mysterious to them how any one at Belfast could have had knowledge of this affair. Their conscious guilt prevented due circumspection. They did not see the bearing of its publication. They advised their father to carry it to the committee of vigilance, and it was so carried. On the Sunday following, Joseph began to think there might be something in it. Perhaps, in the meantime, he had seen one of the Crowninshields. He was apprehensive that they might be suspected. He was anxious to turn attention from their family. What course did he adopt to effect this? He addressed one letter, with a false name, to Mr. White, and another to the committee, and, to complete the climax of his folly, he signed the letter addressed to the committee. "Grant," the same name as that which was signed to the letter received from Belfast. It was in the knowledge of the committee that no person but the Knapps had seen this letter from Belfast, and that no other person knew its signature. It therefore must have been irresistibly plain to them that one of the Knapps was the writer of the letter received by the committee, charging the murder on Mr. White. Add to this the fact of its having been dated at Lynn, and mailed at Salem four days after it was dated, and who could doubt respecting it? Have you ever read or known of folly equal to this? Can you conceive of crime more odious and abominable? Merely to explain the apparent mysteries of the letter from Palmer, they excite the basest suspicions against a man whom, if they were innocent, they had no reason to believe guilty, and whom, if they were guilty, they most certainly knew to be innocent. Could they have adopted a more direct method of exposing their own infamy? The letter to the committee has intrinsic marks of a knowledge of this transaction. It tells the time and the manner in which the murder was committed. Every line speaks the writer's condemnation. In attempting to divert attention from his family, and to charge the guilt upon another, he indelibly fixes it upon himself. Joseph Knapp requested Allen to put these letters into the post office, because, said he, "I wish to nip this silly affair in the bud." If this were not the order of an overruling Providence, I should say that it was the silliest piece of folly that was ever practiced. Mark the destiny of crime. It is ever obliged to resort to subterfuges; it trembles in the broad light; it betrays itself in seeking concealment. He alone walks safely who walks uprightly. Who for a moment can read these letters and doubt of Joseph Knapp's guilt?

The constitution of nature is made to inform against him. There is no corner dark enough to conceal him. There is no turnpike road broad enough or smooth enough for a man so guilty to walk in without stumbling. Every step proclaims his secret to every passenger. His own acts come out to fix his guilt. In attempting to charge another with his own crime, he writes his own confession. To do away the effect of Palmer's letter, signed "Grant," he writes a letter himself, and affixes to it the name of Grant. He writes in a disguised hand. But how could it happen that the same Grant should be in Salem that was at Belfast? This has brought the whole thing out. Evidently he did it, because he has adopted the same style. Evidently he did it, because he speaks of the price of blood, and of other circumstances connected with the murder, that no one but a conspirator could have known.

Palmer says he made a visit to the Crowninshields on the 9th of April. George then asked him whether he had heard of the murder. Richard inquired whether he had heard the music at Salem. They said that they were suspected, that a committee had been appointed to search houses, and that they had melted up the dagger the day after the murder, because it would be a suspicious circumstance to have it found in their possession. Now, this committee was not appointed, in fact, until Friday evening. But this proves nothing against Palmer; it does not prove that George did not tell him so; it only proves that he gave a false reason for a fact. They had heard that they were suspected. How could they have heard this unless it were from the whisperings of their own consciences? Surely this rumor was not then public.

About the 27th of April, another attempt was made by the Knapps to give a direction to public suspicion. They reported themselves to have been robbed, in passing from Salem to Wenham, near Wenham pond. They came to Salem and stated the particulars of the adventure. They described persons, their dress, size, and appearance, who had been suspected of the murder. They would have it understood that the community was infested by a band of ruffians, and that they themselves were the particular objects of their vengeance. Now, this turns out to be all fictitious, all false. Can you conceive of anything more enormous—any wickedness greater—than the circulation of such reports? than the allegation of crimes, if committed, capital? If no such crime had been committed, then it reacts with double force upon themselves, and goes very far to show their guilt. How did they conduct themselves on this occasion? Did they make hue and cry? Did they give information that they had been assaulted that night at

Wenham? No such thing. They rested quietly that night; they waited to be called on for the particulars of their adventure; they made no attempt to arrest the offenders,—this was not their object. They were content to fill the thousand mouths of rumor, to spread abroad false reports, to divert the attention of the public from themselves; for they thought every man suspected them, because they knew they ought to be suspected.

The manner in which the compensation for this murder was paid is a circumstance worthy of consideration. By examining the facts and dates it will satisfactorily appear that Joseph Knapp paid a sum of money to Richard Crowninshield, in five-franc pieces, on the 24th of April. On the 21st of April, Joseph Knapp received five hundred five-franc pieces as the proceeds of an adventure at sea. The remainder of this species of currency that came home in the vessel was deposited in a bank at Salem. On Saturday, the 24th of April, Frank and Richard rode to Wenham. They were there with Joseph an hour or more, and appeared to be negotiating private business. Richard continued in the chaise. Joseph came to the chaise and conversed with him. These facts are proved by Hart and Leighton, and by Osborn's books. On Saturday evening, about this time, Richard Crowninshield is proved, by Lummus, to have been at Wenham with another person, whose appearance corresponds with Frank's. Can any one doubt this being the same evening? What had Richard Crowninshield to do at Wenham with Joseph, unless it were this business? He was there before the murder; he was there after the murder; he was there clandestinely, unwilling to be seen. If it were not upon this business, let it be told what it was for. Joseph Knapp could explain it. Frank Knapp might explain it. But they do not explain it, and the inference is against them. Immediately after this, Richard passes five-franc pieces,—on the same evening, one to Lummus, five to Palmer,—and, near this time, George passes three or four in Salem. Here are nine of these pieces passed by them in four days. This is extraordinary. It is an unusual currency. In ordinary business, few men would pass nine such pieces in the course of a year. If they were not received in this way, why not explain how they came by them? Money was not so flush in their pockets that they could not tell whence it came, if it honestly came there. It is extremely important to them to explain whence this money came, and they would do it if they could. If, then, the price of blood was paid at this time, in the presence and with the knowledge of this defendant,

does not this prove him to have been connected with this conspiracy?

Observe, also, the effect on the mind of Richard of Palmer's being arrested and committed to prison; the various efforts he makes to discover the fact; the lowering, through the crevices of the rock, the pencil and paper for him to write upon; the sending two lines of poetry, with the request that he would return the corresponding lines; the shrill and peculiar whistle; the inimitable exclamations of "Palmer! Palmer! Palmer!" All these things prove how great was his alarm. They corroborate Palmer's story, and tend to establish the conspiracy.

Joseph Knapp had a part to act in this matter. He must have opened the window, and secreted the key. He had free access to every part of the house; he was accustomed to visit there; he went in and out at his pleasure; he could do this without being suspected. He is proved to have been there the Saturday preceding.

If all these things, taken in connection, do not prove that Captain White was murdered in pursuance of a conspiracy, then the case is at an end.

Savary's testimony is wholly unexpected. He was called for a different purpose. When asked who the person was that he saw come out of Captain White's yard between three and four o'clock in the morning, he answered Frank Knapp. It is not clear that this is not true. There may be many circumstances of importance connected with this, though we believe the murder to have been committed between ten and eleven o'clock. The letter to Dr. Barstow states it to have been done about eleven o'clock; it states it to have been done with a blow on the head, from a weapon loaded with lead. Here is too great a correspondence with the reality not to have some meaning in it. Dr. Peirson was always of the opinion that the two classes of wounds were made with different instruments, and by different hands. It is possible that one class was inflicted at one time, and the other at another. It is possible that, on the last visit, the pulse might not have entirely ceased to beat, and then the finishing stroke was given. It is said that, when the body was discovered, some of the wounds wept, while the others did not. They may have been inflicted from mere wantonness. It was known that Captain White was accustomed to keep specie by him in his chamber. This perhaps may explain the last visit. It is proved that this defendant was in the habit of retiring to bed, and leaving it afterwards, without the knowledge of his family. Perhaps he did so on this occasion.

We see no reason to doubt the fact; and it does not shake our belief that the murder was committed early in the night. What are the probabilities as to the time of the murder? Mr. White was an aged man. He usually retired to bed at about half-past nine. He slept soundest in the early part of the night; usually awoke in the middle and latter parts; and his habits were perfectly well known. When would persons, with a knowledge of these facts, be most likely to approach him? Most certainly in the first hour of his sleep. This would be the safest time. If seen then going to or from the house, the appearance would be least suspicious. The earlier hour would, then, have been most probably selected.

Gentlemen, I shall dwell no longer on the evidence which tends to prove that there was a conspiracy, and that the prisoner was a conspirator. All the circumstances concur to make out this point. Not only Palmer swears to it, in effect, and Leighton, but Allen mainly supports Palmer, and Osborn's books lend confirmation, so far as possible from such a source. Palmer is contradicted in nothing, either by any other witness or any proved circumstance or occurrence. Whatever could be expected to support him does support him. All the evidence clearly manifests, I think, that there was a conspiracy; that it originated with Joseph Knapp; that defendant became a party to it, and was one of its conductors, from first to last. One of the most powerful circumstances is Palmer's letter from Belfast. The amount of this is a direct charge on the Knapps of the authorship of this murder. How did they treat this charge,—like honest men, or like guilty men? We have seen how it was treated. Joseph Knapp fabricated letters, charging another person, and caused them to be put into the post office. I shall now proceed on the supposition that it is proved that there was a conspiracy to murder Mr. White, and that the prisoner was party to it.

The second and the material inquiry is, was the prisoner present at the murder, aiding and abetting therein? This leads to the legal question in the case. What does the law mean when it says that, in order to charge him as a principal, "he must be present, aiding and abetting in the murder"? In the language of the late chief justice: "It is not required that the abettor shall be actually upon the spot when the murder is committed, or even in sight of the more immediate perpetrator of the victim, to make him a principal. If he be at a distance, co-operating in the act, by watching to prevent relief, or to give an alarm, or to assist his confederate in escape, having knowledge of the purpose and object of the as-

sassin, this, in the eye of the law, is being present, aiding and abetting, so as to make him a principal in the murder." "If he be at a distance, co-operating." This is not a distance to be measured by feet or rods. If the intent to lend aid combine with a knowledge that the murder is to be committed, and the person so intending be so situate that he can by any possibility lend this aid in any manner, then he is present in legal contemplation. He need not lend any actual aid,—to be ready to assist is assisting.

There are two sorts of murder. The distinction between them it is of essential importance to bear in mind: (1) Murder in an affray, or upon sudden and unexpected provocation; (2) murder secretly, with a deliberate, predetermined intention to commit the crime. Under the first class, the question usually is whether the offense be murder or manslaughter in the person who commits the deed. Under the second class, it is often a question whether others than he who actually did the deed were present, aiding and assisting therein. Offenses of this kind ordinarily happen when there is nobody present except those who go on the same design. If a riot should happen in the court house, and one should kill another, this may be murder, or it may not, according to the intention with which it was done, which is always matter of fact, to be collected from the circumstances at the time. But in secret murders, premeditated and determined on, there can be no doubt of the murderous intention. There can be no doubt, if a person be present, knowing a murder is to be done, of his concurring in the act. His being there is a proof of his intent to aid and abet, else why is he there? It has been contended that proof must be given that the person accused did actually afford aid,—did lend a hand in the murder itself,—and without this proof, although he may be near by, he may be presumed to be there for an innocent purpose; he may have crept silently there to hear the news, or from mere curiosity to see what was going on. Preposterous! Absurd! Such an idea shocks all common sense. A man is found to be a conspirator to commit a murder; he has planned it; he has assisted in arranging the time, the place, and the means; and he is found in the place, and at the time, and yet it is suggested that he might have been there, not for co-operation and concurrence, but from curiosity! Such an argument deserves no answer. It would be difficult to give it one in decorous terms. Is it not to be taken for granted that a man seeks to accomplish his own purposes? When he has planned a murder, and is present at its execution, is he there to forward or to thwart his own design? Is

he there to assist, or there to prevent? But "curiosity"! He may be there from mere "curiosity"! Curiosity to witness the success of the execution of his own plan of murder! The very walls of a court house ought not to stand, the ploughshare should run through the ground it stands on, where such an argument could find toleration. It is not necessary that the abettor should actually lend a hand,—that he should take a part in the act itself. If he be present ready to assist, that is assisting. Some of the doctrines advanced would acquit the defendant, though he had gone to the bedchamber of the deceased, though he had been standing by when the assassin gave the blow. This is the argument we have heard to-day. [The court here said they did not so understand the argument of the counsel for defendant. Mr. Dexter said, "The intent and power alone must co-operate."] No doubt the law is that being ready to assist is assisting, if the party has the power to assist, in case of need. It is so stated by Foster, who is a high authority. "If A. happeneth to be present at a murder, for instance, and taketh no part in it, nor endeavoreth to prevent it, nor apprehendeth the murderer, nor levyeth hue and cry after him, this strange behavior of his, though highly criminal, will not of itself render him either principal or accessory." "But if a fact amounting to murder should be committed in prosecution of some unlawful purpose, though it were but a bare trespass, to which A., in the case last stated, had consented, and he had gone in order to give assistance, if need were, for carrying it into execution, this would have amounted to murder in him, and in every person present and joining with him." "If the fact was committed in prosecution of the original purpose, which was unlawful, the whole party will be involved in the guilt of him who gave the blow; for in combinations of this kind, the mortal stroke, though given by one of the party, is considered in the eye of the law, and of sound reason too, as given by every individual present and abetting. The person actually giving the stroke is no more than the hand or instrument by which the others strike." The author, in speaking of being present, means actual presence; not actual in opposition to constructive, for the law knows no such distinction. There is but one presence, and this is the situation from which aid, or supposed aid, may be rendered. The law does not say where the person is to go, or how near he is to go, but that he must be where he may give assistance, or where the perpetrator may believe that he may be assisted by him. Suppose that he is acquainted with the design of the murderer, and has a knowledge

of the time when it is to be carried into effect, and goes out with a view to render assistance, if need be; why, then, even though the murderer does not know of this, the person so going out will be an abettor in the murder.

It is contended that the prisoner at the bar could not be a principal, he being in Brown street, because he could not there render assistance; and you are called upon to determine this case, according as you may be of opinion whether Brown street was or was not a suitable, convenient, well-chosen place to aid in this murder. This is not the true question. The inquiry is not whether you would have selected this place in preference to all others, or whether you would have selected it at all. If the parties chose it, why should we doubt about it? How do we know the use they intended to make of it, or the kind of aid that he was to afford by being there? The question for you to consider is, did the defendant go into Brown street in aid of this murder? Did he go there by agreement,—by appointment with the perpetrator? If so, everything else follows. The main thing—indeed the only thing—is to inquire whether he was in Brown street by appointment with Richard Crowninshield. It might be to keep general watch; to observe the lights, and advise as to time of access; to meet the murderer on his return, to advise him as to his escape; to examine his clothes, to see if any marks of blood were upon them; to furnish exchange of clothes, or new disguise, if necessary; to tell him through what streets he could safely retreat, or whether he could deposit the club in the place designed; or it might be without any distinct object, but merely to afford that encouragement which would proceed from Richard Crowninshield's consciousness that he was near. It is of no consequence whether, in your opinion, the place was well chosen, or not, to afford aid. If it was so chosen—if it was by appointment that he was there—it is enough. Suppose Richard Crowninshield, when applied to to commit the murder, had said: "I won't do it unless there can be some one near by to favor my escape. I won't go unless you will stay in Brown street." Upon the gentleman's argument, he would not be an aider and abettor in the murder, because the place was not well chosen, though it is apparent that the being in the place chosen was a condition without which the murder should never have happened.

You are to consider the defendant as one in the league, in the combination, to commit the murder. If he was there by appointment with the perpetrator, he is an abettor. The concurrence of

the perpetrator in his being there is proved by the previous evidence of the conspiracy. If Richard Crowninshield, for any purpose whatsoever, made it a condition of the agreement that Frank Knapp should stand as backer, then Frank Knapp was an aider and abettor, no matter what the aid was, or what sort it was or degree, be it ever so little, even if it were to judge of the hour when it was best to go, or to see when the lights were extinguished, or to give an alarm if any one approached. Who better calculated to judge of these things than the murderer himself? And, if he so determined them, that is sufficient.

Now as to the facts. Frank Knapp knew that the murder was that night to be committed. He was one of the conspirators; he knew the object; he knew the time. He had that day been to Wenham to see Joseph, and probably to Danvers to see Richard Crowninshield, for he kept his motions secret. He had that day hired a horse and chaise of Osborn, and attempted to conceal the purpose for which it was used. He had intentionally left the place and the price blank on Osborn's books. He went to Wenham by the way of Danvers. He had been told the week before to hasten Dick. He had seen the Crowninshields several times within a few days. He had a saddle horse the Saturday night before. He had seen Mrs. Beckford at Wenham, and knew she would not return that night. She had not been away before for six weeks, and probably would not soon be again. He had just come from Wenham. Every day, for the week previous, he had visited one or another of these conspirators, save Sunday, and then probably he saw them in town. When he saw Joseph on the 6th, Joseph had prepared the house, and would naturally tell him of it. There were constant communications between them; daily and nightly visitation; too much knowledge of these parties and this transaction to leave a particle of doubt on the mind of any one that Frank Knapp knew the murder was to be committed this night. The hour was come, and he knew it. If so, and he was in Brown street without explaining why he was there, can the jury for a moment doubt whether he was there to countenance, aid, or support, or for curiosity alone, or to learn how the wages of sin and death were earned by the perpetrator? [Here Mr. Webster read the law from Hawkins,—1 Hawk. 204, lib. 1, c. 32, § 7.] The perpetrator would derive courage and strength and confidence from the knowledge that one of his associates was near by. If he was in Brown street, he could have been there for no other purpose. If there for this purpose, then he was, in

the language of the law, present, aiding and abetting in the murder. His interest lay in being somewhere else. If he had nothing to do with the murder, no part to act, why not stay at home? Why should he jeopard his own life if it was not agreed that he should be there? He would not voluntarily go where the very place would cause him to swing if detected. He would not voluntarily assume the place of danger. His taking this place proves that he went to give aid. His staying away would have made an *alibi*. If he had nothing to do with the murder, he would be at home, where he could prove his *alibi*. He knew he was in danger, because he was guilty of the conspiracy, and, if he had nothing to do, would not expose himself to suspicion of detection. Did the prisoner at the bar countenance this murder? Did he concur, or did he nonconcur, in what the perpetrator was about to do? Would he have tried to shield him? Would he have furnished his cloak for protection? Would he have pointed out a safe way of retreat? As you would answer these questions, so you should answer the general question whether he was there consenting to the murder, or whether he was there as a spectator only.

One word more on this presence, called "constructive presence." What aid is to be rendered? Where is the line to be drawn between acting and omitting to act? Suppose he had been in the house, suppose he had followed the perpetrator to the chamber, what could he have done? This was to be a murder by stealth. It was to be a secret assassination. It was not their purpose to have an open combat; they were to approach their victim unawares, and silently give the fatal blow. But if he had been in the chamber, no one can doubt that he would have been an abettor, because of his presence and ability to render services, if needed. What service could he have rendered if there? Could he have helped him to fly? Could he have aided the silence of his movements? Could he have facilitated his retreat on the first alarm? Surely this was a case where there was more of safety in going alone than with another; where company would only embarrass. Richard Crowninshield would prefer to go alone. He knew his errand too well. His nerves needed no collateral support. He was not the man to take with him a trembling companion. He would prefer to have his aid at a distance. He would not wish to be incumbered by his presence. He would prefer to have him out of the house. He would prefer that he should be in Brown street. But whether in the chamber, in the

house, in the garden, or in the street, whatsoever is aiding in actual presence is aiding in constructive presence; anything that is aid in one case is aid in the other.[2] If, then, the aid be anywhere, so as to embolden the perpetrator, to afford him hope or confidence in his enterprise, it is the same as though the person stood at his elbow with his sword drawn. His being there ready to act, with the power to act, is what makes him an abettor. [Here Mr. Webster referred to the cases of Kelly, of Hyde, and others, cited by counsel for the defendant, and showed that they did not militate with the doctrine for which he contended. The difference is, in those cases there was open violence. This was a case of secret assassination. The aid must meet the occasion. Here no acting was necessary, but watching, concealment of escape, management.]

What are the facts in relation to this presence? Frank Knapp is proved to have been a conspirator; proved to have known that the deed was now to be done. Is it not probable that he was in Brown street to concur in the murder? There were four conspirators. It was natural that some one of them should go with the perpetrator. Richard Crowninshield was to be the perpetrator; he was to give the blow. There is no evidence of any casting of the parts for the others. The defendant would probably be the man to take the second part. He was fond of exploits; he was accustomed to the use of sword canes and dirks. If any aid was required, he was the man to give it. At least there is no evidence to the contrary of this. Aid could not have been received from Joseph Knapp or from George Crowninshield. Joseph Knapp was at Wenham, and took good care to prove that he was there. George Crowninshield has proved satisfactorily where he was,—that he was in other company, such as it was, until eleven o'clock. This narrows the inquiry. This demands of the prisoner to show, if he was not in this place, where he was. It calls on him loudly to show this, and to show it truly. If he could show it, he would do it. If he does not tell, and that truly, it is against him. The defense of an *alibi* is a double-edged sword. He knew that he was in a situation where he might be called upon to account for himself. If he had had no particular appointment or business to attend to, he would have taken care to be able so to account. He would have been out of town, or in some good company. Has he accounted for himself on that night to your satisfaction? The prisoner has attempted to prove an *alibi* in

[2] 4 Hawk. 201, bk. 4, c. 29, § 8.

two ways: In the first place, by four young men with whom he says he was in company, on the evening of the murder, from seven o'clock till near ten o'clock. This depends upon the certainty of the night. In the second place, by his family, from ten o'clock afterwards. This depends upon the certainty of the time of the night. These two classes of proof have no connection with each other. One may be true, and the other false; or they may both be true, or both be false. I shall examine this testimony with some attention, because, on a former trial, it made more impression on the minds of the court than on my own mind. I think, when carefully sifted and compared, it will be found to have in it more of plausibility than reality.

Mr. Page testifies that, on the evening of the 6th of April, he was in company with Burchmore, Balch, and Forrester, and that he met the defendant about seven o'clock, near the Salem Hotel; that he afterwards met him at Remond's, about nine o'clock, and that he was in company with him a considerable part of the evening. This young gentleman is a member of college, and says that he came to town the Saturday evening previous; that he is now able to say that it was the night of the murder when he walked with Frank Knapp, from the recollection of the fact that he called himself to an account, on the morning after the murder, as it is natural for men to do when an extraordinary occurrence happens. Gentlemen, this kind of evidence is not satisfactory; general impressions as to time are not to be relied on. If I were called on to state the particular day on which any witness testified in this cause, I could not do it. Every man will notice the same thing in his own mind. There is no one of these young men that could give an account of himself for any other day in the month of April. They are made to remember the fact, and then they think they remember the time. The witness has no means of knowing it was Tuesday, rather than any other time. He did not know it at first; he could not know it afterwards. He says he called himself to an account. This has no more to do with the murder than with the man in the moon. Such testimony is not worthy to be relied on in any forty-shilling cause. What occasion had he to call himself to an account? Did he suppose that he should be suspected? Had he any intimation of this conspiracy?

Suppose, gentlemen, you were either of you asked where you were, or what you were doing, on the fifteenth day of June. You could not answer this question without calling to mind some events to make it certain. Just as well may you remember on what you dined each day of the year past. Time is identical. Its

subdivisions are all alike. No man knows one day from another, or one hour from another, but by some fact connected with it. Days and hours are not visible to the senses, nor to be apprehended and distinguished by the understanding. The flow of time is known only by something which marks it; and he who speaks of the date of occurrences with nothing to guide his recollection speaks at random, and is not to be relied on. This young gentleman remembers the facts and occurrences; he knows nothing why they should not have happened on the evening of the 6th; but he knows no more. All the rest is evidently conjecture or impression. Mr. White informs you that he told him he could not tell what night it was. The first thoughts are all that are valuable in such case. They miss the mark by taking second aim. Mr. Balch believes, but is not sure, that he was with Frank Knapp on the evening of the murder. He has given different accounts of the time. He has no means of making it certain. All he knows is that it was some evening before Fast Day; but whether Monday, Tuesday, or Saturday, he cannot tell. Mr. Burchmore says, to the best of his belief, it was the evening of the murder. Afterwards he attempts to speak positively, from recollecting that he mentioned the circumstance to William Peirce as he went to the Mineral Spring on Fast Day. Last Monday morning he told Colonel Putnam he could not fix the time. This witness stands in a much worse plight than either of the others. It is difficult to reconcile all he has said with any belief in the accuracy of his recollections. Mr. Forrester does not speak with any certainty as to the night, and it is very certain that he told Mr. Loring and others that he did not know what night it was.

Now, what does the testimony of these four young men amount to? The only circumstance by which they approximate to an identifying of the night is that three of them say it was cloudy. They think their walk was either on Monday or Tuesday evening, and it is admitted that Monday evening was clear, whence they draw the inference that it must have been Tuesday. But, fortunately, there is one fact disclosed in their testimony that settles the question. Balch says that on the evening, whenever it was, he saw the prisoner. The prisoner told him he was going out of town on horseback for a distance of about twenty minutes' drive, and that he was going to get a horse at Osborn's. This was about seven o'clock. At about nine, Balch says he saw the prisoner again, and was then told by him that he had had his ride, and had returned. Now, it appears by Osborn's books that the prisoner had a saddle horse from his stable, not on Tuesday even-

ing, the night of the murder, but on the Saturday evening previous. This fixes the time about which these young men testify, and is a complete answer and refutation of the attempted *alibi* on Tuesday evening.

I come now to speak of the testimony adduced by the defendant to explain where he was after ten o'clock on the night of the murder. This comes chiefly from members of the family,—from his father and brothers.

It is agreed that the affidavit of the prisoner should be received as evidence of what his brother, Samuel H. Knapp, would testify if present. Samuel H. Knapp says that, about ten minutes past ten o'clock, his brother, Frank Knapp, on his way to bed, opened his chamber door, made some remarks, closed the door, and went to his chamber, and that he did not hear him leave it afterwards. How is this witness able to fix the time at ten minutes past ten? There is no circumstance mentioned by which he fixes it. He had been in bed, probably asleep, and was aroused from his sleep by the opening of the door. Was he in a situation to speak of time with precision? Could he know, under such circumstances, whether it was ten minutes past ten or ten minutes before eleven when his brother spoke to him? What would be the natural result in such a case? But we are not left to conjecture this result. We have positive testimony on this point. Mr. Webb tells you that Samuel told him, on the 8th of June, "that he did not know what time his brother Frank came home, and that he was not at home when he went to bed." You will consider this testimony of Mr. Webb as indorsed upon this affidavit, and, with this indorsement upon it, you will give it its due weight. This statement was made to him after Frank was arrested.

I come to the testimony of the father. I find myself incapable of speaking of him or his testimony with severity. Unfortunate old man! Another Lear, in the conduct of his children; another Lear, I apprehend, in the effect of his distress upon his mind and understanding. He is brought here to testify, under circumstances that disarm severity, and call loudly for sympathy. Though it is impossible not to see that his story cannot be credited, yet I am unable to speak of him otherwise than in sorrow and grief. Unhappy father! he strives to remember, perhaps persuades himself that he does remember, that on the evening of the murder he was himself at home at ten o'clock. He thinks, or seems to think, that his son came in at about five minutes past ten. He fancies that he remembers his conversation; he thinks he spoke of bolting the door; he thinks he asked the time of night; he seems to

remember his then going to his bed. Alas! these are but the swimming fancies of an agitated and distressed mind. Alas! they are but the dreams of hope, its uncertain lights, flickering on the thick darkness of parental distress. Alas! the miserable father knows nothing, in reality, of all these things. Mr. Shepard says that the first conversation he had with Mr. Knapp was soon after the murder, and before the arrest of his sons. Mr. Knapp says it was after the arrest of his sons. His own fears led him to say to Mr. Shepard that his "son Frank was at home that night, and so Phippen told him," or "as Phippen told him." Mr. Shepard says that he was struck with the remark at the time; that it made an unfavorable impression on his mind. He does not tell you what that impression was, but when you connect it with the previous inquiry he had made, whether Frank had continued to associate with the Crowninshields, and recollect that the Crowninshields were then known to be suspected of this crime, can you doubt what this impression was? Can you doubt as to the fears he then had? This poor old man tells you that he was greatly perplexed at the time; that he found himself in embarrassed circumstances; that on this very night he was engaged in making an assignment of his property to his friend, Mr. Shepard. If ever charity should furnish a mantle for error, it should be here. Imagination cannot picture a more deplorable, distressed condition. The same general remarks may be applied to his conversation with Mr. Treadwell as have been made upon that with Mr. Shepard. He told him that he believed Frank was at home about the usual time. In his conversations with either of these persons, he did not pretend to know, of his own knowledge, the time that he came home. He now tells you positively that he recollects the time, and that he so told Mr. Shepard. He is directly contradicted by both these witnesses, as respectable men as Salem affords. This idea of an *alibi* is of recent origin. Would Samuel Knapp have gone to sea if it were then thought of? His testimony, if true, was too important to be lost. If there be any truth in this part of the *alibi*, it is so near in point of time that it cannot be relied on. The mere variation of half an hour would avoid it. The mere variations of different timepieces would explain it. Has the defendant proved where he was on that night? If you doubt about it, there is an end of it. The burden is upon him to satisfy you beyond all reasonable doubt. Osborn's books, in connection with what the young men state, are conclusive, I think, on this point. He has not, then, accounted for himself. He has attempted it, and has failed. I pray you to remember,

gentlemen, that this is a case in which the prisoner would, more than any other, be rationally able to account for himself on the night of the murder if he could do so. He was in the conspiracy, he knew the murder was then to be committed, and, if he himself was to have no hand in its actual execution, he would of course, as a matter of safety and precaution, be somewhere else, and be able to prove afterwards that he had been somewhere else. Having this motive to prove himself elsewhere, and the power to do it if he were elsewhere, his failing in such proof must necessarily leave a very strong inference against him.

But, gentlemen, let us now consider what is the evidence produced on the part of the government to prove that John Francis Knapp, the prisoner at the bar, was in Brown street on the night of the murder. This is a point of vital importance in this cause. Unless this be made out, beyond reasonable doubt, the law of presence does not apply to the case. The government undertakes to prove that he was present, aiding in the murder, by proving that he was in Brown street for this purpose. Now, what are the undoubted facts? They are that two persons were seen in that street, several times during that evening, under suspicious circumstances,—under such circumstances as induced those who saw them to watch their movements. Of this there can be no doubt. Mirick saw a man standing at the post opposite his store from fifteen minutes before nine until twenty minutes after, dressed in a full frock-coat, glazed cap, and so forth, in size and general appearance answering to the prisoner at the bar. This person was waiting there, and, whenever any one approached him, he moved to and from the corner, as though he would avoid being suspected or recognized. Afterwards, two persons were seen by Webster walking in Howard street with a slow, deliberate movement that attracted his attention. This was about half-past nine. One of these he took to be the prisoner at the bar; the other he did not know. About half-past ten a person is seen sitting on the rope-walk steps, wrapped in a cloak. He drops his head when passed, to avoid being known. Shortly after, two persons are seen to meet in this street, without ceremony or salutation, and in a hurried manner to converse for a short time, then to separate, and run off with great speed. Now, on this same night, a gentleman is slain,—murdered in his bed,—his house being entered by stealth from without, and his house situated within three hundred feet of this street. The windows of his chamber were in plain sight from this street. A weapon of death is afterwards found in a place where these persons were seen to

pass, in a retired place, around which they had been seen lingering. It is now known that this murder was committed by four persons, conspiring together for this purpose. No account is given who these suspected persons thus seen in Brown street and its neighborhood were. Now I ask, gentlemen, whether you or any man can doubt that this murder was committed by the persons who were thus in and about Brown street. Can any person doubt that they were there for purposes connected with this murder? If not for this purpose, what were they there for? When there is a cause so near at hand, why wander into conjecture for an explanation? Common sense requires you to take the nearest adequate cause for a known effect. Who were these suspicious persons in Brown street? There was something extraordinary about them; something noticeable, and noticed at the time; something in their appearance that aroused suspicion. And a man is found the next morning murdered in the near vicinity. Now, so long as no other account shall be given of those suspicious persons, so long the inference must remain irresistible that they were the murderers. Let it be remembered that it is already shown that this murder was the result of conspiracy and of concert; let it be remembered that the house, having been opened from within, was entered by stealth from without; let it be remembered that Brown street, where these persons were repeatedly seen under such suspicious circumstances, was a place from which every occupied room in Mr. White's house is clearly seen; let it be remembered that the place, though thus very near to Mr. White's house, is a retired and lonely place; and let it be remembered that the instrument of death was afterwards found concealed very near the same spot. Must not every man come to the conclusion that these persons thus seen in Brown street were the murderers? Every man's own judgment, I think, must satisfy him that this must be so. It is a plain deduction of common sense. It is a point on which each one of you may reason like a Hale or a Mansfield. The two occurrences explain each other. The murder shows why these persons were thus lurking, at that hour, in Brown street, and their lurking in Brown street shows who committed the murder. If, then, the persons in and about Brown street were the plotters and executors of the murder of Captain White, we know who they were, and you know that there is one of them. This fearful concatenation of circumstances puts him to an account. He was a conspirator. He had entered into this plan of murder. The murder is committed, and he is known to have been within three minutes' walk of the place. He must

account for himself. He has attempted this, and failed. Then, with all these general reasons to show he was actually in Brown street, and his failures in his *alibi*, let us see what is the direct proof of his being there. But first let me ask, is it not very remarkable that there is no attempt to show where Richard Crowninshield, Jr., was on that night? We hear nothing of him. He was seen in none of his usual haunts about the town. Yet, if he was the actual perpetrator of the murder, which nobody doubts, he was in the town somewhere. Can you therefore entertain a doubt that he was one of the persons seen in Brown street? And as to the prisoner, you will recollect that, since the testimony of the young men has failed to show where he was on that evening, the last we hear or know of him on the day preceding the murder is that at four o'clock p. m. he was at his brother's in Wenham. He had left home, after dinner, in a manner doubtless designed to avoid observation, and had gone to Wenham, probably by way of Danvers. As we hear nothing of him after four o'clock p. m. for the remainder of the day and evening; as he was one of the conspirators; as Richard Crowninshield, Jr., was another; as Richard Crowninshield, Jr., was in town in the evening, and yet seen in no usual place of resort,—the inference is very fair that Richard Crowninshield, Jr., and the prisoner were together, acting in execution of their conspiracy. Of the four conspirators, J. J. Knapp, Jr., was at Wenham, and George Crowninshield has been accounted for, so that, if the persons seen in Brown street were the murderers, one of them must have been Richard Crowninshield, Jr., and the other must have been the prisoner at the bar.

Now as to the proof of his identity with one of the persons seen in Brown street. Mr. Mirick, a cautious witness, examined the person he saw closely, in a light night, and says that he thinks the prisoner at the bar is the person, and that he should not hesitate at all if he were seen in the same dress. His opinion is formed partly from his own observation, and partly from the description of others; but this description turns out to be only in regard to the dress. It is said that he is now more confident than on the former trial. If he has varied in his testimony, make such allowance as you may think proper. I do not perceive any material variance. He thought him the same person when he was first brought to court, and as he saw him get out of the chaise. This is one of the cases in which a witness is permitted to give an opinion. This witness is as honest as yourselves,—neither willing nor swift; but he says he believes it was the man. His

words are, "This is my opinion," and this opinion it is proper for him to give. If partly founded on what he has heard, then this opinion is not to be taken; but if on what he saw, then you can have no better evidence. I lay no stress on similarity of dress. No man will ever lose his life by my voice on such evidence. But then it is proper to notice that no inferences drawn from any dissimilarity of dress can be given in the prisoner's favor, because, in fact, the person seen by Mirick was dressed like the prisoner. The description of the person seen by Mirick answers to that of the prisoner at the bar. In regard to the supposed discrepancy of statements, before and now, there would be no end to such minute inquiries. It would not be strange if witnesses should vary. I do not think much of slight shades of variation. If I believe the witness is honest, that is enough. If he has expressed himself more strongly now than then, this does not prove him false. Peter E. Webster saw the prisoner at the bar, as he then thought, and still thinks, walking in Howard street at half-past nine o'clock. He then thought it was Frank Knapp, and has not altered his opinion since. He knew him well; he had long known him. If he then thought it was he, this goes far to prove it. He observed him the more, as it was unusual to see gentlemen walk there at that hour. It was a retired, lonely street. Now, is there reasonable doubt that Mr. Webster did see him there that night? How can you have more proof than this? He judged by his walk, by his general appearance, by his deportment. We all judge in this manner. If you believe he is right, it goes a great way in this case. But then this person, it is said, had a cloak on, and that he could not, therefore, be the same person that Mirick saw. If we were treating of men that had no occasion to disguise themselves or their conduct, there might be something in this argument. But as it is, there is little in it. It may be presumed that they would change their dress. This would help their disguise. What is easier than to throw off a cloak, and again put it on? Perhaps he was less fearful of being known when alone than when with the perpetrator. Mr. Southwick swears all that a man can swear. He has the best means of judging that could be had at the time. He tells you that he left his father's house at half-past ten o'clock, and, as he passed to his own house in Brown street, he saw a man sitting on the steps of the rope-walk; that he passed him three times, and each time he held down his head, so that he did not see his face; that the man had on a cloak, which was not wrapped around him, and a glazed cap; that he took the man to be Frank Knapp at the time;

that, when he went into his house, he told his wife that he thought it was Frank Knapp; that he knew him well, having known him from a boy. And his wife swears that he did so tell her when he came home. What could mislead this witness at the time? He was not then suspecting Frank Knapp of anything. He could not then be influenced by any prejudice. If you believe that the witness saw Frank Knapp in this position at this time, it proves the case. Whether you believe it or not depends upon the credit of the witness. He swears it. If true, it is solid evidence. Mrs. Southwick supports her husband. Are they true? Are they worthy of belief? If he deserves the epithets applied to him, then he ought not to be believed. In this fact they cannot be mistaken; they are right, or they are perjured. As to his not speaking to Frank Knapp, that depends upon their intimacy. But a very good reason is, Frank chose to disguise himself. This makes nothing against his credit. But it is said that he should not be believed. And why? Because, it is said, he himself now tells you that, when he testified before the grand jury at Ipswich, he did not then say that he thought the person he saw in Brown street was Frank Knapp, but that "the person was about the size of Selman." The means of attacking him, therefore, come from himself. If he is a false man, why should he tell truths against himself? They rely on his veracity to prove that he is a liar. Before you can come to this conclusion, you will consider whether all the circumstances are now known that should have a bearing on this point. Suppose that, when he was before the grand jury, he was asked by the attorney this question, "Was the person you saw in Brown street about the size of Selman?" and he answered, "Yes." This was all true. Suppose, also, that he expected to be inquired of further, and no further questions were put to him. Would it not be extremely hard to impute to him perjury for this? It is not uncommon for witnesses to think that they have done all their duty when they have answered the questions put to them. But suppose that we admit that he did not then tell all he knew, this does not affect the fact at all, because he did tell, at the time, in the hearing of others, that the person he saw was Frank Knapp. There is not the slightest suggestion against the veracity or accuracy of Mrs. Southwick. Now, she swears positively that her husband came into the house and told her that he had seen a person on the rope-walk steps, and believed it was Frank Knapp. It is said that Mr. Southwick is contradicted, also, by Mr. Shillaber. I do not so understand Mr. Shillaber's testimony. I think what they both testify is reconcilable and consistent. My learned brother said, on a similar occasion, that there is more probability,

in such cases, that the persons hearing should misunderstand, than that the person speaking should contradict himself. I think the same remark applicable here. You have all witnessed the uncertainty of testimony when witnesses are called to testify what other witnesses said. Several respectable counselors have been summoned, on this occasion, to give testimony of that sort. They have, every one of them, given different versions. They all took minutes at the time, and without doubt intend to state the truth. But still they differ. Mr. Shillaber's version is different from everything that Southwick has stated elsewhere. But little reliance is to be placed on slight variations in testimony, unless they are manifestly intentional. I think that Mr. Shillaber must be satisfied that he did not rightly understand Mr. Southwick. I confess I misunderstood Mr. Shillaber on the former trial, if I now rightly understand him. I therefore did not then recall Mr. Southwick to the stand. Mr. Southwick, as I read it, understood Mr. Shillaber as asking him about a person coming out of Newbury street, and whether, for aught he knew, it might not be Richard Crowninshield, Jr. He answered that he could not tell. He did not understand Mr. Shillaber as questioning him as to the person whom he saw sitting on the steps of the rope-walk. Southwick, on this trial, having heard Mr. Shillaber, has been recalled to the stand, and states that Mr. Shillaber entirely misunderstood him. This is certainly most probable, because the controlling fact in the case is not controverted,—that is, that Southwick did tell his wife, at the very moment he entered his house, that he had seen a person on the rope-walk steps, whom he believed to be Frank Knapp. Nothing can prove with more certainty than this: that Southwick, at the time, thought the person whom he thus saw to be the prisoner at the bar. Mr. Bray is an acknowledged accurate and intelligent witness. He was highly complimented by my brother on the former trial, although he now charges him with varying his testimony. What could be his motive? You will be slow in imputing to him any design of this kind. I deny altogether that there is any contradiction. There may be differences, but not contradiction. These arise from the difference in the questions put; the difference between believing and knowing. On the first trial, he said he did not know the person, and now says the same. Then, we did not do all we had a right to do. We did not ask him who he thought it was. Now, when so asked, he says he believes it was the prisoner at the bar. If he had then been asked this question, he would have given the same answer. That he has expressed himself more strongly, I

admit; but he has not contradicted himself. He is more confident now, and that is all. A man may not assert a thing, and still may have no doubt upon it. Cannot every man see this distinction to be consistent? I leave him in that attitude; that only is the difference. On questions of identity, opinion is evidence. We may ask the witness, either if he knew who the person seen was, or who he thinks he was. And he may well answer, as Captain Bray has answered, that he does not know who it was, but that he thinks it was the prisoner. We have offered to produce witnesses to prove that, as soon as Bray saw the prisoner, he pronounced him the same person. We are not at liberty to call them to corroborate our own witness. How, then, could this fact of the prisoner's being in Brown street be better proved? If ten witnesses had testified to it, it would be no better. Two men, who knew him well, took it to be Frank Knapp, and one of them so said, when there was nothing to mislead them. Two others, who examined him closely, now swear to their opinion that he is the man. Miss Jaqueth saw three persons pass by the rope-walk several evenings before the murder. She saw one of them pointing towards Mr. White's house. She noticed that another had something which appeared to be like an instrument of music; that he put it behind him, and attempted to conceal it. Who were these persons? This was but a few steps from the place where this apparent instrument of music (of music such as Richard Crowninshield, Jr., spoke of to Palmer) was afterwards found. These facts prove this a point of rendezvous for these parties. They show Brown street to have been the place for consultation and observation, and to this purpose it was well suited. Mr. Burns' testimony is also important. What was the defendant's object in his private conversation with Burns? He knew that Burns was out that night; that he lived near Brown street, and that he had probably seen him, and he wished him to say nothing. He said to Burns, "If you saw any of your friends out that night, say nothing about it; my brother Joe and I are your friends." This is plain proof that he wished to say to him, if you saw me in Brown street that night, say nothing about it. But it is said that Burns ought not to be believed because he mistook the color of the dagger, and because he has varied in his description of it. These are slight circumstances, if his general character be good. To my mind they are of no importance. It is for you to make what deduction you may think proper, on this account, from the weight of his evidence. His conversation with Burns, if Burns is believed, shows two things: First, that he desired Burns not to

mention it, if he had seen him on the night of the murder; second, that he wished to fix the charge of murder on Mr. Stephen White. Both of these prove his own guilt.

I think you will be of opinion that Brown street was a probable place for the conspirators to assemble, and for an aid to be stationed. If we knew their whole plan, and if we were skilled to judge in such a case, then we could perhaps determine on this point better. But it is a retired place, and still commands a full view of the house; a lonely place, but still a place of observation; not so lonely that a person would excite suspicion to be seen walking there in an ordinary manner; not so public as to be noticed by many. It is near enough to the scene of action in point of law. It was their point of centrality. The club was found near the spot, in a place provided for it, in a place that had been previously hunted out, in a concerted place of concealment. Here was their point of rendezvous; here might the lights be seen; here might an aid be secreted; here was he within call; here might he be aroused by the sound of the whistle; here might he carry the weapon; here might he receive the murderer after the murder.

Then, gentlemen, the general question occurs, is it satisfactorily proved, by all these facts and circumstances, that the defendant was in and about Brown street on the night of the murder? Considering that the murder was effected by a conspiracy; considering that he was one of the four conspirators; considering that two of the conspirators have accounted for themselves on the night of the murder, and were not in Brown street; considering that the prisoner does not account for himself, nor show where he was; considering that Richard Crowninshield, the other conspirator and the perpetrator, is not accounted for, nor shown to be elsewhere; considering that it is now past all doubt that two persons were seen lurking in and about Brown street at different times, avoiding observation, and exciting so much suspicion that the neighbors actually watched them; considering that, if these persons thus lurking in Brown street at that hour were not the murderers, it remains to this day wholly unknown who they were or what their business was; considering the testimony of Miss Jaqueth, and that the club was afterwards found near this place; considering, finally, that Webster and Southwick saw these persons, and then took one of them for the defendant, and that Southwick then told his wife so, and that Bray and Mirick examined them closely, and now swear to their belief that the prisoner was one of them,—it is for you to say, putting these considerations to-

gether, whether you believe the prisoner was actually in Brown street at the time of the murder.

By the counsel for the prisoner, much stress has been laid upon the question whether Brown street was a place in which aid could be given,—a place in which actual assistance could be rendered in this transaction. This must be mainly decided by their own opinion who selected the place; by what they thought at the time, according to their plan of operation. If it was agreed that the prisoner should be there to assist, it is enough. If they thought the place proper for their purpose, according to their plan, it is sufficient. Suppose we could prove expressly that they agreed that Frank should be there, and he was there, and you should think it not a well-chosen place for aiding and abetting, must he be acquitted? No! It is not what I think or you think of the appropriateness of the place; it is what they thought at the time. If the prisoner was in Brown street by appointment and agreement with the perpetrator, for the purpose of giving assistance if assistance should be needed, it may safely be presumed that the place was suited to such assistance as it was supposed by the parties might chance to become requisite. If in Brown street, was he there by appointment? Was he there to aid, if aid were necessary? Was he there for or against the murderer? to concur, or to oppose? to favor, or to thwart? Did the perpetrator know he was there,—there waiting? If so, then it follows that he was there by appointment. He was at the post half an hour. He was waiting for somebody. This proves appointment, arrangement, previous agreement; then it follows that he was there to aid, to encourage, to embolden the perpetrator, and that is enough. If he were in such a situation as to afford aid, or that he was relied upon for aid, then he was aiding and abetting. It is enough that the conspirator desired to have him there. Besides, it may be well said that he could afford just as much aid there as if he had been in Essex street,—as if he had been standing even at the gate or at the window. It was not an act of power against power that was to be done; it was a secret act, to be done by stealth. The aid was to be placed in a position secure from observation. It was important to the security of both that he should be in a lonely place. Now, it is obvious that there are many purposes for which he might be in Brown street: (1) Richard Crowninshield might have been secreted in the garden, and waiting for a signal; (2) or he might be in Brown street to advise him as to the time of making his entry into the house; (3) or to favor his escape; (4) or to see if the street was clear when he came out;

(5) or to conceal the weapon or the clothes; (6) to be ready for any unforeseen contingency. Richard Crowninshield lived in Danvers. He would retire by the most secret way. Brown street is that way. If you find him there, can you doubt why he was there? If, gentlemen, the prisoner went into Brown street, by appointment with the perpetrator, to render aid or encouragement in any of these ways, he was present, in legal contemplation, aiding and abetting in this murder. It is not necessary that he should have done anything; it is enough that he was ready to act, and in a place to act. If his being in Brown street, by appointment, at the time of the murder, emboldened the purpose and encouraged the heart of the murderer by the hope of instant aid if aid should become necessary, then, without doubt, he was present, aiding and abetting, and was a principal in the murder.

I now proceed, gentlemen, to the consideration of the testimony of Mr. Colman. Although this evidence bears on every material part of the cause, I have purposely avoided every comment on it till the present moment, when I have done with the other evidence in the case. As to the admission of this evidence, there has been a great struggle, and its importance demanded it. The general rule of law is that confessions are to be received as evidence. They are entitled to great or to little consideration, according to the circumstances under which they are made. Voluntary, deliberate confessions are the most important and satisfactory evidence; but confessions hastily made, or improperly obtained, are entitled to little or no consideration. It is always to be inquired whether they were purely voluntary, or were made under any undue influence of hope or fear; for, in general, if any influence were exerted on the mind of the person confessing, such confessions are not to be submitted to a jury. Who is Mr. Colman? He is an intelligent, accurate, and cautious witness; a gentleman of high and well-known character, and of unquestionable veracity; as a clergyman, highly respectable; as a man, of fair name and fame. Why was Mr. Colman with the prisoner? Joseph J. Knapp was his parishioner; he was the head of a family, and had been married by Mr. Colman. The interests of that family were dear to him. He felt for their afflictions, and was anxious to alleviate their sufferings. He went from the purest and best of motives to visit Joseph Knapp. He came to save, not to destroy; to rescue, not to take away life. In this family he thought there might be a chance to save one. It is a misconstruction of Mr. Colman's motives, at once the most strange and the most uncharitable,—a perversion of all just views of his conduct

and intentions the most unaccountable,—to represent him as acting, on this occasion, in hostility to any one, or as desirous of injuring or endangering any one. He has stated his own motives and his own conduct in a manner to command universal belief and universal respect. For intelligence, for consistency, for accuracy, for caution, for candor, never did witness acquit himself better, or stand fairer. In all that he did as a man, and all he has said as a witness, he has shown himself worthy of entire regard.

Now, gentlemen, very important confessions made by the prisoner are sworn to by Mr. Colman. They were made in the prisoner's cell, where Mr. Colman had gone with the prisoner's brother, N. Phippen Knapp. Whatever conversation took place was in the presence of N. P. Knapp. Now, on the part of the prisoner, two things are asserted: First, that such inducements were suggested to the prisoner, in this interview, that no confessions made by him ought to be received; second, that, in point of fact, he made no such confessions as Mr. Colman testifies to, nor, indeed, any confessions at all. These two propositions are attempted to be supported by the testimony of N. P. Knapp. These two witnesses, Mr. Colman and N. P. Knapp, differ entirely. There is no possibility of reconciling them. No charity can cover both. One or the other has sworn falsely. If N. P. Knapp be believed, Mr. Colman's testimony must be wholly disregarded. It is, then, a question of credit,—a question of belief between the two witnesses. As you decide between these, so you will decide on all this part of the case. Mr. Colman has given you a plain narrative, a consistent account, and has uniformly stated the same things. He is not contradicted, except by the testimony of Phippen Knapp. He is influenced, as far as we can see, by no bias or prejudice, any more than other men, except so far as his character is now at stake. He has feelings on this point, doubtless, and ought to have. If what he has stated be not true, I cannot see any ground for his escape. If he be a true man, he must have heard what he testifies. No treachery of memory brings to memory things that never took place. There is no reconciling his evidence with good intention if the facts in it are not as he states them. He is on trial as to his veracity. The relation in which the other witness stands deserves your careful consideration. He is a member of the family. He has the lives of two brothers depending, as he may think, on the effect of his evidence; depending on every word he speaks. I hope he has not another responsibility resting upon him. By the advice of a friend, and that friend

Mr. Colman, J. Knapp made a full and free confession, and obtained a promise of pardon. He has since, as you know, probably by the advice of other friends, retracted that confession, and rejected the offered pardon. Events will show who of these friends and advisers advised him best and befriended him most. In the meantime, if this brother, the witness, be one of these advisers, and advised the retraction, he has, most emphatically, the lives of his brothers resting upon his evidence and upon his conduct. Compare the situation of these two witnesses. Do you not see mighty motive enough on the one side, and want of all motive on the other? I would gladly find an apology for that witness in his agonized feelings, in his distressed situation; in the agitation of that hour, or of this. I would gladly impute it to error, or to want of recollection, to confusion of mind, or disturbance of feeling. I would gladly impute to any pardonable source that which cannot be reconciled to facts and to truth; but, even in a case calling for so much sympathy, justice must yet prevail, and we must come to the conclusion, however reluctantly, which that demands from us. It is said Phippen Knapp was probably correct, because he knew he should probably be called as a witness. Witness to what? When he says there was no confession, what could he expect to bear witness of? But I do not put it on the ground that he did not hear. I am compelled to put it on the other ground, that he did hear, and does not now truly tell what he heard. If Mr. Colman were out of the case, there are other reasons why the story of Phippen Knapp should not be believed. It has in it inherent improbabilities. It is unnatural, and inconsistent with the accompanying circumstances. He tells you that they went "to the cell of Frank, to see if he had any objection to taking a trial, and suffering his brother to accept the offer of pardon,"—in other words, to obtain Frank's consent to Joseph's making a confession,—and, in case this consent was not obtained, that the pardon would be offered to Frank. Did they bandy about the chance of life, between these two, in this way? Did Mr. Colman, after having given this pledge to Joseph, and after having received a disclosure from Joseph, go to the cell of Frank for such a purpose as this? It is impossible; it cannot be so. Again, we know that Mr. Colman found the club the next day; that he went directly to the place of deposit, and found it at the first attempt, exactly where he says he had been informed it was. Now, Phippen Knapp says that Frank had stated nothing respecting the club; that it was not mentioned in that conversation. He says, also, that he was present in the cell of Joseph all the time

that Mr. Colman was there; that he believes he heard all that was said in Joseph's cell; and that he did not himself know where the club was, and never had known where it was, until he heard it stated in court. Now, it is certain that Mr. Colman says he did not learn the particular place of deposit of the club from Joseph; that he only learned from him that it was deposited under the steps of the Howard street meeting house, without defining the particular steps. It is certain, also, that he had more knowledge of the position of the club than this; else how could he have placed his hand on it so readily? and where else could he have obtained this knowledge, except from Frank? [Here Mr. Dexter said that Mr. Colman had had other interviews with Joseph, and might have derived the information from him at previous visits. Mr. Webster replied that Mr. Colman had testified that he learned nothing in relation to the club until this visit.] My point is to show that Phippen Knapp's story is not true,—is not consistent with itself; that, taking it for granted, as he says, that he heard all that was said to Mr. Colman in both cells, by Joseph and by Frank, and that Joseph did not state particularly where the club was deposited, and that he knew as much about the place of deposit of the club as Mr. Colman knew, why, then, Mr. Colman must either have been miraculously informed respecting the club, or Phippen Knapp has not told you the whole truth. There is no reconciling this without supposing that Mr. Colman has misrepresented what took place in Joseph's cell, as well as what took place in Frank's cell. Again, Phippen Knapp is directly contradicted by Mr. Wheatland. Mr. Wheatland tells the same story, as coming from Phippen Knapp, that Colman now tells. Here there are two against one. Phippen Knapp says that Frank made no confessions, and that he said he had none to make. In this he is contradicted by Wheatland. He, Phippen Knapp, told Wheatland that Mr. Colman did ask Frank some questions, and that Frank answered them. He told him also what these answers were. Wheatland does not recollect the questions or answers, but recollects his reply, which was: "Is not this premature? I think this answer is sufficient to make Frank a principal." Here Phippen Knapp opposes himself to Wheatland, as well as to Mr. Colman.

Do you believe Phippen Knapp against these two respectable witnesses, or them against him? Is not Mr. Colman's testimony credible, natural, and proper? To judge of this, you must go back to that scene. The murder had been committed. The two Knapps were now arrested. Four persons were already in jail sup-

posed to be concerned in it,—the Crowninshields, and Selman, and Chase. Another person at the eastward was supposed to be in the plot. It was important to learn the facts. To do this, some one of those suspected must be admitted to turn state's witness. The contest was, who should have this privilege? It was understood that it was about to be offered to Palmer, then in Maine. There was no good reason why he should have the preference. Mr. Colman felt interested for the family of the Knapps, and particularly for Joseph. He was a young man who had hitherto maintained a fair standing in society. He was a husband. Mr. Colman was particularly intimate with his family. With these views he went to the prison. He believed that he might safely converse with the prisoner, because he thought confessions made to a clergyman were sacred, and that he could not be called upon to disclose them. He went, the first time, in the morning, and was requested to come again. He went again at three o'clock, and was requested to call again at five o'clock. In the meantime he saw the father and Phippen, and they wished he would not go again, because it would be said the prisoners were making confession. He said he had engaged to go again at five o'clock, but would not, if Phippen would excuse him to Joseph. Phippen engaged to do this, and to meet him at his office at five o'clock. Mr. Colman went to the office at the time, and waited; but, as Phippen was not there, he walked down street, and saw him coming from the jail. He met him, and while in conversation near the church, he saw Mrs. Beckford and Mrs. Knapp going in a chaise towards the jail. He hastened to meet them, as he thought it not proper for them to go in at that time. While conversing with them near the jail, he received two distinct messages from Joseph that he wished to see him. He thought it proper to go, and, accordingly, went to Joseph's cell, and it was while there that the disclosures were made. Before Joseph had finished his statement, Phippen came to the door. He was soon after admitted. A short interval ensued, and they went together to the cell of Frank. Mr. Colman went in by invitation of Phippen. He had come directly from the cell of Joseph, where he had for the first time learned the incidents of the tragedy. He was incredulous as to some of the facts which he had learned, they were so different from his previous impressions. He was desirous of knowing whether he could place confidence in what Joseph had told him. He therefore put the questions to Frank as he has testified before you, in answer to which Frank Knapp informed him: (1) That the murder took place between ten and eleven o'clock: (2) that Richard Crownin-

shield was alone in the house; (3) that he, Frank Knapp, went home afterwards; (4) that the club was deposited under the steps of the Howard street meeting house, and under the part nearest the burying ground, in a rat hole; (5) that the dagger or daggers had been worked up at the factory. It is said that these five answers just fit the case; that they are just what was wanted, and neither more nor less. True, they are; but the reason is because truth always fits. Truth is always congruous, and agrees with itself. Every truth in the universe agrees with every other truth in the universe; whereas falsehoods not only disagree with truths, but usually quarrel among themselves. Surely Mr. Colman is influenced by no bias, no prejudice. He has no feelings to warp him, except, now that he is contradicted, he may feel an interest to be believed. If you believe Mr. Colman, then the evidence is fairly in the case.

I shall now proceed on the ground that you do believe Mr. Colman. When told that Joseph had determined to confess, the defendant said: "It is hard or unfair that Joseph should have the benefit of confessing, since the thing was done for his benefit." What thing was done for his benefit? Does not this carry an implication of the guilt of the defendant? Does it not show that he had a knowledge of the object and history of the murder? The defendant said: "I told Joseph, when he proposed it, that it was a silly business, and would get us into trouble." He knew, then, what this business was. He knew that Joseph proposed it, and that he agreed to it, else he could not get us into trouble. He understood its bearing and its consequences. Thus much was said, under circumstances that make it clearly evidence against him, before there is any pretense of an inducement held out. And does not this prove him to have had a knowledge of the conspiracy? He knew the daggers had been destroyed, and he knew who committed the murder. How could he have innocently known these facts? Why, if by Richard's story, this shows him guilty of a knowledge of the murder and of the conspiracy. More than all, he knew when the deed was done, and that he went home afterwards. This shows his participation in that deed. "Went home afterwards!" Home from what scene? home from what fact? home from what transaction? home from what place? This confirms the supposition that the prisoner was in Brown street for the purposes ascribed to him. These questions were directly put, and directly answered. He does not intimate that he received the information from another. Now, if he knows the time, and went home afterwards, and does not excuse himself, is

not this an admission that he had a hand in this murder? Already proved to be a conspirator in the murder, he now confesses that he knew who did it, at what time it was done, that he was himself out of his own house at the time, and went home afterwards. Is not this conclusive, if not explained? Then comes the club. He told where it was. This is like possession of stolen goods. He is charged with the guilty knowledge of this concealment. He must show, not say, how he came by this knowledge. If a man be found with stolen goods, he must prove how he came by them. The place of deposit of the club was premeditated and selected, and he knew where it was.

Joseph Knapp was an accessory, and an accessory only; he knew only what was told him. But the prisoner knew the particular spot in which the club might be found. This shows his knowledge something more than that of an accessory. This presumption must be rebutted by evidence, or it stands strong against him. He has too much knowledge of this transaction to have come innocently by it. It must stand against him until he explains it.

This testimony of Mr. Colman is represented as new matter, and therefore an attempt has been made to excite a prejudice against it. It is not so. How little is there in it, after all, that did not appear from other sources? It is mainly confirmatory. Compare what you learn from this confession with what you before knew: As to its being proposed by Joseph, was not that known? As to Richard's being alone in the house, was not that known? As to the daggers, was not that known? As to the time of the murder, was not that known? As to his being out that night, was not that known? As to his returning afterwards, was not that known? As to the club, was not that known? So this information concerns what was known before, and fully confirms it.

One word as to the interview between Mr. Colman and Phippen Knapp on the turnpike. It is said that Mr. Colman's conduct in this matter is inconsistent with his testimony. There does not appear to me to be any inconsistency. He tells you that his object was to save Joseph, and to hurt no one, and least of all the prisoner at the bar. He had probably told Mr. White the substance of what he heard at the prison. He had probably told him that Frank confirmed what Joseph had confessed. He was unwilling to be the instrument of harm to Frank. He therefore, at the request of Phippen Knapp, wrote a note to Mr. White, requesting him to consider Joseph as authority for the information he had

received. He tells you that this is the only thing he has to regret, as it may seem to be an evasion, as he doubts whether it was entirely correct. If it was an evasion, if it was a deviation, if it was an error, it was an error of mercy, an error of kindness,—an error that proves he had no hostility to the prisoner at the bar. It does not in the least vary his testimony or affect its correctness. Gentlemen, I look on the evidence of Mr. Colman as highly important; not as bringing into the cause new facts, but as confirming, in a very satisfactory manner, other evidence. It is incredible that he can be false, and that he is seeking the prisoner's life through false swearing. If he is true, it is incredible that the prisoner can be innocent.

Gentlemen, I have gone through with the evidence in this case, and have endeavored to state it plainly and fairly before you. I think there are conclusions to be drawn from it, the accuracy of which you cannot doubt. I think you cannot doubt that there was a conspiracy formed for the purpose of committing this murder, and who the conspirators were; that you cannot doubt that the Crowninshields and the Knapps were the parties in this conspiracy; that you cannot doubt that the prisoner at the bar knew that the murder was to be done on the night of the 6th of April; that you cannot doubt that the murderers of Captain White were the suspicious persons seen in and about Brown street on that night; that you cannot doubt that Richard Crowninshield was the perpetrator of that crime; that you cannot doubt that the prisoner at the bar was in Brown street on that night. If there, then it must be by agreement, to countenance, to aid, the perpetrator, and, if so, then he is guilty as principal.

Gentlemen, your whole concern should be to do your duty, and leave consequences to take care of themselves. You will receive the law from the court. Your verdict, it is true, may endanger the prisoner's life, but then it is to save other lives. If the prisoner's guilt has been shown and proved beyond all reasonable doubt, you will convict him. If such reasonable doubts of guilt still remain, you will acquit him. You are the judges of the whole case. You owe a duty to the public, as well as to the prisoner at the bar. You cannot presume to be wiser than the law. Your duty is a plain, straightforward one. Doubtless we would all judge him in mercy. Towards him, as an individual, the law inculcates no hostility; but towards him, if proved to be a murderer, the law, and the oaths you have taken, and public justice demand that you do your duty. With consciences satisfied with the discharge of duty, no consequences can harm you. There is

no evil that we cannot either face or fly from but the consciousness of duty disregarded. A sense of duty pursues us ever. It is omnipresent, like the Deity. If we take to ourselves the wings of the morning, and dwell in the uttermost parts of the sea, duty performed or duty violated is still with us, for our happiness or our misery. If we say the darkness shall cover us, in the darkness, as in the light, our obligations are yet with us. We cannot escape their power, nor fly from their presence. They are with us in this life, will be with us at its close; and in that scene of inconceivable solemnity, which lies yet farther onward, we shall still find ourselves surrounded by the consciousness of duty, to pain us wherever it has been violated, and to console us so far as God may have given us grace to perform it.

ARGUMENT IN THE CASE OF LUTHER AGAINST BORDEN, IN THE SUPREME COURT OF THE UNITED STATES, 1848.

STATEMENT.

This controversy arose out of what is known as "Dorr's Rebellion,"—a name given to the internal strife and violence in the state of Rhode Island over the adoption of a constitution in place of the charter granted by Charles II. The facts are fully stated in the following argument. The case was argued by Attorney General Clifford and Mr. Hallett for the plaintiffs in error, and by Daniel Webster and Mr. Whipple for the defendants. The court (Mr. Justice Woodberry alone dissenting) declined to take jurisdiction, on the ground that it was purely a political question, lying beyond the reach of judicial authority.[1]

ARGUMENT.

May it please your honors, there is something novel and extraordinary in the case now before the court. All will admit that it is not such a one as is usually presented for judicial consideration. It is well known that in the years 1841 and 1842 political agitation existed in Rhode Island. Some of the citizens of that state undertook to form a new constitution of government, beginning their proceedings towards that end by meetings of the people, held without authority of law, and conducting those proceedings through such forms as led them, in 1842, to say that they had established a new constitution and form of government, and placed Mr. Thomas W. Dorr at its head. The previously existing, and then existing, government of Rhode Island, treated these proceedings as nugatory, so far as they went to establish a new constitution, and criminal, so far as they proposed to confer authority upon any persons to interfere with the acts of the existing government, or to exercise powers of legislation or administration of the laws. All will remember that the state of things approached, if not actual conflict between men in arms, at least the "perilous edge of battle." Arms were resorted to, force was used, and greater force threatened. In June, 1842, this agitation subsided. The "new government," as it called itself, disappeared from the scene of action. The former government—the "charter government," as it was sometimes styled—resumed undisputed control, went on in its ordinary course, and the peace of the state was restored. But the past had been too serious to be forgotten.

[1] 7 Howard, 1.

The legislature of the state had, at an early stage of the troubles, found it necessary to pass special laws for the punishment of the persons concerned in these proceedings. It defined the crime of treason, as well as smaller offenses, and authorized the declaration of martial law. Governor King, under this authority, proclaimed the existence of treason and rebellion in the state, and declared the state under martial law. This having been done, and the ephemeral government of Mr. Dorr having disappeared, the grand juries of the state found indictments against several persons for having disturbed the peace of the state, and one against Dorr himself for treason. This indictment came on in the supreme court of Rhode Island in 1844, before a tribunal admitted on all hands to be the legal judicature of the state. He was tried by a jury of Rhode Island, above all objection, and after all challenge. By that jury, under the instructions of the court, he was convicted of treason, and sentenced to imprisonment for life.

Now an action is brought in the courts of the United States, and before your honors, by appeal, in which it is attempted to prove that the characters of this drama have been oddly and wrongly cast; that there has been a great mistake in the courts of Rhode Island. It is alleged that Mr. Dorr, instead of being a traitor or an insurrectionist, was the real governor of the state at the time; that the force used by him was exercised in defense of the constitution and laws, and not against them; that he who opposed the constituted authorities was not Mr. Dorr, but Governor King, and that it was he who should have been indicted and tried and sentenced. This is rather an important mistake, to be sure, if it be a mistake. "Change places," cries poor Lear, "change places, and, handy dandy, which is the justice and which the thief?" So our learned opponents say: "Change places, and, handy dandy, which is the governor and which the rebel?" The aspect of the case is, as I have said, novel. It may perhaps give vivacity and variety to judicial investigations. It may relieve the drudgery of perusing briefs, demurrers, and pleas in bar, bills in equity and answers, and introduce topics which give sprightliness, freshness, and something of an uncommon public interest to proceedings in courts of law.

However difficult it may be, and I suppose it to be wholly impossible, that this court should take judicial cognizance of the questions which the plaintiff has presented to the court below, yet I do not think it a matter of regret that the cause has come hither. It is said, and truly said, that the case involves the consideration and discussion of what are the true principles of government in

our American system of public liberty. This is very right. The case does involve these questions, and harm can never come from their discussion, especially when such discussion is addressed to reason and not to passion; when it is had before magistrates and lawyers, and not before excited masses out of doors. I agree entirely that the case does raise considerations, somewhat extensive, of the true character of our American system of popular liberty; and although I am constrained to differ from the learned counsel who opened the cause for the plaintiff in error, on the principles and character of that American liberty, and upon the true characteristics of that American system on which changes of the government and constitution, if they become necessary, are to be made, yet I agree with him that this case does present them for consideration.

Now, there are certain principles of public liberty which, though they do not exist in all forms of government, exist, nevertheless, to some extent, in different forms of government. The protection of life and property, the *habeas corpus*, trial by jury, the right of open trial, these are principles of public liberty existing in their best form in the republican institutions of this country, but, to the extent mentioned, existing also in the constitution of England. Our American liberty, allow me to say, therefore, has an ancestry, a pedigree, a history. Our ancestors brought to this continent all that was valuable, in their judgment, in the political institutions of England, and left behind them all that was without value, or that was objectionable. During the colonial period they were closely connected, of course, with the colonial system; but they were Englishmen, as well as colonists, and took an interest in whatever concerned the mother country, especially in all great questions of public liberty in that country. They accordingly took a deep concern in the revolution of 1688. The American colonists had suffered from the tyranny of James the Second. Their charters had been wrested from them by mockeries of law, and by the corruption of judges in the city of London; and in no part of England was there more gratification, or a more resolute feeling, when James abdicated, and William came over, than in the American colonies. All know that Massachusetts immediately overthrew what had been done under the reign of James, and took possession of the colonial fort in the harbor of Boston in the name of the new king.

When the United States separated from England by the Declaration of 1776, they departed from the political maxims and examples of the mother country, and entered upon a course more

exclusively American. From that day down, our institutions and our history relate to ourselves. Through the period of the Declaration of Independence, of the confederation, of the convention, and the adoption of the constitution, all our public acts are records out of which a knowledge of our system of American liberty is to be drawn.

From the Declaration of Independence, the governments of what had been colonies before were adapted to their new condition. They no longer owed allegiance to crowned heads. No tie bound them to England. The whole system became entirely popular, and all legislative and constitutional provisions had regard to this new, peculiar, American character which they had assumed. Where the form of government was already well enough, they let it alone. Where reform was necessary, they reformed it. What was valuable they retained; what was essential, they added; and no more. Through the whole proceeding, from 1776 to the latest period, the whole course of American public acts, the whole progress of this American system, was marked by a peculiar conservatism. The object was to do what was necessary, and no more, and to do that with the utmost temperance and prudence.

Now, without going into historical details at length, let me state what I understand the American principles to be on which this system rests. First and chief, no man makes a question that the people are the source of all political power. Government is instituted for their good, and its members are their agents and servants. He who would argue against this must argue without an adversary. And who thinks there is any peculiar merit in asserting a doctrine like this, in the midst of twenty millions of people, when nineteen millions nine hundred and ninety-nine thousand nine hundred and ninety-nine of them hold it, as well as himself? There is no other doctrine of government here; and no man imputes to another, and no man should claim for himself, any peculiar merit for asserting what everybody knows to be true, and nobody denies. Why, where else can we look but to the people for political power in a popular government? We have no hereditary executive, no hereditary branch of the legislature, no inherited masses of property, no system of entails, no long trusts, no long family settlements, no primogeniture. Every estate in the country, from the richest to the poorest, is divided among sons and daughters alike. Alienation is made as easy as possible. Everywhere the transmissibility of property is perfectly free. The whole system is arranged so as to produce, as far as unequal industry and enterprise render it possible, a uni-

versal equality among men; an equality of rights absolutely, and an equality of condition, so far as the different characters of individuals will allow such equality to be produced. He who considers that there may be, is, or ever has been, since the Declaration of Independence, any person who looks to any other source of power in this country than the people, so as to give peculiar merit to those who clamor loudest in its assertion, must be out of his mind, even more than Don Quixote. His imagination was only perverted. He saw things not as they were, though what he saw were things. He saw windmills, and took them to be giants, knights on horseback. This was bad enough; but whoever says, or speaks as if he thought, that anybody looks to any other source of political power in this country than the people, must have a stronger and wilder imagination, for he sees nothing but the creations of his own fancy,—he stares at phantoms.

Well, then, let all admit, what none deny, that the only source of political power in this country is the people. Let us admit that they are sovereign, for they are so,—that is to say, the aggregate community, the collected will of the people, is sovereign. I confess that I think Chief Justice Jay spoke rather paradoxically than philosophically when he said that this country exhibited the extraordinary spectacle of many sovereigns and no subjects. The people, he said, are all sovereigns; and the peculiarity of the case is that they have no subjects, except a few colored persons. This must be rather fanciful. The aggregate community is sovereign, but that is not the sovereignty which acts in the daily exercise of sovereign power. The people cannot act daily as the people. They must establish a government, and invest it with so much of the sovereign power as the case requires; and this sovereign power being delegated and placed in the hands of the government, that government becomes what is popularly called the "state." I like the old-fashioned way of stating things as they are; and this is the true idea of a state: It is an organized government, representing the collected will of the people, as far as they see fit to invest that government with power; and in that respect it is true that, though this government possesses sovereign power, it does not possess all sovereign power; and so the state governments, though sovereign in some respects, are not so in all. Nor could it be shown that the powers of both, as delegated, embrace the whole range of what might be called sovereign power. We usually speak of the states as sovereign states. I do not object to this. But the constitution never so styles them, nor does the constitution speak of the government here as the general or the fed-

eral government. It calls this government the United States; and it calls the state governments state governments. Still, the fact is undeniably so. Legislation is a sovereign power, and is exercised by the United States government to a certain extent, and also by the states, according to the forms which they themselves have established, and subject to the provisions of the constitution of the United States.

Well, then, having agreed that all power is originally from the people, and that they can confer as much of it as they please, the next principle is that, as the exercise of legislative power and the other powers of government immediately by the people themselves is impracticable, they must be exercised by representatives of the people; and what distinguishes American governments, as much as anything else, from any governments of ancient or of modern times, is the marvelous felicity of their representative system. It has with us, allow me to say, a somewhat different origin from the representation of the commons in England, though that has been worked up to some resemblance of our own. The representative system in England had its origin, not in any supposed rights of the people themselves, but in the necessities and commands of the crown. At first, knights and burgesses were summoned, often against their will, to a parliament called by the king. Many remonstrances were presented against sending up these representatives. The charge of paying them was, not unfrequently, felt to be burdensome by the people. But the king wished their counsel and advice, and perhaps the presence of a popular body, to enable him to make greater headway against the feudal barons in the aristocratic and hereditary branch of the legislature. In process of time, these knights and burgesses assumed more and more a popular character, and became, by degrees, the guardians of popular rights. The people, through them, obtained protection against the encroachments of the crown and the aristocracy, till in our day they are understood to be the representatives of the people, charged with the protection of their rights. With us it was always just so. Representation has always been of this character. The power is with the people; but they cannot exercise it in masses or *per capita*,—they can only exercise it by their representatives. The whole system, with us, has been popular from the beginning.

Now, the basis of this representation is suffrage. The right to choose representatives is every man's part in the exercise of sovereign power. To have a voice in it, if he has the proper qualifications, is the portion of political power belonging to every

elector. That is the beginning. That is the mode in which power emanates from its source, and gets into the hands of conventions, legislatures, courts of law, and the chair of the executive. It begins in suffrage. Suffrage is the delegation of the power of an individual to some agent. This being so, then follow two other great principles of the American system: The first is that the right of suffrage shall be guarded, protected, and secured against force and against fraud; and the second is that its exercise shall be prescribed by previous law, its qualifications shall be prescribed by previous law, the time and place of its exercise shall be prescribed by previous law, the manner of its exercise, under whose supervision (always sworn officers of the law), is to be prescribed. And then, again, the results are to be certified to the central power by some certain rule, by some known public officers, in some clear and definite form, to the end that two things may be done: First, that every man entitled to vote may vote; second, that his vote may be sent forward and counted, and so he may exercise his part of sovereignty, in common with his fellow citizens. In the exercise of political power through representatives we know nothing—we never have known anything—but such an exercise as should take place through the prescribed forms of law. When we depart from that we shall wander as widely from the American track as the pole is from the track of the sun.

I have said that it is one principle of the American system that the people limit their governments, national and state. They do so. But it is another principle, equally true and certain, and, according to my judgment of things, equally important, that the people often limit themselves. They set bounds to their own power. They have chosen to secure the institutions which they establish against the sudden impulses of mere majorities. All our institutions teem with instances of this. It was their great conservative principle, in constituting forms of government, that they should secure what they had established against hasty changes by simple majorities. By the fifth article of the constitution of the United States, congress, two-thirds of both houses concurring, may propose amendments of the constitution, or, on the application of the legislatures of two-thirds of the states, may call a convention, and amendments proposed in either of these forms must be ratified by the legislatures or conventions of three-fourths of the states. The fifth article of the constitution, if it was made a topic for those who framed the "people's constitution" of Rhode Island, could only have been a matter of reproach. It gives no countenance to any of their proceedings, or to any-

thing like them. On the contrary, it is one remarkable instance of the enactment and application of that great American principle that the constitution of government should be cautiously and prudently interfered with, and that changes should not ordinarily be begun and carried through by bare majorities.

But the people limit themselves also in other ways. They limit themselves in the first exercise of their political rights. They limit themselves, by all their constitutions, in two important respects; that is to say, in regard to the qualifications of electors, and in regard to the qualifications of the elected. In every state, and in all the states, the people have precluded themselves from voting for everybody they might wish to vote for. They have limited their own right of choosing. They have said: "We will elect no man who has not such and such qualifications. We will not vote, ourselves, unless we have such and such qualifications." They have also limited themselves to certain prescribed forms for the conduct of elections. They must vote at a particular place, at a particular time, and under particular conditions, or not at all. It is in these modes that we are to ascertain the will of the American people, and our constitution and laws know no other mode. We are not to take the will of the people from public meetings, nor from tumultuous assemblies, by which the timid are terrified, the prudent are alarmed, and by which society is disturbed. These are not American modes of signifying the will of the people, and they never were. If anything in the country, not ascertained by a regular vote, by regular returns, and by regular representation, has been established, it is an exception, and not the rule. It is an anomaly which, I believe, can scarcely be found.

It is true that, at the Revolution, when all government was immediately dissolved, the people got together, and what did they do? Did they exercise sovereign power? They began an inceptive organization, the object of which was to bring together representatives of the people, who should form a government. This was the mode of proceeding in those states where their legislatures were dissolved. It was much like that had in England upon the abdication of James the Second. He ran away; he abdicated; he threw the great seal into the Thames. I am not aware that, on the 4th of May, 1842, any great seal was thrown into Providence river! But James abdicated, and King William took the government; and how did he proceed? Why, he at once requested all who had been members of the old parliament—of any regular parliament in the time of Charles the Second—to assemble. The peers, being a standing body, could, of course, as-

semble; and all they did was to recommend the calling of a convention, to be chosen by the same electors, and composed of the same numbers, as composed a parliament. The convention assembled, and, as all know, was turned into a parliament. This was a case of necessity,—a revolution. Don't we call it so? And why? Not merely because a new sovereign then ascended the throne of the Stuarts, but because there was a change in the organization of the government. The legal and established succession was broken. The convention did not assemble under any preceding law. There was a *hiatus*—a syncope—in the action of the body politic. This was revolution, and the parliaments that assembled afterwards referred their legal origin to that revolution.

Is it not obvious enough that men cannot get together and count themselves, and say they are so many hundreds and so many thousands, and judge of their own qualifications, and call themselves the people, and set up a government? Why, another set of men, forty miles off, on the same day, with the same propriety, with as good qualifications, and in as large numbers, may meet and set up another government. One may meet at Newport, and another at Chepachet, and both may call themselves the people. What is this but anarchy? What liberty is there here but a tumultuary, tempestuous, violent, stormy liberty,—a sort of South American liberty, without power except in its spasms; a liberty supported by arms to-day, crushed by arms to-morrow? Is that our liberty?

The regular action of popular power, on the other hand, places upon public liberty the most beautiful face that ever adorned that angel form. All is regular and harmonious in its features, and gentle in its operation. The stream of public authority, under American liberty, running in this channel, has the strength of the Missouri, while its waters are as transparent as those of a crystal lake. It is powerful for good. It produces no tumult, no violence, and no wrong:

> "Though deep, yet clear; though gentle, yet not dull;
> Strong, without rage; without o'erflowing, full."

Another American principle growing out of this, and just as important and well settled as is the truth that the people are the source of power, is that when, in the course of events, it becomes necessary to ascertain the will of the people on a new exigency, or a new state of things or of opinion, the legislative power provides for that ascertainment by an ordinary act of legislation. Has not that been our whole history? It would take me from

now till the sun shall go down to advert to all the instances of it, and I shall only refer to the most prominent, and especially to the establishment of the constitution under which you sit. The old congress, upon the suggestion of the delegates who assembled at Annapolis in May, 1786, recommended to the states that they should send delegates to a convention, to be holden at Philadelphia, to form a constitution. No article of the old confederation gave them power to do this, but they did it, and the states did appoint delegates, who assembled at Philadelphia, and formed the constitution. It was communicated to the old congress, and that body recommended to the states to make provision for calling the people together to act upon its adoption. Was not that exactly the case of passing a law to ascertain the will of the people in a new exigency? And this method was adopted without opposition; nobody suggesting that there could be any other mode of ascertaining the will of the people.

My learned friend went through the constitutions of several of the states. It is enough to say that, of the old thirteen states, the constitutions, with but one exception, contained no provision for their own amendment. In New Hampshire there was a provision for taking the sense of the people once in seven years. Yet there is hardly one that has not altered its constitution, and it has been done by conventions called by the legislature, as an ordinary exercise of legislative power. Now what state ever altered its constitution in any other mode? What alteration has ever been brought in, put in, forced in, or got in anyhow by resolutions of mass meetings and then by applying force? In what state has an assembly, calling itself the people, convened without law, without authority, without qualifications, without certain officers, with no oaths, securities, or sanctions of any kind, met and made a constitution, and called it the constitution of the state? There must be some authentic mode of ascertaining the will of the people, else all is anarchy. It resolves itself into the law of the strongest, or, what is the same thing, of the most numerous for the moment, and all constitutions and all legislative rights are prostrated and disregarded.

But my learned adversary says that, if we maintain that the people (for he speaks in the name and on behalf of the people, to which I do not object) cannot commence changes in their government but by some previous act of legislation, and if the legislature will not grant such an act, we do in fact follow the example of the Holy Alliance,—"the doctors of Laybach,"—where the assembled sovereigns said that all changes of government must pro-

ceed from sovereigns; and it is said that we mark out the same rule for the people of Rhode Island.

Now, will any man,—will my adversary here,—on a moment's reflection, undertake to show the least resemblance on earth between what I have called the American doctrine and the doctrine of the sovereigns at Laybach? What do I contend for? I say that the will of the people must prevail when it is ascertained; but there must be some legal and authentic mode of ascertaining that will, and then the people may make what government they please. Was that the doctrine of Laybach? Was not the doctrine there held this: that the sovereigns should say what changes shall be made? Changes must proceed from them; new constitutions and new laws emanate from them; and all the people had to do was to submit. That is what they maintained. All changes began with the sovereigns, and ended with the sovereigns. Pray, at about the time that the congress of Laybach was in session, did the allied powers put it to the people of Italy to say what sort of change they would have? And, at a more recent date, did they ask the citizens of Cracow what change they would have in their constitution? Or did they take away their constitution, laws, and liberties by their own sovereign act? All that is necessary here is that the will of the people should be ascertained by some regular rule of proceeding, prescribed by previous law; but, when ascertained, that will is as sovereign as the will of a despotic prince, of the Czar of Muscovy, or the Emperor of Austria himself, though not quite so easily made known. A ukase or an edict signifies at once the will of a despotic prince; but that will of the people, which is here as sovereign as the will of such a prince, is not so quickly ascertained or known; and thence arises the necessity for suffrage, which is the mode whereby each man's power is made to tell upon the constitution of the government, and in the enactment of laws.

One of the most recent laws for taking the will of the people in any state is the law of 1845 of the state of New York. It begins by recommending to the people to assemble in their several election districts, and proceed to vote for delegates to a convention. If you will take the pains to read that act, it will be seen that New York regarded it as an ordinary exercise of legislative power. It applies all the penalties for fraudulent voting, as in other elections. It punishes false oaths, as in other cases. Certificates of the proper officers were to be held conclusive, and the will of the people was, in this respect, collected essentially in the same manner, supervised by the same officers, under the same

guards against force and fraud, collusion and misrepresentation, as are usual in voting for state or United States officers.

We see, therefore, from the commencement of the government under which we live, down to this late act of the state of New York, one uniform current of law, of precedent, and of practice, all going to establish the point that changes in government are to be brought about by the will of the people, assembled under such legislative provisions as may be necessary to ascertain that will, truly and authentically.

In the next place, may it please your honors, it becomes very important to consider what bearing the constitution and laws of the United States have upon this Rhode Island question. Of course the constitution of the United States recognizes the existence of states. One branch of the legislature of the United States is composed of senators, appointed by the states in their state capacities. The constitution of the United States[1] says that "the United States shall guarantee to every state . . . . a republican form of government, and shall protect each of them against invasion, and on application of the legislature, or of the executive, (when the legislature cannot be convened), against domestic violence." Now, I cannot but think this a very stringent article, drawing after it the most important consequences, and all of them good consequences. The constitution, in the section cited, speaks of states as having existing legislatures and existing executives; and it speaks of cases in which violence is practiced or threatened against the state,—in other words, "domestic violence"; and it says the state shall be protected. It says, then, does it not, that the existing government of a state shall be protected? My adversary says, if so, and if the legislature would not call a convention, and if, when the people rise to make a constitution, the United States step in and prohibit them, why, the rights and privileges of the people are checked, controlled. Undoubtedly. The constitution does not proceed on the ground of revolution; it does not proceed on any right of revolution; but it does go on the idea that, within and under the constitution, no new form of government can be established in any state without the authority of the existing government.

Admitting the legitimacy of the argument of my learned adversary, it would not authorize the inference he draws from it, because his own case falls within the same range. He has proved, he thinks, that there was an existing government,—a paper gov-

[1] Article 4, § 4.

ernment, at least; a rightful government, as he alleges. Suppose it to be rightful, in his sense of "right." Suppose three-fourths of the people of Rhode Island to have been engaged in it, and ready to sustain it. What then? How is it to be done without the consent of the previous government? How is the fact that three-fourths of the people are in favor of the new government to be legally ascertained? And if the existing government deny that fact, and if that government hold on, and will not surrender till displaced by force, and if it is threatened by force, then the case of the constitution arises, and the United States must aid the government that is in, because an attempt to displace a government by force is "domestic violence." It is the exigency provided for by the constitution. If the existing government maintain its post, though three-fourths of the state have adopted the new constitution, is it not evident enough that the exigency arises in which the constitutional power here must go to the aid of the existing government? Look at the law of 28th February, 1795.[2] Its words are: "And in case of an insurrection in any state against the government thereof, it shall be lawful for the President of the United States, on application of the legislature of such state, or of the executive (when the legislature cannot be convened), to call forth such number of the militia of any other state or states as may be applied for, as he may judge sufficient to suppress such insurrection." Insurrection against the existing government is, then, the thing to be suppressed.

But the law and the constitution—the whole system of American institutions—do not contemplate a case in which a resort will be necessary to proceedings *aliunde* or outside of the law and the constitution for the purpose of amending the frame of government. They go on the idea that the states are all republican, that they are all representative in their forms, and that these popular governments in each state, the annually created creatures of the people, will give all proper facilities and necessary aids to bring about changes which the people may judge necessary in their constitutions. They take that ground, and act on no other supposition. They assume that the popular will in all particulars will be accomplished; and history has proved that the presumption is well founded.

This, may it please your honors, is the view I take of what I have called the "American system." These are the methods of bringing about changes in government. Now, it is proper to

[2] 1 Stat. p. 424.

look into this record, and see what the questions are that are presented by it, and consider: (1) Whether the case is one for judicial investigation at all,—that is, whether this court can try the matters which the plaintiff has offered to prove in the court below; and (2) in the second place, whether many things which he did offer to prove, if they could have been and had been proved, were not acts of criminality, and therefore no justification; and (3) whether all that was offered to be proved would show that, in point of fact, there had been established and put in operation any new constitution, displacing the old charter government of Rhode Island.

The declaration is in trespass. The writ was issued on the 8th of October, 1842, in which Martin Luther complains that Luther M. Borden and others broke into his house in Warren, R. I., on the 29th of June, 1842, and disturbed his family, and committed other illegal acts. The defendant answers that large numbers of men were in arms, in Rhode Island, for the purpose of overthrowing the government of the state, and making war upon it, and that, for the preservation of the government and people, martial law had been proclaimed by the governor, under an act of the legislature, on the 25th of June, 1842. The plea goes on to aver that the plaintiff was aiding and abetting this attempt to overthrow the government, and that the defendant was under the military authority of John T. Child, and was ordered by him to arrest the plaintiff, for which purpose he applied at the door of his house, and, being refused entrance, he forced the door. The action is thus for an alleged trespass, and the plea is justification under the law of Rhode Island. The plea and replications are as usual in such cases in point of form. The plea was filed at the November term of 1842, and the case was tried at the November term of 1843, in the circuit court in Rhode Island. In order to make out a defense, the defendant offered the charter of Rhode Island, the participation of the state in the Declaration of Independence, its uniting with the confederation in 1778, its admission into the Union in 1790, its continuance in the Union, and its recognition as a state down to May, 1843, when the constitution now in force was adopted. Here let it be particularly remarked that congress admitted Rhode Island into the constitution under this identical old charter government, thereby giving sanction to it as a republican form of government. The defendant then refers to all the laws and proceedings of the assembly till the adoption of the present constitution of Rhode Island. To repel the case of the defendant, the plaintiff read the proceedings

of the old legislature, and documents to show that the idea of changing the government had been entertained as long ago as 1790. He read also certain resolutions of the assembly in 1841, memorials praying changes in the constitution, and other documents to the same effect. He next offered to prove that suffrage associations were formed throughout the state in 1840 and 1841, and that steps were taken by them for holding public meetings, and to show the proceedings had at those meetings. In the next place, he offered to prove that a mass convention was held at Newport, attended by over four thousand persons, and another at Providence, at which over six thousand attended, at which resolutions were passed in favor of the change. Then he offered to prove the election of delegates; the meeting of the convention in October, 1841, and the drafting of the Dorr constitution; the reassembling in 1841, the completion of the draft, its submission to the people, their voting upon it, its adoption, and the proclamation, on the 13th of January, 1842, that the constitution so adopted was the law of the land. That is the substance of what was averred as to the formation of the Dorr constitution. The plaintiff next offered to prove that the constitution was adopted by a large majority of the qualified voters of the state; that officers were elected under it in April, 1842; that this new government assembled on the 3d of May,—and he offered a copy of its proceedings. He sets forth that the court refused to admit testimony upon these subjects, and to these points, and ruled that the old government and laws of the state were in full force and power, and then existing, when the alleged trespass was made, and that they justified the acts of the defendants, according to their plea.

I will give a few references to other proceedings of this new government. The new constitution was proclaimed on the 13th of January, 1842, by some of the officers of the convention. On the 13th of April, officers were appointed under it, and Mr. Dorr was chosen governor. On Tuesday, the 3d of May, the new legislature met, was organized, and then, it is insisted, the new constitution became the law of the land. The legislature sat through that whole day, morning and evening; adjourned; met the next day, and sat through all that day, morning and evening, and did a great deal of paper business. It went through the forms of choosing a supreme court, and transacting other business of a similar kind, and on the evening of the 4th of May it adjourned, to meet again on the first Monday of July, in Providence,

'And word spake never more."

It never reassembled. This government, then, whatever it was, came into existence on the 3d day of May, and went out of existence on the 4th day of May.

I will now give some references concerning the new constitution authorized by the government,—the old government,—and which is now the constitution of Rhode Island. It was framed in November, 1842. It was voted upon by the people on the 21st, 22d, and 23d days of November, was then by them accepted, and became, by its own provisions, the constitution of Rhode Island on the first Tuesday of May, 1843. Now, what, in the meantime, had become of Mr. Dorr's government? According to the principle of its friends, they are forced to admit that it was superseded by the new, that is to say, the present, government, because the people accepted the new government. But there was no new government till May, 1843. According to them, then, there was an *interregnum* of a whole year. If Mr. Dorr had had a government, what became of it? If it ever came in, what put it out of existence? Why did it not meet on the day to which it had adjourned? It was not displaced by the new constitution, because that had not been agreed upon in convention till November. It was not adopted by the people till the last of November, and it did not go into operation till May. What, then, had become of Mr. Dorr's government?

I think it is important to note that the new constitution, established according to the prescribed forms, came thus into operation in May, 1843, and was admitted by all to be the constitution of the state. What then happened in the state of Rhode Island? I do not mean to go through all the trials that were had after this ideal government of Mr. Dorr ceased to exist, but I will ask attention to the report of the trial of Dorr for treason, which took place in 1844, before all the judges of the supreme court of the state. He was indicted in August, 1842, and the trial came on in March, 1844. The indictment was found while the charter government was in force, and the trial was had under the new constitution. He was found guilty of treason. And I turn to the report of the trial now to call attention to the language of the court in its charge, as delivered by Chief Justice Durfee. I present the following extract from that charge:

"It may be, gentlemen, that he really believed himself to be the governor of the state, and that he acted throughout under this delusion. However this may go to extenuate the offense, it does not take from it its legal guilt. It is no defense to an indictment for the violation of any law for the defendant to come into court and say: 'I thought that I was but exercising a constitutional right, and I claim an acquittal on

the ground of mistake.' Were it so, there would be an end to all law and all government. Courts and juries would have nothing to do but to sit in judgment upon indictments, in order to acquit or excuse. The accused has only to prove that he has been systematic in committing crime, and that he thought that he had a right to commit it, and, according to this doctrine, you must acquit. The main ground upon which the prisoner sought for a justification was that a constitution had been adopted by a majority of the male adult population of this state, voting in their primary or natural capacity or condition, and that he was subsequently elected, and did the acts charged, as governor under it. He offered the votes themselves to prove its adoption, which were also to be followed by proof of his election. This evidence we have ruled out. Courts and juries, gentlemen, do not count votes to determine whether a constitution has been adopted, or a governor elected, or not. Courts take notice, without proof offered from the bar, what the constitution is or was, and who is or was the governor of their own state. It belongs to the legislature to exercise this high duty. It is the legislature which, in the exercise of its delegated sovereignty, counts the votes, and declares whether a constitution be adopted or a governor elected, or not; and we cannot revise and reverse their acts in this particular without usurping their power. Were the votes on the adoption of our present constitution now offered here to prove that it was or was not adopted, or those given for the governor under it, to prove that he was or was not elected, we could not receive the evidence ourselves; we could not permit it to pass to the jury. And why not? Because, if we did so, we should cease to be a mere judicial, and become a political, tribunal, with the whole sovereignty in our hands. Neither the people nor the legislature would be sovereign. We should be sovereign, or you would be sovereign, and we should deal out to parties litigant, here at our bar, sovereignty to this or that, according to rules or laws of our own making, and heretofore unknown in courts.

"In what condition would this country be if appeals could be thus taken to courts and juries? This jury might decide one way, and that another, and the sovereignty might be found here to-day and there to-morrow. Sovereignty is above courts or juries, and the creature cannot sit in judgment upon its creator. Were this instrument offered as the constitution of a foreign state, we might, perhaps, under some circumstances, require proof of its existence; but, even in that case, the fact would not be ascertained by counting the votes given at its adoption, but by the certificate of the secretary of state, under the broad seal of the state. This instrument is not offered as a foreign constitution, and this court is bound to know what the constitution of the government is under which it acts, without any proof even of that high character. We know nothing of the existence of the so-called 'people's constitution' as law, and there is no proof before you of its adoption, and of the election of the prisoner as governor under it, and you can return a verdict only on the evidence that has passed to you."

Having thus, may it please your honors, attempted to state the questions as they arise, and having referred to what has taken place in Rhode Island, I shall present what further I have to say in three propositions:

(1) I say, first, that the matters offered to be proved by the

plaintiff in the court below are not of judicial cognizance, and proof of them, therefore, was properly rejected by the court.

(2) If all these matters could be, and had been, legally proved, they would have constituted no defense, because they show nothing but an illegal attempt to overthrow the government of Rhode Island.

(3) No proof was offered by the plaintiff to show that, in fact, another government had gone into operation, by which the charter government had become displaced.

And, first, these matters are not of judicial cognizance. Does this need arguing? Are the various matters of fact alleged, the meetings, the appointment of committees, the qualifications of voters,—is there any one of all these matters of which a court of law can take cognizance in a case in which it is to decide on sovereignty? Are fundamental changes in the frame of a government to be thus proved? The thing to be proved is a change of the sovereign power. Two legislatures existed at the same time, both claiming power to pass laws. Both could not have a legal existence. What, then, is the attempt of our adversaries? To put down one sovereign government, and to put another up, by facts and proceedings in regard to elections out of doors, unauthorized by any law whatever. Regular proceedings for a change of government may in some cases, perhaps, be taken notice of by a court; but this court must look elsewhere than out of doors, and to public meetings, irregular and unauthorized, for the decision of such a question as this. It naturally looks to that authority under which it sits here, to the provisions of the constitution which have created this tribunal, and to the laws by which its proceedings are regulated. It must look to the acts of the government of the United States in its various branches.

This Rhode Island disturbance, as everybody knows, was brought to the knowledge of the president of the United States by the public authorities of Rhode Island; and how did he treat it? The United States have guarantied to each state a republican form of government; and a law of congress has directed the president, in a constitutional case requiring the adoption of such a proceeding, to call out the militia to put down domestic violence and suppress insurrection. Well, then, application was made to the President of the United States,—to the executive power of the United States. For, according to our system, it devolves upon the executive to determine, in the first instance, what are and what

are not governments. The president recognizes governments—foreign governments—as they appear from time to time in the occurrences of this changeful world. And the constitution and the laws, if an insurrection exists against the government of any state, rendering it necessary to appear with an armed force, make it his duty to call out the militia and suppress it.

Two things may here be properly considered. The first is that the constitution declares that the United States shall protect every state against domestic violence; and the law of 1795, making provision for carrying this constitutional duty into effect in all proper cases, declares that, "in case of an insurrection in any state against the government thereof, it shall be lawful for the President of the United States to call out the militia of other states to suppress such insurrection." These constitutional and legal provisions make it the indispensable duty of the president to decide, in cases of commotion, what is the rightful government of the state. He cannot avoid such decision. And in this case he decided, of course, that the existing government—the charter government—was the rightful government. He could not possibly have decided otherwise. In the next place, if events had made it necessary to call out the militia, and the officers and soldiers of such militia, in protecting the existing government, had done precisely what the defendants in this case did, could an action have been maintained against them? No one would assert so absurd a proposition.

In reply to the requisition of the governor, the president stated that he did not think it was yet time for the application of force; but he wrote a letter to the secretary of war, in which he directed him to confer with the governor of Rhode Island, and, whenever it should appear to them to be necessary, to call out from Massachusetts and Connecticut a militia force sufficient to terminate at once this insurrection, by the authority of the government of the United States. We are at no loss, therefore, to know how the executive government of the United States treated this insurrection. It was regarded as fit to be suppressed. That is manifest from the president's letters to the secretary of war and to Governor King.

Now, the eye of this court must be directed to the proceedings of the general government, which had its attention called to the subject, and which did institute proceedings respecting it. And the court will learn from the proceedings of the executive branch of the government, and of the two chambers above us, how the disturbances in Rhode Island were regarded,—whether they were

looked upon as the establishment of any government, or as a mere pure, unauthorized, unqualified insurrection against the authority of the existing government of the state. I say, therefore, that, upon that ground, these facts are not facts which this court can inquire into, or which the court below could try, because they are facts going to prove (if they prove anything) the establishment of a new sovereignty; and that is a question to be settled elsewhere and otherwise. From the very nature of the case it is not a question to be decided by judicial inquiry. Take, for example, one of the points which it involves. My adversary offered to prove that the constitution was adopted by a majority of the people of Rhode Island,—by a large majority, as he alleges. What does this offer call on your honors to do? Why, to ascertain, by proof, what is the number of citizens of Rhode Island, and how many attended the meetings at which the delegates to the convention were elected; and then you have to add them all up, and prove, by testimony, the qualifications of every one of them to be an elector. It is enough to state such a proposition to show its absurdity. As none such ever was sustained in a court of law, so none can be or ought to be sustained. Observe that minutes of proceedings can be no proof, for they were made by no authentic persons; registers were kept by no warranted officers; chairmen and moderators were chosen without authority. In short, there are no official records; there is no testimony in the case but parol. Chief Justice Durfee has stated this so plainly that I need not dwell upon it.

But, again, I say you cannot look into the facts attempted to be proved, because of the certainty of the continuance of the old government till the new and legal constitution went into effect on the 3d of May, 1843. To prove that there was another constitution of two days' duration would be ridiculous. And I say that the decision of Rhode Island herself, by her legislature, by her executive, by the adjudication of her highest court of law, on the trial of Dorr, has shut up the whole case. Do you propose—I will not put it in that form, but would it be proper for this court to reverse that adjudication? That declares that the judges of Rhode Island know nothing of the "people's constitution." Is it possible, then, for this court, or for the court below, to know anything of it? It appears to me that, if there were nothing else in the case, the proceedings of Rhode Island herself must close everybody's mouth, in the court and out of it. Rhode Island is competent to decide the question herself, and everybody else ought to be bound by her decision. And she has decided it.

And it is but a branch of this to say, according to my second proposition, that if everything offered had been proved, if in the nature of the case these facts and proceedings could have been received as proof, the court could not have listened to them, because every one of them is regarded by the state in which they took place as a criminal act. Who can derive any authority from acts declared to be criminal? The very proceedings which are now set up here show that this pretended constitution was founded upon acts which the legislature of the state had provided punishment for, and which the courts of the state have punished. All, therefore, which the plaintiff has attempted to prove, are acts which he was not allowed to prove, because they were criminal in themselves, and have been so treated and punished, so far as the state government, in its discretion, has thought proper to punish them.

Thirdly, and lastly, I say that there is no evidence offered, nor has any distinct allegation been made, that there was an actual government established and put in operation to displace the charter government, even for a single day. That is evident enough. You find the whole embraced in those two days,—the 3d and 4th of May. The French revolution was thought to be somewhat rapid. That took three days. But this work was accomplished in two. It is all there, and what is it? Its birth, its whole life, and its death were accomplished in forty-eight hours. What does it appear that the members of this government did? Why, they voted that A. should be treasurer, and C. secretary, and Mr. Dorr governor, and chose officers of the supreme court. But did ever any man under that authority attempt to exercise a particle of official power? Did any man ever bring a suit? Did ever an officer make an arrest? Did any act proceed from any member of this government, or from any agent of it, to touch a citizen of Rhode Island in his person, his safety, or his property, so as to make the party answerable upon an indictment or in a civil suit? Never! It never performed one single act of government! It never did a thing in the world! All was patriotism, and all was paper; and with patriotism and with paper it went out on the 4th of May, admitting itself to be, as all must regard it, a contemptible sham!

I have now done with the principles involved in this case, and the questions presented on this record.

In regard to the other case I have but few words to say. And, first, I think it is to be regretted that the court below sent up such a list of points on which it was divided. I shall not go through

them, and shall leave it to the court to say whether, after they shall have disposed of the first cause, there is anything left. I shall only draw attention to the subject of martial law; and in respect to that, instead of going back to martial law as it existed in England at the time the charter of Rhode Island was granted, I shall merely observe that martial law confers power of arrest, of summary trial, and prompt execution, and that, when it has been proclaimed, the land becomes a camp, and the law of the camp is the law of the land. Mr. Justice Story defines martial law to be the law of war,—a resort to military authority in cases where the civil law is not sufficient; and it confers summary power, not to be used arbitrarily or for the gratification of personal feelings of hatred or revenge, but for the preservation of order and of the public peace. The officer clothed with it is to judge of the degree of force that the necessity of the case may demand; and there is no limit to this, except such as is to be found in the nature and character of the exigency.

I now take leave of this whole case. That it is an interesting incident in the history of our institutions I freely admit. That it has come hither is a subject of no regret to me. I might have said that I see nothing to complain of in the proceedings of what is called the charter government of Rhode Island, except that it might perhaps have discreetly taken measures at an earlier period for revising the constitution. If in that delay it erred, it was the error into which prudent and cautious men would fall. As to the enormity of freehold suffrage, how long is it since Virginia, the parent of states, gave up her freehold suffrage? How long is it since nobody voted for governor in New York without a freehold qualification? There are now states in which no man can vote for members of the upper branch of the legislature who does not own fifty acres of land. Every state requires more or less of a property qualification in its officers and electors; and it is for discreet legislation or constitutional provisions to determine what its amount shall be. Even the Dorr constitution had a property qualification. According to its provisions, for officers of the state, to be sure, anybody could vote; but its authors remembered that taxation and representation go together, and therefore they declared that no man, in any town, should vote to lay a tax for town purposes who had not the means to pay his portion. It said to him: "You cannot vote in the town of Providence to levy a tax for repairing the streets of Providence; but you may vote for governor, and for thirteen representatives from the town of Providence, and send them to the legislature, and there they

may tax the people of Rhode Island at their sovereign will and pleasure."

I believe that no harm can come of the Rhode Island agitation in 1841, but rather good. It will purify the political atmosphere from some of its noxious mists, and I hope it will clear men's minds from unfounded notions and dangerous delusions. I hope it will bring them to look at the regularity—the order—with which we carry on what, if the word were not so much abused, I would call our glorious representative system of popular government. Its principles will stand the test of this crisis, as they have stood the test and torture of others. They are exposed always, and they always will be exposed, to dangers. There are dangers from the extremes of too much and of too little popular liberty; from monarchy or military despotism on one side, and from licentiousness and anarchy on the other. This always will be the case. The classical navigator had been told that he must pass a narrow and dangerous strait:

> *"Dextrum Scylla latus, laevum implacata Charybdis,*
> *Obsidet."*

Forewarned, he was alive to his danger, and knew, by signs not doubtful, where he was, when he approached its scene:

> *"Et gemitum ingentem pelagi, pulsataque saxa,*
> *Audimus longe, fractasque ad litora voces;*
> *Exsultantque vada, atque aestu miscentur arenae.*
> *. . . . Nimirum haec illa Charybdis!"*

The long-seeing sagacity of our fathers enables us to know equally well where we are when we hear the voices of tumultuary assemblies, and see the turbulence created by numbers meeting and acting without the restraints of law, and has most wisely provided constitutional means of escape and security. When the established authority of government is openly contemned; when no deference is paid to the regular and authentic declarations of the public will; when assembled masses put themselves above the law, and, calling themselves the people, attempt by force to seize on the government; when the social and political order of the state is thus threatened with overthrow, and the spray of the waves of violent popular commotion lashes the stars,—our political pilots may well cry out:

> *"Nimirum haec illa Charybdis!"*

The prudence of the country—the sober wisdom of the people—has thus far enabled us to carry this constitution, and all our constitutions, through the perils which have surrounded them,

without running upon the rocks on one side, or being swallowed up in the eddying whirlpools of the other. And I fervently hope that this signal happiness and good fortune will continue, and that our children after us will exercise a similar prudence and wisdom and justice, and that, under the Divine blessing, our system of free government may continue to go on, with equal prosperity, to the end of time.

SIR ALEXANDER COCKBURN.

[Alexander James Edmund Cockburn, only son of Alexander Cockburn and Yolande de Vignier, was born 1802. He was educated at Cambridge, where he took high rank. In 1829 he took the degree of bachelor of civil law, and was elected to a fellowship. He was twice an unsuccessful candidate for the mastership of Trinity Hall. In 1825 he entered the Middle Temple, and four years later was called to the bar. He joined the Western circuit, then led by Follett, and soon acquired a large practice, especially in election petitions. In 1841 he was made a queen's counsel. In 1847 he entered parliament for Southampton, and soon attracted much attention by his speech in defense of Lord Palmerston's conduct of the Don Pacifico dispute with Greece. In 1850 he was knighted and made solicitor general, and in the following year succeeded Sir John Romilly as attorney general. In 1854 he was appointed recorder of Bristol, and two years later, on the death of Sir John Jervis, was made chief justice of the common pleas, and sworn of the privy council. In 1859 he succeeded Lord Campbell as chief justice of the king's bench. He twice declined a peerage. From Cambridge he received the degrees of D. C. L. and LL. D. In 1878 his health began to fail, and in 1880 he died at his home in Mayfair of angina pectoris.]

Cockburn was a rhetorician and a scholar in the old-fashioned sense of those terms. Few men had a higher estimate of the capabilities of the language, and none bestowed greater care on all the products of his mind. Possibly there have been more eminent advocates; certainly there have been more profound judges; but rarely a man who united to such an extent the attributes of each, —who made so many great arguments, and displayed in so many notable judgments such grasp of the theory and application of law.

Like Erskine and Brougham, with whom alone he shares the highest honors of forensic advocacy at the English bar, his mind was more capacious than powerful; clear, rather than profound. Although his ability to deal with complicated facts—to present them in harmonious order, and reason powerfully upon them—was

of a very high order, his arguments fall short of the simple logical structure which characterizes Erskine's art; and his methods are in direct contrast to Brougham's energy and force. In comparison with the simplicity of Erskine's diction, Cockburn's eloquence seems picturesque. His high breeding, his great social gifts, his varied scholarship, and numerous accomplishments imparted a peculiar flavor to his mental operations. In judgment he surpassed both Erskine and Brougham, and his acute sensibility manifested itself in a range of imagination to which neither of his rivals could make any pretension. As an illustration of the manner in which his imagination colored all his conceptions, and of the robust reasoning which underlies his imaginative expression, his argument in defense of McNaughton is unsurpassed. His argument in the Hopwood will case is also an effort of singular power. His successful prosecution of William Palmer for murder shows his skill in dealing with complicated facts.

Had Cockburn's imagination been balanced by equal strength in reasoning faculty, his mental equipment would have been perfect. But the acute sensibility which characterized his temperament was itself of no inconsiderable aid in the discharge of judicial functions. The law is not merely a system of rules; nor is its administration simply the application of these rules by rigid logical deduction. Since it is designed to serve the needs of mankind, its efficient administration requires a clear and just appreciation of the facts to which it is to be applied. The successful investigation of these facts is therefore an essential preliminary to, and a most important element of, a just determination. A learned lawyer who is wanting in imagination and knowledge of the world may not only fail to discover the facts; he may also misapprehend the bearing upon them of the rule of which he has no full and pregnant, but only a dry and technical, knowledge. Of course the measure of value of such qualities depends upon the extent to which they coexist with a logical basis in the understanding; but in the perfect coordination of these opposite qualities reside the elements of the highest judicial capacity. In Cockburn's equipment, imaginative qualities certainly predominated. His mind was perhaps too quick and susceptible to admit of the tenacity of grasp essential to the highest excellence in judicial exposition. Hence he was greatest in dealing with facts. At *nisi prius* he displayed his best powers. There his grace of manner, his knowledge of the world, his refined and eloquent diction, and his lucid and orderly intellect combined to make him an ideal judge. His most conspicuous ef-

fort in this sphere was his charge to the jury in the memorable Tichborne case, which occupied eighteen days in delivery. Some of his expressions in this remarkable charge will be of interest as long as trial by jury exists. With respect to his view of his duty as a judge he said:

"In my opinion, a judge does not discharge his duty who contents himself with being the mere passive recipient of evidence which he is afterwards to reproduce to the jury, without pointing out the weight of the facts, and the inferences to which they properly and legitimately give rise. It is the business of the judge to adjust the scales in the balance, that they shall hang evenly; but it is his duty to see that the facts, as they present themselves, are placed in the one scale or the other, according as they belong to the one or to the other. It is his business to take care that inferences which properly arise from the facts shall be submitted to the consideration of the jury, with the happy consciousness that, if he in aught goes wrong, there is the judgment of twelve men having experience in the every-day concerns of life to set anything right in respect of which he may have erred. But if the facts are such that, placed in the scales to which they respectively belong, the one scale kicks the beam, and the other goes down, the fault is in the nature of the case, and not in the conduct of the judge. If, converging from every point, the footsteps all tend towards a common center, and there meet, and if their measure corresponds with the foot tread of the accused, it is the business of the judge to take care that that shall be brought to the minds and attention of the jury. I have long thought, and have more than once expressed the opinion, that a jury assisted by a judge is a better tribunal for the ascertaining of facts and the establishment of truth than a judge unassisted by a jury; but I am perfectly satisfied that it is the business of the judge to assist a jury in the way I have sought to assist you,—that is, by placing the whole case before them,—not only bringing before them all the facts, but also pointing out the inferences which appear to arise from those facts; and I am satisfied that, without this assistance on the part of the judge, the office of the juror is liable to be imperfectly fulfilled. I have yet to learn that it is the business of the judge to suppress facts because they make against the accused, or to refrain from pointing out the conclusions to which the facts, as established by the evidence, properly lead; to suggest to the jury arguments or explanations of the unsoundness of which he is himself convinced; or to adopt those of counsel when satisfied they are delusive; or to refrain, out of tenderness to the accused, from exposing fallacies and sophistry, the hollowness of which he is able to see through, but which may have the effect of misleading minds less accustomed than his own to dissect and analyze evidence in dealing with facts, and to find the way, amid the conflict of testimony, to the ascertaining of truth, —truth, and truth alone, being the object to be attained. If such a principle were admitted, it would follow that, the stronger and clearer the case against the accused, the more reticent must be the judge, the more deficient in his duty in placing the case before the jury in the clearest and plainest light. We must remember that, while it is the business of judicial action to protect the innocent, so, on the other hand, it is the duty of the judge to take care that the guilty does not escape. Not only in the conviction of the innocent, but also in the escape of the guilty, lies, as the old saying well expresses it, the condemnation of the judge,

which applies as well to the juryman who is to judge of the fact as to the judge who presides at the trial, and whose business it is to bring the whole case before the jury. We must take care that the innocent does not suffer; but we must also take care that, if guilt is brought home to the accused, it shall carry with it the consequences of your verdict."

Concerning the duties of jurors he said:

"Gentlemen, you have been asked to give the defendant the benefit of any doubts you may entertain. Most assuredly it is your duty to do so. It is the business of the prosecution to bring home guilt to the accused, to the satisfaction of the minds of the jury; but the doubt to the benefit of which the accused is entitled must be such as rational, thinking, sensible men may fairly and reasonably entertain, not the doubts of a vacillating mind, that has not the moral courage to decide, but shelters itself in a vain and idle scepticism. They must be doubts which men may honestly and conscientiously entertain. . . . .

"I should be the last man to suggest to any individual member of a jury that, if he entertains a conscientious, unalterable conviction, although he may stand alone among his eleven fellow jurors, he should give up that profound and unalterable conviction of his own mind. The law requires the unanimous verdict of twelve men before the verdict of guilty or not guilty can be pronounced; and if a man is satisfied and convinced, after having given the case the best attention that he can give to it, that he cannot find the verdict which the rest of his fellow jurors are desirous of pronouncing, he does right to stand by his conviction. But then we must recollect that he has a duty to perform in this: that he is bound to give the case every possible consideration before he finally determines upon the course which he himself will pursue; and if a man finds himself differing from the rest of his fellows with whom he is associated in the great and solemn functions of justice as a juror, he should start with the fair presumption that he, the one individual, is more likely to be wrong than are the eleven men from whom he differs. He should bear in mind that the great purpose of trial by jury is to obtain unanimity, and to put an end to further litigation. He should address himself in all humility and all diffidence in his own judgment to the task he has to perform, and carefully consider all the reasons and all the arguments which the rest of the body may be able to advance as the ground of the judgment which they are prepared to pronounce. He should let no self-conceit, no notion of being wiser or more clever or higher in point of intelligence and judgment than the rest, no vainglorious assumption of superiority on his part, stand in the way of the most careful consideration of the grounds upon which the rest of the body may found their views. . . . . That, I think, is a duty which a juryman owes to the administration of justice, and the respect which he owes to the opinion of his fellows. . . . .

"Gentlemen, the history of this case may be written by whom it may, —I care not. I am conscious of having done my duty in it, and I can only say:

> " 'There is no terror in these threats,
> For I am armed so strong in honesty,
> That they pass by me like the idle wind,
> Which I regard not.'

"The history of this case may be written hereafter, and, for aught I know, with a pen steeped in gall and venom, that may not scruple to

libel or lampoon the living, or to revile and calumniate the dead. I have no fears. The facts will speak for themselves. I have sat on this bench for many years. I cannot hope that my memory, like that of the great and illustrious men who have gone before me, will live in after ages; but I do hope it will live in the remembrance—nay, I venture to say the affectionate remembrance—of the generation before whom and with whom I have administered justice here. And if my name shall be traduced, if my conduct shall be reviled, if my integrity shall be questioned, I leave the protection of my judicial memory to the bar of England, my relations with whom have never, until this trial, been in the slightest degree unpleasantly disturbed, and whose support I may say has been the happiest part of my judicial life. Gentlemen, motives of favor and fear having been attempted to be brought to bear upon us, allow me to say that there is but one course to follow in the discharge of great public duties. A high and solemn sense of duty should be our only guide; a desire to do that duty honestly our first and ruling motive, before which all other considerations should give way. No man should be insensible to public opinion in discharging a public trust. No man should be insensible to the good opinion—aye, if you like, the applause—of his countrymen. But there is a consideration far higher than that,—the satisfaction of your own internal sense of duty, the satisfaction of your own consciences, in the consciousness that you are following the promptings of that still, small voice which never, if we listen honestly to its dictates, misleads or deceives us; that voice whose approval upholds us, even though men should condemn us, and whose approval is far more precious than the honor and applause we may derive, no matter from what source,—that voice whose approval makes our walk serene by day and our pillow smooth by night. Listen to that, and follow it, and do right, and care not for anything that may be thought or said or done without these walls. In this sacred temple of justice, such considerations as those by which it has been attempted to sway your minds ought to have, and can have, no place. You and I have only one thing to consider,—it is the duty we have to discharge, and which we are bound to discharge, before God and man, with only one thought and one desire, which is to do it honestly, truly, and fearlessly, without regard to any consequences except the desire that that duty shall be properly done."

Among other *causes celebres,* in which his skill in summing up evidence is displayed to advantage, may be mentioned the Matlock will case, the Wainwright murder case, (a leading case on circumstantial evidence), the convent case of Saurin v. Starr, (an action by a Sister of Mercy against her Mother Superior), and Reg. v. Gurney (a celebrated case of fraud and conspiracy).

Cockburn was at his best in the exposition of those branches of the law which are most closely based upon human life and conduct. In Banks v. Goodfellow,[1] one of his most important efforts, both as to form and substance, he formulated the doctrine of partial insanity. By his opinions in Wason v. Walter,[2] Campbell

[1] L. R. 5 Q. B. 549.

[2] L. R. 4 Q. B. 73.

v. Spottiswoode,[3] Hunter v. Sharpe,[4] and Reg. v. Calthorpe,[5] he gave a permanent impulse to the law of libel as applied to the public press. In many other notable cases, among which may be mentioned Reg. v. Keyn,[6] Phillips v. Eyre,[7] Castrique v. Imrie,[8] Goodwin v. Robarts,[9] Nugent v. Smith,[10] and particularly in his charge to the grand jury before which it was sought to indict Col. Nelson and Lieut. Brand for their conduct in the Jamaica insurrection in 1865, he displayed many of the best qualities of judicial exposition.

At a banquet given by the English bar in 1864 to M. Berryer, the distinguished French advocate, Cockburn gave lasting expression to the obligations of the lawyer to his profession. In the course of a speech made on that occasion, Brougham declared that "the first great quality of an advocate is to reckon everything subordinate to the interests of his client"; with respect to which, Cockburn, who followed, said:

"Much as I admire the abilities of M. Berryer, to my mind his crowning virtue—as it ought to be that of every advocate—is that he has, throughout his long career, conducted his cases with untarnished honor. The arms which an advocate wields he ought to use as a warrior, not as an assassin. He ought to uphold the interests of his client *per fas* and not *per nefas*. He ought to reconcile the interests of his client with the eternal interests of truth and justice."

That sentiment may well stand as Cockburn's epitaph.

[3] 3 Best & S. 769.
[4] 4 Fost. & F. 983.
[5] 27 J. P. 581
2 Exch. Div. 63.
[7] L. R. 4 Q. B. 225.
[8] 30 Law J. C. P. 177.
L. R. 10 Exch. 337.
[10] 1 C. P. Div. 423.

ARGUMENT IN DEFENSE OF DANIEL McNAUGHTON, IN THE CENTRAL CRIMINAL COURT, BEFORE CHIEF JUSTICE TINDAL, JUSTICES WILLIAMS AND COLERIDGE, AND A SPECIAL JURY, 1843.

STATEMENT.

On January 20, 1843, Daniel McNaughton shot Mr. Drummond, Sir Robert Peel's private secretary, whom he was supposed to have mistaken for Sir Robert Peel. He was promptly indicted for murder. At the trial, medical experts were called on behalf of the defense to prove the prisoner's insanity; and the court finding that the crown was not prepared with medical evidence to contradict such testimony, stopped the trial, and directed the jury to find the prisoner not guilty on the ground of insanity.[1] The case was argued by Sir William Follett, the solicitor general, for the crown, and by Alexander E. Cockburn, Q. C., for the defendant. In consequence of this verdict, the house of lords subsequently took the opinion of all the judges upon the law with respect to insanity as a defense to crime.[2]

ARGUMENT.

May it Please Your Lordships, Gentlemen of the Jury: I rise to address you on behalf of the unfortunate prisoner at the bar, who stands charged with the awful crime of murder, under a feeling of anxiety so intense—of responsibility so overwhelming—that I feel almost borne down with the weight of my solemn and difficult task. Gentlemen, believe me when I assure you that I say this, not by way of idle or commonplace exordium, but as expressing the deep emotions by which my mind is agitated. I believe that you—I know that the numerous professional brethren by whom I see myself surrounded—will understand me when I say that of all the positions in which, in the discharge of our various duties in the different relations of life, a man may be placed, none can be more painful or more paralyzing to the energies of the mind than that of an advocate to whom is committed the defense of a fellow being in a matter involving life and death, and who, while deeply convinced that the defense which he has to offer is founded in truth and justice, yet sees in the circumstances by which the case is surrounded that which makes him look forward with apprehension and trembling to the result. Gentlemen, if this were an ordinary case; if you had heard of it for the first time since you entered into that box; if the individual who has fallen a victim had been some obscure and unknown person, instead of one whose

[1] 4 State Tr. (N. S.) 847. [2] 10 Clark & F. 200.

character, whose excellence, and whose fate had commanded the approbation, the love, and the sympathy of all,—I should feel no anxiety as to the issue of this trial. But alas! can I dare to hope that even among you, who are to pass in judgment on the accused, there can be one who has not brought to the judgment seat a mind imbued with preconceived notions on the case which is the subject of this important inquiry? In all classes of this great community —in every corner of this vast metropolis, from end to end, even to the remotest confines of this extensive empire—has this case been already canvassed, discussed, determined, and that with reference only to the worth of the victim, and the nature of the crime,—not with reference to the state or condition of him by whom that crime has been committed. And hence there has arisen in men's minds an insatiate desire of vengeance; there has gone forth a wild and merciless cry for blood, to which you are called upon this day to minister! Yet do I not complain. When I bear in mind how deeply the horror of assassination is stamped on the hearts of men, above all, on the characters of Englishmen,—and believe me, there breathes no one on God's earth by whom that crime is more abhorred than by him who now addresses you, and who, deeply deploring the loss, and acknowledging the goodness, dwelt upon with such touching eloquence by my learned friend, of him who in this instance has been its victim, would fain add, if it may be permitted, an humble tribute to the memory of him who has been taken from us,—when I bear in mind, I say, these things, I will not give way to one single feeling; I will not breathe one single murmur of complaint or surprise at the passionate excitement which has pervaded the public mind on this unfortunate occasion. But I shall, I trust, be forgiven if I give utterance to the feelings of fear and dread by which, on approaching this case, I find my mind borne down, lest the fierce and passionate resentment to which this event has given rise may interfere with the due performance of those sacred functions which you are now called upon to discharge.

Yet, gentlemen, will I not give way to feelings of despair, or address you in the language of despondency. I am not unmindful of the presence in which I am to plead for the life of my client. I have before me British judges, to whom I pay no idle compliment when I say that they are possessed of all the qualities which can adorn their exalted station, or insure to the accused a fair, a patient, and an impartial hearing; I am addressing a British jury, —a tribunal to which truth has seldom been a suppliant in vain;

I stand in a British court, where Justice, with Mercy for her handmaid, sits enthroned on the noblest of her altars, dispelling, by the brightness of her presence, the clouds which occasionally gather over human intelligence, and awing into silence, by the holiness of her eternal majesty, the angry passions which at times intrude beyond the threshold of her sanctuary, and force their way even to the very steps of her throne. In the name of that eternal justice—in the name of that God whose great attribute we are taught that justice is—I call upon you to enter upon the consideration of this case with minds divested of every prejudice, of every passion, of every feeling of excitement. In the name of all that is sacred and holy I call upon you calmly to weigh the evidence which will be brought before you, and to give your judgment according to that evidence. And if this appeal be not, as I know it will not be, made to you in vain, then, gentlemen, I know the result, and I shall look to the issue without fear or apprehension.

Gentlemen, my learned friend the solicitor general, in stating this case to you, anticipated, with his usual acuteness and accuracy the nature of the defense which would be set up. The defense upon which I shall rely will turn, not upon the denial of the act with which the prisoner is charged, but upon the state of his mind at the time he committed the act. There is no doubt, gentlemen, that, according to the law of England, insanity absolves a man from responsibility, and from the legal consequences which would otherwise attach to the violation of the law; and in this respect, indeed, the law of England goes no further than the law of every other civilized community on the face of the earth. It goes no further than what reason strictly prescribes; and, if it be not too presumptuous to scan the judgments of a higher tribunal, it may not be too much to believe and hope that Providence, when, in its inscrutable wisdom and its unfathomable councils, it thinks fit to lay upon a human being the heaviest and most appalling of all calamities to which, in this world of trial and suffering, human nature can be subjected,—the deprivation of that reason which is man's only light and guide in the intricate and slippery paths of life,—will absolve him from his responsibility to the laws of God, as well as to those of man. The law, then, takes cognizance of that disease which obscures the intellect, and poisons the very sources of thought and feeling in the human being; which deprives man of reason, and converts him into the similitude of the lower animal; which bears down all the motives which usually stand as barriers around his conduct, and bring him within the operation of

the divine and human law,—leaving the unhappy sufferer to the wild impulses which his frantic imagination engenders, and which urge him on with ungovernable fury to the commission of acts which his better reason, when yet unclouded, would have abhorred. The law, therefore, holds that a human being in such a state is exempt from legal responsibility and legal punishment. To hold otherwise would be to violate every principle of justice and humanity. The principle of the English law, therefore, as a general proposition, admits of no doubt whatsoever. But at the same time it would be idle to contend that, in the practical application of this great principle, difficulties do not occur; and therefore it is that I claim your utmost attention whilst I lay before you the considerations which present themselves to my mind upon this most important subject.

I have already stated to you that the defense of the accused will rest upon his mental condition at the time when the offense was committed. The evidence upon which that defense is founded will be deserving of your most serious attention. I will content myself in the present stage by briefly stating its general character. It will be of a two-fold description. It will not be such as that by which my learned friend the solicitor general has sought to anticipate the defense, and to establish the sanity of the prisoner. It will not be of that naked, vague, indefinite, and uncertain character,—it will be testimony positive and precise, and I say, from the bottom of my heart, that I believe it will carry conviction to the mind of every one who shall hear it. It will be the evidence of persons who have known the prisoner from his infancy,—of parties who have been brought into close and intimate contact with him; it will be the evidence of his relations, his friends, and his connections. But as the evidence of near relations and connections is always open to suspicion and distrust, I rejoice to say that it will consist also of the statements of persons whose testimony will be beyond the reach of all suspicion or dispute. Gentlemen, I will call before you the authorities of his native place, to one and all of whom this unfortunate calamity with which it has pleased Providence to afflict the prisoner at the bar was distinctly known, —to all of whom he has from time to time, and again and again, applied for protection from the fancied miseries which his disordered imagination produced. All of them I will call, and their evidence will leave no doubt upon your minds that this man has been the victim of a fierce and fearful delusion, which, after the intellect had become diseased, the moral sense broken down, and self-control destroyed, has led him on to the perpetration of the crime

with which he now stands charged. In addition to this evidence I shall call before you members of the medical profession,—men of intelligence, experience, skill, and undoubted probity,—who will tell you upon their oaths that it is their belief, their deliberate opinion, their deep conviction, that this man is mad; that he is the creature of delusion, and the victim of ungovernable impulses, which wholly take away from him the character of a reasonable and responsible being. I need not point out to you the great importance and value of the latter description of testimony. You will not, I am sure, think that what I say is with the view, in the slightest degree, of disparaging your capacity, or of doubting your judgment, when I venture to suggest to you that, of all the questions which can possibly come before a tribunal of this kind, the question of insanity is one which (except in those few glaring cases where its effects pervade the whole of a man's mind) is the most difficult upon which men not scientifically acquainted with the subject can be called upon to decide, and upon which the greatest deference should be paid to the opinions of those who have made the subject their peculiar study.

It is now, I believe, a matter placed beyond doubt that madness is a disease of the body operating upon the mind,—a disease of the cerebral organization,—and that a precise and accurate knowledge of this disease can only be acquired by those who have made it the subject of attention and experience, of long reflection and of diligent investigation. The very nature of the disease necessitates the seclusion of those who are its victims from the rest of the world. How can we, then, who, in the ordinary course of life, are brought into contact only with the sane, be competent to judge of the nice and shadowy distinctions which mark the boundary line between mental soundness and mental disease? I do not ask you, gentlemen, to place your judgment at the mercy, or to surrender your minds and understanding to the opinions, of any set of men, for, after all, it must be left to your consciences to decide; I only point out to you the value and importance of this testimony, and the necessity there is that you should listen with patient attention to the evidence of men of skill and science, who have made insanity the subject of their special attention. My learned friend the solicitor general has directed your attention to the legal authorities, and perhaps, when those authorities shall have been minutely examined, no great difference will be found to exist between my learned friend and myself. But lest any confusion should be produced in your minds to the detriment of justice, you

will forgive me if I pray your attention to the observations which I deem it my duty to make on this branch of the subject. I think it will be quite impossible for any person who brings a sound judgment to bear upon this question, when viewed with the aid of the light which science has thrown upon it, to come to the opinion that the ancient maxims, which, in times gone by, have been laid down for our guidance, can be taken still to obtain in the full force of the terms in which they were laid down. It must not be forgotten that the knowledge of this disease in all its various forms is a matter of very recent growth. I feel that I may appeal to the many medical gentlemen I see around me, whether the knowledge and pathology of this disease has not within a few recent years first acquired the character of a science. It is known to all that it is but as yesterday that the system of treatment which in past ages, to the eternal disgrace of those ages, was pursued towards those whom it had pleased Heaven to visit with the heaviest of all human afflictions, and who were therefore best entitled to the tenderest care and most watchful kindness of the Christian brethren,—it is but as yesterday, I say, that that system has been changed for another, which, thank God, exists to our honor, and to the comfort and better prospect of recovery of the unfortunate diseased in mind! It is but as yesterday that darkness and solitude, cut off from the rest of mankind like the lepers of old, the dismal cell, the bed of straw, the iron chain, and the inhuman scourge were the fearful lot of those who were best entitled to human pity and to human sympathy, as being the victims of the most dreadful of all mortal calamities. This state of things has passed or is passing fast away; but in former times, when it did exist, you will not wonder that these unhappy persons were looked upon with a different eye. Thank God, at last—though but at last—humanity and wisdom have penetrated, hand in hand, into the dreary abodes of these miserable beings, and, whilst the one has poured the balm of consolation into the bosoms of the afflicted, the other has held the light of science over our hitherto imperfect knowledge of this dire disease, has ascertained its varying character, and marked its shadowy boundaries, and taught us how, in gentleness and mercy, best to minister to the relief and restoration of the sufferer! You can easily understand, gentlemen, that when it was the practice to separate these unhappy beings from the rest of mankind, and to subject them to this cruel treatment, the person whose reason was but partially obscured would ultimately, and perhaps speedily, in most cases, be converted into

a raving madman. You can easily understand, too, that, when thus immured and shut up from the inspection of public inquiry, neglected, abandoned, overlooked, all the peculiar forms and characteristics and changes of this malady were lost sight of and unknown, and kept from the knowledge of mankind at large, and therefore how difficult it was to judge correctly concerning it. Thus I am enabled to understand how it was that crude maxims and singular propositions founded upon the hitherto partial knowledge of this disease have been put forward and received as authority, although utterly inapplicable to many of the cases arising under the varied forms of insanity. Science is ever on the advance; and, no doubt, science of this kind, like all other, is in advance of the generality of mankind. It is a matter of science altogether; and we who have the ordinary duties of our several stations, and the business of our respective avocations, to occupy our full attention, cannot be so well informed upon it as those who have scientifically pursued the study and treatment of the disease. I think, then, we shall be fully justified in turning to the doctrines of matured science, rather than to the maxims put forth in times when neither knowledge nor philanthropy nor philosophy nor common justice had their full operations in discussions of this nature.

My learned friend the solicitor general has read to you the authority of Lord Hale upon the subject-matter of this inquiry. I hold in my hand perhaps the most scientific treatise that the age has produced upon the subject of insanity in relation to jurisprudence. It is the work of Dr. Ray, an American writer on medical jurisprudence, and a professor in one of the great national establishments of that country. [Counsel quoted the criticisms of Drs. Ray[1] and Prichard[2] on the test suggested by Lord Hale in cases of partial insanity:[3] "Such a person as, laboring under melancholy distempers, hath yet ordinarily as great understanding as ordinarily a child of fourteen years hath, is such a person as may be guilty of treason or felony." On this Dr. Ray observes: "In the time of this eminent jurist, insanity was a much less frequent disease than it is now, and the popular notions concerning it were derived from the observation of those wretched inmates of the mad-houses whom chains and stripes, cold and filth, had reduced to the stupidity of the idiot, or exasperated to the

[1] A Treatise on the Medical Jurisprudence of Insanity, by I. Ray, M. D.
[2] On the Different Forms of Insanity in Relation to Jurisprudence, by James Cowles Prichard, M. D.
[3] 1 Hale, P. C. 30.

fury of a demon. Those nice shades of the disease in which the mind, without being wholly driven from its propriety, pertinaciously clings to some absurd delusion, were either regarded as something very different from real madness, or were too far removed from the common gaze, and too soon converted by bad management into the more active forms of the disease, to enter much into the general idea entertained of madness. Could Lord Hale have contemplated the scenes presented by the lunatic asylums of our own times, we should undoubtedly have received from him a very different doctrine for the regulation of the decisions of after generations."] This is not the first time, gentlemen, that this doctrine of Lord Hale has been discussed with the view to ascertain its true interpretation. One of those master minds whose imperishable productions form part of the intellectual treasure and birthright of their country—the great Lord Erskine, whose brilliant mind never shone forth more conspicuously than upon the occasion to which I am about to allude, and whose sentiments it would be presumption and profanation to give in other than the language which fell from his own gifted lips at the celebrated trial to which allusion was made by my learned friend—put the true interpretation upon the doctrine of Lord Hale. I will read the passage, and I know you will pardon me the time I occupy, for who would not gladly spare the time to listen to observations coming from such a man on so momentous an inquiry? [Counsel then quoted from Erskine's defense of Hadfield the passage in which he asserts that delusion is the true test of insanity, *ante*, p. 148.] Such, gentlemen, is the language of this great man, and in this doctrine is the true interpretation of the law to be found. Gentlemen, that argument prevailed with the court and jury in the case of the person on behalf of whom it was urged. Upon that argument I take my stand this day. I will bring this case within the scope of the incontrovertible and unanswerable reasoning which it comprises, and I feel perfectly confident that upon you, gentlemen, this reasoning will not be lost, but that the same result will follow in this as did in that memorable case. My learned friend the solicitor general has cited to you one or two other cases which I will dispose of in a very few words. A prominent case in his list is that of Earl Ferrers. Here, too, I am glad that my learned friend has referred to the celebrated case of Hadfield, because that case furnishes me with some valuable observations of Lord Erskine's made on Hadfield's trial, which will enable me to show how that great authority disposed of two of the cases relied on by my learned friend. I prefer to read to you, gentlemen, those observa-

tions, rather than trouble you with any of my own. [Quoting from Erskine's speech, *ante*, p. 159.]

Gentlemen, I will now go on to another case cited by my learned friend the solicitor general. I allude to the case of Bowler, which is reported in Collinson on Lunacy.[4] I trust, gentlemen, I shall not be considered open to the imputation of arrogance, or as traveling out of the line of my duty on the present occasion, if I say that I cannot bring myself to look upon that case without a deep and profound sense of shame and sorrow that such a decision as was there come to should ever have been resolved upon by a British jury, or sanctioned by a British judge. What, when I remember that in that case Mr. Warburton, the keeper of a lunatic asylum, was called and examined, and that he stated that the prisoner Bowler had, some months previously, been brought home apparently lifeless, since which time he had perceived a great alteration in his conduct and demeanor; that he would frequently dine at nine o'clock in the morning, eat his meat almost raw, and lie on the grass exposed to rain; that his spirits were so dejected that it was necessary to watch him lest he should destroy himself; when I remember that it was further proved in that case that it was characteristic of insanity occasioned by epilepsy for the patients to imbibe violent antipathies against particular individuals, even their dearest friends, and a desire of taking vengeance upon them, from causes wholly imaginary, which no persuasion could remove, and yet the patient might be rational and collected upon every other subject; when I also recollect that a commission of lunacy had been issued and an inquisition taken upon it, whereby the prisoner was found to have been insane from a period anterior to the offense,—when all these recollections cross my mind, I cannot help looking upon that case with feelings bordering upon indignation. But, gentlemen, I rejoice to say, because it absolves me from the imputation of presumption or arrogance in thus differing from the doc trines laid down in that case by the learned judge, and adopted by the jury, that, in the view which I have taken of it, I am borne out by the authority of an English judge now living amongst us, —a judge who is, and I trust will long continue to be, one of the brightest ornaments of a profession which has, through all times, furnished such shining examples to the world. I refer, gentlemen, to Mr. Baron Alderson, and the opinion that learned judge pronounced upon Bowler's case on the recent trial of Oxford in this court;[5] and I must say that I think, if the attention of my

[4] 673, note.

[5] 4 State Tr. (N. S.) 508.

learned friend the solicitor general had been drawn to that case,—if he had heard or read the observations made by Mr. Baron Alderson on that occasion,—he would not now have pressed Bowler's case upon your notice. The attorney general of that day, the present Lord Campbell, in conducting the prosecution against Oxford for shooting at her majesty, had, in his address to the jury, cited the case of Bowler. When he came to the close of it, Mr. Baron Alderson interrupted him with this observation: "Bowler was executed, I believe, and very barbarous it was." Such was the expression of Mr. Baron Alderson upon the mention of Bowler's case, and I rejoice to be able to cite it. I reverence the strength of feeling which alone could have given rise to that strength of expression, and I am sure that if the attention of my learned friend had been directed to such an observation coming from so high an authority, I know my learned friend's discretion and sense of propriety too well to think he would have cited Bowler's case for your guidance. Gentlemen, you will therefore, I am sure, dismiss that case from your minds after so clear and decided an exposition of the fallacious views which led to that decision. Let the error in that case, I implore you, operate as a warning to you not to be carried away headlong by antiquated maxims or delusive doctrines. God grant that never in future times may any authority, judicial or otherwise, have reason in this case to deplore the consequences of a similar error; never may it be in the power of any man to say of you, gentlemen, that you agreed to a verdict which in itself, or in its execution, deserved to be designated as barbarous.

I pass now, gentlemen, to the next case cited by my learned friend the solicitor general,—the case of Bellingham. All I can say of that case is that I believe, in the opinion of the most scientific men who have considered it, there now exists no doubt at all that Bellingham was a madman. Few, I believe, at this period, unbiased by the political prejudices of the times, and examining the event as a matter of history, will read the report of Bellingham's trial without being forced to the conclusion that he was really mad, or, at the very least, that the little evidence which did appear relative to the state of his mind was strong enough to have entitled him to a deliberate and thorough investigation of his case. The eminent writer I have already quoted,—I mean Dr. Ray,—in speaking of Bellingham's case, says:[6]

"It appeared from the history of the accused, from his own account of

[6] Ray's Medical Jurisprudence, p. 29, § 15.

the transactions that led to the fatal act, and from the testimony of several witnesses, that he labored under many of those strange delusions that find a place only in the brains of a madman. His fixed belief that his own private grievances were national wrongs; that his country's diplomatic agents in a foreign land neglected to hear his complaints, and assist him in his troubles, though they had in reality done more than could have reasonably been expected of them; his conviction, in which he was firm almost to the last, that his losses would be made good by the government, even after he had been repeatedly told, in consequence of repeated applications in various quarters, that the government would not interfere in his affairs; and his determination, on the failure of all other means to bring his affairs before the country, to effect this purpose by assassinating the head of the government, by which he would have an opportunity of making a public statement of his grievances, and of obtaining a triumph, which he never doubted, over the attorney general,—these were all delusions, as wild and strange as those of seven-eighths of the inmates of any lunatic asylum in the land. And so obvious were they that, though they had not the aid of an Erskine to press them upon the attention of the jury, and though he himself denied the imputation of insanity, the government, as if virtually acknowledging their existence, contended for his responsibility on very different grounds."

Gentlemen, it is a fact that Bellingham was hanged within one week after the commission of the fatal act, while persons were on their way to England who had known him for years, and who were prepared to give decisive evidence of his insanity. He was tried, he was executed, notwithstanding the earnest appeal of Mr. Alley, his counsel, that time might be afforded him to obtain evidence as to the nature and extent of the malady to which Bellingham was subject. Moreover, on the occasion of the trial of Oxford in this court, the then attorney general, Sir John Campbell, now Lord Campbell, after Bowler's case had been disposed of by the emphatic observation of Mr. Baron Alderson, expressed himself in these words: "I will not refer to Bellingham's case, as there are some doubts as to the correctness of the mode in which that case was conducted." I would that my learned friend the solicitor general had taken, on this occasion, the same course, and had exercised the same wise forbearance; because the doubts expressed by the late attorney general as to the propriety of the conduct of that case are not confined to that learned person, it being notorious that very serious doubts as to the propriety of that trial are commonly entertained among the profession at large. Under such circumstances, gentlemen, I feel that it would have been much better if your attention had not been directed to that trial as it has been.

I turn now to a very recent treatise on criminal law, which I am the more entitled to cite as an authority because its

learned author, Mr. Roscoe, has been snatched from us by the hand of death while his career was full of that promise which his great attainments and varied learning held out to us. Referring to the rule laid down in the case of Bellingham, and which you have been told was adopted by Lord Lyndhurst in Rex v. Offord, Mr. Roscoe says: "The direction does not appear to make a sufficient allowance for the incapacity of judging between right and wrong upon the very matter in question, as in all cases of monomania."[7] Mr. Roscoe quotes some remarks by an eminent writer on the criminal law of Scotland. Now I may here observe that I have the authority of the present Lord Campbell, when attorney general, in Oxford's case, for saying that there is no difference between the law of Scotland and that of England in this respect; so that all which I may have to cite with respect to the law of Scotland will be quite applicable to the case in hand. Gentlemen, Mr. Roscoe goes on to say:

"The following observations of an eminent writer on the criminal law of Scotland (Mr. Alison) are applicable to the subject: 'Although a prisoner understand perfectly the distinction between right and wrong, yet if he labors, as is generally the case, under an illusion and deception in his own particular case, and is thereby incapable of applying it correctly to his own conduct, he is in that state of mental aberration which renders him not criminally answerable for his actions. For example, a mad person may be perfectly aware that murder is a crime, and will admit it, if pressed on the subject; still he may conceive that the homicide he has committed was no wise blamable, because the deceased had engaged in a conspiracy, with others, against his own life, or was his mortal enemy, who had wounded him in his dearest interests, or was the devil incarnate, whom it was the duty of every good Christian to meet with weapons of carnal warfare.'"

These observations of Mr. Roscoe and Mr. Alison, when applied to the cases of Bellingham, of Arnold, and of Offord, show that they are not cases to be relied upon as perfect,—that the doctrine laid down in them cannot be taken as an unerring criterion by a jury. Unless you attend to all the circumstances of the particular case, you may be led into disastrous results, which it must be your most anxious wish to avoid. [Counsel next referred to Offord's case, and read the report[8] to the jury.] The verdict was not guilty. I think my learned friend did not state to you the verdict.

SOLICITOR GENERAL: I beg your pardon; I did.

COCKBURN: If so, I was in error, and on my learned friend's statement I withdraw at once the observation I made. I am sorry that I made it; and here let me take the opportunity of expressing

[7] Roscoe's Criminal Evidence, p. 838. [8] 5 Car. & P. 168.

my sense—and I am sure my learned friend will not object to receive such a tribute from me—of the forbearance and merciful consideration with which he opened and has conducted this case. I am bound also to say that whatever facilities could be afforded to the defense have been readily granted to the prisoner's friends by those who represent the crown on this occasion.

But to resume. With respect, then, to Offord's case, I have only to remind you that Offord was acquitted on the ground of insanity. Here, gentlemen, I shall prove a much stronger case; and when I have done so you will, I feel confident, have no hesitation in following the precedent set you by the jury in that case. So much, gentlemen, for the legal authorities cited by my learned friend the solicitor general; but, after all, as was observed by him, this is not so much a question of law as of fact. That which you have to determine is whether the prisoner at the bar is guilty of the crime of willful murder. Now, by "willful" must be understood, not the mere will that makes a man raise his hand against another,—not a blind instinct that leads to the commission of an irrational act, because the brute creation, the beasts of the field, have, in that sense, a will,—but by will, with reference to human action, must be understood the necessary moral sense that guides and directs the volition, acting on it through the medium of reason. I quite agree with my learned friend that it is a question—being, namely, whether this moral sense exists or not—of fact rather than of law. At the same time, whatever light legal authorities may afford on the one hand, or philosophy and science on the other, we ought to avail ourselves of either with grateful alacrity. This being premised, I will now take the liberty of making a few general observations upon what appears to me to be the true view of the nature of this disease with reference to the application of the important principle of criminal responsibility. To the most superficial observer who has contemplated the mind of man, it must be perfectly obvious that the functions of the mind are of a two-fold nature,—those of the intellect or faculty of thought alone, such as perception, judgment, reasoning, and, again, those of the moral faculties, the sentiments, affections, propensities, and passions which it has pleased Heaven, for its own wise purposes, to implant in the nature of man. It is now received as an admitted principle by all inquirers that the seat of the mental disease termed "insanity" is the cerebral organization,—that is to say, the brain of man. Whatever and wherever may be the seat of the immaterial man, one thing appears perfectly

clear to human observation, namely, that the point which connects the immaterial and the material man is the brain; and, furthermore, it is clear that all defects in the cerebral organization, whether congenital,—that is to say, born with a man,—or supervening either by disease or by natural and gradual decay, have the effect of impairing and deranging the faculties and functions of the immaterial mind. The soul is there as when first the Maker breathed it into man; but the exercise of the intellectual and moral faculties is vitiated and disordered. Again, a further view of the subject is this: it is one which has only been perfectly understood and elucidated in its full extent by the inquiries of modern times. By any one of the legion of casualties by which the material organization may be affected, any one or all of these various faculties of the mind may be disordered,—the perception, the judgment, the reason, the sentiments, the affections, the propensities, the passions,—any one or all may become subject to insanity; and the mistake existing in ancient times, which the light of modern science has dispelled, lay in supposing that, in order that a man should be mad,—incapable of judging between right and wrong, or of exercising that self-control and dominion without which the knowledge of right and wrong would become vague and useless,—it was necessary that he should exhibit those symptoms which would amount to total prostration of the intellect; whereas modern science has incontrovertibly established that any one of these intellectual and moral functions of the mind may be subject to separate disease, and thereby man may be rendered the victim of the most fearful delusions, the slave of uncontrollable impulses, impelling, or rather compelling, him to the commission of acts such as that which has given rise to the case now under your consideration. This is the view of the subject on which all scientific authorities are agreed,—a view not only entertained by medical, but also by legal, authorities.

It is almost with a blush that I now turn from the authorities in our own books to those which I find in the works of the Scottish writers on jurisprudence. I turn to the celebrated work of a profound and scientific jurist,—I allude to Baron Hume. He treats on the very subject which is now, gentlemen, under your consideration, namely, the test of insanity as a defense with reference to criminal acts, and he says[9]:

"To serve the purpose, therefore, of an excuse in law, the disorder must amount to absolute alienation of reason, '*Ut continua mentis aliena-*

[9] Hume's Commentaries on the Law of Scotland, i. 37.

tione, omni intellectu careat,'—such a disease as deprives the patient of the knowledge of the true disposition of things about him, and of the discernment of friend from foe, and gives him up to the impulse of his own distempered fancy, divested of all self-government or control of his passions. Whether it should be added to the description that he must have lost all knowledge of good and evil, right and wrong, is a more delicate question, and fit, perhaps, to be resolved differently, according to the sense in which it is understood. If it be put in this sense in a case, for instance, of murder,—Did the panel[10] know that murder was a crime?—would he have answered on the question that it is wrong to kill a neighbor? This is hardly to be reputed a just criterion of such a state of soundness as ought to make a man accountable in law for his acts; because it may happen to a person to answer in this way who yet is so absolutely mad as to have lost all true observation of facts, all understanding of the good or bad intention of those who are about him, or even the knowledge of their persons. But if the question is put in this other and more special sense, as relative to the act done by the panel, and his understanding of the particular situation in which he conceived himself to stand: Did he at that moment understand the evil of what he did? Was he impressed with the consciousness of guilt and fear of punishment?—it is then a pertinent and a material question, but which cannot, to any substantial purpose, be answered, without taking into consideration the whole circumstances of the situation. Every judgment in the matter of right and wrong supposes a case or state of facts to which it applies. And though the panel may have that vestige of reason which may enable him to answer in the general that murder is a crime, yet, if he cannot distinguish his friend from his enemy, or a benefit from an injury, but conceive everything about him to be the reverse of what it really is, and mistake the illusions of his fancy for realities in respect of his own condition and that of others, those remains of intellect are of no use to him towards the government of his actions, nor in enabling him to form a judgment on any particular situation or conjunction of what is right or wrong with regard to it; if he does not know the person of his friend or neighbor, or, though he do know him, if he is possessed with the vain conceit that he is come there to destroy him, or that he has already done him the most cruel injuries, and that all about him are engaged in one foul conspiracy to abuse him,—as well might he be utterly ignorant of the quality of murder. Proceeding, as it does, on a false case or conjuration of his own fancy, his judgment of right and wrong, as to any responsibility that should attend it, is truly the same as none at all. It is therefore only in this complete and appropriated sense as relative to the particular thing done, and the situation of the panel's feelings and consciousness on that occasion, that this inquiry concerning his intelligence of moral good or evil is material, and not in any other or larger sense."

This, gentlemen, I take to be the true interpretation and construction of the law. The question is not here, as my learned friend would have you think, whether this individual knew that he was killing another when he raised his hand to destroy him, although he might be under a delusion, but whether, under that delusion of mind, he did an act which he would not have done un-

[10] The prisoner.

der any other circumstances save under the impulse of the delusion which he could not control, and out of which delusion alone the act itself arose. Again, gentlemen, I must have recourse to the observations of that eminent man, Lord Erskine. I am anxious, most anxious, on this difficult subject, feeling deeply my own incapacity, and that I am but as the blind leading the blind (you will forgive me the expression)—I am, I repeat, anxious to avail myself as much as possible of the great light which others have thrown upon the subject, and to avoid any observations of my own by referring to the remarks of much greater minds. I turn again, therefore, to the remarks of Lord Erskine on the subject of delusion, in the case which has so often been mentioned. The case here is one of delusion,—the act in question is connected with that delusion out of which, and out of which alone, it sprung. "Delusion," says Lord Erskine, "therefore, where there is no frenzy or raving madness, is the true character of insanity, and, where it cannot be predicated of a man standing for life or death for a crime, he ought not, in my opinion, to be acquitted; and if the courts of law were to be governed by any other principle, every departure from sober, rational conduct would be emancipation from criminal justice. I shall place my claim to your verdict upon no such dangerous foundation." And, gentlemen, I, following at an immeasurable distance that great man,—I, too, will place my claim to your verdict on no such dangerous foundation. "I must convince you," said Lord Erskine, "not only that the unhappy prisoner was a lunatic, within my own definition of lunacy, but that the act in question was the immediate, unqualified offspring of this disease." I accept this construction of the law; by that interpretation, coupled with and qualified by the conditions annexed to it, I will abide. I am bound to show that the prisoner was acting under a delusion, and that the act sprung out of that delusion, and I will show it. I will show it by evidence irresistibly strong, and, when I have done so, I shall be entitled to your verdict. On the other hand, my learned friend the solicitor general told you yesterday that in the case before you the prisoner had some rationality, because in the ordinary relations of life he had manifested ordinary sagacity, and that on this account you must come to the conclusion that he was not insane on any point, and that the act with which he now stands charged was not the result of delusion. I had thought that the many occasions upon which this matter had been discussed would have rendered such a doctrine as obsolete and exploded in a court of law as it is everywhere else. Let my learned friend ask any of the medical gentlemen who surround him, and

whose assistance he has on this occasion, if they will come forward and pledge their professional reputation, as well as their moral character, to the assertion that shall deny the proposition that a man may be a frenzied lunatic on one point, and yet on all others be capable of all the operations of the human mind, possessed of a high degree of sagacity, in possession of full rational powers, undisturbed by evil or excessive passions. On this point Dr. Ray,[11] in the following observations (the result of his long experience), disposes of the very objection which my learned friend has put forward on the present occasion:

"The purest minds cannot express greater horror and loathing of various crimes than madmen often do, and from precisely the same causes. Their abstract conceptions of crime, not being perverted by the influence of disease, present its hideous outlines as strongly defined as they ever were in the healthiest condition, and the disapprobation they express at the sight arises from sincere and honest convictions. The particular criminal act, however, becomes divorced in their minds from its relations to crime in the abstract; and being regarded only in connection with some favorite object which it may help to obtain, and which they see no reason to refrain from pursuing, is viewed, in fact, as of a highly laudable and meritorious nature. Herein, then, consists their insanity,—not in preferring vice to virtue, in applauding crime and ridiculing justice, but in being unable to discern the essential identity of nature between a particular crime and all other crimes, whereby they are led to approve what, in general terms, they have already condemned. It is a fact not calculated to increase our faith in the march of intellect that the very trait peculiarly characteristic of insanity has been seized upon as conclusive proof of sanity in doubtful cases; and thus the infirmity that entitles one to protection is tortured into a good and sufficient reason for completing his ruin."

I trust, gentlemen, that these observations, proceeding from a man of the most scientific observation, having all the facilities of studying everything connected with the subject, will not be lost upon you. I could mention case after case,—I could continue until the sun should go down on my uncompleted task,—I could cite case after case in which the intellectual faculty was so impaired that the insanity upon one point was beyond all doubt, and yet where there was, upon all others, the utmost sagacity and intelligence. You will see that all the evidence of my learned friend the solicitor general relates to the ordinary relations of a man's life. That does not affect the real question. It may be that this man understood the nature of right and wrong on general subjects. It may be that he was competent to manage his own affairs; that he could fulfill his part in the different relations of life; that he was capable of transacting all ordinary business. I

[11] Ray's Medical Jurisprudence, § 17, p. 32.

grant it. But admitting all this, it does not follow that he was not subject to delusion, and insane. If I had represented this as the case of a man altogether subject to a total frenzy; that all traces of human reason were obliterated and gone; that his life was one perpetual series of paroxyms of rage and fury,—my learned friend might well have met me with the evidence he has produced upon the present occasion; but when I put my case upon the other ground,—that of partial delusion,—my learned friend has been adducing evidence which is altogether beside the question. I can show you instances in which a man was, on some particular point, to all intents and purposes, mad; where reason had lost its empire; where the moral sense was effaced and gone; where all control, all self-dominion, was lost forever under one particular delusion; and yet where, in all the moral and social relations of life, there was, in all other respects, no neglect, no irrationality, where the man might have gone through life without his infirmity being known to any except those to whom a knowledge of the particular delusion had been communicated.

My learned friend has also remarked upon the silent design and contrivance which the prisoner manifested upon the occasion in question, as well as upon his rationality in the ordinary transactions of life. But my friend forgets that it is an established fact in the history of this disease—perhaps one of its most striking phenomena—that a man may be mad, may be under the influence of a wild and insane delusion,—one who, all barriers of self-control being broken down, is driven by frenzied impulse into crime, —and yet, in carrying out the fell purposes which a diseased mind has suggested, may show all the skill, subtlety, and cunning which the most intelligent and sane would have exhibited. Just so in the case of Hadfield. It was urged against Lord Erskine that Hadfield could not be mad, because he had shown so much cunning, subtlety, deliberation, and design in the whole of the circumstances which led to the perpetration of the act with which he was charged. In the present case my learned friend the solicitor general has told you that the prisoner watched for his victim, haunted the neighborhood of the government offices, waited for the moment to strike the blow, and throughout exhibited a degree of design and deliberation inconsistent with insanity. The same in Hadfield's case. Hadfield went to the theater, got his pistol loaded, and took his position in a place to command the situation in which he knew the king would sit. He raised the pistol, he took deliberate aim, and fired at the person of the king. All these circumstances were urged as evidence of design, and as inconsist-

ent with the acts of a madman. What then, gentlemen, is the result of these observations? What is the practical conclusion of these investigations of modern science upon the subject of insanity? It is simply this: that a man, though his mind may be sane upon other points, may, by the effect of mental disease, be rendered wholly incompetent to see some one or more of the relations of subsisting things around him in their true light, and, though possessed of moral perception and control in general, may become the creature and the victim of some impulse so irresistibly strong as to annihilate all possibility of self-dominion or resistance in the particular instance; and, this being so, it follows that if, under such an impulse, a man commits an act which the law denounces and visits with punishment, he cannot be made subject to such punishment, because he is not under the restraint of those motives which could alone create human responsibility. If, then, you shall find in this case that the moral sense was impaired, that this act was the result of a morbid delusion, and necessarily connects itself with that delusion; if I can establish such a case by evidence, so as to bring myself within the interpretation which the highest authorities have said is the true principle of law as they have laid it down for the guidance of courts of law and juries in inquiries of this kind,—I shall feel perfectly confident that your verdict must be in favor of the prisoner at the bar.

With these observations I shall now proceed to lay before you the facts of this extraordinary case. My learned friend the solicitor general has already given you some accounts of the prisoner at the bar, and I will now fill up the outline which my learned friend has drawn. The prisoner, as you have been told, is a native of Glasgow. At an early age he was apprenticed to his father, who carried on the business of a turner in that city. At the end of the apprenticeship he became a journeyman to his father, having been disappointed in not being taken by him as a partner. The prisoner, I should observe, is a natural son, and probably did not meet with that full measure of kindness which is usually shown to legitimate offspring. Whatever might have been the predetermining cause, he appears to have been from the commencement a man of gloomy, reserved, and unsocial habits. He was, moreover, as you will hear, though gloomy and reserved in himself, a man of singularly sensitive mind,—one who spent his days in incessant labor and toil, and at night gave himself up to the study of difficult and abstruse matters,—but whose mind, notwithstanding, was tinctured with refinement. As one trait of his character I would mention that he was extremely fond of

watching children at play, and took infinite delight in their infantine and innocent ways. I will prove, also, that he was a man of particular humanity towards the brute creation, and that, when he went out, he was in the habit of carrying crumbs in his pocket to distribute to the birds. If, in the course of their walks, his companions discovered a bird's nest, he would interfere, and not allow them to approach it. These things are striking indications of character, and certainly do not accord with the ferocity of an assassin. I mention these things to show that, from the earliest period, the prisoner had a predisposition to insanity. I shall prove to you, gentlemen, that the man and his wife with whom he lodged in 1837 became so alarmed at his behavior that they gave him notice to quit, and forced him to leave, despite his wish to remain, from an apprehension that all was not right within his mind. I shall next carry him on to the time when he relinquished his business. When he quitted his lodgings, in 1837, he went to live in his own workshop, and there he lived alone, without friend or associate, without recreation or amusement, save that which was found in turning from severe toil to severer studies. He then began to believe that persons persecuted him. He then began to act more strangely than before. With these moral phenomena must be coupled certain physical accompaniments. The unhappy prisoner would complain of pain. He would sit for hours, aye, even for days, holding his head within his hands, and uttering ejaculations descriptive of the tortures he endured. Often has he been known to hasten out, under the influence of these agonies, and throw himself into the waters of the Clyde, in order to seek some relief from the torturing fever by which his brain was consumed. These facts I shall prove to the court and jury. They do not amount to insanity, but they will show what was going on within. They will show his predisposition to the disease which has since assumed so terrible a shape.

It appears that, in the beginning of 1841, he gave up his business, from which he was deriving considerable gain. Why? Doubtless because at that time the fearful phantasms of his own imagination rendered his existence miserable. He was wretched, because he was constantly harassed by the terrible images his disordered mind conjured up. These terrifying delusions had become associated with the place of his abode, haunting him at all hours of the day and night. You will hear from one of the witnesses, to whom he explained himself, that he gave up business "on account of the persecution by which he was pursued." Yet it appears that all this time his business was prosperous and thriving, and, in

addition, the great tendency of his mind seemed still to be a desire to earn money and to save it. That these phantasms long existed in that man's mind there is no doubt, before he at length sought relief by flight from this hideous nightmare, which everlastingly tortured his distracted senses. No doubt these delusions existed in his mind before, but it was not until he left his business that they were revealed to others in anything like a definite shape. And, gentlemen, you will learn from medical authorities that it was natural for him, who became at last borne down by these delusions, to struggle against them as long as he could, to resist their influence, and to conceal their existence, until, at last, the mind, overwrought and overturned, could contain itself no longer, and was obliged to give form and shape and expression—"a local habitation and a name"—to the fantasies against which it had struggled at first, believing, it may be, for a time, that they were delusions, until, their influence gradually prevailing above the declining judgment, they at last assumed all the appearance of reality, and the man became as firmly persuaded of the substantiality of these creations of his own fevered brain as of his very existence. Wherever he was, these creatures of his imagination still haunted him with eager enmity, for the purpose of destroying his happiness and his life. Nothing, then, could be more natural than that a man under such a persuasion should attempt to escape from the persecution which he erringly imagined to exist, and to seek in some change of place and clime a refuge from the tortures he endured. Alas! alas! in this man's case the question put by the poet of old received a melancholy response:

"——— *Patriae quis exul*
Se quoque fugit?"

When he left his own country, he visited England and then France, but nowhere was there a "resting place for the sole of his foot." Wherever he went, his diseased mind carried with him the diseased productions of its own perverted nature. Wherever he was, there were his fancies; there were present to his mind his imaginary persecutors. When he planted his foot on the quay at Boulogne, there he found them. No sooner was he landed on a foreign soil than there were his visionary enemies around him. Again he fled from them, and again returned to his native land. Feeling the impossibility of escape from his tormentors, what course did he pursue? When he found it was impossible to go anywhere by night or by day to effect his escape from those beings which his disordered imagination kept hovering around him, what does he? What was the best

test of the reality of the delusion? That he should act exactly as a sane man would have done if they had been realities instead of delusions. And there is my answer to the fallacious test of my learned friend the solicitor general. He did so act. He acted as a sane man would have done, but he manifested beyond all doubt the continued existence of the delusions. He goes to the authorities of his native place, to those who could afford him protection, and with clamors entreats and implores them to defend him from the conspiracy which, he told them, had been entered into against his happiness and his life. Are we to be told that a man acting under such delusions, on whose mind was fixed the impression of their existence, and who was goaded on by them into the commission of acts which, but for them, he never would have committed,—are we to be told that such a man is to be dealt with in the same way as one who had committed a crime under the influence of the views and motives which operate upon the minds and passions of men under ordinary circumstances? [Counsel proceeded to refer to the prisoner's applications for protection to his father, to Mr. Wilson, the sheriff substitute, to the lord provost of Glasgow, etc.] That these delusions afterwards took a political bias is possible; they may have done so. But such was not the first morbid impression of the prisoner's mind.

The first was, according to his own complaint to Mr. Wilson, that the Catholic priests and Jesuits were engaged in persecuting him, and he stated that the annoyance he had experienced from them was such that he had been obliged to leave the country, and had gone to France, but that, on landing at Boulogne, he found he was watched by them still, and therefore it was useless to go further. Mr. Wilson endeavored to soothe him, and to disabuse his mind, and he went away, apparently somewhat quieted. At the end of three or four days he comes back and says that there are spies all around him, and that the Church of Rome and the police and all the world are against him. Here you have, in addition to the Church of Rome, the "police" and "all the world." Mr. Wilson spoke to him of the folly of supposing the Church of Rome to be against him, and assured him that, if the police did anything against him, he, Mr. Wilson, would find it out. He comes again in the course of a few days, and then, in addition to his former complaints, he says: "The Tories are now persecuting me on account of a vote I gave at a former election." You will at once comprehend, gentlemen, that the delusion arose not from any part he had individually taken in politics,—it was the form which was assumed by a diseased mind, believing itself to be the

victim of persecution by anybody and everybody. First it was the "Catholic priests," and then it was "the Church of Rome, the police, and all the world," and then it was "the Tories." After that he called again upon Mr. Wilson to know what had been done for him, when Mr. Wilson, to soothe him, told him that he had made inquiries, and promised to speak to Capt. Miller, a superintendent of police. Again he called, and was told that Capt. Miller said there were no such persecutors; if there were, he should know of it. The prisoner said that Capt. Miller was deceiving Mr. Wilson, as he knew that his persecutors were more active than ever; that they gave him no rest day or night; that his health was suffering; and that the persecutions he endured would drive him into a consumption. Mark that statement, gentlemen; couple it with the declaration he made after he was apprehended, and it will enable you to judge of the state of the man's mind at the time he made that declaration. Again he goes away. He does not come back again for some months, when he returns to talk again of his persecutors. This was in the summer, and the time was drawing nigh to the period of this unhappy deed. Mr. Wilson will tell you, gentlemen, that when he saw him at that time his conduct had become more strange, and his conversation more incoherent; doubtless as time progressed his disorder was becoming worse. Having got rid of him, Mr. Wilson does that which affords the best test of the sincerity of the conviction he will express to you, namely, that he believed the man to be insane. He goes to the man's father, and tells him that, in his opinion, it was unfitting for his son any longer to be left at large. [The prisoner also applied to Mr. Turner, who gave the same advice to his father.] Would to God that advice had been listened to! Would to God that warning voice had produced the effect which was intended! Then this melancholy catastrophe might have been prevented! By judicious medical treatment the man might have been restored to reason, or, at all events, such means might have been resorted to as the law allows for the protection of society. Oh, then, what different results would have been produced! The unhappy prisoner might have been spared the horror of having imbrued his hand in the blood of a fellow creature. He would have been spared the having to stand to-day at that bar on his trial for having committed the worst crime of which human nature is capable. As it now is, his only trust must be in your good sense, judgment, and humanity, in the opinion of which you may form upon the evidence which those who come from a distant part to throw a light on the subject will give you, and in

such aid as my humble capacity enables me to afford him. So much, gentlemen, for the evidence I shall give with respect to the origin of this wretched assassination. [The evidence called by the solicitor general did not in the slightest degree negative the case of insanity which the witnesses would clearly establish. It was that sort of negative testimony which can only spring either from the absence of all opportunity of observation, or from want of attention to the matter in question.]

I now come, gentlemen, to the act itself with which the prisoner now stands charged. The solicitor general has said that you are not, from the nature of the act itself, to draw an inference as to the state of mind of the person committing it. My learned friend put the proposition rather vaguely; but I can scarcely suppose that he meant what I have just said to the full extent of the terms. He might have meant either that you were not necessarily to infer from the nature of the act, from its atrocity, and the absence of all probable impelling motives, the insanity of the person committing it,—that is to say, that you were not to infer conclusively from those circumstances alone,—or he might have meant that the nature of the act itself ought not at all to be an ingredient in forming a judgment of the state of the party committing it. Now, if my learned friend could have meant this last proposition, I must say that, with all my respect for him, I should be compelled boldly to differ from him, and to dissent altogether from a proposition so monstrous as that would seem to be. If it be found that an act is done, for which he who committed it was without any of those motives which usually actuate men in a state of sanity to wickedness and crime,—if the whole circumstances connected with the perpetration of that act tend to show that it was one wholly inconsistent with his relation toward the surrounding world of the party committing it,—am I, in such a case, to be told that I am to draw no inference at all from the nature of the act itself? I am sure, gentlemen, you will not allow your minds to be influenced and misled by any such proposition. You must look to the act, not conclusively, indeed, but in connection with the other leading circumstances of the case.

What is the act? In the broad space of day, in the presence of surrounding numbers, in one of the great and busy thoroughfares of this peopled metropolis, with the certainty of detection, and of the impossibility of flight, with the inevitable certainty of the terrible punishment awarded to such a deed, a man takes away the life from one who (in any view of the case) had never, in thought, word, or deed, done to the perpetrator of that act the

faintest vestige of an injury,—from one who, as my learned friend yesterday described him, was of so mild a nature that he would not injure any being that had life,—does this in the total absence of all motive, with the certainty of inevitable detection, and of equally inevitable punishment; yet you are told by my learned friend that you are not to let the nature and the circumstances of such an act enter into your judgment as to whether the person so committing it was sane or not. Who is there who, not having his judgment overclouded by the indignation which the very mention of such a deed is calculated to excite, could bring for a single moment his dispassionate reason to bear upon the nature of the case, whose mind would not suggest that the act must be that of a frenzied lunatic, and not of one possessed of his senses? My learned friend says that, nevertheless, you are not to look to the question of motive, and he appeals to history for instances where fanaticism and enthusiasm have operated on ill-regulated minds to induce them to commit similar crimes. I might possibly object that these instances are not strictly in evidence before you, but I will not adopt such a course. I admit that, in order to understand the nature of insanity aright, we must look beyond the evidence in the particular case. I will travel, therefore, with my learned friend, beyond the facts now before you, and will turn to history in order to aid our judgment. I concede to him that fanaticism and enthusiasm operating on ill-regulated minds have produced similar disastrous results on former occasions. But look at the mode in which those motives operated on the minds of the criminals. The religious fanatic sharpened his steel against his sovereign's life because he was told by a fanatical priesthood that he was doing a service to God and to religion, that he was devoting himself, by that act, to the maintenance of God's religion, and that, while incurring an earthly martyrdom, he was also insuring to himself an everlasting reward. Again, I admit that political enthusiasm has urged on others to similar crimes. Why? Because they acted under the belief that in some great emergency, while they were sacrificing the moral law, they were insuring the welfare of their country. They were impelled by fanaticism in another form,—by political enthusiasm; by misdirected and ill-guided notions of patriotism. Political enthusiasm! Where in this case is there a single trace of the existence of such a sentiment in the mind of the assassin? Where has the evidence for the prosecution furnished you with a single instance of political extravagance on the part of this man? Is he shown to have taken a strong and active part in political matters? Did he attend pò-

litical meetings? Is he shown to have been a man of ill-guided, strong, and enthusiastic political sentiments? There is not a tittle of evidence on that subject. Many among us entertain strong political opinions. I do not disclaim them myself. I entertain them, and most strongly, too; but if I believed that they would make me love, cherish, esteem, or honor any human being the less on account of his holding different opinions, I would renounce politics forever, for I would rather live under the most despotical and slavish government than forego aught of those feelings of humanity which are the charm of human life, and without which this world would be a wilderness. The prisoner had no animosity against Sir Robert Peel, for whom he is said to have mistaken Mr. Drummond. There is no evidence to show that he did intend to shoot Sir Robert Peel, save that of the policeman. I hardly know whether I am not throwing away time in devoting a single observation to the evidence of a man whose own statement justifies me in saying that he was acting a thoroughly treacherous part; a man who now shows himself in his true colors,—an inquisitor and a spy,—but who then, in the garb of fairness and honesty, sought to worm himself into the secrets of the unhappy man at the bar. I allude to the statement made before the magistrate as to the conversation he had with the prisoner. Having gently insinuated himself into the man's confidence, he asks a question as to the identity of the individual who had been shot. The answer he says the prisoner gave may be true or false. The statement of that witness may be consistent with truth, or it may be a fabrication. I know not; care not. Sure I am of this: that whatever may be the nature of the crime with which a man may stand charged, a British jury will hesitate to admit any one single fact which is an essential ingredient in the proof of the case, on the unsupported testimony of an individual who has manifested so much black perfidy, which will remain indelibly stamped upon his character. If the statement were true, why should it rest upon the evidence of that policeman only, when it is clear that, at part of the conversation at least, there was also a constable present? But I really waste time upon this part of the case, and I will proceed at once to a more important point, namely, the conduct of the prisoner himself after he had been brought before the magistrate.

And this brings me to the question whether or not the delusion under which the prisoner previously labored existed in his mind at the time the act was done with which he now stands charged, and in truth was the cause of that act? I have already laid before

you circumstances (and they will be proved in evidence) which establish beyond all controversy the existence of a delusion, exercising a blind and imperious influence over the man; and I have only further to establish that the delusion led to the act, and was subsisting at the time that act was done. But surely it would be most monstrous and unjust to say that the same degree of delusion which prevailed eighteen months or two years before did not exist at the time of his committing the act. What was his statement before the magistrate? He said:

"The Tories in my native city have compelled me to do this. They follow and persecute me wherever I go, and have entirely destroyed my peace of mind. They followed me to France, into Scotland, and all over Europe; in fact, they follow me wherever I go. I can get no rest for them night or day. I cannot sleep at night in consequence of the course they pursue towards me. I believe they have driven me into a consumption. I am sure I shall never be the man I formerly was. I used to have good health and strength, but I have not now. They have accused me of crimes of which I am not guilty. They do everything in their power to harass and persecute me,—in fact, they wish to murder me. It can be proved by evidence; that's all I have to say."

Save only that the enemies he spoke of and their persecutions were the phantoms of a disordered mind, his statement was true. True it was that he was a different man, in health of body and in health of mind; quite different in the regulation of his passions and propensities. He that at home had been a quiet, calm, inoffensive man—one who had never raised his hand against a human being or created thing—had been converted by the pressure of imaginary evils into a shedder of human blood. This statement of the prisoner, which doubtless, at first, was received with suspicion, shows, when coupled with his previous history, in a totally different light, and now cannot be regarded otherwise than as the true and genuine expression of the feelings which were alive in his breast. No wonder that, in the first excitement of popular feeling, such a statement should be unfavorably received. The people had seen an innocent and unoffending man perish by the hand of an assassin. They were justified in viewing with distrust manifestations of insanity, which might be only assumed; but now, when the fearful delusions under which this man has so long labored are made clearly known to you, the whole matter will, I am sure, be regarded by you under a totally different aspect. But then the solicitor general speciously asks whether this is not the case of a man feigning and simulating insanity in order to avoid the consequences of his crime? It is not so. It is the case of a man who manifested, after the deed was done, the same delusion

which will be proved to have been present in his mind for months, nay, years, before the act was committed. But I shall not leave this part of the case upon the prisoner's statement alone, for I am enabled to lay before you evidence that will satisfy your minds of the prisoner's insanity since he has been confined within the walls of a prison. He has been visited by members of the medical profession, of the highest intelligence and the greatest skill, not chosen by the prisoner himself, but some of them selected by his friends, and others deputed by the government, which my honorable and learned friend the solicitor general represents on the present occasion. They visited the prisoner together several times. They together heard the questions put to him, and noted the answers he gave. My learned friend has accurately told you the nature of the defense I have to offer. He has sought to anticipate it by evidence to establish the prisoner's sanity. How is it, then, that the medical men employed by the crown have not been called? Why, my learned friend has now beside him, within his arm's reach, two of the medical gentlemen sent by the government, and he has not dared to call them. My learned friend knew (because their opinions have been communicated to the government and to my learned friend) that the man was mad, and, in justice to the public and to the prisoner, those gentlemen ought to have been brought forward. I was astonished when the case for the prosecution was closed without those two witnesses being called. They sat within my learned friend's call, and yet my learned friend, in the exercise of the discretion which is his characteristic, dared not put them in the witness box. Their testimony is, however, upon record. It requires not their delivery by their own mouths of the opinions I know them to entertain. Their absence from the witness box speaks trumpet tongued as to the opinions they were ready to pronounce; and when I call before you the medical gentlemen who have attended at the request of the friends of the prisoner, and have communicated with this poor deluded maniac, and it is found that their opinions correspond in all particulars, there will not be left a shadow of doubt that this was no simulated insanity, but a real delusion, by which the prisoner was deprived of all possibility of self-control, and which left him a prey to violent passions and frenzied impulses.

I know there has been much said of the danger of admitting a defense of this kind. I do not dispute it. It is a defense at which it is the province of a court and jury to look with care. True, it is a defense easily made, but it is a defense which the sagacity of courts and juries prevents being too easily established. If an

offender should first suggest insanity as a defense after the perpetration of a crime, the eye of suspicion would naturally rest upon such a defense. Here, however, there can be no pretense for saying there is the slightest reason to believe that this was a case of feigning and simulation, when I shall have proved the existence of the delusion for the space of two long years before, as well as its continuance since, the act was committed. When I have proved this, my learned friend will not dream of contending that this is a case of simulation. Again, I ask, is there no distinction between the manner in which the common murderer, who acts under the impulse of ordinary motives, executes his purpose, and that of the unhappy maniac who, in self-defense, as he thinks, slays one who, in his delusion, he fancies is attacking him? There is every distinction. The ordinary murderer not only lays plans for the execution of his designs,—not only selects time and place best suited to his purpose,—but, when successful, he either flies from the scene of his enormities, or makes every effort to avoid discovery. The maniac, on the contrary, for the most part, consults none of the usual conveniences of crime. He falls upon his victim with a blind fury, perhaps in the presence of a multitude, as if expressly to court observation, and without a thought of escape or flight; not infrequently he voluntarily surrenders himself to the constituted authorities. When, as is sometimes the case, he prepares the means, and calmly and deliberately executes his project, his subsequent conduct is still the same as in the former instance. The criminal often has accomplices, and always vicious associates. The maniac has neither. What was the case in the present instance? The prisoner does not attempt to escape; he acts coolly and deliberately; he shows himself to be a maniac seeking only the gratification of his involuntary impulse. He made no attempt to secure his own safety by flight or escape. Though he knew that the noise of his first pistol must have attracted attention to the spot; though he saw Mr. Drummond's coat in flames, and his victim staggering under the shot; though he must have known that his purpose was effected,—instead of thinking of himself, he drew forth the other pistol, with a deliberate intent he passed it from one hand to the other, he levelled it at his victim, and, when the policemen had even seized him, still the struggle was not to escape, but to raise his arm, and to carry out the raging impulse of his burning and fevered brain. A common murderer would have acted in a different manner; he would have chosen a different time, a different place; he would have sought safety by escape.

Gentlemen, I have mentioned that I shall call medical men of the highest rank in the profession; men who have frequently been employed by the government in cases of this nature, and upon whose characters the stamp of the highest approbation has thus been placed. They will state the result of their examinations of the prisoner, and their evidence, upon the whole, will be such as to leave no other than a firm conviction that he is insane. I shall also call the surgeon of the gaol, whose duty it has been to see him daily, and whose facilities of observation have therefore been such as to enable him to come to a sound conclusion, and who, besides, was directed to pay particular attention to the state of the prisoner's mind. My friend has not thought fit to call him. I will call him. You will hear from that gentleman the result of his deliberate and impartial judgment, which is that the prisoner is laboring under morbid insanity, which takes away from him all power of self-control, and that he is not responsible for his acts. When I have proved these things, I think the defense will be complete. I do not put this case forward as one of total insanity. It is a case of delusion; and I say so from sources upon which the light of science has thrown its holy beam. I have endeavored to show the distinction between partial delusion and complete perversion and prostration of intellect. I may, however, perhaps be allowed to refer to one more author on this subject. I allude to Mr. Marc, physician to the King of the French, and one of the most profound investigators of this disease. I will translate the passage as I proceed. Mr. Marc, in his treatise "De la Folie," says:[12]

"Homicidal monomania is a partial delusion, characterized by an impulse, more or less violent, to murder; just as suicidal monomania is a partial delusion, characterized by a disposition, more or less voluntary, to destroy one's self. This monomania presents two very distinct forms. In some cases the murder is provoked by an internal, but raving conviction, by the excitement of a wandering imagination, by a false reasoning, or by the passions in delirium. The monomaniac is impelled by some motive obvious, but irrational. He always exhibits sufficient signs of partial delirium of the intelligence or of the affections. Sometimes his conscience makes him turn with horror from the act which he is about to commit, but his will is overcome by the violence of his impulse. The man is deprived of his moral liberty; he is a prey to a partial delirium; he is a monomaniac; he is mad. In the other cases the homicidal monomaniac does not present any alteration of intelligence or affections; he is carried away by a blind instinct, by something indefinable, which impels him to kill."

I think, gentlemen, I have sufficiently dwelt upon the authori-

[12] M. Marc, De la Folie, p. 25.

ties which can throw light upon this inquiry. I trust that I have satisfied you by these authorities that the disease of partial insanity can exist; that it can lead to a partial or total aberration of the moral senses and affections, which may render the wretched patient incapable of resisting the delusion, and lead him to commit crimes for which, morally, he cannot be held to be responsible, and in respect of which, when such a case is established, he is withdrawn from the operation of human laws. I proceed now to lay the evidence before you. In doing so, I shall give my learned friend the solicitor general the opportunity of a reply. In this case it will be of considerable advantage, for he will have the opportunity of addressing you, and commenting on the evidence after it all shall have been given, whereas I can only anticipate what it may be. Many facts may be spoken to by the witnesses—many important observations may fall from them—on which I shall be deprived of all comment. The arguments which my friend's profound experience and his great legal acquirements may suggest are yet within his own mind. I can but dimly anticipate them. If any advantage should exist in such a case, surely it should not be on the part of the prosecution, but of the prisoner. And my learned friend, moreover, will have the immense advantage resulting from that commanding talent before which we all bow down. But I know that he will prolong to the end of this eventful trial that calm and dispassionate bearing, that dignified and appropriate forbearance, which sat so gracefully on him yesterday. Gentlemen, my task is at an end. I have received at your hands and at the hands of the court a degree of considerate attention for which I owe you my most grateful acknowledgments. I ought to apologize to my lords and to you for the length of time that I have detained you; but you know the arduous and anxious duty which I have had to perform, and you will pardon me. From the beginning to the end I have felt my inadequacy to discharge it; but I have fulfilled it to the best of my poor ability. The rest is with you. I am sure that my observation in all that deserves consideration will be well weighed by you, and I am convinced that the facts of this case, and the evidence adduced in support of them, will be listened to by you with the most anxious and scrupulous attention. You can have but one object,—to administer the law according to justice and to truth. And may that great Being from whom all truth proceeds guide you in this solemn inquiry, that, when hereafter the proceedings of this memorable day and their results shall be scanned by other minds, they may bear testimony that you have rightly done your duty; and, what

to you is far more important, that when hereafter, in the retirement of your own homes, and the secrecy of your own thoughts, you revert to the part you have taken in the business of this day, you may look back with satisfied consciences and thankful breasts on the verdict you will this day have given. Gentlemen, the life of the prisoner is in your hands. It is for you to say whether you will visit one on whom God has been pleased to bring the heaviest of all human calamities—the most painful, the most appalling, of all mortal ills—with the consequences of an act which most undoubtedly, but for this calamity, never would have been committed. It is for you to say whether you will consign a fellow being, under such circumstances, to a painful and ignominious death. May God protect both you and him from the consequences of erring reason and mistaken judgment! In conclusion, let me remind you that, though you do not punish the prisoner for an offense committed at a time when he was unconscious of wrong, you have, on the other hand, the power of causing him to be placed in an asylum provided by the mercy of the law, where he will be protected from the consequences of his own delusions, and society will be secured from the danger of his acts. With these observations, I trust the case in your hands, with the full conviction that justice will be upheld in the verdict to which you shall come.