

PROCEEDINGS AND DEBATES

OF THE

CONVENTION

OF THE COMMONWEALTH OF PENNSYLVANIA,

TO PROPOSE

AMENDMENTS TO THE CONSTITUTION,

COMMENCED AT HARRISBURG, MAY 2, 1837.

VOL. XIV.

GENERAL APPENDIX.

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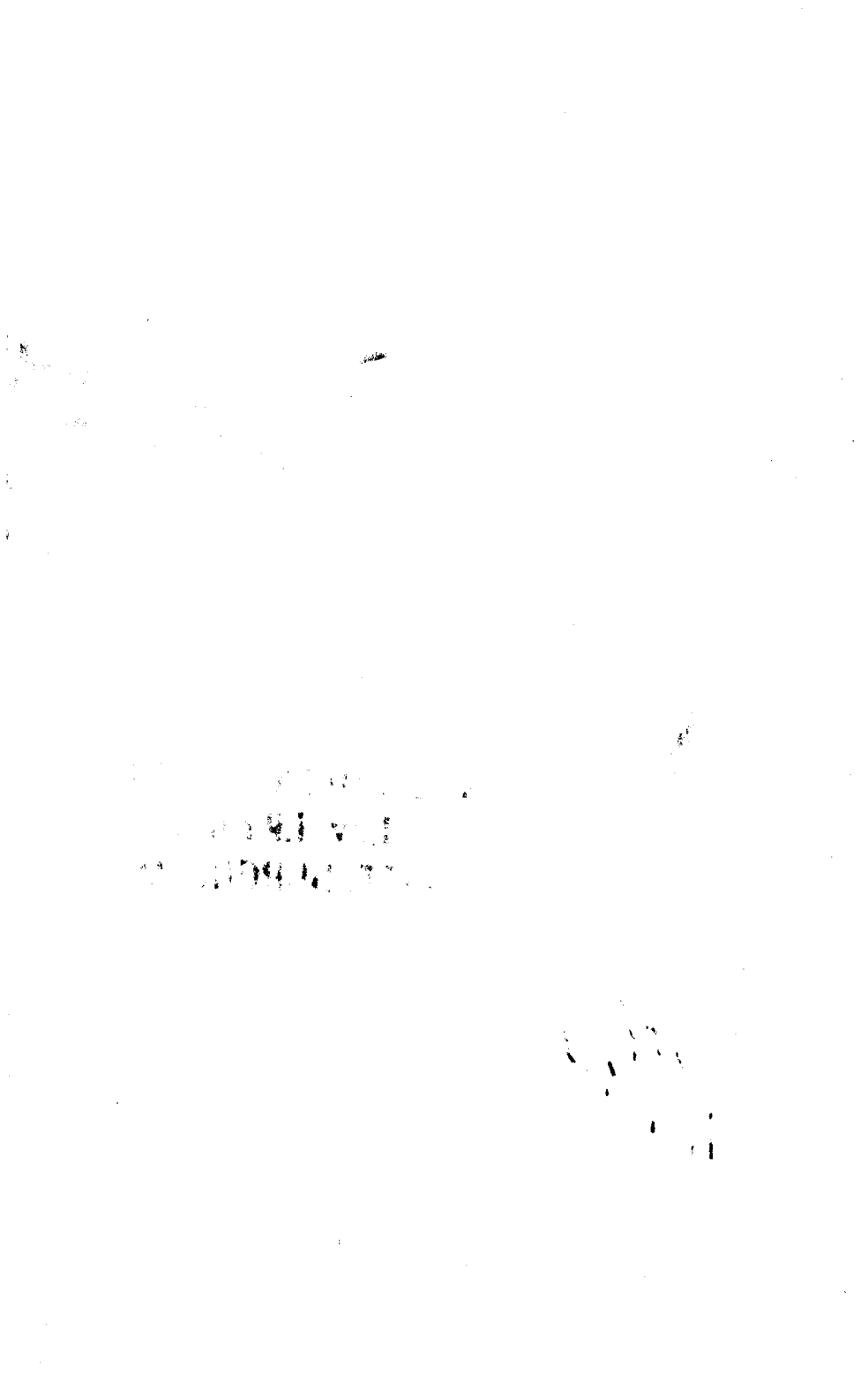
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P R E F A C E.

The speeches contained in this volume are those which have been subjected to the revision and correction of the different speakers, but which were not returned in time for their insertion in the proper order. The great delay which took place in the publication of the preceding volumes, in consequence of the detention of some of these speeches, was the cause of so much, and such just complaint, that it was considered by the stenographer, who was charged with the superintending of the publication, to be his most judicious course, to close the volumes in which the missing speeches should have appeared, and to collect them into a "GENERAL APPENDIX."

GENERAL APPENDIX.

The following speech of Mr. C. J. INGERSOLL, is in continuation of the remarks of that gentleman, made on the 5th of February, which will be found in volume eleven:

In what was said, the 15th of December, respecting political economy, I mentioned what I now repeat, that the former view was but preliminary to this greater question of the right to repeal bank charters by enactment of law, without judicial agency. This restoration of public supremacy is the great desideratum. Settle this in general consent, and with a coin basis, banks will be useful and states sovereign. Without it banks are government, and the very worst government.

I disclaim all power of this convention to act directly on banks. It can reach them only through future legislation. And I desire to introduce my argument by expressly repudiating nearly every assertion and concession of Mr. Dallas's much abused letter. All that he concedes of contract I contend for; all that he asserts of the effect of fraud in legislation, I dispute. I question at any rate, his doctrine as to the contract obligation of reimbursing a bank bonus; and I need hardly add that I disown every one of his unlucky, though misconstrued and perverted, illustrations.

Furthermore, I acknowledge the supremacy of the federal government in whatever may be the appropriate way to control state laws, and the acts of this convention; and wherever a charter is a contract within the constitution of the United States, that is the supreme law, to maintain the obligation of such contract against all state laws impairing it, whether proceeding from convention or legislature.

I repudiate, and strongly deprecate, every violation of property and vested right. I own the inability of a state, by law or otherwise, to resume its grant of private property; and I hold a state bound to protect private property and right. I cannot but dwell a moment on my denial already intimated of what has been conceded by Mr. Dallas, Mr. Forward, Mr. Porter, and Judge Hopkinson, that a law infected by fraud is therefore either void, or voidable by judicial proceeding. The argument in Peck's case appears to me in this particular to be conclusive; and on this point alone is the supreme court unanimous in that case. If a majority of both houses of a legislature can be proved to have enacted a law from fraudulent motives, perhaps that may be reason enough for its repeal by law, but not for its judicial abrogation. To take the instance of fraud imputed to the Bank of the United States in the alleged corruption of a certain number of one branch of the legislature, in the persons of two members of this convention, with other senators, I cannot perceive how

such a circumstance is to annul, though it may vitiate the act of all the rest constituting a majority of both branches. Without prior conviction a court of justice cannot judicially know the fraud; and, as is said in Peck's case, there appear to be insuperable difficulties in the way of ascertaining, assuming, or acting upon it judicially at all. Plutarch states, in his life of Cicero, that Cornelius Lentulus, under accusation, corrupted most of his judges; and being acquitted by a majority of two, he said that what he had given one of them was thrown away, for a majority of one was all he wanted. At least a majority must be corrupted; and even then there remains many difficulties before a court of justice can set at naught a law on the plea of fraud.

Having thus, by liberal concession, cleared my premises of all that might embarrass the real, and, my only question, I deny that bank charters are contracts within the meaning of the constitution. That they have been thought such was, without due consideration, judicial determination, or other sanction, taken for granted from the sweeping but individual doctrines of one of the judges in the Dartmouth college case and its unfortunate offspring, as novel as they are latitudinarian; from Judge Story having without any authority, said so in the course of his discussion and support of those doctrines; and from inconsiderate and unauthorized compilers and book-makers, to whom the legal profession is beholden (and doubtless they are convenient) for commentaries, digests, and other works, which abridge research, but ought seldom to be taken as law. Let it always be kept in mind that I speak of bank charters only. It is a common error to confound all charters of incorporation—which is done often without reflection, though sometimes disingenuously. Modern free republican self-government, with bills of rights, liberty and equality, are confounded with the totally different political systems of old, when charters less known were entirely unlike modern corporations. Mr. Forward, in his letter on this subject, treats all charters as alike, a very prevalent misapprehension assuming that all are contracts, because some are. "Everybody knows," he says, "and even partisans (alluding probably to Mr. Dallas) do not deny that a charter is a contract between the government and individuals, and has all the essential attributes of any other contract." And so he proceeds, on premises altogether assumed, and as I conceive fallacious, confounding all charters, and affirming that all are contracts because some may be, making no distinction between public and private, or between a state and an individual, and concluding from such premises that because a state has no power to resume a private grant or impair contracts between individuals, it therefore has no right to control public incorporations or regulate what is part of political government. Having thus, by assumption and confusion of the subject-matter, established his position, Mr. Forward adds that "it is to be recollected that it is not the solitary power of destroying the Bank of the United States that is ascribed to the convention, but a power to destroy all charters—annihilate all vested rights." "If there be any exception," says he, exultingly, "let the friends of absolute power point it out, and let them fix the limits that shall circumscribe the omnipotence of the convention. No such limits can be assigned. The power to annul charters is the power to annul patents for lands; and if either the one or the other can be done by the convention, they may expel us from our houses and rob us of our goods." All this eloquence and obloquy, these hard words and alarms, are the result of

mistaken premises, if not discriminating between obviously different kinds of charters, and assuming what Mr. Dallas's letter may perhaps warrant,—but I plant as the very cardinal question, whether bank charters are private contracts. Every lawyer is familiar with the distinction between the public and private acts of incorporation. Every statesman should recollect the difference between the guilds and colleges of despotic ages, and a charter of privilege from our free condition. Every American feels to his cost that power to make public currency a substitute for money, is a recent grant or usurpation of part of the sovereignty which, for the first time, is now mistaken for a mere private charter. Charters of old were mostly municipal exemptions and immunities from the general lot of individual restraint and subjection—grants of freedom—such as Magna Charta and others. But modern acts of incorporation are generally grants of special privilege and franchise from common liabilities and segregation from individual equality; grants of privilege, contrary to common right, almost peculiar to this country and this century. Old charters were asylums of liberty; modern charters are strongholds of property. Formerly the freedom of some town or guild was necessary to a man's being permitted to follow a trade; whereas, now all men are free alike to choose any calling; but the incorporated are privileged above the rest in property. If American legislatures can charter at all, the charters they grant for private purposes may be rights, which, once vested, cannot be resumed or impaired by legislation. Whether such grants are contracts, in the meaning of the constitution, or not, they may be rights, as well vested as other private rights. It is a great mistake to suppose that charter or corporate rights are more sacred than personal rights. Judicial speculations and professional obsequiousness have tended, if not endeavoured, to place property on higher ground than persons. But this is a mischievous error, without the least foundation in justice or authority. Charter property is held by no better tenure than private. All rights are vested. No charter vests corporate rights more firmly than every individual right, whether actual, acquired, or howsoever held. I assert all personal rights; and I question no private or vested rights, by denying that a bank charter is a contract. No novel or alarming denial of any right is set up, by vindicating the right of government to superintend, regulate, control, and repeal, if need be, without judicial agency, the bank charter which government grants.

I will not altogether deny, but desire to question briefly, the power almost universally taken for granted, without express authority by constitution of an American state, to grant a charter of incorporation. We are taught that social and political authority in the old world proceeds from either parentage or force; which is the derivation of government, according to Paley, and other inquirers into its origin. The power of parents or that of force, founds political authority. Perhaps our American governments are founded in consent—that of the United States certainly is. But however established, why is an American legislature necessarily authorized by tacit commission, without express grant, perfunctorily to confer chartered privileges on a favored few? Such franchises have no foundation but in public convenience and public utility; and are they within the ordinary scope of the mere trust of American legislative function? That legislature should not, if they can, grant monopolies, seems to be yielded by the studied effort to show that corporations are not

monopolies. Are perpetuities within the power of legislation? They are contrary to common law and right. Public policy denies, and courts of justice annul them, as incompatible with good government. Courts of justice will not indulge even wills, so as to create a perpetuity which the law abhors—strong language, but it is the language of Blackstone. Yet the law is, that one of the peculiar properties of a corporation is perpetual succession; for in judgment of law it is capable of indefinite duration. What right have annual legislative trustees of the permanent sovereignty, without express authority in their written commission—what public policy is there, by personal privilege, in granting property in perpetuity to one or more incorporated persons, which common law and equity withhold from the same persons, if not incorporated? Common law abhors and annuls perpetuities. The common practice of American legislatures pullulates them. A man may have as a corporation sole what he cannot have as an individual. It is settled law that a charter conveys no power but what is expressly granted, or indispensable to effectuate what is so granted. Yet personal exemption from the common lot of all unincorporated persons, which is not expressly granted by any charter, is assumed as part and parcel of the grant, to the detriment of the community. Property prevails over person, to establish, by judicial and professional interpretation of common law, what if tested by any mode of ascertaining it, would assuredly be refused by common sentiment. Charters, in the theory, are to go by their very letter; but in practice they confer privileges beyond all their original and true spirit. American legislators are trustees of parts of a reserved sovereignty. But they grant the whole sovereignty over the currency, the highways, and other property of the sovereignty, which they are not entrusted to part with. Because the federal legislature has no power, in terms, to grant charters, such power is denied by much of the intelligence of the country. It has always been insisted by many of the makers of the federal constitution, that without express power to incorporate, such power does not exist. Hamilton in his vindication of the constitutionality of the Bank of the United States, asserts the English position, that power to incorporate is inherent in every definition of government, as a general principle, essential to every step of its progress; that every power vested in the 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, 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 general principle then, he says, puts an end at once to Jefferson's abstraction, that the United States have not 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. "It is incident," says Hamilton, "to sovereign power to erect corporations." The difference is this, that where the authority of government is general, it can create corporations in all cases; where it is confided to certain branches of legislature, it can create corporations only in those cases. The Roman law is the source of the power of incorporation; according to which a voluntary association of individuals, at any time or for any purpose, was capable of producing it. In England whence notions of it are immediately borrowed, it seems 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 important portions of sovereign power, legislative as well as executive, which belong to the government of the United States. An incorporation seems to have been regarded as some great independent substantive thing; as a political engine, and 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 business. Here the business to be prosecuted is the end. The association in order to form the requisite capital is the primary means. 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 advantage. 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. To erect a corporation is to substitute a legal or artificial 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; for the true definition of a corporation seems to be thus: that 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 contra distinguished from a natural capacity."

I have quoted thus copiously from Hamilton's admirable defence of legislative power to grant corporations, because I know of no abler vindication, and my object is to state the whole question in its utmost fairness and force. But this argument was in answer to Jefferson's—become like Hamilton's, the standard of a political school. I will not say that the errors of Hamilton's argument, but its inconsistency at any rate with those political principles which have been asserted by certain philosophers from Locke to Jefferson, consists among other things in ascribing sovereignty to legislation, which however consistent with English doctrines, is inconsistent with American. Congress is not sovereign, even though supreme in its delegated authority: nor is a state legislature. Power superior to that of legislation, abides in written constitutions, and sovereignty only in the people. Corporations are derived from Roman law: and in England part of the executive authority may have been corroborated by the common law annexing to them personal intangibility. But English common law has never secured corporate beyond private rights, and how came that part of the common law of England, which sanctions corporations, to be consecrated here as law at all? That it is not the law of the United States must be agreed, and whether so in any state, depends on the particular constitution and law of that state. In all the states carved out of Louisiana, if the Roman law is their inheritance, every voluntary association might be incorporated, but no member of a corporation would be personally privileged from common liability. The flower of English royal prerogative to grant charter, even by deputy, when transplanted to America, took root, if any where, in the popular, not the legislative soil. When Jefferson denies that congress can create a corporation with capacity to set aside the laws of mortmain, alienage, descents, distributions, escheats and monopolies established by the state, does he not authorize

denial of the common law's power to do so? State legislation may effect those purposes directly, but can it grant charters as successor to the British crown, without explicit constitutional permission? Or can the English common law, Americanized, judicially repeal these most important of our alterations of that common law? I venture to question this boasted issue of complicated construction—all assumed, all constructive—construction reared on assumption. The crown incorporates, therefore the legislature incorporates, without express constitutional permission. The English common law annexes incidents to corporations subversive of equality, therefore American common law abrogates the cardinal statutes of our government, and thus an incorporated individual is placed beyond all our political institutions.

The first constitution of Pennsylvania is explicit in this respect, chapter I, section 3 and 4, of the Declaration of Rights. "The people of this state have the sole, exclusive and inherent right of governing and regulating the internal policy of the same. All power being originally inherent in, and consequently derived from the people; therefore all officers of government, whether legislative or executive, are their trustees and servants, and at all times accountable to them." These pregnant declarations of the source, trust, and accountability of legislation, if not unmeaning phrases, are original and explicit reservations by a sovereign people of their rights, always to regulate the internal policy of their state, by mere short lived responsible trustees, never empowered, unless in terms, to devolve on other trustees (which is incompatible with the nature of trusts) perpetual and exclusive privileges of exemption from the common lot of their common constituents. In the second chapter of the same constitution, legislative power are defined; and among others is, in terms that of granting charters of corporation. It may be affirmed, therefore, from the constitution of '76, when corporations had not become common right by common misapprehension, and state bank charters were unknown, that the prevailing opinion in Pennsylvania was that legislatures cannot grant them without being authorized expressly by constitutional permission. In the debates on repealing the charter of the Bank of North America, this is forcibly urged by Mr. Smilie and Mr. Findley; and before legislative practice on this subject had become inveterate, under the seductive influence of public improvements and individual infidelity, legislative power to incorporate was not taken for granted as it is now, but the contrary. The first article of the Declaration of Rights of the constitution of '90, declares the birthright equality of all men, and their indefeasible right of acquiring, possessing and protecting property; which is no unmeaning phrase, as it must be, if legislation may render all men unequal in the acquisition, possession, and protection of property, by privileging a few to be exempt from the liabilities common to all the rest concerning it. The law of continental Europe, from which we derive our illegitimate corporations, does not confer on men incorporated the formidable privilege of holding corporate property free from the personal liabilities to which they are liable for their unincorporated property. The pedigree of American corporations is extremely base. Privileges inconsistent with American government proceed from acts of legislatures having no constitutional power expressly to grant them; but the legislature does not give the most formidable privileges—a name, faculty of suit, succession, a seal, authority to make laws not contradicting the law para-

mount, and to hold property, are capacities useful to the public ends which alone legislation has a right to provide for, when individuals are incorporated. Privilege of exemption from individual liability, which is no part of the Roman original, is assumed in this country as an incident of English common law. As a corporation cannot be committed to prison or outlawed, be arrested or appear to suits in person, therefore, proceedings against it are by distress on its lands and goods. But on what principle of common law or good government are the members privileged from personal responsibility for their corporate property? Granting that to be the English common law, no part of that law was adopted in America which is inconsistent with American institutions. There were very few if any political corporations at the time of the revolution; and what is taken for common law perhaps even there, but certainly here, is not that custom arising from universal agreement which Blackstone defines to be the common law, but rather assumption or usurpation of very recent and unnatural growth—the fungus or imposthume of professional plethora. The Roman original being entirely departed from, and even the English royal prerogative of incorporating extended, may it not be questioned whether by the American revolution this formidable power passed to our legislatures? If the people are the state, and the legislature is not, it follows that no legislature has authority to grant charters, unless permitted by the people in a constitution. It is of vast importance to the permanence of our institutions that the origin of assumed power should be ascertained. Corporation power is now an overshadowing influence in this state whose very prepotency requires investigation. Such as its rights are, let us abide by them, but let us ascertain what they are.

Mr. Porter concedes as most others seem to do, the right of posterior legislation to tax banks, limit dividends, and otherwise restrain banks. Power to limit bank issues of paper, and confine them to coin, is universally asserted and acquiesced in. The governor in his late message, insists on much more extensive intervention than is necessary, by subsequent enactment to impair the original privileges of bank charter. I never heard a denial of the legislative right to change the public circulation by diminishing the paper and increasing the coin of banks, (whatever may be said of direct repeal of their charters,) till Judge Hopkinson insisted upon it here. It has not been questioned before, I believe, either in practice or principle. He contends that power to issue the paper or coin medium continues always as granted at first; which is pushing vested right in public power to the uttermost; though perhaps the best test of the validity of the argument which denies posterior legislation any power to affect the alleged contract of bank charters. Paine, as cited by Mr. Porter, evades the question of power and fabricates an argument on contract, by suggesting that charters are not laws but acts—acts of bargain and sale by the legislature. But who commissioned legislatures to sell and bargain acts of favor for money, as kings sell titles? Mr. Forward in his letter, calls a charter the act of a legislature, clothed with limited powers, he grants, but to the extent of those powers representing the people; and he would be pleased by some one's defining what is meant by sovereign power. Chief Justice Marshall says, in *Peck's case*, that it may well be doubted whether the nature of society and government does not prescribe some limits to the legislative power. Although less susceptible of definite restriction, legislative powers requires limitation at

least as much as executive or judicial power; and it is a great desideratum of American politics to teach our legislators, many of whom, especially the professional members, are extremely loose in their notions of legislative power, that it is limited at all. Too many suppose they may vote as they will, provided it is not morally wrong. Paine's suggestion is but an evasion of the question of power. The notion that a law may be a contract, because called an act and not a law, though clothed with all the forms, solemnities and effects of a law duly enacted, is a mere sophism. By whose commission do law makers become chapmen, to sell privileges for money in which they too often contrive to share themselves, or with friends, relations, or partisans? Not only is a charter a letter of attorney, to be executed to the letter, and infringed by every departure from it; but legislation is a strict commission also, and every representative, whether corporator or legislator, who forgets that he is a trustee, violates his trust. Kings of England have sold charters and even granted to others the power to sell them, as they have sold titles. But that American legislators have no such power, Paine himself proves in the following extract from a republication by him, dated June 21. 1805, addressed to the citizens of Pennsylvania on the proposal for calling a convention to reform this constitution:

"A constitution is the act of the people in their original character of sovereignty. A government is the creature of the constitution; it is produced and brought into existence by it. A constitution defines and limits the powers of the government it creates. It therefore follows as a natural, and therefore a logical, result, that the government exercise of any power not authorized by the constitution, is an assumed power and therefore illegal.

"There is no article in the constitution of this state, nor of any other state, that invests the government, in whole or in part, with the power of granting charters or monopolies of any kind; the spirit of the times was against all such speculations; and therefore the assuming to grant them is unconstitutional, and, when obtained by bribery and corruption, is criminal. It is also contrary to the intention and principle of annual elections. Legislatures are elected annually, not only for the purpose of giving the people, in their elective characters, the opportunity of showing their approbation of those who have acted right, by re-electing them and rejecting those who have acted wrong; but also for the purpose of correcting the wrong (where any wrong has been done) of a former legislature. But the very intention, essence and principle of annual election would be destroyed, if any one legislature, during the year of its authority, had the power to place any of its acts beyond the reach of succeeding legislatures; yet this is always attempted to be done in those acts of legislatures called charters. Of what use is it to dismiss legislators for having done wrong, if the wrong is to continue on the authority of those who did it? Thus much for things that are wrong. I now come to speak of things that are right, and may be necessary.

"Experience shows that matters will occasionally arise, especially in a new country, that will require the exercise of a power differently constituted from that of ordinary legislation; and therefore there ought to be an article in a constitution defining how that power shall be constituted and exercised. Perhaps the simplest method which I am going to men-

tion is the best, because it is still keeping strictly within the limits of annual elections, makes no new appointments necessary, and creates no additional expense. For example :

“ That all matters of a different quality to matters of ordinary legislation—such, for instance, as sales or grants of public lands, acts of incorporation, public contracts with individuals or companies, beyond a certain amount—shall be proposed in one legislature, and published in the form of a bill, with the yeas and nays, after the second reading, and in that state shall lie over to be taken up by the succeeding legislature ; that is, there shall always, on all such matters, one annual election take place between the time of bringing in the bill and the time of enacting it into a permanent law.

“ It is the rapidity with which a self interested speculation or fraud on the public property can be carried through within the short space of one session, and before the people can be apprised of it, that renders it necessary that a precaution of this kind, unless a better can be devised, should be made an article of the constitution. Had such an article been originally in the constitution, the bribery and corruption employed to seduce and manage the members of the late legislature in the affairs of the Merchants’ Bank could not have taken place. It would not have been worth while to bribe men to do what they had not the power of doing. That legislature could only have proposed, but not enacted the law ; and the election then ensuing would, by discarding the proposers, have negatived the proposal without any further trouble.

“ This method has the appearance of doubling the value and importance of annual elections. It is only by means of elections that the mind of the public can be collected to a point on any important subject ; and as it is always the interest of a much greater number of people in a country to have a thing right than to have it wrong, the public sentiment is always worth attending to. It may sometimes err, but never intentionally and never long. The experiment of the Merchants’ Bank shows it is possible to bribe a small body of men, but it is always impossible to bribe a whole nation ; and therefore in all legislative matters that, by requiring permanency, differ from acts of ordinary legislation, which are alterable or repealable at all times, it is safest that they pass through two legislatures, and that a general election intervene between. The election will always bring up the mind of the country on any important proposed bill, and thus the whole state will be its own council of revision. It has already passed its veto on the Merchants’ Bank bill, notwithstanding the minor council of revision approved it.”

It is not my intention, however, to fatigue or perplex by metaphysical inquiries into the origin of communities, or the power of their representatives to enact charters, meaning to submit, with deference, views divested of every questionable assumption or preliminary doubt, in the plainest way to common understanding, and therefore I superadd to all preceding concessions, that American legislatures have power, without a constitutional grant of it, to create charters for banks ; which I concede for argument’s sake, yet contend that a bank charter, created by any American state, is not a contract within the purview of the constitution of the United States or this state, forbidding acts of state impairing contracts. That a bank charter is not a contract within the purview of the constitution, is what I undertake to prove.

There is still, however, another preliminary to be noticed before that position is taken up. Bank charters, as I have shown, are apt to be confounded with all other charters. My view requires, not only that their kinds should be discriminated, but that their classification also should be somewhat better fixed than it is in the law books to which we must look for most of the published learning on this subject. We should guard against technical and professional impressions, for lawyers, like other men, are wedded to their peculiar reverence. They seldom define corporations accurately, and describe only two classes, viz : public, those created for municipal purposes, such as counties, cities, towns and boroughs ; and private, such as insurance companies or others for merely private concerns. I submit that there are at least three classes, viz : first private, such as an incorporated hotel, forge, quarry, or the like, of which I believe there are instances owned by individual members of this convention ; second, municipal, such as incorporated cities and places, which are public, though local ; and third, political, such as share the sovereignty, among which I place banks, because they share the sovereignty by making the public currency, together with corporations allowed by law to partake of the sovereignty by controlling public highways, whether rivers or roads, and all other political corporations whatever. Professional learning surrenders what Judge Story rather oddly calls strictly public corporations, to legislative control. Consider, then, for a moment the reason of that law which surrenders the city of Philadelphia for instance, with its complicated interests, debts, loans, innumerable contracts, plans, and future as well as present involvements, by-laws, and all, to the regulation or repeal of an act of assembly, while it deems the charter of a bank making the circulating medium of a state, perhaps for thirty states, beyond the reach of legislation. Does it stand to reason that the state may at any time destroy all the vested interests, and impair, if not destroy, the contracts, of a city, while it cannot prevent a bank from affecting all the property and all the contracts of the state, including the city, by a substitute for money ? Is there any reason for constructive law that all the private interests, held under a city, are of political cognizance, but all the public power of a bank is intangible private right ? In the true definition or the philosophy of corporations, is a bank less a public concern than a city ? Mr. Hallam, in his constitutional history of England, holds that corporate privileges may be revoked when it can be done without injuring private rights.

It is only for the advantage of the public, says Blackstone, that artificial existence is ever given by incorporation to natural persons. In the judgment of the circuit court of the United States for the New Jersey district, on the Camden and Amboy rail road company, Judge Baldwin was at a loss to determine whether that immense private sovereignty is a public or private corporation, the true criterion being, he says, whether the objects, uses and purposes of the incorporation are for public convenience or private emolument, and whether the public can participate in them by right or only by permission. But so careful and accurate a lawyer as Judge Baldwin falls into a mistake in classing corporations,—public corporations being, he says, towns, cities, counties, parishes existing for public purposes ; private corporations being for banks, insurance, roads, canals, bridges, &c. For authority he cites 4 Wheat. 664 ; at which page of that book is to be found Chief Justice Marshall's classification

of corporations, but with no mention of, or allusion to banks for the introduction of which Judge Baldwin must have mistaken Judge Story for Marshall, and the profession might be taken from him as law what has no foundation in authority, though it may be published as judicial sentiment. Judge Story, I believe, is the only federal judge who has ever ventured to say that a bank is a private corporation, in which he merely repeats what Mr. Webster said at the bar, no doubt without adverting to the distinction I am essaying. Even he has never so adjudged; but in the sweep of those large and radical notions which he has broached, this is one of the unsupported sayings for which so respectable a judge may be quoted; to whom it is but justice to remark, that probably his attention never was directed to the difference between municipal and political corporations, both public, both in a measure partaking of the sovereignty, but the latter much more than the former. Judge Baldwin, when throwing banks into the definition of a private corporation, does not mean to put himself in conflict with a very able opinion pronounced by him and Judge Hopkinson, that "bank notes, payable to bearer, form the currency of the country, passing from hand to hand, in all the pursuits of life, like coin, they circulate on their intrinsic or representative value by common consent. It is their being a currency and a substitute for coin that makes the difference between them and bills of exchange, promissory notes or checks on banks." The mints in which such currency is made would hardly be defined as private institutions, and Judge Baldwin will not so class them whenever his discriminating understanding applies itself to the subject as its novelty and importance deserve. I believe that when he looks beyond mere law-book definition to the enlargement I have attempted, of three instead of but two kinds of charters, he will perceive that banks which are political, cannot be private, though not municipal corporations; and that it does not follow that a charter falls within the class of private, because it is not municipal, the true criterion being, as Judge Baldwin explains, whether the objects, uses and purposes are for public convenience or private emolument.

Mr. Porter also relies on the published opinion of the present Chief Justice, while Attorney General of the United States, on the same Camden and Amboy railroad, that charters for canals and railroads are contracts. That opinion made much sensation from its imputed denial of what, without reflection, are apt to be thought not only vested but sacred rights. Its argument against the power of legislatures to bind their successors in all cases, is coincident with some of my views; and I feel no disposition to contradict Mr. Taney's acknowledgment, that private charters are vested rights not to be resumed or impaired. It is too well settled to be disputed, he says, yet the recency of federal adjudication and the conflicts of judicial opinions about it, warrant, I conceive, the propriety of reviewing and endeavoring to settle the whole subject. Without reference to other charters it is enough for my purpose that bank charters are not railroad or canal charters, much less merely private charters. The latter may be contracts without affecting my argument that the former are not. The subject of charters altogether, whether political, municipal, or private, has acquired vast importance. By the official documents on our table it appears that one hundred and sixty millions of property have been, within the last forty-five years, locked up, in Pennsylvania, in this modern mortmain corporation law, and therefore calls loudly for dispassion-

ate American consideration to ascertain what it was in its first Roman state what in its English, and what it ought to be in its American. Bank and other charters have become an estate in our realm. They are, in effect, perpetuated by renewals, often obtained long before the existing charter expires. Charters are sold by the legislature. Bonuses and other lucrative considerations are taken for them, and a system of pernicious legislation has established the practice of members, at least individually, themselves, or their connexions and partisans, sharing in the gains. What may be called public or local corruption is openly and eagerly resorted to by members and others. No one deems it wrong to take and to give for his county or district, and jobbing in legislation is as common as in stocks. Exchanges of local advantages are the levers that move the whole commonwealth. To a certain extent this is unavoidable, and therefore not to be reprobated, however it may be regretted. But I look to two governmental means of, at any rate, checking and controlling their continuance, which, if incurable, must render American legislation as vicious as royal prerogative. Laws formally enacted will be no better than ordinances issued by monarchs from arbitrary councils, unless restraint be put on the mutual disposition of legislators and speculators to give and to gain undue advantages by favored, generally unworthy, individuals. The most common and most injurious of their contrivances is a charter, by which their designs are protected from personal liability to law. I will not dwell, now, on the flagrant vices of this modern canker of republican institutions. The governmental means of correction are: first, legislation—rendered the cure, as it is the cause, of the evil, by a free use of the reserved right of repealing bad grants of public privileges: and, secondly, which I hope to see the most effectual of all checks, impartial and independent administration of justice on corporations as on individuals. Such administration is now unknown in Pennsylvania, and generally throughout the United States. They are almost always stronger in funds and intelligence than individual opponents in courts of justice. They have the ablest counsel—very elements as they are considered of public improvement and prosperity. Belief in their superior utility and exaltation of their directors, such as we have heard from most of the gentlemen of the bar in this convention, particularly Mr. Scott, Mr. Sergeant, Mr. Sill, Mr. Porter, and Mr. Merrill, make the atmosphere and the faith in which lawyers and judges live and thrive; and, without detraction from the integrity or even the independence of courts of justice, their adjudications, like their professional prepossessions, and the commentaries and compilations on the subject, from Chancellor Kent down to the humblest retainer, have become perversions of the common law, common equality, and common right, to elevate and sustain the supposed benefactors and actual masters of the state. But I think their reign is drawing to a close, and that, beginning with public opinion, enforced by legislation, a great barrier against charter power will be completed by the courts as the most effectual restorer of individual right—right to be equal—yes, to be superior—to corporate privilege. Such is undoubtedly the common law and the civil law,—the reason, and as such it will come to be the learning, of all law administered. The charter of a man's rights is large and free, and to be always liberally construed. Charters of incorporated men are derogations from man's equal rights, to be restrained to the letter of the grant. Such are law and reason, and so to be enforced. The Supreme Court of the United States

has set an example which no doubt will be generally followed. Let any lawyer look into his English authorities, and he will be satisfied that chartered and combined men are not favored by the common law of England or by the judges who have administered it. If that truly great magistrate, the late Chief Justice of the United States, could resume his place in the meridian of his superior faculties, he would be as forward as his distinguished successor to maintain those obvious limitations of corporate power which all the philosophy of law inculcates, and which, indeed, are the adjudged doctrine of the Supreme Court of the United States at all times. Arbitrary English monarch and subservient judges violated law to destroy charters; but its principles are, nevertheless, well settled there. In this country, courts of justice, influenced by overshadowing circumstances, have suffered individual and public interests to be subjugated by chartered associations. But they will return, with chastened public opinion, to those unquestionable standards of right and law which the Roman code, and the English teach, and which, ever since Trajan's well known letter to Pliny, prescribe the regulation that whatever a body of men got by charter is to be restrained, as the French say, *au pied de la lettre*, to the very foot of the letter. Numberless abuses now unconsciously common with corporations are illegal, and must be so decreed. It is instructive to recur to Hamilton's defence of corporate power: "a strange fallacy seems to have crept into the manner of thinking and reasoning upon the subject," said he; "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 engine, and of peculiar magnitude and moment; whereas it is truly to be considered a quality, capacity, or means to an end." We have lived to feel corporations—all that he treated as absurd creations of imagination—great independent substantive things, political engines of peculiar magnitude and moment. And it is as curious as it is instructive, that what Jefferson forwold and Hamilton treated as preposterous, is the reality of our present government by corporate supremacy. The enactment of laws, their administration by courts of justice, and their execution by chief magistrates, are all controlled by these great independent substantive things, political engines of peculiar magnitude and moment, which at this moment absolutely govern this commonwealth and this union of commonwealths with more sway than even its legitimate institutions. Emancipation from this sway cannot be effected at once. But it is coming—coming by law, by law to be enacted, and by law to be administered, by resorting to the sovereignty what no sovereignty, whether single or popular, can do without, viz: power to control the passions and machinations of men combined to usurp it—more necessary than power to control individual passions.

I cannot leave this part of my subject without remarking, that those eminent lawyers whom we see the champions of charter usurpations are as blind to their professional interests as they are deaf to the voice of good fame. Fortune and fame must be theirs who devote their talents to rescue and vindicate individuals from charter supremacy. The courts, the legislature and the community must eventually concur to overthrow an usurpation so contrary to all republican institutions, and modern tendencies that it cannot endure; and the legal profession will be great losers in

fortune and in character, if they do not join to support the principles of law against the practices of innovators on it.

State incorporated banks are a novelty wholly unforeseen by the constitutions; a vast fungus grown upon government, upon property, upon liberty and equality, by which the common welfare is thoroughly affected, and the currency, more than two-thirds of it, engrossed. Never before, in the annals of jurisprudence, has such a great public interest been withdrawn from the power of legislation to be regulated as exclusive matter of mere common law. The power to make currency is a sovereign power. Even granting that a state may farm or depute such authority, it must have, it cannot alienate, the right to regulate and control. The legislative power, says Rutherford, in his *Institute of Natural Law*, implies a power not only of making laws, but of altering and repealing them. As the circumstances either of the state itself or of the several individuals which compose it, are changed, such claims and such duties, as might at once be beneficial, may become useless, burdensome, or even hurtful. If, therefore, the legislative power could not change the rules which it prescribes, so as to suit them to the circumstances of the body politic, and of the members of that body, it could not answer the purposes for which it was established; it could not at all times settle their claims and their duties in such a manner as is most conducive to the good of the whole, and of the several individuals which make up that whole. With this fundamental doctrine of English legislation our own agrees. The principle, in the English constitution, that the Parliament is omnipotent, does not prevail in the United States, says Chancellor Kent, in his instructive commentaries, though if there be no constitutional objection to a statute, it is with us as absolutely uncontrollable as laws flowing from sovereign power, under any other form of government. But in this, and in all other countries where there is a written constitution, designating the powers and duties of the legislative, as well as of the other departments of the government, an act of the legislature, may be void as against the constitution. No law will or can be drawn in question without appeal to constitutional interdict: an act repealing, is as valid as an act granting, a charter. The power of parliament to abolish laws establishing vested rights has been exercised in numerous instances, from the repeal of the mortmain rights till now, when the whole vested interests in tithes and other church property are, as well as numerous corporations, undergoing parliamentary revocation. Pennsylvania has repeatedly, and in signal instances, exercised the same legislative power. I shall mention only those of—first, the Proprietaries' Property; second, the College or University of Pennsylvania; third, the Bank of North America, and fourth, the Wrightsville, York, and Gettysburg Railroad. Of the first and last I must say something specially. It will be borne in mind that I am not treating the *policy*, but the *power*, of legislation to repeal laws granting vested rights. That power I assert, over all public or political acts. When and whether it ought to be exercised, is not to be confounded, as a question of policy, with the right to exercise it at all times. By the newspaper reports of what Mr. Meredith said on this subject, he states that what he called vested rights are held by stronger obligations than written law—by those bonds of conscientious acknowledgment which are in every breast the monitors of honesty and integrity. If he did say so,

the whole course of English legislation and of the adjudications of the Supreme Court of the United States contradicts his assertion, and manifests that what are commonly called vested rights, like others, if connected with public interests, are always liable to public control. If, therefore, that gentleman intended, by such argument, to give any countenance to the vulgar impeachment, continually repeated by interested men, that those who would relieve the state from the burthen of their privileges are enemies to property and wrong doers, he impeached all the reforms of good government and many of its judicial supports. The doctrines of this commonwealth, in the preamble to the act of '76, for resuming the estates of the late Proprietaries of Pennsylvania, is: "Whereas the claims of the late Proprietary, by the charter, cannot longer consist with the safety, liberty and happiness of the good people of this commonwealth, and the safety and happiness of the people is the fundamental law of society, and it has been the practice and usage of states, most celebrated for freedom and wisdom, to control and abolish all claims of power and interest inconsistent with their safety and welfare, and it being the right and duty of the representatives of the people to assume the direction and management of such interest and property as belongs to the commonwealth, or was designed for their advantage; be it therefore enacted, that all and every the estate, right, title, interest, property, claim, and demand of the heirs and devisees, grantees or others claiming as Proprietaries of Pennsylvania, whereof they or either of them stood seized, or to which they or any of them were entitled, or which to them were decreed to belong, in or to the soil and land of the said late province, now state, of Pennsylvania, or any part thereof, together with all granted by the charter, shall be, and are hereby, vested in the commonwealth of Pennsylvania, for the use and benefit of the citizens thereof, freed and discharged, and absolutely acquitted, exempted and indemnified of, from and against the estate, right and title of the Proprietaries, and subjected to such disposal, alienation, conveyance, division and appropriation of this or any future legislature of this commonwealth." The same legislature, by the same transcendent authority, fixing, without umpirage or other invention, the sum of money to be bestowed on the Proprietaries, as indemnity, take care to declare, that it is given from liberality and grateful recollection of the enterprising spirit which distinguished the founders of Pennsylvania. The lands, rents, property and possessions are all taken from individuals to whom they belonged, and are vested in the people of the state. The right thus to divest is put on the ground of state necessity. No right in the divested party is acknowledged to conflict with the right of the State. What is allowed is *ex gratia*. The legislature gives what it thinks proper. Nor is it privilege or corporate immunity that is taken away, but private property—property which the state did not grant originally or ever own at all. In the same year the legislature enacted the law to amend and alter the charter of the College, *Conformably to the Revolution and to the constitution and government of this Commonwealth*, alleging, as a reason for such act, that the trustees had departed, by a by-law concerning religion, from the plan of the original founders, and narrowed the foundation of the said institution. Having explained, in a public letter, the grounds of the legislative repeal of the charter of the Bank of North America, I shall not here review that vocation of what is called vested right, and I reserve the remarkable instance of the Wrightsville, York and Gettysburg

railroad for the distinct consideration I mean to give hereafter to that signal illustration of the right of a state to qualify its grant or contract. It is a recent instance going much further than I can approve. One of the most clamorous in theoretical vindication of vested rights carried into execution on that occasion much more than the power I contend for.

Several of the members of the legislature condescended to ask my opinion on this subject, in compliance with whose request I endeavoured to explain, by a letter published in November, 1836, the difference between property and privilege—the alleged right in corporate exemption from personal responsibility, distinguished from vested right in individual ownership of any kind of property. The views of Smilie, Findley, and other eminent legislators of Pennsylvania, the fathers of republicanism, were cited for the plain distinction between a legislature's taking away the gold and silver, notes and other property of the stockholders of a bank, and taking away their corporate franchises. A charter is not property, was their argument, but a permit to sue and be sued, in a particular way, which, if it prove a public injury, the public may take back without affecting any vested right of property. A legislature, repealing a bank charter, leaves all the property of the bank untouched to the stockholders, and takes from them nothing but their corporate franchise, which consists in permission to sue and be sued impersonally—to be exempt, personally, from all liability of suit—and in succession, without limitation of time, while the charter lasts. The difference between such franchises, and the right conferred by the commonwealth by a patent for land or in ownership of the house or chattle of an individual, was demonstrated, as must be manifest; although there still, and always will, remain disingenuous and weak defenders of corporate privilege to assert the contrary and insist on its identity with property. *Strictures*, published by a citizen of Maryland, on that letter, enable me to reinforce it. I was principally induced to publish by apprehension that clamorous denunciation of Mr. Dallas' letter, and the artful abuse of it by speculating champions of what they vociferously vindicate as vested rights, had succeeded in impressing the public with prejudices against the true doctrine of property. My object is the protection of property from artificial and disguised depredations upon it by unequal privileges, and the preservation of public sovereignty also inviolate. The author of the *Maryland strictures* falls into the common mistake of confounding all charters, for colleges, manufactories, hospitals, roads, canals, bridges, insurance offices and banks; he herds them all together in utter confusion, with the conclusion which, from such confused premises, may perhaps be got at, that the most inviolable contract of all is a bank charter. My letter expressly distinguishes private from public corporations; my argument rests on that position, and it is strange how a reply to it should "take for granted that I consider my theory of the property of a corporation applicable to every kind, whether bank or bridge, canal or college." My view, throughout, is just the reverse; and such remarkable misconception of it is unaccountable, as that of a Maryland lawyer not noticing at all the judgment of the Supreme Court condemning Maryland and Ohio laws taxing the Bank of the United States, when I cite the cases, and quote the very language of Chief Justice Marshall, and the very judgment of the court, that the bank was a public and not a private

corporation. He also misunderstands the distinction between the ancient charters of freedom, and modern, particularly American, charters of personal privilege. Those of the middle ages conferred, he thinks, monopolies because they granted peculiar privileges to be free from common restraint, such as exclusive right to carry on particular branches of trade, or certain manufactures or handicrafts; exemption from taxes or services required of the rest of a community, and from personal service in war. These, which I quoted Mr. Findley and Mr. Smilie for deeming sacred, the author of the strictures says are now the only privileges which are not so. We have changed all that, says he, flippantly, since the Dartmouth College case, and the legislatures have a right to cut and carve as they please what your forefathers of republicanism held sacred. The revolutionary effect of the Dartmouth College case is not equal to this gentleman's apprehension of it; the very issue between us is, that I deny the power which he concedes, without reserve, to American legislatures, to cut and carve either public rights or private property as they please. Their pleasure is no right. They have no right to give to individuals what is common property; and they are too apt, under the guidance of off-hand violaters of social and political right, to misconceive altogether what private property is—the real and legitimate meaning, use, and appropriation of property. I hold the right of property sacred, coeval and coeternal with the social state, if it did not precede it; and the artificial contrivances, by legislation, to change its tenure to the advantage of one and disadvantage of another, or of one class to the disadvantage of another, is doubtful, if not false assumption of legislative right. Monopolies, perpetuities, castes and titles of nobility, will not be contended for by any American. Privileges to levy imposts and duties, not for public ends, but particular emolument, or to administer justice according to regulations peculiar to a few beneficiaries, are conceded by the Maryland gentleman himself, while he considers it even comic to discriminate between the right, by American institutions, for all men, according to every bill of rights, to be equal in the means of acquiring, possessing and transmitting property, and the arbitrary permission of old times, by special leave, to a few freedmen to follow what livelihood they liked. In his theory it is a sacred contract for a few men incorporated to make currency for the public, which no state can interfere with, when granted by charter, because such privilege is the property of the incorporators. But the right of any number of men, incorporated in a town, to follow such callings as they prefer, may be cut and carved as legislators please. I feel too much reverence for the sacred right of property to cut and carve thus. Industry is property. A man's earning, by labor, is property as sacred as his profits from bank stock. The social edifice stands entirely on the basis of property. To protect property from false and unequal privileges—privileges to hold it exempt from exposure to the common liabilities of property—to protect property from all infringements is what I contend for. This gentleman, who cannot comprehend, but confounds, the striking difference between charters of old and recent corporations, likewise loses himself among the metaphysics of monopolies, and will not perceive why the charter of a bank is derogatory to common right. By turning his attention to the plain matter of fact, that formerly freedom was a privilege, whereas, now privilege, by charter to some, inflicts unjust inequality on others—that to be exempt, in stock, from personal suit is

above equality with the rest of your fellow-citizens—perhaps the citizen of Maryland may discover, that equality, which was a privilege of old, is now the common right derogated from by charter. Freedom is no longer a privilege, but common right. He might have learned from Burke, in the very speech he quotes, that the *great charters*, as Burke calls them, (the old) *restrained power*, while modern charters *create it*. Not only so, but power, by *privilege*, which, since the American Bill of Rights became part of all constitutions, is contrary to common right. The distinction between ancient and modern charters thus appears, together with the derogation from common right which a modern charter vouchsafes, to the prejudice of all those who are not privileged by charter. It was the boast of Napoleon that he established equality, without which his encoomiasts insisted that liberty cannot be. Liberty reigns in this country to a degree he could hardly conceive of; but equality in the acquisition, disposal and transmission of property is becoming extinct by laws more destructive to property than the most radical or agrarian enemies to its tenures, if there are any, can desire. With persons perfectly free, our property is much of it held by unequal titles more unjust than the rules of primogeniture and entails. The same lively citizen of Maryland insists that if, by privilege, I mean that attribute or quality by which any corporation performs its proper functions, and he supposes I can mean nothing else, then he entirely denies any shadow of right in a legislature to destroy it, for it is as much property as money in the vault. The corporate franchise, quality or privilege is a right—a vested right—says this sarcastic advocate, in the phrase of the forefathers of republicanism, and, according to the meaning of that phrase, a sacred right—it is property, to all intents, within the protection of the law. He then recapitulates, carefully, all corporate franchises except that particular one which I especially denounce as unjust privilege, held by no vested right, viz: exemption from personal responsibility for corporate property, and triumphantly closes his strictures by saying: “I will not discuss, further, whether a charter is a contract—I think it beyond discussion—but I will pause to inquire how it comes to pass that you should assume a doubt that a bank charter is not a contract.” He had not discussed it at all: it was beyond his discussion: and when he pauses to inquire how it came to pass that I doubt why a bank charter is not a contract, his whole force, never noticing the two solemn judgments of the Supreme Court of the United States, that banks are public institutions, consists of a citation of one of Judge Story’s solitary dicta, in his favorite Dartmouth College case, that a bank is a private corporation, emblazoned in italics, capitals and all the brilliancy of the art of printing. This candid antagonist, condemning the whole inventory of my propositions, by an eastern figure as without even an islet of orthodoxy, (also duly italicised,) in a waste of heresy and schism, evidently did not choose to confront the radical differences between public and private charters; between charters of personal freedom and charters of corporate property, or between the corporate franchise of suit and the privilege of personal exemption from suit at all for incorporated property. Such strictures do not even approach the question, but expend themselves in tropes on mistaken premises. Property is a right, vested in an individual, which legislation cannot take away, for another individual, nor for public use, without equivalent. In this country the means of acquiring, holding and trans-

granting property are equal to all; monopolies and perpetuities are illegal, so are privileges. When, therefore, legislation renders these means unequal, by incorporating individuals exempt from common liabilities, it violates the first principle of equality in property. And when it does so by authorizing privileged individuals, as a bank, to make currency, it moreover grants what belongs to the public. Should the public resume that privilege without taking the chattels of the bank, it affects no property, impairs no contract, infringes no right, but it resumes a privilege merely, in derogation of common right, the grant of which is of questionable power, the resumption of which, if politic, is unquestionably authorized.

My Maryland antagonist is especially offended at my having said, that *perhaps*, in rescinding a bank charter, the bonus, if any paid for it, should be restored, which poor *perhaps* he denounces, as a wretched casuist, borne down by the load of sin I have heaped upon his shoulders, and vainly endeavoring to look with an honest face upon the crowd of astonished and indignant contemners of his shabby office; tropes and metaphors more figurative than argumentative. In plain English, how stands reason and the argument on this, which by the much abused *perhaps* I acknowledge debateable, ground? Governor Ritner's late message, has relieved me from much of the argument, since he condemns the impolicy of bank bonuses—which proposition I have long contended for, till latterly, I confess, without much countenance. The Maryland philippic supposes the question settled, by the magnitude of this price of privilege! The value of the right, which I think (he says) too insignificant to be called property, and too unsubstantial to be entitled to the protection of courts, is, according to his reckoning, nearly six millions of dollars; which in his estimate is overwhelmingly conclusive that it is not only property, but a great deal of it, and a great deal of property he concludes, must be held by some right. It is not because the price was insignificant or unsubstantial, that I doubted the claim of a bank bonus to reimbursement. But I will meet my metaphysical assailant on his own ground. Political economy admonishes even the governor himself, that for the state of Pennsylvania to part with a large portion of its sovereign power to a few incorporated individuals, in exchange for some of their credit given in return, is a very poor exchange for the state, a bad bargain by which it actually gets nothing, and gives a great deal—what perhaps it cannot part with at all. The six millions which our Maryland arithmetician reckons so large a price and value, cost the banks but a few dollars worth of paper and lampblack, impressed with the counterfeit seignorage of bank credit, for which paltry thing the state gave the entire and perfect chrysolite of its sovereignty. It is high time, that the whole community should appreciate the preposterous and pernicious delusion of a state exchanging its credit for that of forty or fifty of its citizens, chartered to substitute their credit for money. So much in brief, for the political economy of the bonus doctrine. But this is not all: there is moreover, a problem of finance to be solved. In all my views of this subject, I have studied to keep clear of those personifications and appeals that excite passion and disturb judgment. My aim is to treat fairly a high constitutional and fundamental topic; not to shew that the only bank in Pennsylvania whose charter is not revocable in its terms, ought

to be revoked. That I leave to others, if so inclined. I have never denied that some large state banking institution, to take the place of the Bank of the United States, may have been judicious, and even necessary, in the habits of the community; as I have always believed that the Bank of the United States might, and would be so now, but for what, with deference to other judgments, I thought injudicious means of obtaining a recharter. But I have abundant materials carefully constructed of simple arithmetic and unanswerable proof, that the finances of Pennsylvania are large sufferers by the ignorance of the short-sighted donors of what was exchanged for the six millions, said to have been got in a bonus. Granting, as I now do, for the argument, that the six millions were paid in money, and not in depreciated credit, it is still perfectly demonstrable, that the bonus costs the state much more than it has or can come to. As I mean to dwell on this demonstration, I will not do more than simply lay down the proposition, that what the Bank of the United States gave the state, and is to give, for a charter, (counting the bonus in good money) is nevertheless no gain, but a large loss to the state, by the vast increase of expenditure and debt, that bonus opened. It was Pandora's box for Pennsylvania. Thirdly, it was not however either the economical or the arithmetical view of the subject that induced my *perhaps* against the bonus, but the plain and positive law of the matter. I doubt the *contract* obligation. A bonus is a sort of fee or gift like a lawyer's, bestowed arbitrarily for a service of inappreciable value not reducible to computation, not a price to be the subject of a legal demand, but a donation neither demandable nor recoverable by law. Once given, it cannot be reclaimed. It rests with the donee in mere honor and policy, whether to take it all, or to restore it altogether or in part, on a change of circumstances, as it rested with the donor whether to give it. I question the legislative right to sell a charter or any other advantage. Kings have sold titles of nobility—I know of no authority by which an American legislature can sell a bank charter for a bonus. The pernicious impolicy of the system has become continually more flagrant. Formerly internal improvements and even churches were constructed by lottery grants by legislation. But the practice has ceased with universal reprobation; as the corrupt and costly schemes of bank bonuses soon will. A state, like an individual, should preserve its faith inviolate, and make sacrifices of money rather than lose credit and character: and in repealing a bank charter the highest obligation of state honor and policy enjoin punctilious fulfilment of all their mere expectations. But it is no contract or engagement of which the obligation may be impaired, or which courts of justice can enforce. It is altogether matter of sound policy resting in the discretion, wisdom, and virtue of the legislators, who are to bear in mind that it is not their own but public money, with which they reimburse, if they do, a bonus improvidently, or perhaps fraudulently, taken by unwise predecessors.

Thus, whether we consider economy, arithmetic, or law, *perhaps* with an honest face looks from their tripod, on his assailant dismounted and thrown on a mere islet of mistake, with only his Iliad of shabby strictures to hide among, *quo cunque nomine gaudet*.

The citizen of Maryland agrees that the grant of a corporate franchise implies the deliberate assent of the legislature to the wisdom and sound policy of the grant. "A legislature has no right—I speak in a moral

sense—to pass any act but for the benefit of the country. It must be presumed, therefore, in all cases, that sufficient political inducements—some clear conviction of public advantage resulting from the act—to determine the legislature to make the grant.” Now this presumption of political inducement is seldom true even as a presumption, and public advantage hardly used as a pretext, the avowed object being individual exemption from common liability.

I am beholden to the Maryland strictures for also adopting my classification of charters and reasons for it. “Charters to cities and towns,” he says, “are purely political corporations, and do not include the idea of contract. The parties on both sides are the public, in these corporations; and being erected solely for the better administration of government, they are at all times subject to the modification at the will of the supreme authority.” But according to his own presumption, that political inducements and public advantages are indispensable to the legislative right or power to grant charters, coupled with the fact that banks make most of the public currency, and regulate the value of all labor and the price of all property, it is clear that they are political institutions. The party receiving the charter acts for the public, as much as the party granting it. The mixture of some private interest and gain does not change this state of things, because the public interest predominates, and it is a universal principle of all politics and all jurisprudence, that whenever public and private interests are blended, the public are paramount.

The whole question lies in a very narrow compass—in one word—and be it remembered that the burthen of proof does not rest on me. It is for the citizen of Maryland to shew, if he or his like can, that bank charters are private contracts, or bank bonuses public gains. I deny the one and question the other; but the burthen of demonstration does not rest on me. By no means,—those who affirm that bank charters are constitutional contracts, are to shew it. They are to demonstrate what, however taken for granted, has never yet been adjudicated, or hardly assumed by any court, and contradicts the whole impression of English, American and common understanding. Not only so, but all doubt, even doubt, resolves itself into decision, against those who would condemn a law as contrary to the supreme law of the constitution of the United States. Judges, particularly Chase, Marshall, Washington, Tilgham and Shippen, have expressed themselves most pointedly to this effect. Jurisdiction to annul laws is an awful power, said Judge Iredell. Judge Chase said if he ever exercised it, he would not decide any law to be void, but in a very clear case. I believe that he meant such an indubitable error, as would induce even an English judge to declare an act of parliament void. But grant that he did not, and conceding without grudging the judicial power to annul laws as unconstitutional, it is yielded by all judges that such an extremity requires a case of the clearest necessity. After strongly asserting the duty of a judge to declare an act of assembly void, when convinced beyond doubt that it was passed in violation of the constitution of the United States, or the state, Tilgham adds, that nevertheless, the utmost deference is due to the opinion of the legislature, so great indeed, that a judge would be unpardonable, who in a doubtful case, should declare a law to be void.

With such judicial authority, I hold my position firmly, that if it be doubtful, whether bank charters are constitutional contracts, they are not such contracts, simply because to doubt, is to be resolved.

Thus with the four legislative precedents I have mentioned, the Proprietaries, the University, the Bank of North America, and the Gettysburg road, of repeal of laws granting vested rights, I may assume that the power and the practice of the legislature of Pennsylvania are unquestionable, from first to last, to revoke grants by law, to divest vested rights, whenever public necessity requires it, and that it has never deemed it unjust to consult great public interests on principles of large and judicious policy. Unless the constitutions of the state and the United States forbid such legislation, as impairing contract, there is no interdict upon it.

Thus having shewn unquestionably, that the judicial power to declare laws void as contrary to constitutions, is an extreme jurisdiction, never to be exercised but in very clear cases, I now cast on those asserting it, the burthen of affirming that the charter of a bank is a contract within the meaning of that term as used in our constitutions. It cannot be done. Affirming the negative, I shall now take the burthen of proof without dwelling on the difference between the constitution of the United States, which adds the vexed word *obligations*, to that of *contract*, as used in the constitution of Pennsylvania. We know how lamentably the supreme court of the United States were divided and exercised by this apparently slight difference of a mere word. But I shall attempt no advantage from it, although the omission of the word obligation in our constitution, makes for my argument, I am content to do without it. The fact is, and it is a strong fact, that the courts of Pennsylvania have never adjudged any law of Pennsylvania to be contrary to the constitution of Pennsylvania, (for the case of the Ebensburg road, in the 2d volume of the Pennsylvania Reports, forms no exception;) nor has the supreme court of the United States ever adjudged an act of Congress to be contrary to the constitution of the United States. In Pennsylvania I stand upon a rock. Not only has neither legislation nor adjudication ever deemed a law a contract; but further, the judgment of no court of this state sanctions the assumption that a law can be judicially annulled, as impairing some other law importing a contract within the constitution. These are persuasive premises. The courts of justice of our own state, by at least significant silence and inaction, are abettors, while its legislature by repeated and unquestionable acts, has always exercised the power I assert, and much greater power than I assert, over what are called vested rights.

Going beyond the confines of mere professional impression, founded on no authority, let us inquire of philosophy, of the best foreign sources of information, of common parlance and common sense—whether a law is a contract? Was it ever so considered? Do they think so in England? in France? at present? did antiquity? What reason has Judge Story, or any other bold asserter of such a novelty, for venturing to say so? Why is a charter a contract? Without regard to the sovereignty it shares, why is a bank charter, why is any law, held a contract with the state, subject to judicial control? Why is the great power of a community exercised in the enactment of a law, to be reduced to the level of a

private agreement, and construed, regulated, or annulled accordingly? Blackstone, to whom I prefer referring, because from a random word or two of his, in a parenthesis, Chief Justice Marshall was prevailed on by Judge Story to infer all this immense result, defines law to be something *prescribed*, and prescribed by a *superior*, which *commands*, and mostly with *penal* sanction, what is to be done or not done. There is no contract in this, no equality, no consideration, no agreement, such as Blackstone defines a contract. All his instances of contracts, obviously contemplate individuals; he mentions A and B, as the parties to a contract. He has no idea of an act of state. It is palpable, that a law is not in his mind at all. In both his definitions, that of law and that of a contract, he shews beyond doubt, that he considers the one a public and sovereign act, the other an individual transaction. To the same effect, may Rutherford be cited. "A law," he says, "is a rule to which men are obliged to make their moral actions conformable." And "such acts of mankind as produce a mutual obligation, and consequently, a mutual claim on the parties concerned on both sides, are contracts." Again, he adds, "when we consider only the general notion of a law, there appears to be a plain difference between positive laws and compacts. A compact is an act of two or more persons, which produces an obligation upon those who make themselves parties to it, by their own immediate or direct consent. A law is an act of a superior, which obliges all, who are under his authority, as far as they are concerned in the matter of the law, and as far as the legislator has intended to oblige them; whether they immediately and directly consent or not." These doctrines from indisputable authorities cannot be gainsaid. Even Marshall himself, in the very ratiocination of deducing a law to be a contract, by means of an innocent word in Blackstone, cannot help saying that *one* of the *parties* to the contract he constructs from a law, were individuals whom he names—James Gunn and others. The civil code of the state of Louisiana drawn with great care and precision, with reference to the best authorities, defines law to be a solemn declaration of legislative will. Law commands, permits, forbids, announces rewards and punishments, makes general dispositions not for particular instances, but for what is of common occurrence. A law prescribes for the future only, can have no retrospective operation, nor impair the obligation of contracts.

This definition of law, referring, among other authorities, to the judgment of the supreme court of the United States, evidently contemplates private contracts between individual parties, and excludes, both in its terms and spirit, all idea of an act of a state, or law itself, thus defined, being a contract.

To Madison's explanation in the *Federalist*, and Luther Martin's and others, for which I beg leave to refer to my letter of 1836, all proving that the constitutional prohibition applies to private contracts, between man and man, and not to laws, or what have been construed to be contracts between states and men, let me here add, Judge Story's note to the 33d chapter, page 217, of the 3d volume of his *Commentaries on the Constitution*, which is as follows:

"In the original draft of the constitution, some of the prohibitory clauses were not inserted; and particularly, the last clause, prohibiting a state to pass any bill of attainder, *ex post facto* law, or law impairing

the obligation of contracts. The former part was inserted by a vote of seven states against three. The latter was inserted in the revised draft of the constitution, and adopted, at the close of the convention, whether with or without opposition, does not appear. It was probably suggested by the clause in the ordinance of 1787, (art. 2.) which declared "that no law ought to be made, &c., that shall interfere with, or affect *private* contracts or engagements, bona fide, and without fraud, previously formed." By this note, Judge Story would seem to agree to the original design of the clause, its *meaning* as contradistinguishable from the *construction* he has since been mainly instrumental in putting on it.

An intelligent foreigner, M. de Tocqueville, says of this clause in the constitution, this power appears to me to attack more deeply than all the rest, the sovereignty of the states. I put the question to a respectable Italian lawyer now in this country, whether a law can be deemed a contract, to which he at once replied in the negative. A contract without individual parties to it, is not a common idea. A state contracting is an unusual thing; and a state contracting by general law, having none of the ordinary features of a contract, is, I believe, what was seldom if ever thought of, till a law of Georgia was so considered by Marshall, on the suggestion of Mr. Story, under peculiar circumstances which I shall endeavor to explain.

Legislative precedent, judicial authority, and the reason of all mankind concur, while we keep ourselves within a state, to refute the notion that a law is a contract, much less a bank charter created by law. Are we bound to look beyond, as Chancellor Kent said in *Fulton's* case, to inquire further, to go out of our own state, our own legislation, our own jurisprudence, and to rake among the embers of a supposed federal interdict for the apprehension that a different government, that the judiciary of the United States may annul a law of this state, which by our state authority rightfully repeals a bank charter? There is no adjudication of the United States to alarm or warn us. The federal judiciary has never adjudged that a bank charter is a contract—has never adjudged any thing like it. There is no analogous or kindred judgment of that judiciary. On the contrary, there are two solemn and deliberate judgments of the supreme court of the United States, that bank charters are public laws, that banks are political institutions. Laws of Maryland and Ohio taxing the Bank of the United States, were vacated by the supreme court on the ground that it was not a private, but a public corporation. In the last mentioned case, Chief Justice Marshall's language is, that the bank is not a private corporation, but a public corporation created for public and national purposes; that it is not an individual or company, having no political connexion with government and carrying on the private business of banking. Even if the Chief Justice had not said so, the judgment of the court rests entirely on that ground. Its acts speak more conclusively than any words.

There is other and stronger authority to the same effect; stronger than even that of the supreme court. Hamilton's defence of the constitutionality of the bank vindicates it as a political machine, and the whole argument of this originator of the first great bank, is, that it was a public measure. "The simplest and most precise idea of a bank," he says, "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." Private interests and direction are involved and employed, as the best means of accomplishing this public end. "It is a medium of exchange, a regulation of trade, and a general object," he says, "because its bills are to circulate in all the revenues of the country." He appeals to the practice of other nations for asserting that banks are an usual engine in the administration of national finances, and an ordinary, and the most effectual instrument of public loans. So Burke, on the East India bill, said, if the Bank of England should by mismanagement fall into a state similar to that of the East India company; if it should be oppressed with demands it could not answer, engagements which it could not perform, and with bills for which it could not procure payment; no charter would protect the mismanagement from correction, and such public grievance from redress. If the city of London had the means and will of destroying an empire, and of cruelly oppressing and tyrannizing over millions of men as good as themselves, the charter of the city of London would prove no sanction to such tyranny and oppression. (These acts of mismanagement are precisely such as are now objected to our banks.) Thus Marshall's authority and that of the supreme court, is confirmed by Hamilton and Burke, that banks are political contrivances, and not private concerns, to which may be superadded the practice and understanding of every American state in all branches of government, with the full approbation of the community, that bank privileges are subject at all times to such changes as the state may make in them.

An uninterrupted current of judicial, executive, and legislative determinations, by which states have taxed banks, reduced their paper and increased their coin circulation, as public welfare required, together with the enactment and enforcement of other fundamental changes, never supposed to impair the obligations of their charters and contracts, prove beyond refutation, that banks have always been universally deemed political means, not private property, and that legislation may regulate them from time to time as occasion requires. The Governor's late message recommends radical alterations, more sweeping than I consider expedient, but to the power of whose enactment no objection has been raised.

Mr. Sergeant, Mr. Forward, and Mr. Hopkinson, justify the palpable breach of the letter of the law in the non-payment of coin, by asserting the right of the banks to judge whether it best comports with the public welfare. And how can they judge but as part of the government authorized to determine what is good for the community? All the governor's suggestions assume that the banks are part of the state, to be regulated as such. The Bank of the United States is now the very state and government itself. All states, according to the varying emergencies of bank agency with currency, always act on this ground. Several of the states, Massachusetts and Kentucky for instances, repealed bank charters by legislative action without judicial proceeding. In the debate of our legislature on the repeal of the charter of the Bank of North America, the right of legislative repeal, without conviction of any offence or judicial agency was expressly insisted on. The professional notion that a court of justice is an indispensable agent in annulling a bank charter is merely professional, and wholly unfounded in either law or reason. It is one of the many spurious offspring of that professional paternity which in this country beyond all others is extremely prolific of technical dogmas. A

legislature may and must be the revoking power when the bank has not forfeited its charter by misbehaviour, but the public good requires its revocation. A misbehaving bank may be tried for misbehaviour, and punished by forfeiture, in a court of justice. But a bank injurious to the commonwealth from any cause not proceeding from mismanagement or misconduct, falls within the power of legislative repeal alone. A court of justice has no judicial faculty of judging whether the bank is detrimental to the community; no recognizance of the case. The community itself must judge of that, and execute its judgment by the popular representatives. Moreover, the supreme court of the United States have unanimously determined,—and their unanimous resolution of a constitutional question is a rare thing,—that the legislature of Pennsylvania retains judicial faculties especially of equitable character, owing to that imperfect distribution of the several powers of government, which it has been my unsuccessful effort in this convention to remedy by a distinct constitutional provision. When incorporated persons violate charters, the courts may act on both persons and charters; but when charters are public injuries, legislation alone can apply the remedy to the charters; and it must be a mere question of state policy whether public good requires repeal. Power to charter is assumed by American legislatures as devolved on them through the Revolution from the royal prerogative of the mother country; and legal proceedings being necessary in England to repeal a royal grant of charters, the idea has naturally prevailed with lawyers in this country, that charters can be revoked here as in England, by judicial action only. But this mistakes both premises and conclusion. It is extremely doubtful whether American legislation derives from succession to royal prerogative the power to charter: and even if it does, that is no reason why the charter emanating from a legislature must be revoked by a court. Royal prerogative has no faculty of investigation with a view to repeal. It must act through the instrumentality of courts of justice, which are but emanations from the royal authority, not co-ordinate departments of government as with us. Nearly all our charters contains a clause reserving to the legislature, power to repeal them when public welfare requires. It is equally impracticable for a court to try questions of politics, and for legislatures to try forfeitures of private franchises. The technical notion that writs and courts are indispensable to repeal public charters, is in short only asserting that they are irrepealable but at the will of the bar. That legislatures, or the people, are not to be trusted with the exercise of this dangerous power; and that it is better administered by courts of justice is, however common a notion, not an argument I need combat. It is altogether contrary to the whole theory of American government, and, I believe, has proved extremely injurious in practice; one of those technical usurpations which it becomes us to throw off.

Distinguished lawyers and eminent judges have said, whose sayings published in law books, often pass for law, that laws are common contracts, that bank charters are such contracts, and that all charters are irrevocable but by judicial proceeding to forfeit them. Denying this, as to bank charters, but with unaffected respect, by professional reverence for those who have dictated it, I must treat it somewhat extensively, with all the freedom compatible with perfect deference for those whose mis-

take I shall strive to shew ; one in particular, whose contribution to the literature of law, I consider more valuable than to its stability, and whose extravagances all tend to take power from the community, and place it with the judiciary, which I hold to be even more injurious to the usefulness of the judiciary than derogatory to the sovereignty of the people. The law of prerogative, of prize, the common English law,—which, by fiction of law, he has contributed to fasten on the French of Louisiana, while he would take it, together with jury trial, in maritime cases, from those of New England and the other states much attached to it, if not make it the common law of these United States altogether,—charter law, criminal law and constitutional law, the whole encyclopædia of jurisprudence has been so remodelled by this learned judge as to require dissent to his doctrines, from, if I am not mistaken, every judge on the bench with him. At his suggestion, Chief Justice Marshall, for the first time that such a thing was ever thought of, pronounced a law a common contract, when, indeed, there was much to induce some extraordinary act of judicial intervention, being one of those exigencies which may justify false judgment, or at any rate, false reasons for right judgment. It was a grant of land by a state to individuals by name, who sold it to third purchasers, so that it was actually irrevocable by subsequent law of that state, without manifest injustice. Judgment annulling such law is therefore right, and its only infirmity is that the judge pronouncing it, gave a wrong reason for it. Soon after that bold judgment, Mr. Story was promoted to a seat in the court which gave it : and then, for the first time in the history of any jurisprudence, followed several other judgments, affirming and exaggerating that of Fletcher and Peck, to which I allude, unfortunately mistaking the argument of the Chief Justice, (suggested as it was by Mr. Story, as the law,) for the judgment of the court. At length, nearly the whole court was prevailed upon to carry the doctrine that laws may be judicially rescinded, as even common contracts, to the extent that a college charter is also a private contract; the fatal results of which untenable position together with a sequel of similar judgments, soon betrayed themselves in the utmost uncertainty of the law, and irreconcilable contradiction among the judges. And when the principle, after these results, was attempted by the Harvard University to be again enforced, intolerable consequences had left no one advocate among the judges, but its author and perhaps another. The private contracts of individuals are of sacred obligation, and even grants of land by states to individuals, must be irrevocable. But Judge Story was early warned by a friend, always studious of his reputation, that judicial enactments sustaining as contracts ante-Revolution charters against reform by post-Revolution law, would never be practicable or tolerable judicature. My immediate purpose, however, does not need the denial of the New England College cases, rank as their growth was like to be, to choke the common harvests of state legislation. The legislature of Pennsylvania in the act I have cited, resuming the Penn property, asserted the safety and happiness of the people as the fundamental law of society, and the practice and usage of states most celebrated for their freedom and wisdom, to control and abolish all claims of property and interest, inconsistent with their safety and welfare, and that it is the duty as well as the right of the representatives of the people, to assume the direction and management of such interest and property as belongs to the

commonwealth, or was designed for their advantage. The same legislature reformed the charter of the University of Pennsylvania, that it might conform to the revolution and the constitution and government of the Commonwealth. They acknowledge the right consecrated by the constitution of every state of the American Union, for the people to change their government and reform it as they will, and when they will. It is reasonable if not indispensable, that the exercise of such power should follow a revolution, in order to conform government to a new state of things. But in the instances of laws of many of the states of this Union, the supreme court, under Judge Story's suggestion of the contract character of laws, individual and charter laws, resolved that laws may be judicially repealed. I am not bound to demonstrate the error of this doctrine, except as to bank charters. After annihilating, first, legislative repeal of a private grant of land, and then reform of a college charter, as impairing the obligation of contracts, the Chief Justice, to the false reasoning of the first case, superadded in the second as a rule of general constitutional construction, that the rule once established, it is not enough to say that a particular case was not in the mind of the convention, when the article was framed, concerning laws impairing the obligation of contracts, nor of the American people when it was adopted. We must go further and say, that had the particular case been suggested, it would have been excluded by the language of the constitution. The case being within the words, must be within the operation of the rule. This is going further indeed. The case in question, or any such case, is not within the words of the constitution: but, by technical interpretation, finding one isolated word to bear a well known meaning, in questions of property, the rule laid down is, that in questions of politics, all idea of the intention of those using that word, and all historical recollection, are to be rejected, and from a single word thus perverted, judicial power is to be assumed which none but dictators and vanquishers have ever exercised—power to set aside established laws. The propagation of constructive law is remarkable. Mr. Story suggests at the bar, and judge Marshall takes the first step: Mr. Story, appointed a judge, naturally makes the most of his offspring, and Marshall patronises it in the cases within the words, because, he says, they then fall within the operation of the rule, inasmuch as, had they been suggested, it does not appear that they would have been excluded by the language. Judge Story some time afterward, publishing commentaries, declares it to be a law, that it has not been thought any objection to this constructive assumption, that the preservation of charters and other corporate rights might not have been primarily, or even secondarily, within the contemplation of the framers of the constitution, when the clause was introduced. Finally, Chancellor Kent extols both the rule and the reason as admirable safeguards of property. A written constitution guards private contracts from vicious or inconsiderate legislation; so said the accredited commentary on that constitution published with it by one of the principal framers—Madison. Twenty years afterwards, a judge adopts the suggestions of an ingenious lawyer, that a grant by law executed is a contract, and nine years after adds, that with the help of the further judicial rule having found such meaning in a word, it is immaterial whether a case falls within the meaning or not, so that it is covered by the word. The construction is thus carried from an individual grant to a charter trust. Judge Story then

throws in bank charters to boot, among his illustrations of the omnipotent word; of course in his commentaries he repeats his own arguments and those of the judge who was prevailed on to adopt them, and they pass as law; they are obsequiously taken as such by most of a learned profession, and perhaps nothing but the inveterate vice of this doctrine, betraying itself forthwith in utter contradiction and confusion, prevents its being perpetuated as the supreme law; so that every law enacted by any state would be but a contract whenever a court thought so, to be rescinded at pleasure by those whose vocation is neither to make or break, but simply to interpret and enforce laws. There is an honest judicial exultation in Chancellor Kent's promulgation of this vast increase of judicial power that is quite edifying. It was in the great case of the Dartmouth College says he, that the inhibition upon the states to impair by law the obligations of contracts, received the most elaborate discussion and the most efficient constructive application. This decision did more than any single act proceeding from the authority of the United States, to throw an impregnable barrier around all rights and franchises derived from the grant of government, and give stability and inviolability to the literary, charitable, religious, and commercial institutions of our country!! Generous concession! by a learned judge, one of whose ablest and most elaborate vindications of state law in the case of the steam boat privilege, fell under the federal constructive supremacy he delights in;—just conclusion! if, as no doubt he believes sincerely, it is for public good that states should be but corporations, and corporations, states, under constructive reform of a federal constitution of the United States, centralized by judicial action.

When a court constructs a judgment, says a late English analyser of legal judgment, it forms that judgment of certain materials which are law; which materials the court does not make; and so far the judgment is not creative of law. But the judgment is law, although the materials may be mistaken. An emulous expounder of American organic and political law, and a great admirer of English law, assumes power to annihilate statute law constructively, by reducing statutes to contracts, and augmenting the assumed power not by judgments but arguments, his own arguments at the bar, adopted it is true, but only as arguments, by another eminent judge, and propagated by commentaries. In a country consisting of thirty countries, with laws and opinions varying with various meridians and descents, such arbitrary, novel and single minded opinions not originating with legislatures or common sentiment, are uttered by judges to be accredited as the law of the whole land; by judges whose habitual exuberance of argumentative illustration (an affluence for which the late Chief Justice and Judge Story were conspicuous) renders it always necessary to distinguish the judgment of the court from the ratiocination of the judge, lest individual speculation be taken for adjudication. No statesmen, politicians or partisans, have argued more contradictorily than the federal judges on questions of political law. Analysis of the Dartmouth College case for instance, gives the curious result of five of the seven judges concurring in the decree, but only three coinciding in opinion generally, and of those three, one of the most to be relied upon, differing in many important particulars from the other two; so that at most but two reasoned alike, and one ventured so far as to speak of

bank charters as contracts ; that one holding divorces, public salaries, and acts of limitation, to be all mere contracts within judicial abrogation. The first and best compilation of American constitutional law by Judge Sergeant, which is confined to adjudication without speculation, remarks the difference between judgment and argument, while in the commentaries of Story and Kent, one may trace the humble parentage, monstrous birth, and inordinate growth of judicial constructive prepotency. Power is assumed to judge laws, and avoid them as unconstitutional ; laws are reduced to contracts by one word taken contrary to its meaning as used. This construction is protested against by part of the court and forms no part of its judgment, being the mere argument of the judge pronouncing it. Yet this mere argument is propagated as judgment—as law ; and the laws of twenty-six sovereign states are to be subject to a perennial annihilation by young advocate's fancy, fondled into formidable law by him as a judge, while clinging to *stare decisis* as the only rock of judicial salvation, deprecating novelty as injustice, and protesting against American courts thinking and reasoning at all, while blessed with even modern English courts to do it for them ? According to Hume's opinion, the common law of England is nothing more than the body of laws framed by Alfred, long lost, though now constituting the great basis of English jurisprudence. An English judge, Wilmot, deemed the common law, altogether statutes worn out by time. All the most accepted and even renowned systems of legislation have been the gradual growth of public opinion, registered by enactments. Common law itself, the common civil law, as well as the common English law, is but the wisdom of many men distilled by the process of many ages, and finally declared as the accord of experience and common consent. But this entirely new theory of constitutional law broached in the heat of argument, resisted on the bench, never acquiesced in by any unanimous court, and sprung upon a confederation, has all the characteristics of dictation. It is revolution in the law ; forced upon a people by such questionable construction, that as a rule it cannot pretend to stand without the allowance of numerous and deep exceptions.

Let us endeavour to imagine an English judge repealing an act of Parliament. He has the same judicial right, and is under the same obligation of official duty to do so with an American judge, to repeal the law. But the English judge always recollects that Parliament or the people make the law which he is only to administer, and that his function does not extend to either creating or vacating it. Such constructive law as some American judges have attempted to fabricate for annulling statute law, without any explicit constitutional authority, would never be thought of by the English judiciary ; nor would they be suffered to make laws or destroy them, by Marshall's argument, that a word in a political compact shall be subjected to all the consequences of technical meaning, without regard to whether the authors of the compact contemplated such meaning,—distended by Judge Story to the extreme that it is immaterial what they meant,—and canonized by Chancellor Kent, as the impregnable barrier thrown around all the rights of property, fortified against the will of men and the acts of states,—having originated in Hamilton's defence of the bank, who says, that if 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, arguments drawn from extrinsic circumstances regarding the intention of the convention, must be rejected. Whatever may have been the intention, that intention is to be sought for in the instrument itself, according to the usual and established rules of construction. Madison reasoned otherwise. In his speech on the same subject, as preliminaries to a right interpretation, he laid down these rules: "An interpretation that destroys the very characteristic of the government cannot be just. Where a meaning is clear, the consequences, whatever they may be, are to be admitted; where doubtful, it is fairly triable by its consequences. In controverted cases the meaning of the parties to the instrument, if to be collected by reasonable evidence, is a proper guide. Contemporary and concurrent expressions are reasonable evidence of the meaning of the parties. In admitting or rejecting a constructive authority, not only the degree of its incidentality to an express authority is to be regarded, but the degree of its importance also; since on this will depend the probability or improbability of its being left to construction." Considering the constitution by these rules, Madison could discover no authority in it to incorporate a bank, much less imagined that a statute could be judicially vacated as a contract; and no circumstantial reason against the notion that a bank is a private affair, pleads more forcibly than President Madison yielding his judgment several years afterwards to the many judgments in favor of its constitutionality; for it cannot be that the united opinions of the legislatures, the judiciary, and the community to that effect, to which he yielded, were predicated of a private corporation, but it must have been some institution of great public concernment, which such sanction had rendered constitutional. The only instances of corporations stated by Hamilton as having been created by congress were the governments of the northwestern and southwestern territories, both obviously political, and the most that can be argued from the conflicting opinions of Jefferson and Hamilton on the whole subject of corporate power and state rights, is, that they formed respectively the creeds of opposite political schools, of which that of Jefferson was departed from by Marshall and Judge Story in their constructive interpolation; Madison finally yielding to authority, (contrary to his own opinion) that a bank may be constitutionally established, but always adhering to his view as published in the *Federalist*, that laws may be judicially annulled as impairing private contracts, not acts of state. It is Judge Baldwin's opinion, and that of others, that injustice is done to Marshall by imputing to him coincidence in many of the extravagances of Judge Story; and that, fairly interpreted, the late eminent Chief Justice's political law will be found to be of the Madisonian stamp of federal doctrine. I have heard the late Judge Johnson say, that Marshall was as good a democrat as there was on the bench; and his insuperable repugnance is well attested to some of Judge Story's prize and prerogative and corporation law. But the book of learning, industry, and amiable disposition of Judge Story, rendered him a very acceptable and influential associate to Chief Justice Marshall, especially in the latter years of his long judicial career; and with unfeigned reverence for his illustrious character, I confess that I find it difficult to separate his position from Judge Story's, in what I deem the great aberration of the contract doctrine.

Nothing is more misunderstood or misrepresented by lawyers, much

more by the community, than the decisions of the supreme court of the United States, respecting its duty to repeal laws impairing the obligation of contracts. All the early judgments while there was any harmonious action on that bench, involving laws of Georgia, New Jersey, Virginia, and Vermont, turned on direct grants of land to individuals, resumed from third persons, which grants are irrevocable ; as much so by a state as by an individual. If I give any thing to another, by tradition it is gone from me, he has possession of it, and it is probably beyond my physical power, as it ought to be contrary to my legal right, to retake that thing : not because the grant was a contract ; at any rate that is not the reason when a state grants a thing to an individual. The state of Georgia granted land by act of assembly through the instrumentality of the governor of the state to James Gunn and others. Then no subsequent act of that state could resume that land, revoking the grant, no matter why. It was given and taken ; the state having no right, which is equivalent to having no power, to take it back. But in order to do justice on this plain case, Marshall made a constructive contract, because he says a compact is a contract, and he cites Blackstone, saying that an executed contract differs in nothing from a grant. The whole paragraph in Blackstone is in a short parenthesis, not vouched by any judgment or authority, never intended to be misconstrued as it has been by a learned profession, seizing on it to supersede legislation whenever a contract can be distilled, by the forensic process, from the numberless laws which (if any law be a contract) may be so reduced by this chemistry of law. After defining and classifying contracts as agreements or mutual bargains between two contracting parties whom he individuates as A and B, and instancing that one pays the other for a transfer of property ; (all of which is totally unlike a law) and so proceeding to explain his views, Blackstone adds, as part of a sentence, "for a contract executed (which differs in nothing from a grant) conveys a chose in possession." From those five words, found in a short parenthesis, comes the unfortunate and unnecessary argument, that a law must be a contract to be annulled. For a long time after Blackstone's Commentaries were in the library, and in the memory of every lawyer, they were not quoted in English courts ; and it is said their illustrious author was struck with modest repugnance when told that they had been. In this country they are the vade-mecum of the bar, and the rubric of courts, and it is curious to contemplate the unexampled revolution which a diffident, and almost conjectural, expression respecting property and persons, thrown into a parenthesis of an English law book, vouched by no adjudication or authority, and palpably with no thought of such result, has led to in the political law of a new world. I may add, that in Marshall's use of this short phrase of Blackstone, he does not even quote it accurately, but adds a word, perhaps of no importance, yet not in the short sentence of five words, on which he draws for his whole argument.

Judge Johnson in his more considerate and more enduring adhesion to this declaration of judicial independence, (for such the judgment deserves to be called when separated from the reason) after subscribing to the judgment, that a state does not possess the power of revoking its own grants, on a just and general principle, the reason and nature of things—a principle which will impose laws, he says, even on the Deity—because when

the legislature have once conveyed their interest or property in any subject to the individual, they have lost all power over it, have nothing to act upon, it has passed from them, is vested in the individual, and becomes intimately blended with his existence, adds, that his opinion is not founded on the provision in the constitution relative to laws impairing the obligation of contracts, which he quotes Madison in the *Federalist*, for saying was intended to afford a general protection to *individual* rights, against the acts of the state legislatures. Judge Johnson gives into the technical definition of the misconstrued word *contract*, though he qualifies this otherwise fatal concession by dwelling on the difficulty which the Chief Justice does not appear to have adverted to, till it perplexed, and I may say prostrated, the judgments of the whole court a few years afterwards, when the other word *obligation* came to be thoroughly considered, as Johnson first said it must be. The inconsistency of an obligation continuing with a grant after its execution, is demonstrated by Johnson, as it must convince every one. And he proceeds upon higher and broader views of constitutional jurisprudence to anticipate the insurmountable difficulties which have distracted the supreme court, perplexed jurisprudence, exaggerated jurisdiction, and confused the community, from the impracticable construction which, taking the word *contract* alone in its mere technical meaning, attempts to bind all laws by such pigmy fetters. I enter, says he, with great hesitation, on this question, because it involves a subject of the greatest delicacy, and of much difficulty. The states and the United States are continually legislating on the subject of contracts, prescribing the mode of authentication, the time within which suits shall be presented for them, in many cases affecting existing contracts by the laws which they pass, and declaring them to cease or lose their effect for want of compliance in the parties with such statutory provisions. All these acts appear to be within the most correct limits of legislative powers, and most beneficially exercised, and certainly could not have been intended to be affected by this constitutional provision; yet, where to draw the line, or how to limit the words, "obligation of contracts" will be found a subject of extreme difficulty.

To give it the general effect of a restriction of the state powers in favor of private rights, is certainly going very far beyond the obvious and necessary import of the words, and would operate to restrict the states in the exercise of that right which every community must exercise, of possessing itself of the property of the individual when necessary for public uses; a right which a magnanimous and just government would never exercise without amply indemnifying the individual, and perhaps amount to nothing more than a power to oblige him to sell and convey when public necessities require it. Judge McLean, in the *Charlesown bridge* case, not only repeats and affirms Johnson's objection to Marshall's adoption of Judge Story's suggestion, that a law is a contract within the purview of the federal constitution, but he adds another substantive refutation, that an executed contract cannot be subject to any contract obligation; and, as I understand his argument, he moreover takes Madison's position, that the clause in the constitution merely refers to private transactions, and was never designed to act upon those of states. These quotations show how Johnson differed from Marshall, and that Judge McLean also dissents, and truly indicate the embarrassments that have ensued.

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ed, not from the federal judiciary declaring state laws unconstitutional (I do not now call that power in question) but from their attempting it on the mistaken principle that such laws are to be judicially dealt with as mere contracts.

That postulate I venture to deny, and have endeavoured to show the difference between the judgments and the individual speculations, of some of the judges of the supreme court, especially that one who alone has ever called a bank charter a contract, and broached many other speculative sentiments, subversive of ordinary and constitutional law. Even, however, granting that laws are contracts, and (going to the uttermost of this judicial speculation,) that laws of incorporation are contracts, still the Dartmouth College case itself does not venture beyond private characters, and if a bank be not a private institution, there is no pretext from that disastrous judgment itself for considering a bank charter a contract. On the contrary, the only judgments of the supreme court on bank charters pronounce them public institutions.

Having thus explained the law, I cannot leave the supreme court without presuming farther to question the great lawyers who have adorned its bench. Constitutional law is politics. The constitutionality of a national bank and other controverted questions of political law—the touchstones and formations of parties, must needs divide eminent lawyers, whether at the bar or on the bench, like other men affected even by the northern or southern atmosphere of their respective residence. Most of our federal judges were statesmen deeply imbued with party politics. The Chief Justices were active and leading members of a party when promoted to the bench. It becomes indispensable, therefore, to such a verdict as history and truth will record on their constitutional doctrines, to appreciate them in connexion with those fundamental movements, which have agitated all countries and ages, but in ours especially have been always a primary element of all public life. At the formation of the constitution, with reference to constitutional opinion, there were first, centralists, who endeavoured to make the federal authority, in all departments, not only judicial but executive and legislative, a controlling supremacy over that of the states in all their departments; secondly, federalists, whose plan was that the supreme court of the United States alone should decide questions of constitutional difficulty; thirdly, republicans, consisting of two classes; first, those who, denying the sole supremacy of the supreme court, granted a qualified federal supremacy in certain contingencies; and secondly, those who denied federal supremacy altogether,—holding that the states and the Union, and each branch of each government must determine for themselves in constitutional exigencies and conflicts; and fourthly, there were some of all parties who may be called optimists, for making the experiment of the constitution as substituted for the confederation, without siding entirely with either the centralists, the federalists, or the republicans; trusting the experiment to work its own way, but never anticipating, as I know from one of them, that the vast constructive power worked out would ever come to pass: for as my informant always said, if such result had been foreseen, neither the federal convention, nor the state conventions, would have adopted the constitution. The several divisions I have designated as centralists, federalists, republicans and optimists, comprehended men of various parties as parties have since been formed; and while

confining myself strictly to an historical account of their preferences, I refrain from any opinion on their respective merits. Patriots, in the best sense of the term, were attached to each party. In the progress of events, centralism is now nearly extinct; constitutional republicanism, till latterly hardly existing north of Virginia, now predominates in the south, and has increased to a strong interest in the west, centre and even in the east.

Constitutional federalism proved the strongest of all the several parties; it organized the government, and for the first eight years was the ascendant interest: not the federalism in whose revival Judge Hopkinson exulted during this discussion. That forbearing federalism which was the creed of Washington and Madison, was not the central federalism of Hamilton and Morris, or of the elder Adams; be it said, not only without meaning offence, but even an opinion, my sole object being to ascertain the constitutional politics of those to whom as judges we are called upon to bow for constructive constitutional doctrines. To appreciate their judgments on political questions we must know their politics.

During the first eight years of federalism, no state law was declared unconstitutional by the supreme court of the United States. In 1795, one of the judges, Paterson, on his circuit in Pennsylvania, ruled a state law to be unconstitutional in the course of an eloquent and able charge to a jury, asserting great original principles of judicial power and duty, and of fundamental, rather than constitutional law, which, far from controverting, I deem much more conformable to right reason than the doctrine of contracts long after suggested by Mr. Story, adopted by Marshall, and propogated by both, especially Judge Story. The very question of contract, as they invented and extended it, was distinctly presented to Judge Paterson, within six years of the time when he had assisted, as a member of the federal convention, to insert the clause against state laws, impairing the obligation of contracts. Yet, while asserting the loftiest powers of judicial supremacy over legislation, the idea of rescinding a law as a mere contract never occurred to him. On the contrary, his brief view of this point, in the close of his opinion, demonstrates that what long posterior suggestion brought to light, and subsequent experience has exploded, was never imagined at or near the period of the constitution, nor thought of by its framers, but is a constructive creation, which as Judge Story in his commentaries admits, was not at all foreseen or intended by the framers of the Union. At a later period, the supreme court rejected all Paterson's grounds. Thirteen years after the constitution, when a law of Connecticut was brought immediately before the supreme court on the allegation of its invalidity as contrary to the federal constitution, the judges evidently shrunk from the exercise of authority so formidable as annulling a law. Judge Chase said, 'without giving an opinion whether this court has jurisdiction to decide that any law made by congress contrary to the constitution of the United States is void, I am fully satisfied that this court has no jurisdiction to determine that any law of any state legislature, contrary to the constitution of such state, is void.' The other judges, Paterson, Iredell and Cushing, in several opinions each, discussed the constitutional clause in question, without the least approach to Judge Story's notion, that, by prohibiting laws of

states impairing the obligation of contracts, the constitution contemplates laws as contracts : and Judge Paterson said that he had 'an ardent desire (as one of the framers of the constitution) to extend the provision to retrospective laws in general, which are all contrary to the fundamental principles of the social compact.' But throughout the whole of the arguments of these primeval judges, familiar with the constitutional intention, not one idea appears, to justify that long subsequent and extravagant construction, by which the modern doctrine was introduced, contrary, as its author admits in his commentaries, to the design of the constitution.

It was not till 1810, when the federal judiciary had been in existence so long as to have worn out several successions of judges, that for the first time, and under remarkable circumstances, the great step was taken of judicially declaring a law void ; and not only so, but void because it was a contract. After a party contest, which, from its fury and its effects has been called a political revolution, Jefferson became president in 1801, and while the outset of his administration attacked to destroy the most prominent measures of Adams' administration, which Marshall had been largely instrumental in building up,—Marshall, just appointed chief justice, was as intently occupied in an attack on one of the first measures of Jefferson's administration, by the proceeding against Madison as secretary of state, for withholding commissions. The Chief Justice's extraordinary argument in that case contains the first solemn assertion in the supreme court of the powers of courts to annul laws as unconstitutional, which had often been intimated before, but that was the first occasion (and without any reason for it in the case itself,) when the power and duty were ominously explained by an elaborate argument. Nine years afterwards that stupendous power was first exercised, just after Jefferson, the first presidential apostle of constitutional republican principles, had retired from the presidency, and was succeeded by a constitutional federalist ; not such a federalist as those Judge Hopkinson rejoices with, but holding with them that the federal judiciary is the sole and exclusive resolvable of constitutional controversies. As soon as such a federalist, in the person of Madison, was president, it was determined by the supreme court, under memorable circumstances, in a case which one of the judges charged with double dealing, not only to annul a law, to which there would have been no great objection, but for the unfortunate opinion that it was annulled because it was a contract. This judgment was in perfect harmony with the new president's constitutional tenets, however dissonant from those of his patron predecessor.

The reason given by the Chief Justice was nothing more than his individual opinion, binding neither the court, the community, the future nor any other judges, and explicitly disavowed by one who held to the constitutional doctrines of Madison ; moreover, protesting, from the bench, that he was very unwilling to proceed to the decision at all, because it appeared to him to bear strong evidence, upon the face of it, of being a mere feigned case, and it is the duty of courts to decide the rights but not the speculations of parties ; but his confidence in the respectable counsel induced him to abandon his scruples. Among the counsel thus half acquitted by Judge Johnson was Mr. Story, with whose accession to the bench next year began that cataract of cases, in which laws were

overwhelmed by the notion that they may be dealt with as contracts. The judgment that land granted by a state to individuals cannot be resumed by the granting state from third purchasers, would not have been objected to. It stood firm on those first principles of obvious justice, propounded by Paterson and Johnson, though abandoned by Marshall and Judge Story for a constructive novelty much less satisfactory, dignified, or effectual. We don't know whether any of the other judges concurred with Marshall in that notion, while uniting in the judgment. The two senior judges, Chase and Cushing, men of great learning and experience, were absent, so that even the judgment was that of a bare majority of the court. The opinion that a law making a grant is a contract, was the ingenious suggestion of a young lawyer, fruitful of reasons, in a case which, as Johnson suspected, may have been a mere speculative issue, made up without his convenience or knowledge. It was a germ, which duly cultivated, must add vastly to judicial authority, rendering its fiat more powerful than any law of a state; exceedingly grateful to those, and they abound, who think constructive supremacy, enthroned in courts holding office during good behaviour, a safer and better chancery of constitutional power than any other branch of government,—much safer and better than the common forum of a community, the mere mass, to whom, by our constitutions and theories of government, the sovereignty is assigned, but whom, in the honest politics of many, it is nevertheless wise and just to deprive of as much of it as judicial construction can lay hold of.

Two years after the Georgia law was annulled, a law of New Jersey shared its fate, under circumstances much extending the doctrine. Jersey had agreed to release from taxation, lands purchased from the Delaware Indians, who, removing to New York, sold the lands to third purchasers, who claimed exemption from taxation for them, and the supreme court repealed a law taxing them, on the ground that the convention with the Indians was a contract with the lands, though it admitted that the state might have insisted on a surrender of the exemption from taxation, as a condition to their sale by the Indians. In both these cases the judgments are recommended at any rate by a persuasive equity. But the contract principle they introduced and extended, soon came to be applied with increasing extravagance, until self-destroyed by the contradiction, confusion and discredit, which inevitably ensued. The supreme court determined that a law might be a contract, and that even the taxing power of a state must be annulled by a court, if it discovered in a tax law what might be deemed a contract. The assumption thus established was soon applied to church laws, to colonial acts, and to corporations, through which stages of exaggeration it rapidly passed to its doom. In 1815, a Virginia law of '98, the well known session when Madison's cardinal resolutions brightened the rusting rights of states and people, was set aside by the judgment of a majority of the supreme court; pronounced by Judge Story in an eloquent and learned argument, which shadowed forth the coming event of the Dartmouth College extension. That eventful decision followed in 1819, pushing the contract principle to extremity. Until the Georgia case, the constitutional interdict was supposed to be confined, as explained in the *Federalist*, by Madison, to contracts between individuals. The first judicial step beyond, in 1810, applied it to states; and successive enlargements carried it to tax laws and church laws, until final-

ly it embraced a colonial charter, annulling the law of an independent state reforming it. Other analogous judgments soon followed this, the *ne plus ultra* of judicial construction. Judge Story, who, with the fond feeling of attachment to illegitimate offspring, which is natural, would reduce limitation laws, divorce acts, and nearly all other state laws within the power of the federal judiciary, as mere contracts—that is, would entirely centralize a federal government—struggled still in the Harvard College case to keep his then languishing doctrine alive, as it stole into being in the Georgia, and came to monstrous maturity in the New Hampshire case: but it died the common death of excess, by its own excesses. If stability and inviolability can construct an impregnable barrier around property, with materials from the customary contrivances of centralism, and it is for the general welfare that states should be reduced to corporations, while corporations are made states, their power to enact laws subordinate to that of corporations to make by-laws, this judicial constructive power should be matter of exultation. It revives the politics of Hamilton and Morris, in which Judge Hopkinson rejoices as those most consonant with the constitution and the happiness of the country. But it will be regretted, and by reason resisted, if Madison was right or Jefferson's politics ought to prevail. It is palpable and intolerable violation of the constitution and of state rights, according to the more anti-federal opinions of once a small remnant of republicans, magnified by re-action against judicial and other political usurpation into great numbers, whose appreciation of the Union is perhaps as just as that of central federalism. It is not a question of judicature, but mere politics, on which parties are divided, and ever have been, and will, as they must and should be. Judge Hopkinson shews that it is mere politics, while laying it down as law. Conceding to courts of justice better faculty of deliberate and satisfactory judgment than other umpires, still this is a question in the determination of which political parties, not individual litigants, make the very issue, and one or the other party, as a party must settle it, as a question of politics, not law. It is preposterous to expect obedience to constructive fiat, reversing enacted law, pronounced by courts, as the only mode of establishing supreme law. There is no sanction. Constitutional are as much political principles, as judges are men. In the debates of this convention we are obliged to hear gentlemen of certain politics extolling Marshall and condemning Jefferson, sometimes by labored comparison and disparagement, as was the effort particularly of Mr. Meredith, which proves nothing but such gentleman's preference of Marshall's politics to Jefferson's. For a disciple of the one to reprobate the other as a bad man, tends no more to make the doctrine of the one right, or the other wrong, than for those who differ in forms of worship to deny the religion, and assert the infidelity, of each other. A christian and Mahometan may as well undervalue each other's faith. There would be as much reason in the one's undertaking to convince the other.

Mr. Clay, in his excellent speech in the senate against the Bank of the United States, thus indicates my views of the necessity of considering the individual politics of a court which is to determine political questions; and at the same time countenances my doctrine as to the legislative power to repeal bank charters. Mr. Clay's whole argument is distinguished for ability; it may be taken as the best against, as Hamilton's is

the best for, a Bank of the United States. Mr. Clay said that congress have as much right to judge of their constitutional powers as their successors. But had they revoked the law, the judiciary would probably have been appealed to, and from the known opinions and predilections of the judges, then composing it, they would have pronounced the act of incorporation, as in the nature of a contract, beyond the repealing power of any succeeding legislature. He therefore concluded, that it was wisest to wait the natural dissolution of the corporation, rather than accelerate that event by a repealing law, involving so many delicate considerations. New and immense extraordinary and political faculty and responsibility, more than it can bear, has been assumed by magistracy whose appropriate function it has heretofore been, always and every where, only to adjudicate private rights without meddling with political questions of constitutional perplexity and popular peril. When the last President insisted on his official right and duty to judge for his own office of a constitutional difficulty, without abiding by the determination of the judiciary or any other co-ordinate branch of government, his much assailed position conformed to the doctrine of Jefferson, and had the sanction of all his school of politics. When a disaffected state lately refused to yield to the authority of the United States in the adjustment of such a difficulty, and even armed to maintain its stand, that state could vouch such high authority as Chief Justice McKean, and perhaps Mr. Rawle for its conflicting independence. Judicial supremacy is no more written in the constitution than nullification. Both come of construction. Wherefore acknowledging the right of superintendence in the federal government on all questions of the constitution, and laws of the United States made in pursuance thereof, and all treaties made under the authority of the United States, constitutional federalism and sincere patriotism may still recommend forbearance from constructive power and political judicature, as wise for a judiciary whose unquestioned authority in all unquestionably judicial controversies, suffers more from usurpation of political exclusiveness than any other radicalism—such assumption being extreme radicalism. Judge Hopkinson's pleasure at the indications of a revival of federalism, and his panegyric of its virtues, are mistaken, if he meant the principles of Hamilton, and what he would call federalism. It is very common to say, as the judge did, that the federal doctrine is the dernier resort on all emergencies. But nothing is more contrary to history, if centralising federalism be meant. So far from it, the principles of that federalism are not only exploded here, but their English models are much decried; the politics of Hamilton, Morris, and their respectable compatriots, the American *doctrinaires*,—some of them, even with Washington's sanction—are gone forever. Their English predilections for limited suffrage, profuse taxation, long terms of office, national debt, funding, a national bank, restricted naturalization, alinage, sedition, libels, and others, the great articles of English creed, and the favorites of American federalists, are no longer tolerable. He must be blind to continual manifestations, to all modern history, to the march of intelligence and melioration of politics, who does not see that the uttermost theories of the Virginia school have gained ground beyond, probably, the most sanguine anticipations of the founders of their long peculiar tenets; and that all excessive government is coming to an end. Among the realizations of these changes, the judiciary has rendered itself no longer the sole arbiter of constitutional diffi-

culties. Should they who most anxiously revere and uphold that department regret this change? Will it not save and strengthen the judiciary? Will it not corroborate and perpetuate the Union? The exclusive authority which Madison and the constitutional federalists ascribed to the federal judiciary, to settle the constitution by judicial construction, has been at least unfortunate in its exercise. The perilous function of invalidating what are deemed unconstitutional laws, is an awful power, said Judge Iredell, in its experiment. The supreme court has seldom, if ever, been of one mind in the high function of even repealing a state statute—has never ventured to offer such indignity to an act of congress. Conflict has produced inconsistency; of consequence the judiciary has failed to convince or satisfy. A tribunal vitally important to the community, for judicial purposes, has suffered in its great usefulness and dignity by gratuitous disparagement; for frequent political or constitutional controversies are not consonant with the judicial office. Why should judges expose the judiciary to the vicissitudes of politics injurious to the judiciary, as a body, fatal to the judicial standing of individuals? A profession and politicians maintaining the exclusive prepotency of the federal judiciary, forget that some of the most elaborate, convincing and accredited decisions of such justly celebrated magistrates as Parsons, Spencer, Thompson, Kent, Kirkpatrick, Tilghman and their learned associates, gentlemen mostly of federal politics, on benches of justice justly venerated—deliberate and able determinations of the superior courts of most of the states—have been reversed and annulled, together with state laws affirmed by masterly judgments, in contradictory decisions of seldom, if ever, the whole of the judges of the supreme court of the United States widely differing among themselves in every opinion. In a country like ours, so wide spread, so little bound by metropolitan supremacy, can the learned profession of the law ever be satisfied that Judge Story's arbitrament of a constitutional controversy is of better reliance than that of Parsons, Kent, Tilghman, or Roane? Without intending personal comparison, let any considerate man, let every judicious lawyer contemplate the whole Union, with a broad view to the great result. Will the bar, and suitors, and community believe that the federal court or judgment cannot but be right, and the state court must be wrong? Is it not too much for general acquiescence, that the judgments of a few however able and unexceptionable magistrates at Washington, shall supersede and suppress those of their equals in learning and reputation throughout the Union, when the latter affirm statutes of their several states? Consider the admirable, the fervid, and the solid argument of Kent and his eminent associates in the steamboat controversy, for instance: can the mind, will it, embrace without hesitation the reverse of such conclusion? Or may it not apprehend that even the same magistrate under metropolitan influences at Washington, might have come to the very federal conclusion which at Albany, with provincial feelings, he most ably demonstrated to be entirely wrong? And will not the effect be to undermine that faith in judicial wisdom, which is so necessary and in this country so prevalent? By grasping at excessive cognizance, judges lose the substance for the shadow. Construction leads to construction; like all other aberration, a first step inevitably produces more. Political jurisdiction must be continually backsliding. The decisions of the supreme court from 1812 to 1834, encouraged the bar to stimulate the court to further excesses, and para-

lyzed an overstrained power which, moderately exercised, might have proved a permanent and acceptable umpirage. Constitutional jurisprudence, judicial legislation, political construction, are necessarily contradictory and questionable. It is the infirmity of their nature. With republican institutions, such determinations belong mostly to the political sovereignty. The judiciary should never interpose, but in extremity.

Far from denying the power of courts of justice to declare laws void, I approve the examples of Paterson and Chase, asserting it much more extensively and rationally than Marshall or Judge Story; and Johnson's (with whom I believe Judge Thompson agrees, as the late Judge Brackenridge did) denial that the *ex post facto* interdict of the constitution is to be confined to criminal law, but extended to all retro-active injustice, by palpably wrong legislation, according to English law, and all law of which the everlasting and unchangeable attributes of morality and honesty and elements, is but a restoration of them to its genuine philosophy. It is by novel experiments, departure from the more talked about than respected wisdom of ancestors, by violation of precedents, and disregard of authorities, and attempting new principles of constructive power, assumed by a department having little or no power but what is conferred on it by legislatures, or derived from precedents, that the American judiciary has brought itself into difficulties and disparagement.

Although it is no part of my task or wish to question judicial power and duty to abrogate statutes, I ask attention to Chief Justice Gibson's very able refutation of Chief Justice Marshall's vindication of that power, by a train of cogent reasoning condemning what he calls dogmas of professional faith, rather than matter of reason; and demonstrating, I conceive, that whatever may be thought of the rule, the reasons alleged for it by Marshall are unsatisfactory. The squandering of judgments by the exercise of an extreme judicial authority (which, to be valuable in time of need, ought to be hoarded with the utmost economy) and the founding it on false reason, are my objections, rather than the denial of the authority; the practice, not the principle.

After all that has been said of this power, extraordinary it must be admitted, and different from the ordinary jurisdiction prescribed by the judicial oath and office, the practical result may be that American judges, returning to the principles of those of England, will not act upon the obligation to declare statutes void, whether unconstitutional or not, only when unquestionably violative of constitutional or fundamental prohibitions, and never otherwise. That written constitutions give courts political power over laws, is certainly not to be found in the letter of the judicial commission. Judge Hopkinson says the judges assumed the power; but wherefore more because the supreme law is written than if original, natural or common paramount, but not written? What is radically wrong, courts of justice cannot administer as right, no matter whether unconstitutionally or otherwise radically wrong. Why is it only wrong where contrary to a written constitution? Palpable and flagrant inconsistency between the law of a statute and the law of a constitution, is no more contrary to justice than any other fundamental wrong. Then why is it a judge's duty to adjudge the one wrong but not the other? Judge Thompson and other judges have considered the constitutional

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guard of private contracts and against ex post facto laws, as but declaratory of the great aboriginal code of moral obligation, forbidding palpable injustice, binding on all courts of law; law before written constitutions and without them; law in every constitution. Chase, who duly appreciated the extremity of judicial political intervention against statutes, mentioned several instances of them to be treated by courts of justice as void, which is doctrine much more consonant with judicial duty and rational jurisdiction, than the re-cision of statutes as contracts by color of collision with a word in written constitutions. Not less than two thousand five hundred American judges, according to Marshall's interpretation of their judicial oaths, and his doctrine of the injunction of written constitutions, are bound to enforce the judicial authority of annulling statutes. This is a great reason for restoring law to what it was before the contract doctrine. For what system, constitution, or country, can bear the constant shock of armies of legislators and judges, five thousand making, and half that number breaking laws perpetually? It is a substantive objection to such extravagance of judicial prepotency, that every inferior judge (why not every magistrate?) is to be always mounted on this hobby galloping round the zodiac of constitutional jurisprudence, and whether bull, bear or goat, trampling laws under the hoofs of incapacity, surely more to be deprecated than the popular understanding. So tremendous is this power, and so impracticable, that in near fifty years the federal judiciary has never exercised it on an act of congress, nor the courts of Pennsylvania on a law of this state. Marshall, in *Madison's case*, makes no distinction between laws to be adjudged unconstitutional, whether acts of congress or assembly. According to him, they are all obnoxious to it. Chase denied the power of the federal judiciary to declare a state law void because inconsistent with the constitution of that state. Chief Justice Gibson thinks that any judge may declare a state law void, if undoubtedly contradictory to the constitution, laws, or treaties of the United States; but that a judge cannot declare a state law void for inconsistency with the constitution of the state. The whole subject is involved in difficulties; and the clearest position on which unprejudiced reverence of law can rest, is that before cited as the only one in which American judges are agreed, and which never has been and cannot be questioned; that it is an awful power, an extreme power, the revolution power of courts of justice, never to be exercised but in a case beyond all doubt; which principle, together with the practice of conforming to it, restores the English doctrine and reconciles the American to it. There may be instances of such indubitable wrong or error by statute laws, as to leave courts of justice no option but to pronounce them void. Tried by this test, the contract doctrine will not bear the least touch of the stone. With great deference, I submit that the later decisions of the supreme court overruling the early doctrines of *Paterson* and *Chase*, that laws may be declared void though not unconstitutional, are not well founded. And if the early adoption of one of *Blackstone's* few mistakes, that ex post facto laws are penal laws only, be likewise corrected by adjudications against all retroactive and otherwise fundamentally false statute laws, whether national or state, the jurisdiction, usefulness, and dignity of the federal judiciary, will be what considerate Americans must wish to see and feel them.

It is not the power I presume to question, but the constructive and ex-

travagant exercise, the abuse of it. Mistaken reason begot a bad rule whose euthanasia need not impair the right. It can hardly be deemed impertinent to anticipate of the lately renovated supreme court of the United States, a milder and a better code of constitutional and fundamental jurisdiction. When acts of assembly are treated as reverentially as acts of congress, and they are fully entitled to it, that harmony of all, and supreme judicial authority of the federal judiciary, will be reinstated, which it is my constant endeavour to uphold. The empire of law, the sanctity of property, the inviolability of private rights, corporate as well as individual, I contend for. But their preservation depends, I submit, on a temperate exercise of the high offices of judicature, rarely interposing with political jurisprudence, and never adjudging any law to be a mere contract. A sure touchstone for courts will be whether the ground is debatable; for if a judge may repeal a law whenever a lawyer by plausible argument can bring it into even strong doubt, there are many laws to be repealed, and a constitutional protection of private rights will be perverted to the means of creating a council of irresponsible censors, continually employed in frustrating legislation. If the question is debatable, the law should not be adjudged unconstitutional.

An elaborate essay by Judge Hopkinson, in the American Quarterly Review for September, 1827, criticises Chief Justice Gibson's opinion, and entirely disapproves of it, with a show of authorities, which, I think, when examined, do not much affect the reason of either side of this question. Of Judge Hopkinson's sixty-three law cases collected from the judicatures of fourteen states, (all of which I have consulted, as far as the references lead to them—some of the citations not being exact) most are judgments against the doctrine he maintains, although asserting the right to exercise it when proper; several of the cases have no reference to the constitutional question, but assert judicial authority generally over statutes fundamentally wrong; a distinction not observed by Judge Hopkinson himself, who dwells on Paterson's celebrated argument as if it were constitutional, while it has nothing to do with the letter of constitutions, much less the contract doctrine; and its fundamental doctrine has been repeatedly overruled by the supreme court in adjudications much to be regretted, in which all retro-active and ex post facto injustice is pronounced to be irremediable, however enacted, unless by penal law or impairing the obligation of contracts. After all, therefore, Judge Hopkinson's authorities prove no more than the mere assertion of the alleged judicial right, rarely exercised by some judges, while denied by others; by some the constitutional confounded with the fundamental authority, and the whole question when treated by statesmen, out of court, determined on the one side or the other, according to their politics. Judge Hopkinson cites Marshall, Morris, Ross, Griswold, and Bayard, with other federalists for the affirmative; and Giles, Breckenridge, of Kentucky, Mason, of Virginia, and Stone, of North Carolina, with other republicans, for the negative; and it is somewhat indicative to remark the learned Judge's disposal of the respective parties; for instance, Mason and Stone offer no reasons, and Giles is a wily politician; whereas Bayard is an accomplished lawyer and able statesman, Griswold gives the great power of his mind to the cause, and so forth. Appreciation of the force of argument and character which depends on the politics of the advocates and the judge, and even on the degree of latitude

in which his party sympathies may chance to be formed, will hardly be accepted by history as the verdict of impartial justice. I have said that in my humble opinion, American judges, like those of England, must sometimes, though very seldom, go so far against palpable violations of the original and immutable law of right by statutes, as to be constrained to declare them void.

A well informed foreign lawyer, M. De Tocqueville, in his excellent view of Democracy in America, chapter VI, on the judicial power in the U. States, considers that power competent to annul all retro-active laws, making no distinction between such as are unconstitutionally *ex post facto*, and others, and declares that this power is recognized by all the authorities; that not a party, not even a man, is to be found who questions it.

But the American constitutional historian, recording results, without opinion of their merits, will declare that while the American judicial power to pronounce statutes void has been for the most part asserted by the judges, yet it has seldom been exercised, and that many statesmen have always denied it; that all asserting it have uniformly acknowledged that it requires an unquestionable case of extreme urgency for such judicial intervention; that some highly respectable, though but few, judges have deemed it their duty to declare statutes void which are manifestly unjust, though not contrary to constitutional provision, but that the supreme court of the United States have rejected this principle, confining the jurisdiction to statutes contrary to the letter of a constitution. The same impartial historian must add that in no instance has the supreme court of the United States adjudged an act of congress void, or been unanimous in adjudging that a state law may be annulled as a contract, and that great confusion and uncertainty have followed the enforcement of that contradicted construction, unknown in any other country or age. I think he must add further that, according to English principles, *ex post facto* laws are not merely penal laws, but all retro-active laws; and, if he gives an opinion, he must regret that American judges, by adopting Blackstone's error to the contrary, have divested the judicial office of its noblest authority. While appearing anxious to enlarge their jurisdiction, they have thrown away its best part.

After so long an excursion into foreign parts, the realms of federal jurisdiction, to shew by monuments, with all respect for constituted authorities, that there is nothing to apprehend from them, from the embers of fire, (to repeat Chancellor Kent's felicitous balm) which do not lie in the way, and indeed have never been lighted at all, for no federal authority sanctions the menace, however often repeated, that bank charters are contracts which the judiciary will guard from revocation by a state—I return to Pennsylvania for the conclusion of my task, trusting that it has been shewn that whether a bank charter shall be repealed, is not a question for the federal judiciary, on the plea of contract, but altogether and merely matter of state policy.

All the banks of Pennsylvania, except one, hold their charters by express provision in them, that if it shall appear that the charters and privileges are injurious to the citizens of this commonwealth, the legislature reserve full power to alter, revoke and annul them at any time. It is the statute law of Pennsylvania that no company, incorporated by the laws

of any other of the United States, shall be permitted to establish within this commonwealth any banking house or office of discount and deposit; and all bank notes under five dollars, between five and ten, ten and twenty, and twenty and fifty dollars, are prohibited by penalties enacted posterior to the bank charters. The whole regulation of banking is thus within legislative action, applied occasionally contrary to Judge Hopkinson's denial of legislative authority over bank charters, excepting one bank. Mr. Dallas' suggestion of the mode of proceeding with that bank has been denounced with great severity; by no one of this convention more than Mr. Stevens. But I shall shew, finally, that he is the originator of Mr. Dallas' destructive doctrine, as Mr. Stevens calls it, and that the only bank whose charter is not, by the charter, revocable, owes its creation to an attempt by Mr. Stevens and others to place it, for illicit and selfish purposes, beyond the law.

By the journal of the house of representatives for 1835-6, volume 2d, page 204, report No. 45, made on the 6th January, 1836, it is stated by the report of the judiciary committee, relative to the incorporation of the Wrightsville, York and Gettysburg railroad company, which report was made by Mr. Stevens, that an act of the legislature incorporating that company had been carried, through mistake or fraud, whereupon the committee declare that they entertain no doubt of the power of the legislature to *repeal the law, and declare void the charter obtained by such palpable fraud and imposition.* To permit such fraud to prevail, and the authors to take advantage from it, either to themselves or their constituents, would be a reproach upon legislation, and an encouragement to dishonor and dishonesty. The committee, therefore, unanimously recommend the passage of a law compelling the company to complete the railway to Gettysburg, as was originally intended by the house; or if they should refuse to do so, *repealing the law by which said company was incorporated, and declaring the charter null and void.* They accordingly report a bill. So that Mr. Stevens was the practical expounder of the destructive doctrine which he denounces in Mr. Dallas.

The cases are precisely the same, identical, for all the purposes of my argument. A law passed incorporating a company, which, I understand, was accepted and acted on by the corporators. On the allegation of fraud, with little more proof than Mr. Stevens' declaration, *on honor*, that act was repealed, the charter recalled, the corporators compelled to change it fundamentally, at a ruinous loss; in short, every suggestion of Mr. Dallas' much abused letter was carried into effect at Mr. Stevens' instance, by subsequent act of the legislature resuming the vested rights of a chartered association. It was not a public object, like a bank, but private. The ground alleged was fraud; fraud in only one member of the legislature, who, on oath, denied the fraud imputed to him on Mr. Stevens' honor only. I am not to be understood as affirming that a subsequent legislature, on such premises, should rescind their predecessor's act; still less as adopting Mr. Stevens' unwarrantable position of imputed fraud in a single member, on the statement, on honor, of another member directly interested in the issue, and, by recrimination, implicated himself in the fraud, as adequate proof of fraud; least of all as subscribing to the palpable injustice of this flagrant violation. All I use it for is its aptitude, recency and force, as a precedent, to show what the legislature of this state has lately done,

and considers it may do, in such cases. In all respects it is the very case of the Bank of the United States, as put by Mr. Dallas, with no difference except that the act of repeal was a much stronger exercise of authority in the instance of the railroad, even supposing the fraud proved, than any such act can be in that of the bank.

In closing this long and arduous effort, I am not insensible of its temerity, and fully aware that the task is beyond my powers. To broach the subject with independence, as becomes an American, is all the good I can do; the intelligence of the community will accomplish the rest. Not long ago it was very generally apprehended that a bank charter is a contract, and probably most of the members of a learned profession acquiesced in the whole contract doctrine dictated by one of its most respectable heads, which I have ventured to call in question, and which I have good reason to believe a very large portion of the intelligence of the community, including that learned profession, is already disposed to reject as an untenable dogma; not from the force of my reasoning,—my only merit is to have called the attention of superior minds to the inquiry. It was impossible to confront honest and respectable prejudice, as I have ventured to do, without incurring obloquy. Many sincere and worthy persons really dread every independent denial of partially established opinions, and especially deprecate what they deem irreverent contradiction of merely judicial say so's. Many others, insincere, interested, and frequently infamous, sticklers for what they clamor as vested rights, are outrageous in denouncing the alleged heresy of questioning them. Towards the former I cherish every respect; the latter I put at defiance. Every candid hearer or reader of whatever sentiments I have uttered on this subject, must acknowledge that my object has continually been to affirm and even enlarge judicial authority as the sheet anchor of order and happiness, to protect property with scrupulous regard to all its rights, to confine the continually overflowing power of legislation within constitutional channels, but within those channels to sustain its current, to maintain and, if possible, gradually and cautiously to improve constitutions, as experience teaches, and to inculcate, on all occasions, that there can be no rational liberty without the empire of law.

Interested and passionate idolatry has taken charge of banks as if all their properties were sacro-sanct. Their ground seems to be sacred, while the air their questioners breathe is full of daggers. Grave and authoritative members of this convention have treated this subject in a manner that is surprising. A gentleman so intelligent as Mr. Sill, ascribed most of the liberty and improvements of modern civilization to corporations. Mr. Forward, going one step further, gave banks the credit of those advantages. Mr. Sergeant, further still, awarded it to paper money. Judge Hopkinson considers federalism, now reviving, the great impulse of all good government, including, I suppose, that second birth of federalism, like the governor's whose eleven commandments, as they have been rather profanely called, strike blows at banks far too radical for my notions of regulation. Mr. Forward, whose letter to the people of Allegheny county recommended him to their suffrages, by denouncing excessive banking, actually pronounced an encomium, almost one by one, upon the directors of all the banks of Pennsylvania, contrasting their highly extolled virtues with the much condemned vices of politicians

courting the people. That respectable gentleman must excuse my saying, that a more generous and, I have no doubt, a more profitable exercise of either professional or representative talents, would consist in just and temperate condemnation of law-breaking institutions, of which I have been accused of saying, what Mr. Denny said before me, that the administration of justice stands still and powerless before them. When a report was introduced in this convention, last summer, by a minority of the committee on the currency, it was not suffered to be printed; since when, it has been published in almost every newspaper from the Penobscott to the Balize, its sentiments generally adopted, at least in theory, and governors of many states have pressed their practical enactment upon legislatures. Not the destruction of banks, but their regulation, with acknowledgment of their vicious system and practice, is the sentiment of all but an exclusive few, who still persist in imputing to credit and paper what is due to liberty and labor. A large majority of American presses now sanction the doctrines of a report, which, a few months ago, was decried in this assembly as a fire-brand, but is now ratified even in this benighted city. The voice of the people is not in harmony with the cry of banks. I did not wait for presidential permission, but before the chief magistrate, by his recommendation, involved this topic in the delirium of politics, the report of the committee which I allude to was with deference submitted through this body to public judgment, and that judgment has exceeded my most sanguine anticipations. In states and places where what Judge Hopkinson might call federalism, prevails, despite of party influences, the supremacy of laws, and subordination of banks, have been sanctioned by constituted authorities. The good sense of the country at large perceives and insists that regulation and limitation are not destruction, and that when evils are ascertained inconsistent with the public good, repeal of bank charters is no violation of property. Increase of coin and decrease of paper circulation are actually affected, so far as public opinion can do it. Separation of banking business from affairs of state remains to be accomplished by law, while a fortunate convulsion has established it in fact. The last and greatest consummation, repealing bank charters by act of assembly, must soon follow as a principle, the adoption of which is indispensable. Bank idolatry and professional bigotry have heretofore covered it with mystification and difficulties; but the very agitation of the question has fixed its destiny. Control of the currency, without which a state is held in bondage by banks, absolute control, free from all judicial interposition or federal restraint, is the greatest need of states, towards which the good sense of the community is rapidly tending. Far from divesting vested rights, or disparaging judicial authority, it is in harmony with all the principles of good government.

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PITTSBURGH

TUESDAY AFTERNOON, DECEMBER 26, 1837.

Speech of Mr. CHAMBERS, of Franklin, delivered during the discussion concerning banks and the currency.

Mr. READ, of Susquehanna, having moved to amend so much of the report of the committee to whom was referred the seventh article of the constitution, as declares it expedient to amend the same, so as to read as follows:

SEC. 3. The rights, liberties, privileges, immunities and estates of religious, charitable and literary corporations and corporations for internal improvement purposes, shall remain as if the constitution of Pennsylvania had not been altered. But no company shall be hereafter created by the legislature, with banking or discounting privileges, without the concurrent action of two successive legislatures.

And the question being on a motion by Mr. FULLER, of Fayette, to amend the same, by adding to the end thereof the words following, viz:

“No bank shall issue any bill, check, note or paper credit of a less denomination than ten dollars.”

Mr. CHAMBERS, rose and said:

Mr. Chairman: The only apology for this protracted debate, is the importance of the subject of discussion—the currency of the country. It is an engrossing subject out of this hall; discussed not only in our public assemblies, in the daily press, but also in the social circle. I am aware of the disadvantage of entering on this debate at the eleventh hour, and immediately following my learned and eloquent friend (Mr. Hopkinson,) who has just taken his seat. I propose to submit some plain remarks in defence of the interests of my constituents, and in defence of Pennsylvania policy and state institutions. The currency is admitted to be in a disordered condition; not what it was, or what it ought to be: I will not detain the committee by now inquiring into the cause of the disorder, or who are the authors of it. That has been fully discussed, and I leave it to the decision of the committee and the public:—Our great concern and inquiry now are, how and when we are to improve and restore it. It is to be done by a resumption of specie payments by the banks, as soon as it can be safely done, without distressing a business and trading community. What is wanting to enable the banks thus to resume, is moderation and forbearance on the part of the people, and confidence on the part of the government. The crisis just past, of the suspension of specie, has been attended with consequences of some inconvenience to the holders of notes. It was at the time a relief, to some extent, of a pressure, bearing hard upon business men. But, sir, the coming crisis of the resumption of specie payments by the banks is much more important from the consequences that may attend a sudden and excessive curtailment of bank loans to our merchants and manufacturers. Much will depend on the circumstances under which that resumption is

made. On this subject we should profit by the light of experience furnished by the history of the former suspension by the banks in 1814, 1815, 1816, and the resumption of 1817. There was then no party war waged against the banks; no hostility on the part of the national government. That government was administered then with regard to the public welfare and not for the office holders; and the statesman who was then at the head of the national treasury, A. J. Dallas, Esq., could, in the management of his department, look above the grovelling views of party and party leaders. That secretary proposed to the state banks, in 1816, all the aid and co-operation of the government, to induce them to resume specie payments. From a circular by Mr. Dallas to the state banks, dated July 22d, 1816, I present the following extract: "The present opportunity is embraced to repeat the assurances which have been uniformly given and maintained, that this department deems the fiscal interests of the government, and the successful operation of the Bank of the United States, to be intimately connected with the credit and prosperity of the state banks. Upon just and efficient principles of co-operation, it is hoped the institutions, federal and state, will be mutually serviceable. From the state banks a sincere and effectual exertion in the common cause of restoring the legal currency is certainly expected and required, but in return, *they will merit and receive the confidence of the treasury and of the national bank.* The transfer of the public money from the state banks to the national bank and its branches will be gradual, and *the notes of the state banks will be freely circulated by the treasury and the national bank.*"

On the 1st of January, 1817, when the United States bank was to go into operation, there were deposited in state banks more than eleven millions of dollars of public money. To induce the state banks to return to the payment of specie, it was proposed by the treasury department, that no part of the sums then in deposit should be drawn from them before the first of July following. And in no case were drafts to be drawn in favor of the Bank of the United States, unless necessary to protect it against the state banks. All that was then professed, and more, was performed on the part of the federal government to sustain the state banks and relieve the people. I could wish, much, there were a like disposition and policy exhibited at this time, by those who now have in their hands the powers of the national government. If our national rulers should now regard the common welfare, they would encourage and aid the state banks in restoring a specie currency. With such aid and co-operation, the state banks could, in sixty days, resume the payment of specie, without hazard or sacrifice. And without that aid and co-operation, the banks and the community are exposed to the disasters of 1817, 1818 and 1819, arising from the excessive curtailments of banks to sustain their payments.

The bank capital of Pennsylvania in 1816, was \$12,880,397, with a circulation of \$11,401,390, and in 1820 that circulation was reduced to \$3,282,020 on the same capital; the circulation reduced in four years more than two-thirds. The specie basis of the banks in 1820 was \$2,003,295, with a circulation a little over three millions of dollars. The failure of many banks, and the alarm created by it, occasioned a pressure upon all and a drain of specie.

The consequences of this contraction were most sensibly felt by all, who had payments to make in this appreciated currency, under contracts created with reference to a currency of only one-third of the value. Property depreciated, and was sacrificed for one-third of the original cost, or less. Business and manufacturing operations were suspended, and to all the officers of the law there was a great harvest, arising from the embarrassment and at the loss of their fellow citizens.

The Pennsylvania banks at this time are in a condition infinitely better than what they were in 1816.

In 1816 their circulation was nearly equal to their capital; at this time their circulation is less than one-third of their capital. The circulation being only \$16,164,539 21, on a capital exceeding 59,000,000 of dollars—and their loans \$69,942,755.

In 1816 the circulation was \$11,401,390, and specie \$4,005,644. In November, 1837, the circulation was 16,164,539 21, and specie \$6,906,-510 88.

If we compare the condition of the Pennsylvania banks with that of the banks of New York and other states, the superiority for ability and means of payment is with the Pennsylvania banks. The New York banks, with a capital of \$34,351,460 had outstanding on loans on 1st of December instant, exceeding \$61,000,000, and with \$3,482,620, of specie, they owe of immediate liabilities on notes \$13,908,393, and on deposits \$16,100,930.

The Boston banks have a capital of \$20,400,000; their loans are \$32,600,000; their specie \$1,078,000, and their immediate liabilities \$8,600,000.

The circulation of the Pennsylvania banks is now reduced to the standard, which, in the opinion of the secretary of the treasury, was desirable and proper. Mr. Woodbury, in his annual treasury report, of the 5th December inst., estimates the circulation of all the banks of the United States, at the time of the suspension of specie payments, at over 99,000,000 of dollars: and that this was about twenty per cent. above what in a former report he had estimated as the proper amount of paper circulated as sufficient and safe. From the message of the governor of Pennsylvania, it appears that the circulation of the Pennsylvania banks, have been reduced from May till November last \$4,899,003 84, near one fourth, being more than twenty per cent. The banks of Pennsylvania have then in six months reduced their circulation to the standard, which in the opinion of the secretary was desirable; and if the banks of other states should have done as much, the total circulation of bank paper in the United States, would be below the proposed standard of the secretary of the treasury.

This, however, will not avail to save our business and manufacturing community from distress, if specie payments are to be resumed, under the untoward circumstances of a party war, and clamor against the banks, and hostility and opposition on the part of the government. The currency has been compared to the life blood of the human system, which is now disordered, and its great organs, the banks, are inactive. What would we think of a physician who was called in to see a confined and suffering patient, and should begin with pouring out upon the sufferer all

the epithets of abuse and reproach that he could invent, next proceed to blows, and hold up over the sick man the fetters he proposed to put on him after his recovery; not content with this, he should endeavor to excite against his patient all who attended upon him, or had intercourse with him, to acts of unkindness and distrust. Would there be but one opinion of the folly and cruelty of the physician, and that he ought himself to be consigned to a prison or a mad-house?

And are not the proposed measures of some of our law makers and politicians, in relation to the banks and currency, at this time, little better in their spirit, policy and tendency?

Why the hostility to banks, manifested in this hall, and elsewhere, by gentlemen of one political party? Can we do without them? No! No man of intelligence and candour, who has given his attention to the extended and diversified interests of these prosperous states, can suppose that we can do without them, as furnishing the necessary circulating medium and instrument of exchange.

The experience of more than a century in the states of this Union, and the opinions of intelligent statesmen of all parties, attest the necessity of a paper medium. The delegate from Susquehanna (Mr. Read) and the delegate from Indiana, (Mr. Clarke) have on this floor advanced and advocated different opinions. They have both declared themselves in favor of an exclusive metallic currency, and for the extinction of banks. The delegate from Susquehanna, in his speech delivered by him, and printed, states that a "temporizing policy must be pursued with existing evils (the banks,) and a period of fifteen or twenty years allowed for *their final extinction.*" The delegate from Indiana, who has given us his opinion of currency and credit, is thankful that there is no bank in his district, and hopes there never will be any. He prefers much the individual capitalist, as a lender of money, to a banking institution, which he considers as a monopoly, and aristocratic. From the spirit and prejudices evinced by both of these gentlemen against all banks, I should not suppose that I could influence their opinions by any arguments that I could offer, addressed to their understandings. The opinions, also, of distinguished statesmen and financiers, not of their party in politics, would, I presume, be received unheeded and without regard, so long as they are under the influence of the violent prejudices which have characterized their remarks on this subject.

I will, however, Mr. Chairman, refer to the opinion of one of their party, whom they have delighted to honor, who is eminent for his talents and his high station, though I do not admire the road or means by which he attained that station. It is the opinion of Mr. Taney, when secretary of the treasury, in a letter to the committee of ways and means, on the 15th April, 1834, on the subject of banks and credit.

After saying the state banks were then so numerous, and so intimately connected with our habits and pursuits, that it was *impossible* to suppose that the system could *ever* be entirely abandoned—or that it was desirable that it should be—he proceeds:

"If there were no state banks, *the profitable business of banking and exchange would be monopolized by the great capitalists.* Operations of this sort require capital and credit to a large extent, and a private

individual, in moderate circumstances, would be unable to conduct them with any advantage. Yet there is, perhaps, no business which yields a profit so certain and liberal, as the business of banking and exchanges, and it is proper that it should be open, as far as practicable, to the most free competition, and its advantages shared by all classes of society. Individuals of moderate means cannot participate in them, unless they combine together, and by the union of many small sums create a large capital, and establish an extensive credit. It is impossible to accomplish this object without the aid of acts of incorporation, so as to give to the company the security of unity and action, and save it from the disadvantages of frequent changes in the partnership, by the death or retirement of some one of the numerous partners. The incorporated banks, moreover, under proper regulations, will offer a safe and convenient investment of small sums to persons whose situations and pursuits disable them from employing the money profitably in any other mode."

He afterwards remarks :

"For these reasons, it is neither practicable nor desirable to discountenance the continuance of the state banks. They are convenient and useful also, for the purpose of commerce. No commercial or manufacturing community could conduct its business to any advantage without a liberal system of credits, and a facility of obtaining money on loan, when the exigencies of their business may require it. This cannot be obtained without the aid of a paper circulation, founded on credit."

Mr. Taney, with his means of knowledge, and qualifications to form an opinion on the subject, differs entirely from the views of the delegates from Susquehanna and Indiana. Banks, in his opinion, have been, and may be extensively useful, and a liberal system of credit was essential to a commercial or manufacturing community. The wealthy capitalist, who has money to lend, is more to be feared as a monopolist than a banking institution, whose funds are the property of many, and managed for the common benefit.

On the subject of credit and paper currency, I would also refer to the opinion of one who belonged to no party, but to his country ; who united in his own person the experience of almost a century ; whose gigantic mind not only embraced the whole circle of science, but was distinguished for a practical wisdom, that was allotted to few human beings, and, withal, was the poor man's friend—Dr. Benjamin Franklin. Franklin had lived in this city when the only currency was specie, and when the first issue of paper money was made ; and what is his description of the condition of trade and currency of the state, in all its early history ?

In the memoirs of his life, vol. 1. p. 69, he states, "that about 1729, there was a cry among the people for more paper money," and that the wealthy inhabitants opposed any addition, being all against paper money. Franklin was on the side of an addition to the paper money ; being, as he said, persuaded that the emission in 1723 had done much good, by increasing trade, employment, and the number of inhabitants in the province. Before it was issued, many of the houses on Chestnut and Walnut streets, between Second and Front streets, were without tenants, and *to let*, and the inhabitants seemed to be deserting the city. Franklin advocated a further increase, and it was carried in the house of assembly,

The utility of this currency became by time and experience evident; trade, building and inhabitants increasing with it.

In p. 84, vol. 2, in an essay written by him on the subject of paper money, it is stated that " Pennsylvania, before it made any paper money, was *totally stripped of its gold and silver*, though they had, from time to time, like the neighboring colonies, agreed to take gold and silver coins, at *higher* nominal value, in hopes of drawing money into, and retaining it for the internal uses of the province." But this did not answer. The difficulties for want of cash were accordingly very great, the chief part of the trade being carried on by extremely inconvenient methods of barter, when, in 1723, paper money was first made there, which gave new life to business, promoted greatly the settlement of new lands, whereby the province was greatly increased in inhabitants, and the exports in 1764 were more than tenfold what they had been; and they were able to obtain great quantities of gold and silver to remit to Pennsylvania in return for the manufactures of the country."

This testimony in favor of credit and circulating paper medium, was from a man who had the opportunity of witnessing the condition of trade, business and the improvement of the country, under an exclusive hard money system, and the addition of a paper medium in the province of Pennsylvania, during a period of more than fifty years. With all the disadvantages of a paper currency not convertible into specie, trade revived, the city and country improved, individual wealth and comfort were extended, and the state prospered.

The banks, against which there is now so much clamor from a certain quarter, have done much for the commonwealth. The state has already received on bank charters, in premiums, \$3,302,586 18, and there is still receivable from the same, \$2,185,916 67. There has also been paid into the state treasury, in taxes on bank dividends up to 1837, the sum \$577,220 49, receiving in all by way of tax on this description of property, upwards of *four millions of dollars*, which, if properly vested by the state authorities, would have been sufficient for the ordinary expenditures of the state government. The state now owns of stock in state banks \$2,108,700.

The banks have assisted much in developing the wealth and resources of this great state; and in giving employment to the skill, industry and enterprize of its inhabitants. They have been essentially instrumental in establishing and sustaining our useful manufactures. They have contributed largely by their loans to build up our towns, to construct the turn-pike roads and other public improvements which now distinguish our commonwealth. They have been convenient to our citizens for the purposes of deposit, and afford great facilities, in the way of exchange and remittance of money to distant places.

We have had banks in Pennsylvania for about fifty years, and for more than twenty-three years the system has been general and distributed throughout the country. During all this time, with the exception of a suspension in 1814, when the country was at war, and the present crisis, the banks have sustained their credit and paid specie when demanded for their paper. During that war they furnished a currency better than that furnished by the United States government. Government

stock was sold at a discount of from 12 to 15 per cent., payable in notes of the banks. The government then resorted to the experiment of issuing treasury notes, but they were without credit; and as a medium of exchange, they sunk in credit below that of bank notes. Treasury notes of the government, bearing interest, were resorted to, but with no better success. Such were their depreciation that they could not be circulated, and the holders were willing to exchange them at a discount for the notes of the banks.

The experience of more than a century in these United States, and the invention and sagacity of our ablest statesmen and politicians, have furnished the people with but two kinds of paper currency; the one by the government and the other by the banks. While a paper currency under proper regulations and limits is indispensable, experience and public opinion attest the superiority of the medium furnished by the banks, over that ever furnished by the state or other governments.

The several states commenced the issuing of government paper money about the beginning of the last century.

Bills of credit were issued by the government of S. Carolina in 1700,	
“ “ by Massachusetts,	1702
“ “ by New York,	1709
“ “ by Connecticut,	1709
“ “ by Rhode Island,	1710
“ “ by Pennsylvania,	1722
“ “ by Maryland,	1731
“ “ by North Carolina,	1748

First issue by Virginia, called treasury notes,	1755
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The emission of paper money by the states, previous to the adoption of the federal constitution, were merely *bills of credit*; not founded on any fund for their resumption or payment, but resting on state credit. They contained no promise to pay, but a simple declaration that they would be received in payment of *public dues*. Their circulation was *forced* on the people by statutory provisions and penalties. By law they were made current as coin and a tender in payment of debts, or for the purchase of commodities. Persons refusing to receive them lost their debts, and penalties were imposed on persons selling lower for specie, or refusing to sell for these bills of credit.

The congress of the United States, during the revolutionary war, issued what was known by the name of continental money, to the amount of three hundred and sixty millions of dollars.

Its circulation as money was continued, when it had depreciated so low as to pass at the rate of five hundred for one. The paper money of those times was the *monopoly* of the governments, being issued by the government, which enforced by penalties its circulation. There was no competition, nor were the people allowed to choose their paper money, nor were they at liberty to refuse to take it. Those governments were unwilling to allow any competitors in issuing bills of credit or paper money. Private banking was not allowed. This was attempted by a company of merchants at Boston, as early as 1714, who “agreed on a *land security*, as a fund for bills and notes to be circulated by them.” The attorney-general of Massachusetts protested against it as “a high crime and misdemeanor,” and the council chamber in Boston, 20th August, 1714, forbid the printing of the scheme, or to make or emit their notes or

bills, until they laid their proposals before the general assembly. It was attempted some years afterwards, but as it was opposed by the government it appears to have been relinquished.

The legislature of Virginia, in 1777, passed an act imposing penalties "on any person issuing, or offering in payment, a bill of credit, or note, for any sum of money payable to bearer, issued by an individual." It was from such government monopoly, which forbid competition, and forced, under heavy penalties, its own paper money in the form of bills of credit, that we have been relieved under our constitutional government. Banks are the institutions of modern times, favored and sustained by republican governments. The establishment of the Bank of England in 1694 followed the amelioration of the condition of the people, and the tendency to free institutions which accompanied and marked the revolution of 1688.

The delegate from Mifflin, (Mr. Banks) has referred to the first bank that was established at Venice, which he says was a bank of deposit only. It was a bank of credit also. What became of it? It went down with the republic. The French army that subdued and destroyed the republic of Venice, plundered and destroyed its bank. This was done by the aristocracy of the *sword*, which some of the reformers here seem to admire, in preference, as they say, to the aristocracy of money.

The institution of banks in these United States was among the early prominent acts of their governments after the establishment of their independence and the adoption of the federal constitution. They have grown up under our republican governments, and have been created by and supported by every political party in the country. They are democratic in their associations and purposes, being alike open to *all* who may choose to become stockholders. The man of small means, as well as the capitalist, may vest their money in this manner, in a corporation, so as to afford credit to a community that may want and be benefited by it. The business and transactions of banks are for the accommodation of *all*. Being established for the public accommodation the people may apply for loans, which should be granted, according to the means of the bank, and the merits and security of the borrower. It is the business of the banks to lend; and the citizen who applies for a loan does not humble himself, as many are obliged to do, who apply to an individual capitalist for a loan. As is stated by Mr. Secretary Taney, in his letter before referred to, "if there were no state banks, the profitable business of banking and exchange would be *monopolized by the great capitalists.*"

Mr. Chairman, I would next inquire, by what paper currency, that furnished by the government or the banks, had the people and our governments suffered most, under the experience of more than a century. The government losses on their depreciated stocks and depreciated treasury notes, during and immediately following the late war, was estimated, by a committee of congress, in their report of April, 1830, at not less than forty-six millions of dollars.

The losses of the people by bills of credit and continental money are incalculable. By the continental money, which was issued by the continental congress to the amount of \$360,000,000, and which at the rate of depreciation was estimated of the value of \$135,000,000, there was a

loss to the government and the people exceeding \$200,000,000. Almost every family who lived in Pennsylvania before the institution of banks, and during the period of the circulation of the government paper money, have in their archives and history, evidence of the losses sustained by the head of the family in continental money.

The losses to either the government or the people, by the banks, during the existence and operation, have been comparatively small. I will examine the estimates and statements on the subject, as made by the delegate from Susquehanna, (Mr. Read) and contained in his printed speech. The gentleman states the circulation of all the banks of the United States, which he supposes about six hundred, as amounting to \$396,000,000, being fifty per cent above their nominal capital. This erroneous basis, founded on gross error and exaggeration, is the foundation of other great errors and inaccuracies in the remarks of the gentleman. It is also stated by the delegate from Susquehanna, "that we have \$396,000,000 of spurious currency now in the hands of the industrious." The exaggeration in this is astounding. He began with error in supposing the circulation to exceed the nominal capital fifty per cent. On that subject, said Mr. C. we had information which showed the great error. The returns received of the condition of the banks of Pennsylvania show that so far from the banks having a circulation of fifty per cent above their nominal capital, their circulation was less than *one-third* of that capital, their circulation being only \$16,164,539 21, on a capital exceeding \$59,000,000.

I would refer again to the authority of the secretary of the treasury on this subject. Mr. Woodbury, in his annual report of the 5th December instant, submitted to congress with all the means of information afforded by his department, estimates the circulation of all the banks of the United States, at the time of suspension of specie payments at over \$99,000,000. The number of those banks he estimates at seven hundred and ninety-four. Their circulation is reduced much since the suspension, as is attested by the returns recently made by the banks of Pennsylvania and the banks of several of the other states. The circulation of the Pennsylvania banks, was reduced, in the six months following the suspension, over twenty per cent.

Taking the sum, however, at \$99,000,000 for the net circulation according to the opinion of the secretary of the treasury, how materially does it differ from the estimate of the delegate from Susquehanna, who estimates the bank circulation at *three hundred and ninety-six millions!* The excess of his estimate over that of the secretary of the treasury is, in this one item of bank circulation, the small error of *two hundred and ninety-seven millions of dollars!*

I will next advert to the gross exaggerations and estimates of the same delegate, in relation to the supposed losses by banks, incurred by the people. In the same speech he states, that from 1811 to the year 1835, one hundred and ninety-three banks broke up in *irretrievable bankruptcy*. He estimates "the circulation of those banks at \$57,900,000, and that twenty-five per cent of these liabilities was eventually paid by the broken banks. This leaves \$43,515,000 of their bills *never redeemed*. A dead loss to the industrious poor. A clear gain to the wealthy banker. A tax upon, or more correctly speaking, a robbery, of the industrious classes,

of almost *two millions annually*." This estimate and statement abounds in exaggeration more gross and erroneous than what has just been exposed in relation to bank circulation. It supposes, that the "industrious poor" lost by the notes of broken banks exceeding \$43,000,000, an amount nearly equal to what Mr. Crawford, secretary of the treasury, supposed the whole bank circulation of the United States in 1819, which he estimated at \$45,000,000. The gentleman supposes that the one hundred and ninety three banks may have paid *twenty-five* per cent of their liabilities; being one-fourth. In his list, composing the one hundred and ninety-three, are included nineteen in Pennsylvania, and if we take the same average of capital and loss, it would make the loss to the community, by the Pennsylvania banks, exceeding *four millions of dollars*. From the best information I can procure, and which I believe to be correct, I state, that all the Pennsylvania banks which failed, with the exception of about six, *redeemed their notes and paid their deposits*.—The remaining six paid the greater part of their liabilities to the holders of notes and deposits. Amongst those failures was that of the Bank of Greencastle, located in the county of Franklin, and whose affairs I have had occasion to investigate, and am enabled to state, that though its authorized capital was \$250,000, yet, the loss to its creditors does not exceed \$25,000, for principal and interest; and nine-tenths of that loss was to banks, the United States government, merchants and brokers. From the investigation I have given this subject, I believe the loss to the whole community, by the failure of the Pennsylvania banks, would be covered by \$100,000, and does not exceed *one hundred and fifty thousand dollars*, instead of the many millions estimated by the delegate from Susquehanna. Of the losses in other states, I am without information by which to estimate them, but it is to be presumed, that the circumstances of suspension by the banks in those states were like those of Pennsylvania, and that those banks paid their creditors as did the banks of this state.

What has been the government losses, by the banks, from the establishment of the government? On this point I am pleased to have it in my power again to refer to authority—no less than the secretary of the treasury, Mr. Woodbury, in his communication to congress, dated December 12th, 1834, in relation to government losses, by banks.

"It is a singular fact in praise of this description of public debtors, *the selected banks*, that there is not now due on deposits, from the whole of them which have ever stopped payment, from the establishment of the constitution to the present moment, a sum much beyond what is now due to the United States from one mercantile firm, that stopped payment in 1825, or 1826, and of whom ample security was required, and supposed to be taken, under the responsibility of an oath."

"If we include the whole present dues to the government from discredited banks, at all times and of all kinds, whether as depositories or not and embrace even counterfeit bills, and every other species of unavailable funds in the treasury, they will not exceed what is due from two such firms. Of almost one hundred banks, not depositories, which, during all our wars and commercial embarrassments, have heretofore failed in any part of the union, in debt to the government, on their bills or otherwise, it will be seen by the above table, that the whole of them, except seventeen

have adjusted every thing which they owed, and that the balance due from them, without interest, is less than \$82,000. Justice to the state banking institutions, as a body, whose conduct in particular cases has certainly been objectionable, but whose injuries to the government have been almost incredibly exaggerated, and whose great benefits to it, both during the existence of our two national banks, and while neither of them existed, have been almost entirely overlooked, has led me to make this scrutiny, and submit its results, under a hope that it will, in some degree, not only vindicate them from unmerited censure, but justify this department for the confidence it formerly, and in the great improvement of their condition and of the financial affairs of the government, has recently reposed in them.

It appears that though the government had in the local banks, at the time of the suspension of specie payments in 1816, upwards of eleven millions of dollars, and afterwards received the *local currency* of the banks in payment of dues to the government for excise, direct taxes and the payments of the public lands, to an amount exceeding *twenty millions of dollars* (letter of Mr. Crawford, secretary of the treasury, to a committee of congress, dated 24th February, 1836,) yet the losses to the government by all did "not exceed what was due to the government by two mercantile firms for duties." And that of "almost one hundred banks, not depositories, which during all our wars and commercial embarrassments, have heretofore failed in any part of the union, in debt to the government on their bills or otherwise," the whole but seventeen have adjusted every thing which they owed, and that the balance due from them without interest is less than \$82,000. What a contrast does the official statement of the secretary of the treasury make with the extravagant statements and estimates of the delegate from Susquehanna. Well may we say that the estimates and statements of the gentleman not only, in his own language, "*distance statistics*," but that they distance imagination itself:—and yet these statements, with all their exaggeration, have been published and circulated under the name and credit of a delegate of the convention.

This estimate of losses to be apprehended, in the statement of the gentleman, from the failure of one-third of the banks now in the United States, is in the same extravagant style, being imaginary and regardless of facts and reality. This loss he estimates at ninety-nine millions (page 14,) in addition to twenty-six millions lost by depreciation on the late suspension—making a loss to be apprehended to the "*industrious classes*" of one hundred and twenty-five millions. When the gentleman who says the supposed capitals of the banks of the United States is "mere moonshine" indulges in such statements, may we not say his estimates and arguments are obscurity, darkness and extravagance in the extreme?

The government of the United States has a claim called "unavailable funds," on banks that had been depositories of the government, during the war and shortly after, amounting to something over one million of dollars. This is a kind of suspended debt, part of which is now in a train of collection, and of which a considerable part, with attention may be collected. These "depositories" had been the agents of the government to receive and disburse the local currency. The loss by them, if it

should continue unavailing, is short much of what has been lost in the various departments of the government by individual public officers, who were *defaulters*, and from whom the law had required good and sufficient security. This is proved by the annual reports from the different departments of government to congress, of "balances" due by public officers and government agents.

The two banks of the United States, chartered by the national government, were in operation near forty years. These banks furnished to the government and the people during all that time a currency never surpassed for its convenience and security; and as fiscal agents of the government, received and disbursed its immense revenues without the loss of a dollar either to the government or to the people.

The present hostility to banks, and clamor against them are founded on the late suspension of specie payments. This suspension was, as I believe, an unavoidable alternative, suddenly forced upon the banks by circumstances beyond their control. There was an unexpected and sudden revulsion in the regular channels of trade and exchange between this country and Europe, to which the measures of our own government had much contributed. American credit was depressed in Europe, and liabilities there were to be met, by the shipments of specie, which created alarm and impaired confidence. The New York banks were first exposed to heavy drafts, that obliged them to suspend. The Pennsylvania banks had no alternative but to do the same. By doing so, they saved their business and trading men from immediate embarrassment and distress and retained within our own state, specie funds that would have been taken away by the banks of other states, which did not redeem their own notes, and that specie would also have been exported to Europe, to pay a debt which has since been in a great measure satisfied by the operations of trade, bank accommodation to merchants, and the transfer of American securities that were acceptable. The specie still remains in the banks of Pennsylvania, and will enable them to resume the payments of specie for their notes, under circumstances that merit and should obtain for them public confidence.

That the condition of the banks at the time of the suspension in May last had not been rendered any more unsafe by their operations or issues, during the preceding six months, is evident from what the secretary of the treasury states in his report at the late session of the present congress! He says:

"As a whole, their specie, compared with their circulation, continued to be almost as large in May as in November. It averaged more than one to three, or much more than has been customary with the banks in this country, and was over double the relative quantity held by all the banks in England at the same period, and was in a proportion one-fourth larger than that in the Bank of England itself. Their immediate means compared with their immediate liabilities, were somewhat stronger in November than in May, but were at both periods nearly one to two and a half, or greater than the usual ratio, in the best times, of most banks which have a large amount of deposits in possession.

The directors of these banks had a trust of importance and responsibility, not to the holders of their notes and stockholders alone, but to the whole community, that might be most seriously affected by their mea-

tures. Banks are not established for the profit of money-lenders; they are created from considerations of public policy and a regard to the accommodation and convenience of a business and trading people; and the directors who would overlook or sacrifice those interests by violent, excessive and unexpected contractions, would be unqualified for their station. While the banks were liable to be called on to pay specie for their notes they had the right to demand specie from their debtors, who were under the same legal obligation to pay in discharge of their loans, that the banks were.

Would the banks, at the crisis of pressure and interrupted trade, have been justifiable in exacting from their debtors instant payment of their accommodations in a currency that could not be procured? No. It would have been oppressive and ruinous.

While the banks of Pennsylvania, at the time of the suspension of specie payments in May, 1837, had a circulation of \$21,063,543 03, deposit \$12,491,008 15, they had to meet those liabilities—specie \$4,391,072 23, discounts \$86,407,613 43.

If the bank directors had made sudden and great curtailments on their debtors, they would not and could not have been complied with, and the order would have been nugatory, by being at the time, and under existing circumstances, impracticable. The failure of the banks to pay has been pronounced a *fraud* by the delegates from Susquehanna and Indiana, brought about by conspiracy on the part of the banks. The evidence of this conspiracy is said to be found in the circumstance of simultaneous suspension. The cause was general, its effects were like those of the storm on the wings of the wind. The intelligence communicated, left no alternative to the banks but for the preservation of their resources, and the protection of the community against distress, to suspend for a time the payment of specie. As well might the debtors to the banks, many of whose notes became due at the same time, and which they were unable to pay in the currency that might be demanded, be charged with a "conspiracy" to commit a "fraud," because they failed to pay simultaneously. Every man who is unable to pay his liabilities, at a crisis of unusual and unexpected pressure, though it is known that he has ability and will meet those liabilities with a reasonable indulgence, may be charged with "a fraud," and if two or more be in the same situation, they are called "conspirators." What will commercial and business men think of such an argument as this, which has been gravely urged and repeated by delegates *in this convention!*

Public opinion approved of this measure of the banks, and experience under it has shown that it was as beneficial as necessary. An agitated and harrassed community were much relieved. The banks of the United States, in a period of near fifty years since their establishment, have redeemed their notes with specie, except during the limited suspension during the last war and the present crisis, amounting in all to about three years, and yet the great Bank of England, with its immense capital and resources, suspended the payment of specie from February, 1797 to 1st May, 1803, a period of 26 years. During that time the government of England, with this irredeemable paper currency, sustained itself in a protracted war against the most formidable armies that overrun Europe, under the command of Napoleon, the greatest captain of the age. The legislature

of New York, which was in session at the time of the suspension of specie by the banks, by an almost unanimous vote of both houses, sanctioned the suspension, and relieved the banks for one year from the forfeitures of their charters. The pressure that thus suddenly bore down on the banks, was as unexpected on the part of those who administered the national government, with all their means of information, through their official agents at home and in Europe. They were unprepared for it, and to their creditors they have not acted with the justice and equality that the banks have. The banks retain their funds for the common equal benefit of all, refusing to give their specie funds to any preferred creditor. With them equality is equity. The government has been paying out its specie funds to that favoured class of public servants, *the congress*, who have under their control the public purse, as well as much of the public patronage. If the banks had paid out their specie to some of their own directors and officers, to the exclusion of others, they would have deserved and received the unqualified censure of an indignant community throughout the whole country. Yet an act of such preference and injustice is done under the authority of our rulers at Washington, without any public animadversion on the part of those who now declaim most against the banks.

I am not one who thinks that our banking institutions are faultless. There might be, and ought to be, imposed on them some additional restrictions on their issues and liabilities for public security, suggested by the experience we have had. This should be now done with a tender and judicious hand. It is a proper subject for ordinary legislation, and not for a constitutional provision, which cannot be changed. The legislation in relation to it should be cautious, and with reference to the legislation of other states on the same subject, as well as to the legislation and action of the general government.

Whilst many who advocate the resolutions introduced into the convention by the delegate from Susquehanna say they are only for a reasonable restriction or regulation of the banks, and not for their destruction, yet the measures proposed would, if adopted, lead almost to the extinction of the Pennsylvania banks.

The mover has in his speech declared that his purpose was their *extinction* after a lapse of some years. The resolutions proposing amendments, submitted by the same gentleman, if adopted, would be destructive to credit and banking institutions within the state of Pennsylvania. These resolutions or proposed amendments, restricting the legislature in their legislation on the subject of banks, are not to be regarded as expressing the single opinion of this gentleman, but of the party in the convention with whom he is associated and acts. They are said to have been approved and adopted in a party caucus, and the gentleman from Susquehanna is only the organ of the party to introduce them. I will not examine all of the proposed *eight* amendments submitted, but direct attention to a part of them. The first proposes to make the stockholders of banks severally and individually liable for the debts of the corporate body. Would a provision of this kind add to the stability of the banks or the greater security of the public? No; the effect of it would be to withdraw real capital from the banks, as those who have money to lend and invest would not put it in institutions attended with such risk and liabilities, and

from which a profit little exceeding the ordinary rate of interest was to be derived. The capital would be transferred to the banks of other states, to their advantage and the prejudice of our own. It would with such a provision be left to speculators and borrowers to establish banks, for the purpose of obtaining loans and having the control of the banks. Instead of a real capital furnished by capitalists, the stock of the banks would belong to the directors of the banks, and their discounts would constitute the bank funds: Such a provision, whilst it would enhance the stock of the banks of other states in the market, would depress the stocks of the Pennsylvania banks, and render the public less secure on the liabilities of such banks. It is also proposed that a bank shall not be chartered for a longer term than ten years, nor with a capital exceeding three millions of dollars, and that not more than one bank shall be chartered or re-chartered in one year. The effects of such provisions as these would be to reduce the number of banks in Pennsylvania, now fifty, to ten, inasmuch as but one could be chartered or re-chartered in one year, and as their term was not to exceed ten years, which must, by the efflux of a few years, limit their number to ten for the whole state. One of the proposed amendments is, that the banks shall be restricted from establishing branches. The country would still require its bank accommodations, though the capital required for their banks would be small. Giving the country one-half the banks, would leave but five for the cities of Philadelphia and Pittsburgh, with a capital not exceeding fifteen millions of dollars, and for the five country banks the capital wanted would not exceed \$1,500,000. To restrict, also, as proposed, bank issues to notes not under ten dollars, would incommode many of our citizens in their small business transactions, and also favour the banks of other states, whose five dollar notes would be used in circulation, to the advantage of those banks and their proprietors, and to the loss and inconvenience of our own citizens.

The state of New York has now ninety-five banks, with a capital of near thirty-five millions of dollars. The state of Massachusetts has upwards of one hundred and fifty banks, with a capital exceeding thirty millions of dollars. Rhode Island has upwards of fifty banks, and the other states with which we have trade and intercourse, have their numerous banks.

Is Pennsylvania, distinguished as she is for her agricultural and mineral wealth—the magnitude and products of her great public works—her numerous and extensive manufactures—the skill, enterprise and industry of her citizens, and their growing numbers, to be reduced down to the grade of a third rate state, by depriving her of her facilities of credit, currency and exchange, afforded by her banking institutions, and made dependent on those of other states, over whose operations and security she can exercise no control or influence? The hostility to the banks and banking in the United States is now exhibited in overt acts of war upon those of Pennsylvania. In the convention it is attempted to wage it by a constitutional provision, which, however severe, oppressive, unequal or unjust, will be beyond the remedy and relief of the legislature in all future time. The public authorities—the representatives of the people and citizens of other states, evince a disposition to sustain their banking institutions by legislative sanction, public confidence and individual support. It is Penn-

sylvania alone that presents the spectacle of a domestic war within her borders, and by her state representatives, on the institutions which have been established by her power—have grown up with her growth and prosperity; and now exhibit a health, stability and integrity superior to those of the other great states of this Union.

If such a war upon Pennsylvania institutions and interests was made by emissaries from other states, we might account for it by imputing it to commercial or political rivalry, and that Pennsylvania was to be arrested in her march of improvement and power by blows at her capital, credit, business and trading community, inflicted through the sides of her banking institutions, which now have on loans to her citizens near seventy millions of dollars; the sudden contraction of which must produce wide spread embarrassment and distress through our yet happy and prosperous state. That such a war should be waged by any of her own citizens or their representatives "is passing strange," and can only be accounted for by believing, that in these evil times the spirit of party in Pennsylvania is so violent, unreasonable, unjust and intolerant, that it must have the course meditated and directed by its leaders, though in its march it should sacrifice state credit, state interests, state institutions, and overwhelm with embarrassment her enterprising and trading citizens of all parties and occupations.

States, like individuals, have their interests best promoted when they give them their proper care and attention. If state governments do not watch over and sustain their own interests and rights, it is to be expected that, like all other neglected interests, they will be sacrificed. States, like individuals, have their competitors and rivals in the pursuit of power, trade, or whatever may be supposed to advance their interests; and the protection of state rights, state interests and state policy, requires vigilance on the part of the people as well as their public officers.

The unanimity that marked the councils of our state government and its legislature, as well as the public sentiment of our citizens, but a few years since, in relation to the great public interests of Pennsylvania, were too strong and impressive to be forgotten or overlooked. Those interests, avowed and proclaimed by the public resolutions of our state legislature, with the sanction of the governor, and responded to by the people, were the protection of American manufactures—the maintenance of the sound currency furnished by the Bank of the United States—the distribution of the surplus revenue; and, after the payment of the national debt, the distribution of the proceeds of the public lands. The legislative voice was again and again made known in resolutions of the most decisive character, in defence of these great interests—resolutions adopted without regard to party demarcation, and by majorities almost approaching to unanimity. The fell spirit of party, however, that reigned at Washington, demanded the sacrifice of these interests, in order to conciliate the favour of influential men in other states. The protection of our manufactures, &c., promised to our citizens, under the act of congress of 1828, was rejected and withdrawn by the act of 1832, and our manufacturing interests given up as a concession to the menaces and dictation of southern nullifiers. The United States Bank was next yielded up as a sacrifice to the offended spirit of party, and to the influence of jealous and interested counsellors of other states, that were desirous of depriving Pennsylvania

and her great commercial capital, Philadelphia, of the advantage arising from having that bank, with its great and solid capital. But, happily for our commonwealth and her great city, which it should be the pride of Pennsylvanians to advance and prosper, a Pennsylvania legislature was sufficiently sagacious to disappoint the machinations of our state enemies, and there was retained for us a banking capital of which it was intended to deprive us, whilst at the same time there was secured for us a *bonus* for the charter privileges that replenished our exhausted state treasury and enabled the government to prosecute its unfinished public works.

Whether the share coming to Pennsylvania of the proceeds of the public lands ceded to the United States for the common benefit of the states is to be relinquished to the party policy advocated at Washington, of reducing their price so as to cover cost of survey, or of surrendering them to the new states, a short time will discover. The Pennsylvania interests now immediately assailed are her banking institutions, and the commercial and manufacturing community now aided by their loans and other money accommodations. These great interests and their dependencies are not those of a party, but of the whole people of this commonwealth, and whilst public policy and public security may, through our legislature, require some moderate and judicious limitations on the extent of *bank issues and liabilities*, a war against the banks of Pennsylvania is a war on Pennsylvania capital and credit, which, if pursued, must overwhelm or embarrass our enterprising, useful and productive citizens and be attended with distress which we will all have to deplore when it is too late to repair it. To avert so great a calamity, and to mitigate the evils attendant on the present condition of the currency and trade, let our citizens exercise moderation and forbearance to the banks; and let our national and state representatives afford them the aid and confidence of the government, and our currency will soon be restored and our trade and business revived.

Though the rate of foreign exchange is now reduced, and there be no demand for specie for export, which circumstances, in other times, might be relied on as indicating ease in the money market, and induce the opinion that the banks might at once resume the payment of specie, yet, at this juncture, it does not afford to the banks the encouragement that may at first seem to be warranted. The embarrassment to be apprehended now by them arises from the want of general confidence, the interruptions and derangement of our domestic trade and exchange, the hostility of a portion of our citizens, and the unfriendly disposition towards the banks, manifested in the councils of our national executive.

If the government, through its collections for public dues, and others, shall occasion a drain from the banks of their specie, the banks must curtail rapidly their accommodations to their customers, to enable them to sustain their credit under such pressure. The city banks must demand payments from the merchants, manufacturers and other business men, who in their turn must call on the country merchants and traders for the immediate payment of all their liabilities. The country banks will also suffer under a like distrust and operation, and be obliged to make like calls on their debtors. Where, I would ask, are the means of payment now to be had in Pennsylvania to meet such demands at such a crisis? The banks may call on their debtors to pay but they will call in vain, for the

payments cannot be made, and they may ruin their business men without raising the cash means thus suddenly required. The circulation is not only now greatly reduced, but in the train of further reduction.

Eastern Pennsylvania has, for the last two seasons, been deprived of her great agricultural staple, wheat, by the entire failure of one crop, and by a failure of one-half of an average crop at the last harvest. Our iron masters, those great and useful operators in our great inland trade, who not only give employment and subsistence to the hardy yeomanry that drive their furnaces, forges and rolling mills, but furnish an important market for agricultural product, are now, by the great interruptions of trade, obliged to suspend or curtail their business, and have in the market or on hand their iron manufactures for which they cannot raise cash, or such notes and acceptances as can be converted into cash, to pay the cost of manufacturing, and for the provisions consumed by their labourers. These and other great and pervading interests should be regarded with care, forbearance and encouragement; and the policy or legislation that will sacrifice such interests, and those of the people connected with them, would be a reproach to a republican government, and to a free and intelligent people; and only become a barbarous age and a despotic government.

From the abstract of the returns of the Pennsylvania banks for the month of January, May, June and November, 1837, prepared for the legislature by the auditor general, it appears that:

	January 1837.	May 1836.	June 1837.	November 1837.
Capital.	\$58,570,338 18	\$59,659,316 34	\$59,867,400 76	\$59,944,435 76
Notes in Cir'n.	25,241,982 33	22,049,235 80	20,751,295 81	17,078,567 95
Deposits,	15,002,939 81	16,046,444 29	14,865,257 04	13,011,285 04
Discounts,	86,471,023 18	87,740,585 57	84,894,344 86	71,133,671 25
Specie,	5,752,439 83	4,489,999 68	4,336,900 73	7,024,043 74

FEBRUARY 3, 1838.

Speech delivered by JAMES M. PORTER, Esq. in the Pennsylvania convention, February 3, 1838.

The convention resumed the second reading of the report of the committee to whom was referred the ninth article of the constitution. The fourth section being under consideration in the words following :

“SECTION 4. That 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.”

A motion was made by Mr. READ, to amend the same section, by striking therefrom all after the word “Section 4,” and inserting in lieu thereof the words following :

“That no person who acknowledges the being of a God, and his own accountability to the Supreme Being, shall, on account of his religious sentiments, be disqualified to give evidence, or to hold any office or place of trust or profit under this commonwealth.”

And the said amendment being under consideration,

A motion was made by Mr. DORAN, to amend the same by striking therefrom all after the word “that,” in the first line, and inserting in lieu thereof the words following, viz :

“The civil and political rights, privileges, or capacities of any citizen shall, in no wise, be diminished or enlarged, on account of his religious opinions.”

After some speeches in favor of this proposition,

Mr. PORTER, of Northampton, said that as this subject had been referred to the committee upon the ninth article, of which he had the honor to be chairman, and the committee had deemed it inexpedient to make any alteration in this provision of the constitution of 1790, it seemed proper that he should say something on the subject, justifying the action of the committee, and for that purpose he had left the chair.

By reference to resolution No. 43, and report 22, to be found on page 207, of the first volume of our journal, it will be seen that this subject was distinctly brought before that committee :—the report, upon so much as relates to it, was as follows :

“No. 43, submitted by Mr. KEIM, of Berks, instructing this committee, “to consider the expediency of so amending the constitution, as to allow for ever, in this state, the free exercise and enjoyment of religious profession and worship to all mankind ; but that the liberty of conscience hereby secured, shall not be so construed as to excuse acts of licentiousness, or to justify practices inconsistent with the peace and safety of this state.”

“The committee deem it inexpedient to adopt any further provision on this subject, than is contained in the existing bill of rights, which allows full freedom of religious opinions to all, and denies the right of

any human authority to control or interfere with the rights of conscience, and prohibits any preference from ever being given by law to any religious establishment, or modes of worship, and prohibits the legislature from ever disqualifying persons from holding offices or places of trust or profit under the commonwealth, on account of their religious sentiments, who acknowledge the being of a God, and a future state of rewards and punishments."

Some gentlemen who have addressed the convention, appear to have fallen into error as to what the provision of the existing constitution is. In point of fact, the existing provision of the constitution prescribes no rule in itself, on the subject of religious belief, as a test or qualification for office, or for being admitted as witnesses. It merely declares that "*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." This is not the imposition of any test. It merely restrains legislation upon the subject, where the acknowledgment and belief mentioned exist. It says in so many words, that the legislature of Pennsylvania shall not, by any future enactment, disqualify any person from holding office, if he believes in the existence of a God, and a future state of rewards and punishments. There is nothing, then, in this constitutional provision, which in itself disqualifies any person. Nor has the power to legislate upon the subject, within the restriction imposed, ever been exercised during the period of forty-seven years it has been in force, to disqualify any one.

What, then, are we asked to do? We are asked solemnly to embody in the fundamental law of Pennsylvania, a provision which is to repeal and destroy all that our courts of common law have done in settling and deciding the common law of the land. That common law let it be known, has grown up and been established by the experience and wisdom of ages. It is the embodied common sense of society, adapting to any existing state of things, that rule of conduct best calculated to suit the peace, order, and welfare of the community. It has grown with our growth, and strengthened with our strength. Our courts have decided, and in my judgment, very properly too, that the man who denies the existence of a God, is not entitled to be sworn and examined as a witness. So too, with the man who does not believe in "*a future state of rewards and punishments*." It is intended by the amendment to the amendment which the gentleman from the county of Philadelphia, (Mr. Doran) has proposed, to reverse these well settled principles of the law, by a constitutional provision.

There are two objections to be urged against doing this.

The first objection is, that if it be necessary so to alter the existing law of the land, the legislature of the commonwealth is abundantly competent to legislate on the subject. If it be advisable that those persons should be excused from the operation of the common law rule, which says that the man who denies the being of a God, shall not be called upon to invoke that God to punish him for falsehood, when he comes forward to testify in a court of justice, your legislature has the power to do it. So, too, if he does not believe that there is a state of rewards and pun-

ishments in eternity. The common law has said that the man who disbelieves in a state of future rewards and punishments, shall not be called upon in a court of justice, to take an oath, which in a certain event, invokes the infliction of future punishment upon him: that is to say, if he will testify what is untrue. This, as I have said, is the common law of the land, and has grown out of no statutory provision. I do beg, that gentlemen will be careful not to commit innovations by adopting in this amended constitution, provisions which, if necessary, are only and properly, the legitimate subjects of state legislation. Such a course is calculated to overload the instrument with improper provisions, and render it complex and unintelligible.

But sir, in the second place, I am opposed to this amendment, because I consider it improper even as a matter of legislation. I think it wrong in principle. The existing rule, as I have stated, has grown out of the good sense of society. The judges have adopted this rule, because they believe that it is, of all others, the best calculated to promote a sacred regard for truth. They have said, that in the administration of the common law, they cannot give credence to, or have confidence in the statements of a man denying the existence of a Supreme Being, or denying his own responsibility to him.

Are we prepared to say, that an atheist—a man who denies the existence of that God who made him, as well as his own accountability to him—shall be entitled to give evidence in a court of justice? Are you, gentlemen, ready to promulgate this doctrine here? I do not think there is a single member of this body, who, if he will give his common sense play, and reflect seriously on the consequences which would inevitably result to human society from such a doctrine, would give his sanction to such a proposition.

It may be true, as the gentleman from the county of Philadelphia, (Mr. Earle) has stated, that there are but few atheists: still we know that there are some. In a neighbouring county, (Chester) not long since, one miserable wretch came before the court and openly disavowed his belief in the existence of a Supreme Being. The testimony of that man was rejected, but that rejection was not in consequence of any provision in your constitution. It was only carrying out the common law of the land. There could be no policy in admitting such testimony—no guarantee that there was any thing which the person considered a binding obligation upon him to speak the truth.

What is the form of the oath administered to a witness? It is, when they swear by the book, “You do swear that the evidence which you will give, &c. shall be the truth, the whole truth, and nothing but the truth, *so help you God*,” in token of assent to which he kisses the book. Where the oath is taken with the uplifted hand, the person raises his right hand towards heaven, and the oath is administered thus: “You do swear *by Almighty God*, the searcher of all hearts, that the evidence which you will give &c. shall be the truth, the whole truth and nothing but the truth, and that, *as you shall answer to God at the great day*.” The affirmation is declared by law to have the same binding effect as an oath.

Is it not mere mockery for the man who disbelieves in a God—who

scoffs at the idea of a future state of rewards and punishments—to call on God to punish him if he perjures himself, or to submit to answer to the Supreme Being at the great day of final account, when he does not believe that there is either a God or a day of future retribution?

I hold this idea of future responsibility to be the great bond which holds society together. The only thing, in fact, which renders mankind safe in society, and I for one, am not prepared to cut it asunder and inflict upon mankind the evils which would inevitably follow so destructive a course. I am aware that the doctrine for which I contend in these days of latitudinarianism, is scoffed and sneered at, by those who either do not feel the force of it, or for other causes trample it under foot, and that it is considered bigoted, fanatic and sectarian, to raise a voice in any sort of legislation in behalf of the sound system of morals, which the religion of the Bible and of Revelation teaches. Well be it so. I have no fear of taking the responsibility of raising my voice on this occasion. This driving all consideration for religion out of view, has had its advocates at all times, and upon all occasions. It was the leading, the triumphant doctrine at the period which has been alluded to by the gentleman from the county of Philadelphia, (Mr. Earle) when the Christian religion was abolished in France, and the Goddess of reason was the Deity of their adoration. What was the consequence of all this? All moral ties were severed or disregarded, the marriage contract was dishonoured and dissolved, at the will of either or both the parties—the natural relations were destroyed—morality was lost sight of—and as might be expected, France expiated in blood this desecration of all that was holy and pure.

History is said to be philosophy teaching by example. Let it be so to us. Let us learn a lesson from experience when we see how many of the citizens of that country were butchered in cold blood by a population that had lost all sense of religious obligation;—who said that death was an eternal sleep;—that man when he died was like the beasts that perish. Let not the blood stained historic record of that misguided land be altogether lost upon us. Open the door and hold out the inviting hand of encouragement to infidelity here—permit the man who denies the existence of a Supreme Being, or denies the existence of a future state of rewards and punishments to be received as a witness in a court of justice upon the same terms as conscientious men, who do believe in the existence of a Supreme Being to whom they are accountable in a future state for their conduct here upon earth, and you do a deed fraught with most dangerous consequences to the morals and to the interests of our country. You place in the hands of the irreligious and profligate an instrument by which at some future day they may uproot the foundations of society in this now favored and happy land.

I am aware that there are several congregations of the society of Universalists at this day who deny that there is a future state of rewards and punishments, and to their exertions I have no doubt we are indebted for the numerous petitions, couched in general terms, praying that no religious tests may be established, when none are intended.

I do not profess to be very familiar with the creeds of the various sects in our country, but this much I know, that this entire denial of all future rewards or punishments was not originally the doctrine of that sect. They originally held, and I believe a portion of them still hold, that in

the future state men are subjected to punishment of a limited duration for the misdeeds of this life, but that ultimately that punishment will cease and all be saved. All such persons are now admitted as witnesses in courts of justice. It is only the man who utterly denies every thing of the kind who is rejected, and if gentleman will take the trouble to refer to a decision contained in the 2d volume Cowen's Reports, page 432, and the note thereto in page 572, they will find the subject discussed and decided as I have stated, on the broad principles of the common law, and of sound policy. This is also the law of the United States courts. It is the law of the commonwealth of Pennsylvania, and it is, and ought to be, the law of every Christian country at this enlightened day. How can a man be held responsible under any form of oath that may be devised, who does not believe in a world to come, and that in that his state will be determined for weal or for woe by the deeds done in the body. By what other bond can you bind him. You must either retain this doctrine or you may—nay you must throw away the use of all oaths and affirmations entirely, for which I apprehend but few are prepared. Who among us has not seen a child called up as a witness in one of our courts? If the child be supposed to be of tender years, or immature judgment, the first question is, as to age, and the next the nature and obligation of an oath, and as part of the latter "what will become of persons who swear or affirm falsely?" The response usually is "that they will be punished in the world to come." And if the child does not answer so, it is said not to possess a sense of responsibility sufficient to justify the admission of its testimony to bear upon the rights of the parties litigant, or the guilt or innocence of the party accused. And let me ask what does all this imply? Is it not, that without a firm belief in a future state of rewards and punishments, no man, in a legal point of view, is worthy of credit? This rule then comes down to us sanctified by the wisdom and recommended by the approbation of ages. It grows out of no bigotry—no superstition—no fanaticism. It has its origin in the good sense of mankind—in a knowledge of the true basis upon which human society is founded, and the means which are requisite for its preservation.

Now, Mr. President, we are asked to set aside, by a constitutional provision, a solemn course of decisions upon this important subject, by our courts of justice. In the organic law of our commonwealth, to repeal a portion of the common law—a measure, as I do most solemnly believe, if carried into effect, fraught with danger—calculated to destroy the purity of the administration of justice, as well as the peace, order, and well being of society itself. Have we reflected upon the consequences of such a step, and if we have not are we prepared to take it without such reflection? Shall we allow all persons disbelieving the existence of a Supreme Being, and denying their own future accountability for their deeds upon earth to enter the sanctuaries of justice and invade the rights of society? Shall we order our courts to absolve such men from the consequences of their disbelief? I for one am not prepared to sanction such an innovation, or to approve of such a change—I know of no sufficient cause for so doing.

There is nothing in the existing provision of the constitution which has, in my judgment, worked any harm, or from which any injury, in-

justice, or oppression may be apprehended. While I will go as far as any man in this body to secure and protect the rights of conscience to all as far as is compatible with the peace and safety of society, there is a point beyond which even the most fastidious on this subject cannot go, and that point is, will the rights of society at large be invaded, or its peace, order, and safety be put in jeopardy. I permit every man to have his own religious belief and to worship according to the dictates of his own conscience, but as in the case of writing and speaking his opinions I leave him to the consequences of so doing as settled by no tyrannical statute, but by the silent and sure operation of the collected sense of mankind embodied in the common law, which, as before stated, is nothing more or less than the collected common sense of the community.

Under the present provision, the legislature has no right to exclude any man from being a witness who is not now excluded according to the law of the land, that common law which our fathers brought with them from England—under which we have thus far lived, and under which, by the blessing of God, we were carried safely through the war of the revolution, and the scarcely less important war of 1812. I am willing to leave the subject, under the existing restriction, to the legislature of the commonwealth coming from time to time, immediately from the people, and expressing their views. I am unwilling to unsettle the rule which works well in practice to adopt a speculative latitudinarian proposition, which I solemnly believe will cut loose the bonds which bind society together, and may land us where it landed France, in the days of her revolution, when Atheism and Deism let loose the fiends of discord and deluged with blood and carnage the fairest fields upon which the light of the sun ever shone. I cannot willingly aid in bringing about such results—I cannot permit them to be brought upon us without raising my voice of warning and solemnly entering my protest as I now do, against it. I now leave the subject to the action of this body, and be the decision what it may, my skirts at least are clear.

The amendment to the amendment was then negatived by a vote of 16 to 88, and the amendment itself also negatived by a vote of 36 to 85—so that the existing constitutional provision is retained.

FEBRUARY 19, 1838.

Remarks of Mr. CLINE, of Bedford, on the following resolution which he offered on the 19th of February, 1838. (See journal of the convention, page 606.)

Resolved, That in the opinion of this convention, the legislature ought to continue to provide by law for the establishment of common schools throughout the state, and to make such further enactments on this subject, as will be most likely to insure the benefits of instruction to all the children of this commonwealth.

Mr. CLINE rose and said :

In offering this resolution, Mr. President, it would be in vain to attempt to conceal from the convention the embarrassment under which I labor. A firm and determined resistance on the part of members, to incorporate any provision in the constitution on the subject of education, other than that meagre one which has existed for half a century under the present frame of our government, and the protracted stage to which the business of the convention has progressed, might well discourage any attempts to elicit attention to this matter, save in the shape in which I have put it. Nothing but an overwhelming sense of duty, and a desire to avoid a misapprehension of the motives of members, which I am afraid, if left unexplained, may prevail extensively in the public mind hereafter, has induced me to bring up the resolution which I have offered at this late period of our proceedings.

I must confess that I was more than disappointed at the course which many members thought proper to pursue, when this grave and important subject was fully before the convention. I watched with breathless anxiety the sentiments which were expressed, and the votes which were counted. I at first calculated on the exertion of talent, of feeling and of eloquence in behalf of a question of such momentous importance to the people of this state. I hailed the report of the committee, to whom this great subject was entrusted, as an earnest of the high minded and enlightened liberality which I thought would have manifested itself by an almost unanimous vote of the members of the convention, and for some time after the subject came up for discussion in committee of the whole, I congratulated myself that I was not disappointed. But when at last I was called to witness the unaccountable but certain transition of the human mind from enthusiasm to indifference, and afterwards from indifference to open and avowed opposition, I felt the reaction on my spirits like the weight of an Atlas. I was chilled and mortified.

I am well aware, Mr. President, that the reasons alleged by gentlemen for this opposition, were such as would seem to have satisfied their own minds. They thought and they openly avowed, that the incorporation of an amendment into the constitution, which would secure to the children of this commonwealth the advantages of a common school education in all time to come, would be unpopular with the people, and that such a measure would have a tendency to defeat the other amendments. It is not my intention to take up the time of this body in an attempt to combat

a position thus gratuitously assumed, * and which the arguments of the gentlemen themselves would seem at once to overturn. For let it be remembered, that all here profess to be the friends of a liberal course of public instruction, and the argument is that that system has already been carried into successful operation, and that it is rapidly gaining the esteem and approbation of all classes of the community. But if this be true, where is the danger of submitting a fixed and permanent system to the people, which would insure to them and to their posterity those advantages which it is said they already enjoy, and which they are learning more and more to appreciate from day to day? Why object to perpetuate that, which not only we ourselves agree to be right, but which it is alleged the people likewise approve and sanction? Why permit a subject like this to be exposed to the pressure of partisan revolutions, when it can be so much better secured on this broad foundation of the constitution of the state? It seems to me that the reasoning of the gentlemen on the other side is as lame as it is cruel and improvident.

Sir, what conclusion have we come to at last in relation to the important work which we are about to submit to the people? We have made certain amendments either for the weal or woe, the advantage or disadvantage of our constituents. The great democratic principle has been over and over asserted, that the people themselves must be the judges of the frame of government under which they are willing to live, and that in all our deliberations it is our bounden duty to consult their wishes and their opinions on this important subject. And yet we are willing to expunge from the instrument which we are about submitting to them the only and the best means of judging whether that instrument be a good or a bad one, whether it ought to have been received or rejected, and whether when it is received they ought to be willing to retain it, or ought to alter it for some other system, more worthy of their confidence and approbation.

"You take my life, when you do take the means
"By which I live."

It has very forcibly and very correctly been said by Mr. Wines, in a work recently published on the subject of education, "that our very freedom will prove our bane, unless the people, the original source of all power, are so far enlightened as to be able to exercise the various functions of power aright. The ability to reflect, examine and judge, and the possession of elevated virtues, each attainable for the most part only through the instrumentality of education, are essential to the safe enjoyment and useful exercise of the privileges of freemen. It is a truth which we all acknowledge, but which we do not lay to heart as we ought that intelligence and virtue are the bulwarks of a free government, that education is the parent of all true personal independence, and that in proportion to our intellectual and moral illumination, will be our chances of surviving, in the vigor of perpetual manhood, the operation of those

* The result of the election has shown, when considered in relation to the different counties, that the vote on the new constitution would have been the same, had a much stronger provision been incorporated into it than the friends of education contended for.

causes which have undermined all preceding republics, and which are already at work for our ruin." Sir, I agree with this writer, that public instruction and political prosperity must go hand in hand together, that the surest foundation for all our rights must be looked for in the intelligence and virtue of the people, and that just in proportion as you increase and establish the means of securing these blessings, in the same proportion may we hope for the perpetuation of rational liberty, and the unappreciable rewards of public and political integrity. On any other principle than this the structure of republican government is but an inverted cone, balanced on a point for the temporary amusement or admiration of mankind, but liable to be overturned by every factious gale, no matter how trivial or how light, which may sweep across the country.

But Mr. President, I have not risen for the purpose of discussing the broad principle, whether we should or should not make some provision for the general diffusion of knowledge throughout the state. That principle has been decided, and as I have already said, decided contrary to my wishes and expectations. The resolution I have the honor of submitting to the consideration of the convention has another object in view, and speaks for itself. It does not contemplate retracing the ground which we have passed, and taking that elevated stand which most of us did when this subject came up in committee of the whole. Its object is to save us from the disgrace, and our country from the injurious consequences, which if viewed by itself, might follow from the course which we have thought proper to pursue in relation to the great question of enlightening the public mind. I for one am unwilling that posterity should judge of this course without understanding the motives by which the minds of the gentlemen have been influenced. They tell us that they are friendly to a general system of education, but are unwilling to meddle with the subject themselves, and desire that it may be committed to the wisdom of future legislation. Ought we not therefore to make some open, direct and unequivocal avowal on this subject? Are we sure that in the lapse of time, some narrow minded partisan may not rise in his place, and point with confidence to the acts of this body, as sanctioning a policy, the tendency of which is to keep the minds of the people in darkness and ignorance? Is there not danger that it may be said with some plausibility, that the members of this convention were enemies to public instruction, that they voted against incorporating any provision on that subject in the constitution, and that it is only necessary to refer to the journal in order to be assured of the fact? Sir, I am unwilling to incur the risk of such a charge as this. I think I can see to what unhallowed purposes it may be made subservient, and how extensive may be the mischief which will follow to the community from a misconception of our purposes. Let us therefore pass the resolution which I have offered, and declare now and hereafter, that although we have done nothing for the cause of education, yet we are not and have not been opposed to it. Let us proclaim, in terms which cannot be misunderstood, that it is the duty of the ordinary legislature to make such provision on this subject as will be of lasting and general benefit to the whole state.

JUDICIAL TENURE.

WEDNESDAY AFTERNOON, JAN. 24, 1838.

The question being on the motion of Mr. MEREDITH, to amend the second section of the fifth article,

Mr. M'DOWELL, of Bucks county, rose and said :

Mr. President, it is extremely discouraging to me to take the floor at this time, considering the circumstances under which it has been yielded by the gentleman from Lycoming who has just taken his seat, (Mr. Fleming) and I certainly shall not fare better than he has done, unless probably I may be less sensitive. With this preliminary remark, I shall proceed at once to make such observations connected with this important subject, as have suggested themselves to my mind, leaving all other matters of excuses, exordiums and so forth, to come in, if at all, at the tail of what I have to say.

The gentleman from Chester, (Mr. Bell) if I did not misapprehend his argument, has assumed the position that this question of the judicial tenure, or the opposition to life offices, originated in the city and county of Philadelphia. I did not know that the city of Philadelphia was radical on this, or on any other subject. I did not know that the city was in any manner instrumental in enforcing the doctrines of radicalism or reform; because, to say the least of it, the attempt to limit the tenure of the judicial office is a part of the radicalism of the day; it is that which is denominated radicalism. If the gentleman from Chester county had taken as much pains as he might have taken to obtain correct information as to the state of public opinion in this particular, it is manifest that he would not have drawn such an argument. If he had taken pains to obtain information from the members of this body from all parts of Pennsylvania—from the south, the west and the north, in relation to the judicial tenure, he would not at least have charged upon the city of Philadelphia, whatever he might have done upon the county, the offence of radicalism in relation to the judicial tenure. But the gentleman had not supplied himself with correct information, and it was not to be expected, therefore, that he should have arrived at correct conclusions.

Mr. BELL rose to explain: I did not state as my opinion, said Mr. B. that the idea of reform in this particular was urged altogether or merely by the city and county of Philadelphia. What I said had reference to the remarks which fell this morning from the gentleman from the county of Philadelphia, (Mr. Doran.)

Mr. M'DOWELL resumed :

For the information of the gentleman from Chester, I will state that I have before me a document, from which it is apparent that the first complaints which were made on the subject of the judicial tenure came from that very county which the gentleman himself in part represents in this convention. I have before me materials which go to show with perfect

clearness, that the people of the commonwealth of Pennsylvania never have been satisfied with the judicial tenure of good behaviour, or the life tenure, as it is called; and that from the adoption of the constitution of 1790 down to the present moment, there have been continued complaints in relation to the judicial tenure in this state. I have in my possession petitions which have been laid before the legislature from time to time from all the counties in the commonwealth, from the year 1805 to the year 1835—at which latter period the law was first passed calling for a convention—evidencing clearly that, upon the subject of the judicial tenure none were satisfied, but that continually from the moment of the adoption of the constitution of 1790 to the year 1835, they have been calling upon the legislature incessantly, to pass a law enabling them to call a convention for the purpose of altering this feature in the constitution. I will show the gentleman that, in the year 1805, so far from the people having been satisfied with the constitution of 1790, they were clearly dissatisfied with it—that petitions were pouring in from all parts of the commonwealth, complaining of the judicial tenure—complaining of the abuses which existed, and complaining that the judges were beyond the reach and above responsibility to the people. And, sir, for the information of the gentleman from Chester especially, and generally for the information of the other members of this body, I will read a short abstract of the complaints which were made; for the character of the complaints which are found in all the petitions is nearly the same.

[Mr. M'D. here read a petition presented to the legislature as far back as the year 1805.]

In 1805, fifteen years after the constitution of 1790 went into operation, the people manifested and expressed their strong dissatisfaction with the manner in which, through the life tenure, the judges were placed beyond the reach or control of a proper or wholesome responsibility to the people.

In 1825, the first act was brought forward, but not passed, for calling a convention. The reason assigned why it did not pass, was because it did not provide that the constitution, as amended, should be submitted to the people. And, the people, ever jealous of their rights, as they always ought to be, rejected the law, but still persisted in making their complaints, and the law before the legislature in 1835, was passed authorizing the call of a convention. In October, of the same year, the people through the ballot boxes, gave a vote of upwards of thirteen thousand in favor of the call. He had been thus particular in noticing these facts for the purpose of showing that the complaints, which had been made, did not originate with a few petitions, or a few disappointed lawyers, or perhaps, a few disappointed judges, but that there had been a permanent and abiding dissatisfaction among the people from the time the constitution of 1790 went into operation, until the present time; that, not only was the power of the executive a matter of complaint, but that originally there was no complaint at all. The first disposition manifested on the part of the people to complain was, in relation to the judiciary. The exorbitant power of the executive, then, was an after thought. Those powers did not exist at that time. At the adoption of the constitution of 1790, the powers of the executive were not so excessive; but they grew to be so as the business operations of the state became enlarged. The first complaints,

then, that were uttered, were in regard to the judiciary. And, he spoke on the subject from the record—from facts—from petitions of the people now before him, and which were presented from time to time to the legislature. It was, therefore, in vain that members on this floor asserted, and reasserted, that the people want no change in the fundamental law of the land as regarded the judicial tenure. It was in vain to say that the people are satisfied with the judiciary. He did not believe it. The evidence which was before this body, was to the contrary. Therefore, it became important for the convention to ascertain—for the convention to decide, what it was the people did want in reference to the judiciary. They were dissatisfied—they were complaining, and the representatives on this floor said they asked for a limitation of the judicial tenure.

Before he proceeded to an examination of this subject, directly, he would beg to be permitted to notice the argument which had been advanced by the gentleman from the city of Philadelphia, (Mr. Meredith) who last addressed the convention, and which argument appeared to have been sanctioned to a very considerable extent, by the gentleman from Chester, (Mr. Bell)—that was, that by giving to the senate and the executive, the joint appointment of judicial officers, we were parting with one branch of our government—that instead of its being a republican—instead of its being a representative government—we had got an oligarchy. Why, he confessed that he was somewhat at a loss to understand the arguments of the delegate from the city of Philadelphia, that because the appointing power is put into the hands of the senate—that, therefore, we are parting with a branch of the government; that one branch is about to be merged in the other two. How, he asked, was it to operate? And, what was the argument? Why, that by an attempt to bring the appointing power more nearly within the immediate agency of the people than when confided to the executive, that, therefore, we are merging one of the distinct powers of the government into two. What, he would ask, was the effect and what the operation of the senatorial interference in judicial appointments? Why, it was that all the powers of appointment should not be vested in the hands of one individual. It was, that the agents of the people—that the representatives of the people—the senate—who were elected for three years, should, when at the seat of government, participate in the power of appointment with the executive. What difficulty was there on the subject? And, how were we parting with one of the powers of the government? Was it not precisely similar to the constitution of the United States? Where was the difference? The President of the United States nominates to office, and he appoints by, and with the advice and consent of the senate. Now, all that was asked here, under the present amendment, was, that the senate of Pennsylvania shall exercise a controlling or revisory power over the nominations of the governor. What evil could result from it? The object was, that the agents of the people shall have some participation and control in the appointments of the governor, so as to prevent him from appointing his political favorites, his friends, and other persons, from interested motives, to office, without assigning his reasons therefor. Again, he would ask, what was the operation of the provision? Whenever the tenure of a judge shall have expired, and he applies for a re-appointment, the governor has it not in his power, without assigning a good and sufficient reason to re-

appoint him to office. He could not secretly, or clandestinely appoint, or re-appoint any one to office. The representatives of the people, (or senators) having a participation in the power of appointment, would know why this, or that, man was appointed, or re-appointed, and every office could be filled to their perfect satisfaction, and that of the people. The governor would be responsible, mainly, for the appointments, because, without his nomination, the senate could not approve. And, therefore, it was that the responsibility was thrown on the governor, to make prudent and wise nominations. If, then, the senate should refuse their sanction to a good appointment, the blame is attached to them. But if, on the other hand, the governor made a bad one, the responsibility was thrown on the governor.

He confessed himself to be entirely at a loss to see what grounds there were for alarm in reference to admitting the senate to a participation in the appointing power. He could not believe that we were changing the principles of our government, or parting with one of the principal powers of it. He did not believe that the amendment of the committee was objectionable. For, if so, then the constitution of the United States was equally objectionable. Besides, too, there was to be an advantage accrue to the people above what was afforded by the senate of the United States. The senate was to be open—whatever was done was to be done in day-light—before the people. There were to be no clandestine acts. No man could be slandered or abused. The senate of Pennsylvania are responsible to the people, and are to look to them for their re-election or rejection; and, therefore, they would act under great responsibility in the transaction of their duties.

Now, having said thus much on the various matters as connected with this amendment, he came to speak of the immediate subject before the convention, and he admitted that it was one of very considerable importance. But he really could not conceive it to be of that importance which the arguments of the gentlemen on both sides of the convention would seem to warrant. He denied that this attempt to change the judicial tenure from the term of good behavior, as it was called, to a term of years, was altering a fundamental principle of the constitution. He denied it. It was a mere matter of detail, and did not alter or change the fundamental principle in the least. What was it? Why, it was said to involve the question of judicial independence. What, he would ask, was judicial independence? What did the gentleman from the city of Philadelphia (Mr. Meredith,) mean? He (Mr. M'D.) had heard a great deal in relation to an independent judiciary. He confessed that he was at a loss to understand what was meant by the gentleman on the subject. Judicial independence, as defined by the conservatives, consisted in placing a man, with all the sins he may have upon his head, beyond the reach of all responsibility to human power. Yes! the argument was, that unless a man was unaccountable, unless he was irresponsible to any human power, that, therefore, he was a poor dependent creature. He could not be independent, unless irresponsible! He (Mr. M'D.) did not believe the doctrine. Not a word of it.

Let us carry the matter a little further. Now, he presumed that there was not a man in this convention, radical or conservative, that did not

entirely concur in the opinion that the judiciary of the state of Pennsylvania, and of every other state in the Union, in order to be efficient, must be independent. But, he did not believe that any man here thought it necessary, in order to constitute an independent man a judicial officer, he must be irresponsible. That was another question entirely. He believed that judges were men. He had advanced that doctrine when he had the honor of submitting some remarks on the impeaching power, on first reading. He was, then, very glad to hear his venerable friend from Philadelphia, (Mr. Hopkinson) admit that judges were but men. He supposed the gentleman meant to say that they were like other men, having their faults, and their vices, and their virtues and other good qualities. What did gentlemen mean? Judicial independence separate and apart from personal independence? Could any member of this convention believe that a man who was at least a vassal—who was in all his feelings a slave—who did not know an independent wish, could be transformed into an independent man by placing him on the bench? There were judges who could not be independent. If you were to have them as high as Draco, you could not make them independent. Independence! What, he would ask, was the meaning of “independence?” Why, it was nothing more nor less than simply honesty. You may talk about the term “judicial independence,” in all its ramifications; you may apply the word as you choose, and all that is meant, and all that is understood, and all that is desired of judicial independence is honesty. Is it necessary to place a man beyond all law and responsibility, to make him an honest judge? Is that the doctrine? How is it with men in other relations of life? Why, what is a judge? He is the representative of the law; he is a steward. And, why should he not render an account of his stewardship, like all other men? Because you call a man to an account, you make a slave of him! Because he is responsible to the laws of his country, you deprive him of all moral obligation! Is that the doctrine contended for here? It is certainly a most extraordinary one. The gentleman from Chester (Mr. Bell,) has argued that, because you give a judge to understand that he will be held responsible, for the proper and faithful discharge of his duties, you therefore unnerve him. Why, it is an absurd doctrine. I know of no gentlemen who is not responsible for his principles. I know of no steward who has not to give an account of his stewardship. I know of no man, in any capacity, who is not responsible. But, it is said that a judge should not be governed—that he should be restrained by no power, but should be left to the exercise of his own sense of duty to himself, and governed only by the fear of God. Now, this may sound very well, but I am afraid that all the judges of the commonwealth of Pennsylvania are not exactly restrained by the fear of God. Am I saying too much when I say this? Do we always take care to have such men appointed judges, who can, at all times, forget their relations and every thing else which might interfere with the proper discharge of their duties, and who have the immediate fear of God before their eyes? I am very much mistaken if we have not had judges who have made it a boast of their want of belief in the sacred scriptures. I do not like to name the judges. I am very much mistaken if they ought not to have been called to account for their infidelity.

Then what are you to do with those judges who have not the immedi-

ate fear of God before their eyes? Now, if you can convince me that all the judges were pious men, under the direct and immediate influence of the gospel—that they were guarded and watchful in all their actions, then I should say that the argument of the gentleman, is a good one. But, the question is, what is the character of our government? Is it one of responsibility, or irresponsibility? What are the principles of our government? Are not all agents responsible to the people? And why, if it be so—are the judges not responsible? I say they ought to be held to an account, as well as all the other agents of the people. But, the doctrine has been advanced on this floor that a judge should be responsible to no man, nor no human power. Yes! that is the doctrine which has been contended for here—that a judge of the commonwealth of Pennsylvania should be controlled by no man, nor no human power.

If you were to make judges of angels, I might believe the doctrine, but so long as the judges are nothing but poor, frail mortal men, (as the gentleman from the county of Philadelphia says,) I cannot give my sanction to it. For my own part, I believe that judges are neither better nor worse than other men. I believe that they require watching like other men; I believe that they require the restraining influence of the law like other men, and if a judge is to be frightened from the discharge of his duty, simply because the law watches over him, as it watches over other men, he never was an honest man, and he never will be. Carry out this principle, and see how it is. What is its operation? How is the case in relation to members of congress? How is it in relation to the governor of your commonwealth? Why do you hold the governor responsible? Why do you restrain him? Why do you restrain the members of congress? Is it not because you are afraid that they will legislate for the strong against the weak, that they will shrink from the fearless and faithful discharge of their duty? Will gentlemen who stand up here, for the inviolability of the judicial character, have the goodness to point out to me, in what respect the duty of a judge is different from that of any other man acting as the agent of the people? Is it because his duties are of a judicial character? Is it because a man may discharge other duties honestly and with the fear of God before his eyes, and yet when he comes to discharge the duties of a judge, you must not touch him, for that the moment you do so, he ceases to be an honest man? Sir, this is no new doctrine—it is of a much more ancient date, than some gentlemen seem inclined to think. It has always struck my mind as a solecism to say, that the best men are chosen as judges, and yet that they will be reduced to a state of dependence that they will shrink from the discharge of their duties and will become poor, frail, erring creatures, because they are to be made responsible. Sir, I subscribe to no such doctrine. I have a better opinion of the judges of the commonwealth, and if I had not heard this doctrine come from a judge himself, I should have thought that it was monstrous.

It is to be presumed that the gentleman from the city of Philadelphia, (Mr. Hopkinson) did not contemplate the extent to which this argument may be carried;—but I put the question directly to him. So far as relates to himself, I cannot think that he believes the doctrine which he advocates. He has said upon this floor, that it is more than human nature

can do—that it is asking too much of a judge to do his duty when, by doing his duty, he knows he is to lose his office. I took down at the time some of the sentiments which several gentlemen expressed in the course of their observations, and I believe that some gentlemen forgot what they actually did say. The sentiment to which I have referred, however, is the sentiment expressed by the gentleman from the city of Philadelphia. I will ask him, if it is not.

Mr. HOPKINSON, rose to reply to the interrogatory of the gentleman from Bucks, (Mr. M'Dowell.)

In the first place, said Mr. H., I will take the liberty to remark, that I do not think it is in good taste to make these personal appeals. I never said any thing like that which the gentleman imputes to me. I did, it is true, put a certain case of strong temptation, in which I said it was too much to expect of human nature that a judge would do his duty.

Mr. M'DOWELL resumed. I took down the sentiment of the gentleman at the time he uttered it, and I did so with a view to prevent mistake. I will read the words as I wrote them, and I will be obliged to the learned judge, if he will say, whether they are not the words which he spoke. They are as follow :

“It is asking too much of a judge to secure you and destroy himself.” This is the precise language.

Mr. HOPKINSON. It is true I said so.

Mr. M'DOWELL resumed. I believe that this is nearly the same in substance, as I expressed it before, and as to the personal appeals of which the learned judge has spoken, I did not, and do not intend to make any. I have treasured up these opinions in order that I might be enlightened and benefitted by them in my future course of argument.

But, Mr. President, there is another curious thing in regard to the judges. The second section of the constitution of 1790, declares that the judges “shall, at stated times, receive for their services an adequate compensation, to be fixed by law, which shall not be diminished during their continuance in office.” So far this matter was carried, and so strange and curious a sort of being is a judge, that you cannot even diminish his salary for fear that you will destroy his integrity. Your forefathers, however, did not seem to think of one thing. They have made no security in the constitution, against a judge's salary being increased. Not a word on that point is to be found. What, let me ask, has the greatest influence on the mind of men—the fear of losing that which they have already got, or the hope of grasping more? I do not know which is the stronger influence of the two. I do not believe that any one of these things operates upon the mind of an honest man. I do not believe that when we raise to the bench, a man learned in the law—eminent for his talents and his integrity, (for so he is believed to be at the time of his appointment) I do not think that we have any thing to fear from such influences as these. I do not believe that they will have any effect upon the mind of an honest judge. I confess, that I am entirely at a loss to know, why you wish to shield this individual, more than any other, from a great and proper responsibility. I confess that I am unable to see why he

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cannot discharge honestly and faithfully the duties of his office, unless he is an irresponsible man; because the gentleman from Chester, as well as the gentleman from the city of Philadelphia, asks, will you make your judges responsible to the executive? Will you make them responsible to the representatives? Will you make them responsible to the popular will? To all this, suppose the gentleman say—no. The question then comes, to what power will you make them responsible? Does the gentleman from Chester, (Mr. Bell) democrat as he is, intend to say that the judges must not be held responsible to any human tribunal neither to the executive, nor to the legislature, nor to the popular will?

I am free to confess that an honest, conscientious, upright judge is not to be awed, nor swerved by the fear of the law; he has no need of such influence or protection. But in as much as judges are but men, frail, fallible creatures as they are said to be, it may chance that they are not all honest; it may chance that they are not all conscientious; it may chance that they are not all upright; and therefore for the purpose of guarding the people against the tyranny and wrong of a dishonest, despotic, or tyrannical judge, I would have them all made responsible to the law. With the honest, the independent and the upright judge, the law will never interfere, because he will never be swerved from his duty by such influences as have been here alluded to. It may have a tendency to awe the dishonest judge into the performance of his duty; but it never can touch, affect, or awe the honest and the upright man.

Mr. President, there is no dispute in any part of this hall, as to the integrity or the independence of the judges. On this point, none of us entertain any doubts. He would be worse than a madman who would express any other opinion than that the judiciary of the commonwealth of Pennsylvania, are upright, honest and independent; that is to say, that they discharge the duties of their offices independent of any external considerations or circumstances.

There is, however, another side to this question, and it appears to me that, up to this time, the whole matter has been argued with reference only to one single consideration—that is to say, to the protection of the judges. Do we forget that the people—and the rights, property, liberty and reputation of the people, need protection as well as the judges? The gentlemen who take the opposite side of this argument, would not have the law supervise and operate upon the judges of the commonwealth, for fear that they should thereby swerve from the direct path of their duty, and they would not place in the power of the people too easy a remedy for the many and bitter scenes of which they might have cause to complain, for fear that by so doing, they might injure the independence of the judges.

Now, sir, let me ask, whilst you are doing all this for the judge, what are you doing for the people? How many suitors are injured by the dishonest discharge of the duties of the judge? And are not the people to be protected as well as the judge? Have they not a right to claim any thing at your hands? Is it not better that an honest man should occasionally be found guilty of misdemeanor in office, even if he were not actually guilty, than that the people's rights should be trampled upon, or that they should not be regarded at all. It would be better that a judge

should sometimes suffer wrong, than that the rights of the people should be disregarded or set at naught. You must not forget—for you are not at liberty to forget—that while you are contesting for the rights and immunities of judges, the people also have rights to be maintained. It has been said that the judiciary is the most important branch of the government, that it decides daily on the property of the people to the amount of thousands upon thousands, and upon the rights of the people. It is true that such is the case. And since it is so, how careful should we be that no judge should be permitted to be beyond the reach of all responsibility. It is important to the interests of the people—it is important to the rights of the people that a proper responsibility should be enforced; and the people are entitled to protection as well as the judges.

This brings me, Mr. President, to a second point in the discussion of this question

We all agree that the judges of our courts should be honest men. We all agree that they should be learned men—and we all agree that they should be fearless and upright in the discharge of the duties of their office. On any of these points, there is not any difference of opinion here or elsewhere. And we all agree that they should be independent. This then is common ground upon which we can all meet. Now, the great question is, in what way will you make your judges most independent, so as not to wrong the people as to those rights and interests they are called upon from time to time to protect, upon whose liberty, and life, they are also called upon to pass judgement? This is the question; because as I said before, at the same time that you throw a necessary protection around the judge in the discharge of his duties, and to enable him to maintain his independence and to keep straight on in the path of his duty—while I say, you do this, you must, at the same time, remember that the rights of the people are also to be protected. It is, therefore, an important and a nice point to settle, how far you will, or can protect the judge without trespassing on the rights and immunities of the people. It is a nice and critical point to determine how far you will maintain his independence, and yet not place him in a position where he will be above all human responsibility.

Well sir, upon the one side, it is contended that nothing but the tenure of good behavior, as it has been denominated, and which is to all practical intents and purposes, as I propose to show, a life office—will protect a judge in his rights and independence.

Upon the other side it is contended, that a tenure, during a term of years, with the privilege of being re-appointed, sufficiently protects the people, while at the same time, it protects the judge. And this brings us to the point which is now at issue between a tenure during good behavior, and a tenure during a term of years.

Now, Mr. President, I must here be permitted to say, as I can with perfect candor, that I am an advocate of the tenure during good behavior. I believe in the necessity of such a tenure—I believe in the virtue of it. And I believe the only legitimate and proper tenure during good behavior is a tenure for a term of years. But do not let any gentleman tell me that, if you put a man into office for life, that is a tenure during good behavior. If it is, as gentlemen say that it is, a tenure dur-

ing good behavior, why shrink from accountability? At the expiration of the term for which a judge may be appointed, all that he has to do is to apply to the source of all power and to ask a re-appointment. The question will then be, sir, have you behaved yourself well? How did the people say that you have performed the important duties of your office? If nothing should be said against him, he will, as a matter of course, be re-appointed. And this, Mr. President, is the only true and practical tenure of good behavior, that is known to the law. It is in vain to say that it is not so.

But gentlemen have told us, that honest and upright judges may not be re-appointed when they deserve to be so; while dishonest, frail and dependent men may be reappointed. To get at this argument, to give it any consideration or weight—you have to assume the fact that the appointing power is corrupt and dishonest. There is no other way in which the argument can be of any avail. You must begin by assuming that the governor is corrupt and dishonest; and if gentlemen are to set out in their arguments with assuming that which does not exist, why, we all know it will be a very easy matter for them to arrive at any conclusions which may best suit their purposes. But I have not heard any difficulty raised upon this point. I have not heard any gentleman advance the position that no trust or confidence is to be placed in our senators or in our governors to be hereafter elected; or that there is any danger to be apprehended that they will fraudulently exercise the appointing power. Gentlemen have no right to assume this. I go upon the premises—and I have an undoubted right to the argument—that the appointing power is a correct and intelligent power—that they will do in behalf of the people, that which the best interests of the people seem to require—and that they will not wantonly or without proper regard to those interests, make injurious or dishonest appointments. Take away, then, the assumptions on which the opposite arguments are founded—that is to say, that the appointing power is dishonest and that it is not worthy to be trusted, and what follows? As a matter of course, the arguments themselves fall to the ground. Gentlemen have told us that if a judge under a tenure for a term of years, is not an active politician, there will be little or no hope of his ever being re-appointed. Sir, I do not believe it; I cannot believe it. I never yet knew a judge of a court that did not interfere in politics, and who faithfully performed the duties of his office, that was complained of. I can refer to instances within my own knowledge. We may feel assured, that if a judge demeans himself well, and carries himself unoffendingly among his fellow citizens, there will be no difficulty in the matter of his re-appointment. I do not believe that there is a single delegate to be found in this body who will say, that any judge in the commonwealth of Pennsylvania has become obnoxious, from the fact that he has discharged his duty faithfully. There is not I believe, such an instance to be found. I have more faith in the integrity, in the intelligence, and in the virtue of the people of the community over which a judge presides, than to believe any such thing. Therefore, I contend that if a judge demeans himself honestly, if he is impartial in the administration of justice between man and man—and if his manners and habits, as a man, are unoffending to the community, I contend that the people will never take a dislike to him—that he never will become obnoxious—and that he never will be in

any danger as to his office, so far as that danger may be supposed to result from an honest discharge of his duties. In this respect, judges are like other men. They have their duties to perform, like a member of congress, or a member of this convention. We have all our duties to perform in this body, and if we do not faithfully perform them, we know that we are responsible to the popular will; we know that we are responsible to our constituents. And will it be contended that a member of this body will shrink from the performance of his duties here, because he may be subject to the will of his constituents? Will it be contended that *therefore* he is not fit to be trusted? I apprehend that no gentleman would undertake to defend such a proposition.

How then does the tenure for a term of years operate? It is said that its effect will be injurious. It is said that, under the tenure of a term of years, the judiciary will be dependent on the executive will—that a judge will be disqualified for the proper discharge of his duties, because as the period approaches at which his term of office is to expire he will find it necessary to make fair weather—to join a political party, and that while, by doing so, he gives satisfaction on the one side, he will on the other give great offence.

When we are told that a judge, whose tenure of office is about to expire, will not do his duty, because he thinks he will not be re-appointed, I must confess that to my mind it is a most singular argument, and one I do not understand. I should have supposed that when a person has stood high, and wants to stand higher—when he has received favors from a certain source, his own feelings would prompt him to an upright and fearless discharge of his duty. The argument may be well founded, when predicated on the supposition to which I have alluded. But, suppose that he has discharged his duty faithfully, then the argument falls to the ground. It is contended by a portion of the conservatives, that the judge should be responsible to some power—that he should be made subject to some law—that the present power of impeachment is not ample—that it is insufficient. Now, let us examine this matter, because I confess I am not only in favor of a limited tenure—but am in favor of a majority of that body—whether it be the senate or the house of representatives, deciding upon all matters of the kind. Prejudiced as I am, I believe in the potency and virtue of the majority. How does the power of impeachment operate? How has it operated? Why, gentlemen tell us that there is not a long catalogue. I believe I have before me a list of those who have been complained of, and I am sorry to see the name of one man, (Mr. M'Dowell,) among the number. I think there have been some twenty, or thirty, or forty, judges complained of since 1791, perhaps 1801–2. While, it is said, that only one judge has been impeached successfully, one removed by address to the legislature. Mr. M'D. said that was really the fact. There had never been an instance of a man's being brought before the senate, whose actions had not been represented as so criminal as to justify his being arraigned there, in which the senate found no difficulty in coming to the conclusion that he was guilty, or represented that he was, if obnoxious to the party then in power. Therefore, it was contended, it was necessary to have the concurrence of two-thirds, to dismiss. Well, it might operate very well. But, let us

suppose a judge about to be convicted, to belong to the popular party, and there was no doubt of his purity coming within the law of independence, he (Mr. M'D.) would ask if they would undertake to have that man successfully impeached? They might undertake—but that would be all. It was just as good in the one case as the other. Neither were to be exactly relied on, and neither were exactly safe. But, it was said that the impeaching power of Pennsylvania had operated beneficially. Mr. M'D. was about to proceed to show how it had operated, when he was arrested on his remarks by

The CHAIR, who apprized him that he had spoke out his hour.

JANUARY 25, A. M.

The convention again resumed the second reading of the report of the committee to whom was referred the fifth article of the constitution, as reported by the committee of the whole;

The amendment to the second section of the said report being again under consideration.

Mr. M'DOWELL, rose and said ;

When I addressed the convention last evening on the subject of the present judicial tenure in the state of Pennsylvania, I was endeavoring to show the inefficiency of the impeaching power under the provision of the constitution of 1790, and I was about saying that the power which the law really contained had been generally evaded by the legislature, and as an evidence of this fact, I was about to introduce to the consideration of the convention, the cases of judges, who have been brought before the legislature, charged with offences in their official capacity. And I was about also to show that, from time to time, the same men have been brought before the legislature, and that each time the consideration of the complaints have been postponed by the legislature. It has been asserted in the course of debate on this floor, and contended as an argument in favor of the existing power of impeachment, that although the charges which have been made against judges and have been brought before the legislature, have not received the immediate action of that body, still that they have had the beneficial effect of frightening the judges into a resignation of their offices.

It has been asserted that the senate, sitting as an impeaching power, as a court of high criminal jurisdiction, is a tribunal of great importance as well to the parties accused as to the interests of the commonwealth. And if it be so, if the senate is a high impeaching power, then it is of the utmost importance that that body, sitting to decide upon the criminality of these high officers of the commonwealth, should act in that capacity not only promptly, but directly and certainly. And when I say that the legislature have evaded their duty in this particular, according to the arguments of gentlemen upon this floor, I say nothing more than what appears to be strictly true; if the concessions made here in relation to the

impeaching power are to be taken as true. If the senate is the impeaching power, let me ask, what right has that body, sitting as a high court of impeachment, to banter with the criminality of any judge against whom charges of official misconduct may be brought? If an officer is brought before the senate charged with an impeachable offence, it is an accusation brought by an injured community. That community has a right to be heard. I say, sir, that community has a right to be heard, yes, and to be heard immediately without delay or loss of time. And there is no feeling of mercy or sympathy—or rather I should say, there ought to be no feeling of mercy or sympathy—in the minds of the legislature. The legislature is bound to hear it, and bound to hear it on the spot, and at the time the accusation is presented. What more authority has the senate as a court, to evade accusations, out of sympathy or mercy towards the accused party, than the judge of a court, actuated by feelings of a similar character, has a right to evade a criminal charge brought against an offender? Suppose a man to be accused of murder! Or, suppose a man to be accused of perjury. What would you think of that court asking time for another term, in order that the party accused might have time to run away? And this is the argument which has been advanced by gentlemen here; that although the legislature do not act immediately, yet that beneficial results have followed; that the judges have been rebuked, that they have been terrified—that they have been admonished to resign their commissions by another term of court—or within a given space of time.

Now, the judges against whom these charges have been brought, were either guilty or not guilty. According to the constitution and the law of the land, the parties bringing these complaints against the judges had a right to be heard. I know of no sympathy in this matter. I know of no sympathy that a judge is entitled to on such an occasion. As I have said before, he is either guilty, or he is not guilty. Either the party had preferred a frivolous accusation, or he had preferred a substantial accusation. In either point of view, it is the duty of the senate to have the case decided. At the time these matters are in the course of agitation, are there no considerations of public policy to be regarded? Are there no considerations of justice belonging to the party complaining? While you are giving to a tyrannical or unjust judge, an opportunity to escape the disgrace which would fall upon him by conviction, or by removal from office, are you not to take into your consideration, what is due to the injured party? What is to become of them? Are they to be passed over as though they were not entitled to notice? Must they yield to sympathy for the judge? Must they yield to sympathy for the criminal? It is for this reason that I say there has been an evasion on the part of the legislature—that the power contained in the constitution of 1790, has failed to answer the necessary purpose.

But, sir, this is not all. There are other evils attending this system. What is the present process of accusing a judge?

In the first place, who is it against whom you prefer the charge? It is against the president judge of a court of common pleas—of the court of a district. He has his power. And here I take leave to say that I differ from the learned gentleman from the city of Philadelphia, (Mr. Hopkin-

son) when he asks us, as he did, who is so powerless as a judge? I do not intend to say that a judge, by virtue of his office, possesses political power. I do not mean to say, that all judges exercise political power. No judge who has a proper regard to the duties of his office, would do so. Yet they have power. Their power over the community is enormous—it is nothing less than enormous. Where is the man to be found who would wish to come in contact with judicial power? Where is the man who would wish to be brought in contact with a judge, or who would willingly expose himself to the enmity of the judge? Where is the man whose lot it may not be to-morrow, to have a court decide upon his character, his property, or his liberty? And is it to be said that judges have no power. Sir, they have power—power connected with the very nature and dignity of the office. There is a monstrous power in the judicial bench. It is unseen; and probably it is unfelt, until such an occasion as this arises, when it is exercised by every judge in the community. Where is the man who does not weigh the consequences of bringing an accusation against a judge? Where is the man whose moral courage is equal to the task of accusing a judge? Sir, there are few men who would like to do it? The gentleman from Northampton county, (Mr. Porter) has said, that the cry against the judges, has arisen sometimes in disappointed and vexed suitors, and sometimes in disappointed lawyers. Sir, I will appeal to the experience of that gentleman. I say it is not exactly true. So far as relates to the bar, I believe that it is neither the interest nor the inclination of its members to find fault with, or set themselves in opposition to the court in which they practice.

I appeal to that gentleman to say whether it is not the first business of young men who go to the bar to gain the influence of the court? Whether he has not seen them—I have frequently seen them—playing the sycophant at court. There is nothing like having a friend at court. It is a feather in a young man's cap to say, "I am a favorite with the judge." If he can make the community believe it, he has a fast foot-hold of them. And does he not possess the power of calling down the enmity of the judge on those who may be obnoxious to him? Do you believe that any member of the bar would wickedly, causelessly, provoke the ire of any judge? No. Not only do lawyers calculate it, but it is calculated by the suitors and it is very seldom, though there may be cases where frivolous charges are made, such as were mentioned by the gentleman from the city of Philadelphia, (Mr. Hopkinson) but they are rare, compared with those of longer duration and the difficulty of which is to reach the source of remedy. Out of the thirty or forty judges that have been complained of from time to time in the commonwealth of Pennsylvania, since 1791, (I have been told, I know not how true it is) one single judge only has been impeached and one removed by address to the legislature. Now, have the judges all been right, or have they all been guilty? Or, have the people who complained from time to time—I speak of communities—for it is a matter generally joined in by communities—large masses of the people—been wrong, and preferred charges against innocent men? Is it so? Or, has there been a shrinking—a failure to carry into effect, the impeaching power? Just in proportion to the importance of the judicial character of Pennsylvania, is it important that that judicial character should be upheld and that justice should be fairly and properly and promptly administered.

And whenever there is a spirit wanting to carry the provisions of the constitution into execution, there is a failure to do justice to some party or other. There is a failure to do justice to the people on one side, while at the same time it is said, there has never been an instance of an attempt to shield a judge. And, just in proportion to the attempt made to shield a judge, do you do injury to those who preside with him. There is now an unnecessary and improper protection thrown around the character of our judges. No man could have a higher opinion of the judicial character of Pennsylvania, than I have myself, and no man is willing to labor more, or to go further to secure a pure administration of justice than I am. Give me integrity—give me purity—give me honesty—give me every thing that is granted by the constitutional provision and thrown around the judicial character. Give me a prompt execution of all the duties that belong to the office, I will risk the judicial independence. I hold it to be a cardinal principle of the judiciary of Pennsylvania, that the laws shall be not only promptly and honestly executed, but that justice shall be satisfactorily administered.

I would even go further, and say, that the laws shall be not only honestly, promptly, and uprightly administered, but that it is due to the people—due to the community, that when justice is administered, it should be administered to the satisfaction of the people. But suppose a case—and such a case may arise—I do not doubt that there have been cases in Pennsylvania—it may be that a judge is uprightness and honesty—it may be that in his office, he acts correctly, but it may be that there are some circumstances, in connexion with his private character, or relations that have rendered him exceedingly obnoxious. Such may be the objections to his character, or to his connexions, that however honestly, fairly and promptly he may administer justice, still he may not be satisfactory to the people. I do not mean that a judge should be removed from office, merely on this account.

But, with regard to a limited tenure there is this advantage—that although a judge may have done nothing to forfeit his office—nothing to forfeit the judicial confidence that should be placed in him, yet, as we must on this, as on all other occasions, minister to men's prejudices—for they must be regarded—an opportunity would be afforded, not to remove him from office, but to send him to another district, where he is unknown. And, this would give satisfaction to the people. The judge may have done nothing to forfeit the office he holds, but seeing that he is obnoxious to the people of the district in which he presides, he would rather administer the law in another portion of the community where he might be more acceptable. Hence, sir, the benefits that would arise from the adoption of a limited tenure.

Sir, I am entirely opposed to a local judiciary. I believe that one of the great evils of the system—one of the cardinal and prominent evils of the judiciary system, is the locality of the judges to the people. Sir, I repeat that I regard it as a cardinal evil, and that we never will have a perfect judiciary and a perfect judiciary system, until the practice is abandoned. I believe that justice would be better administered—that the duties of the judge would be better performed, if we had a better system in the commonwealth of Pennsylvania. It is the locality of the judge to the

people among whom he dispenses justice, which sometimes makes him unpopular. He has his political friends and his political enemies. He may be a violent politician, and although he may feel conscious of doing justice to men of all parties, when administering the law, he will find that it is impossible for him to create that impression among the community. I hold, then, that it is of the highest importance that when justice is administered, it should be satisfactory to the people. Sir, it would be much better if we could have a judiciary on the rotatory principle—if we could have men brought from different parts of the community, to preside where they are free and unshackled by the ties of relationship and old associations. By the adoption of a limited tenure, this would be partially effected, although the principle cannot be carried to the extent I desire, yet it may be accomplished from time to time, as the judges' commissions expire, and are renewed.

Sir, these are some of the reasons why I say the impeaching power of the present constitution is annihilated—that it is a farce—that it is a dead letter, and never has been carried into execution, but with one or two exceptions merely. Enough on that subject.

It is said that the present change, which is about to be made, is an experiment—that the appointment of the judges for a term of years, instead of for good behavior, which has been denominated an appointment for life, is nothing less than an experiment, and that it is introducing an important alteration in the fundamental law, of the land; an assertion he had already denied. But, suppose it to be an experiment. And, I know that in the estimation of some members of this convention, it is a very dangerous experiment. I know that in the opinion of some gentlemen, it is dangerous to run counter to that which our forefathers regarded as right and proper, and did for us. I am aware, sir, that some delegates in this body firmly believe that we are less wise than those who have gone before us. I know, moreover, that it is not only the impression of a great many of the members of this convention, but that, perhaps, it is the general opinion that to change a fundamental principle of the government is an important matter, and therefore ought to be approached gravely and carefully. This is the doctrine—whether true or false, I will show directly. It is a doctrine, not confined to one party—not confined to the conservative party—but, it is the doctrine of almost all parties, that it is dangerous to alter the fundamental law of the state. I perfectly agree, sir, that frivolous alterations should not be made—that unless there exist a great necessity for a change of principle, it ought not to be made. But, I deny the doctrine that in a republican government it is a dangerous matter to touch the fundamental law of the land. It is a good doctrine in a monarchy. But, in a country like this, where the government is a matter of choice, it does not at all apply. Sir, there is an essential difference between the government of this country and the government of England. There is a very material difference between a republican government and a monarchy. In this country, the government belongs to the many, while, in other countries, the government belongs to the few. What, sir, is the fundamental law of the land? Why, it is this government, which was entered into by the people. And, are not the people competent on all occasions? Are not the parties to

the instrument, who made the instrument, and who signed it? And, are their successors and their children, who follow after, less able to do it, than those who entered originally into the compact? I say, sir, that this doctrine, is the doctrine of tyrants. It is the doctrine of tyranny over the mind. It is the doctrine of a monarch to an enslaved people. You must not change the fundamental principle of your government, however great the evil. Sir, it is the doctrine of a monarch to tell his subjects—to say to his people: “You cannot change the fundamental law of the land. It is dangerous; it is wrong in itself.” I believe that the people of the commonwealth of Pennsylvania are just as competent to change the laws of the land now, as they have been, or will be at any future day. And, I believe that the constitution of Pennsylvania, in the hands of the people, is as clay in the hands of the potter. What is it? A written constitution. And, I believe that the people of this country are the only people that have written constitutions. And, what is the argument after all? Why, that the people cannot change it—that they do not grow wiser than those who have gone before them—that they cannot, and should not, alter and amend their government so as to accord more nearly with the spirit of the age and times. This was the argument. Why, say those men, in so many words, the people grow little wiser by experience. They say, why is this change of opinion? Why is this departing from the principles of our forefathers? I answer, for similar reasons that actuated the framers of the constitution of 1790, who thought they were then wiser than the framers of the constitution of 1776. I ask, sir, was it not right and proper for them to change the constitution of 1776, in 1790? So it is for us to change the constitution of 1790. They had lived only fourteen or fifteen years under their constitution, while we have lived fifty. If there be any advantage in time, we have had it. I say it is exercising a tyranny over the mind, when gentlemen undertake to hold in terror over the people the idea that they must not interfere with the fundamental law of the land. What, sir, is the result? What is the argument? The argument is, that you must shut your eyes; you must close your intellect; you must take every thing for granted, to be perfection, and not make any inquiry as to it. Such, sir, has been the doctrine all over the world. The names of Hampden and Sydney, have been introduced here. Why, sir, they were martyrs to the very spirit for which we are contending here. What did they fall martyrs to? Their own spirit of freedom and independence—for they had the boldness of mind to avow their belief, that the government under which they were then living, was not the best government in the world. They dared to assert their opinions candidly, and freely, and openly. Is this an experiment? Because, if it be an experiment; if it be true that there is danger in making the experiment, and that there is no necessity for making any alteration, then, I am free to admit that the change ought not to be made. But, sir, the question is—is it an experiment? I say—certainly not. In the first place, what does it contemplate to do? To change the tenure of the judiciary, from the tenure for good behavior, which is said to be a tenure during life, for one for a term of years. And, that is said to be a monstrous alteration—a cardinal alteration in the law of the land. Where, sir, are your district courts? Where your district judges? I would appeal to the gentlemen from the city and county of

Philadelphia. I might also appeal to the gentleman from the city of Lancaster. And might I not appeal to the gentleman from Pittsburg? Have they not judges in those courts, who hold their offices for the term of five or ten years? And, I ask those gentlemen whether it is, so far as they are concerned, an "experiment?" Certainly not. There is no experiment about it. The matter has been tried; and if there is any complaint against them, I have not heard of it. On the contrary, I have heard it said that the district judges are the best judges. And, it has been said, that the difficulty was in getting competent men to fill the offices. Experience, however, has shown no such thing. There was no trouble in obtaining the most able and competent men to fill those offices. What is the question immediately before us? It is on the amendment of the gentleman from the city of Philadelphia, (Mr. Meredith) to strike out the tenure for a term of years, as regards the supreme court, and to allow them to hold their appointments during good behaviour. And, we were asked to draw a distinction between the judges of the supreme court and the president judges of the common pleas. If it be a principle, valuable in itself—if it be a principle distinct in its character, I confess I can see no reason to apply it to the common pleas, and not apply it to the supreme judges. Now; I say there is great force in the argument, that, if there be danger at all, there is less danger as regards the supreme court than the common pleas. Who, I ask, sir, are the judges of the supreme court? They are men of high standing. I never heard any thing against them, except what I have heard on this floor. And, the people generally know nothing of them. How does it happen? They are removed from, and out of the reach of the people. They are not like those judges who sit *in banc* and who decide questions of law. It is not to those judges the principle will apply. There is ten times more danger in the common pleas—the judges of which have to sit in judgment in the respective counties, to decide on the rights and interests of parties and are concerned in the granting of licenses, in the appointing of auditors and commissioners of roads, &c., and are engaged in such a way as is likely to bring them into dispute. But, there is no danger as regards the supreme court. They decide matters of law. And, I have heard great complaint made as to their decisions. This, however, is not a difficulty in which the president judges could become involved. It is with the interference of the facts of the case that there is more offence given to the people. I call it the exercise of illegitimate power, because, in many cases, the court is both judge and jury. It is an interference with the jury.

If, sir, this is an important principle, and if it is valuable to the judicial character of Pennsylvania, then I maintain that it is doubly important as regards the judges of the supreme court. And, why, should it not be? Why, gentlemen say, the danger is of introducing instability into the decisions of the court. The danger is of having changes introduced into that bench. Sir, let me not be misunderstood. I do not wish to change any where. Gentlemen, take it for granted that because a judge's commission expires under the proposed limited tenure, that he will not be re-appointed. I deny the correctness of the position. I do not see why a man, whose commission expired to-morrow, should not be re-appointed. I know, as I have already said, of no complaint against any of

the judges of the supreme court, and I am willing to see them re-appointed when their commissions expire, if they continue to perform their duties as they have heretofore done ; but as the principle of a limited tenure, has been decided by this body to be an important principle in regard to the judges of some of the courts ; I desire to see it carried out in regard to the judges of all the courts, from the lowest to the highest.

JANUARY 12, 1838.

FIRST ARTICLE.

The convention resumed the second reading of the report of the committee to whom was referred the first article of the constitution, as reported by the committee of the whole.

The question being on the amendment submitted by Mr. **HIESTER**, to the amendment of Mr. **REIGART**, striking therefrom, all preceding the word "nor," and inserting as follows :

"The legislature shall not grant or renew any charter of incorporation, until after three months' public notice of the application for the same shall have been given in such manner as shall be prescribed by law. Nor shall any corporation hereafter created, possessing banking, discounting, or loaning privileges, be continued for more than fifteen years without renewal ; and no such corporation shall be created, extended, or revived, whose charter may not be modified, altered, or repealed by the concurrent action of two successive legislatures, subject to an equitable and just indemnification."

Mr. **HIESTER** rose and modified his amendment, so as to read as follows, viz :

"No corporate body shall be hereafter created, renewed or extended, with banking or discounting privileges, without six months' public notice of the application for the same, in such manner as may be prescribed by law. Nor shall any charter for the purposes aforesaid, be granted for a longer period than twenty years ; and, every such charter shall contain a clause reserving to the legislature the power to alter, revoke and annul the same, whenever, in their opinion, they may be injurious to the citizens of the commonwealth. No law hereafter enacted shall contain more than one corporate body."

Mr. **CRAIG** apologised for offering an amendment at a time when the patience of the convention was borne down with the numerous amendments which had been already proposed.

The amendment now offered contained a very important principle, which he would explain in very few words ; the amendment offered by the gentleman from Lancaster, (Mr. **Hiester**) contained a provision for

indemnifying the banks, as it was originally offered, but the delegate has changed and modified his proposition so often, that it has entirely lost its originality, and is now defective in this particular.

There are but two cases in which the legislature will be likely to repeal the charter of a bank. First, in case of mismanagement—gross mismanagement. In that case, the sooner the charter is repealed, the better for the stockholders. It is true that those who mismanage the bank, may turn it to their own advantage, whilst the stockholders generally are suffering a loss; for it is a well known fact, that unless a bank is well managed, it will always be an unprofitable concern. It therefore follows that no damage can arise to the stockholders, in consequence of repealing the charter of a mismanaged bank; and no judicious men, chosen as stated in the amendment proposed, would give damages, and the state would not be compelled to pay damages under such circumstances.

The other circumstance which may occasion the repeal of a bank charter, is political excitement; this has been alluded to by the delegate from Allegheny, (Mr. Forward) and it is only necessary for me to turn the attention of the convention to it. A bank may be dragged into politics by refusing to appoint some political aspirant one of its officers, or by refusing a loan to an influential politician, and thereby incur the displeasure of a party, (I allude to no particular party) and if the party thus offended should have a majority in both branches of the legislature, and a governor, the bank would be in their power. And is it too much to say, that in time of high party excitement, the charter of a bank may be repealed unjustly, without remedy or compensation? The legislature that would take away the charter unjustly, would, on the same principle, withhold compensation, unless compelled to do so by the fundamental law. He regretted the necessity of detaining the convention one moment at this very late hour of the night, but in order to do justice to this subject, he felt bound to take the yeas and nays.

JANUARY, 16, 1838.

The convention then resumed the second reading of the report of the committee, to whom was referred the second article of the constitution, reported by the committee of the whole.

The eighth section of the said report, amended by the committee of the whole, being under consideration, as follows, viz :

SECTION 8. He shall appoint a secretary of the commonwealth during pleasure, and he shall nominate, and, by and with the advice and consent of the senate, appoint all judicial officers of courts of record, unless otherwise provided for in this constitution : *Provided*, That, in acting on executive nominations, the senate shall sit with open doors, and, in confirming or rejecting the nominations of the governor, the vote shall be taken by yeas and nays."

The question recurring on the amendment to the eighth section, as amended by the committee of the whole, by inserting after the word "second" in the fourth line, the words "and all other officers whose offices are, or shall be, established by law."

Mr. CRAIG said, that, after long delay, we have arrived at a part of the constitution, where the people of the commonwealth are looking for action on our part; if there is any one measure in which all are agreed, it is in this, that something should be done to allay the excitement which, in Pennsylvania, always precedes the election of a governor. For this very purpose we are assembled in convention.

I admit that we may readily go to an extreme in taking away executive patronage, but there can be no danger of that error in offering the amendment now before us, inasmuch as it is calculated to increase executive patronage, by conferring on the executive and senate the residuary power of appointments, that is, to fill all offices now in existence, that may not be provided for in this constitution, and all offices hereafter created by law, which may be numerous.

The report of the committee of the whole, leaves this residuary power with the legislature, where it is safer than to confer it on the governor and senate, for I cannot believe that the legislature is so corrupt as is sometimes asserted here. The legislature will have the privilege of exercising the power thus conferred on it, giving it to the governor and senate, or to the people, which, to say the least of it, will be a great convenience.

The delegate from Beaver, (Mr. Dickey) says, there is great danger in leaving this power with the legislature, to create offices, and fill those offices themselves. I do not think so; experience drawn from what is past, shows that the danger is on the other side; the legislature have not retained to themselves, nor to the people, the power of filling many offices which could have been very conveniently filled by a vote of the people, or by the legislature; in this way the patronage of the governor has been constantly increasing. The constitution of 1790 did not require the governor to appoint canal commissioners, and a numerous class of officers spread over the whole commonwealth; these offices were not contemplated by the framers of the constitution of 1790, and were not provided for. The legislature has created these offices, and conferred on the governor the duty of filling them; in this way the executive patronage has been extended and enlarged to an extent never thought of by the convention of 1790, and to an extent alarming to the community. This extraordinary increase of executive patronage is one of the fruits of party spirit, and being thus increased, it fans the flame of party spirit, which is consuming the vitals of our republican institutions. When a party comes into power, it grasps all the power possessed by the party that preceded it, and will, if possible, acquire more power, and exercise it to the advantage of the party. When a governor is elected, his party generally have the ascendancy in the legislature, who confer the power of appointing officers on the governor, and he gives it back to the party that placed him in office, by appointing his friends in the party to fill these offices; by this process, friends are mutually accommodated. The legislature but rarely, if ever, employ a printer of the laws, but hand it over to the gov-

error, or his secretary, in order that he may accommodate some influential political printer.

Now, sir, the amendment proposed, will be giving a sanction to this course of legislation. Nay, it will compel the legislature to adopt this mode in filling all offices hereafter created.

The delegate from Beaver, (Mr. Agnew) has one, and only one objection to the report of the committee, that is "that the legislature may create an office, and not provide for filling it." That, sir, would be an extraordinary case indeed, the legislature knowing that the governor had no authority to fill the office, and having the law before it, forget to provide for filling the office!! would be as extraordinary as if a gentleman should build a house, and forget to live in it. I trust that this objection will not stand in the way of the gentleman, in voting for the report of the committee of the whole.

JANUARY 17, 1838.

The convention proceeded to the second reading of the report of the committee on the third article of the constitution, as reported by the committee of the whole.

The first section, which is as follows, was then read :

"SECTION 1. In elections by the citizens, every freeman of the age of twenty-one years, having resided in the state one year, and, if he had previously been a qualified elector of this state, six months, and within two years paid a state or county tax, which shall have been assessed at least ten days before the election, shall enjoy the rights of an elector. Provided that freemen, citizens of the United States, between the ages of twenty-one and twenty-two years, and having resided in this state one year before the election, shall be entitled to vote, although they shall not have paid taxes."

Mr. CRAIG said, his worthy friend from Juniata, (Mr. Cummin) seems to think that he is the representative of his and my friends in Ireland, and that an attack is made by honorable members of this convention on the loyalty and bravery of his constituents. In this, sir, the delegate is entirely mistaken, no one has, no one dare cast such a reproach on these noble-hearted Hibernians, the delegate's constituents. Whether they are yet in Ireland, or in the United States, we all acknowledge that they are soldiers—fighting, warlike men, who never feared an enemy at home or abroad. The delegate who represents the hardy, patriotic mountaineers of Centre county, (Mr. Smyth) has fallen into a similar error, (by way of sympathy) in supposing that the bravery and patriotism of his constituents are implicated. Not so, gentlemen; the question before us this morning is on the right of suffrage, "shall a voter reside within his district ten days before he is entitled to vote, or not?" I believe this restric-

tion to be necessary to prevent fraud in elections; if the amendment is not adopted, a person entitled to vote in any one district, can vote in any other part of the state, without reference to residence: thus you open the way for a general amalgamation of voters throughout the state, and nullify the district system. It is said that voters are now illegally imported into some counties in the states, in time of strong political excitement, and frauds are committed. Is it not right and proper that we should place a bar in the way of those who are disposed to exercise this right improperly. But very few will be prevented voting who are residents of the state, by the amendment, and they will be on both sides, whereas, illegal votes are generally on the wrong side; if there is a corrupt party, fraudulent voters will certainly be for that party.

I rose principally for the purpose of calling the attention of the convention to the fact, that unless we adopt the amendment, we shall have returned to the principles of the constitution of 1776, which says, (chap. 2d, sec. 6,) every freeman of the full age of twenty-one years, having resided in this state for the space of one whole year next before the day of election for representatives, and paid public taxes during that time, shall enjoy the right of an elector, &c. Under that constitution there was no restriction as to being in the district, nor the time when the tax was to be assessed. After fourteen years' experience, the framers of the constitution of 1790, finding, no doubt, that this part of the constitution did not work well, made a change, that is, that the tax should be assessed six months before the election. This was to prove that the voter had a residence, and was assessed in the regular way. The committee of the whole has changed that part of the constitution of 1790, which requires the tax to be assessed six months before the election, and reduces the time to ten days, which renders it necessary to fix some time of residence within the district.

The framers of the constitution of 1790 were as intelligent, honest, and patriotic, as any body of men ever collected together in the state. They lived under the constitution of 1776, up to 1790, and at a time when every eye was turned to the operation of their new government, they abolished the principle contended for by gentlemen of this convention. I ask, should not their decision have some weight in this matter?

Having stricken out the six months assessment, let us now substitute ten days residence as the next best safe-guard against illegal voters.

The Stenographer feels it due to himself, to make a brief explanation of the causes which produced delay in publishing these Debates. It was the desire of the convention, that the members should have an opportunity to revise their speeches, before publication. For this purpose, the franking privilege was conferred on the stenographer; and in compliance with the sense of the convention, the manuscripts of speeches, whether such as seemed to require revision, or those the examination of which was requested, were transmitted for correction. A very short experience proved that the result of this process would be materially to retard the work of publication. Speeches were detained, in consequence of irregularity in the mails, or the absence of members, or the interference of professional duties at home; until it became necessary, to prevent the printers from discharging their unemployed operatives, to pass over the intermediate volumes (leaving a calculated space for the portions to be transmitted) and to re-commence with the more advanced stages of the proceedings. There was no alternative but the protraction of the work for years. But this arrangement has also been productive of its disadvantages. A great many of the transmitted speeches have never been returned, and most of those which reached the stenographer, came back "shorn of their fair proportions," curtailed, and changed, so as to produce the disparity in the size of the volumes left open for their reception, which would otherwise have been avoided. A few speeches which came to hand after the appropriate volumes were closed, have been presented in this volume, as a "General Appendix."



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