a/n

2. B. C. 344 c/n

Notes

On the method of commencing and prosecuting civil suits at common law, in Virginia.

Continued from Book IX. page 97.

Of appearance & pleading. — 3. 3. 6.

Having in the note at the end of the preceding Chapter pointed out the manner in which a suit is commenced in our Courts; the intermediate process between that and the time of the Defendant's arrest; and the methods by which the plaintiff may either compel his personal appearance, or obtain Judgement against him, or his Bail, or the Sheriff, according to the nature of the Case, if the Defendant still continues to stand out, or makes default; it will now be our business to shew what proceedings are to be had in Case he appears, pursuant to the writ, or the stipulations of his bail bond given to the Sheriff, for his appearance.

5. th Year. Where the Defendant means to appear and contest the suit, he is to enter his appearance at the first rule day, after the rising of the Court, in the Office of the Clerk; this is done in a Rule book kept for that special purpose. At this time, if he means to plead to the Jurisdiction of the Court, or to avail himself of any irregularity in the writ, or process, he

\+ Thus if the Writ be not indorsed pursuant to the
1794. c. 66. s. 25. Statutes which require the true cause of action
c. 67. s. 19. to be endorsed upon every writ; or if there be
not three days between the Teste, or, the Execution,
of a writ issuing from the County-court, and the
Ib: c. 67. s. 17. return day thereof; the suit may, for either of
these causes, be dismissed at the first calling, if the
Defendant appears, and excepts to it; or if he fails
to appear at the rules, so that an Office Judgement is
confirm'd against him, yet it seems now to be
settled, that he need not plead in Abatement, but
may take advantage of the irregularity by motion
to the Court at any time during the term next after
the Judgement was confirm'd against him, in the
1. Wash: rep: Office, but not after. So, if a summons issued against
pa: 153. 154. a person against whom a writ of capias ad respondendum
can not be regularly issued, be returned executed
V. L. 1794. by leaving a copy thereof at the Defendants house,
c. 66. s. 23. within ten days, before the return day, this
c. 67. s. 18. irregularity, if it appear upon the face of the writ of summons (as if
there be not ten days between the Teste and the return),
or by the return itself, may I apprehend be taken
advantage of in the same manner. But, if instead
of a summons, a capias be issued against ~~such~~ a
person so privileged; or if a Defendant being a resident
Ib. c. 67. s. 23. of one County, is sued in the Court of another County or
Corporation, in which the Cause of action did not arise,
and before a non est inventus returned upon a writ
issued

he ought to demand oyer of the writ, or other process,
and of the return thereon made; for it seems to be held that
the writ of capias is not necessarily a part of the record in
any suit, & therefore that the Defendant who wishes to
avail himself of any defect therein, or in the manner
in which it hath been issued, or executed, ~~he~~ must demand
oyer of it; whereupon it is spread at length upon the record,
and the defendant may avail himself of any legal
L. V. 1794. Exception which he can make to it. \+ Thus if the Defendant
c. 67. s. 23. being a resident of one County, is sued in another, where
the Cause of action did not arise, and the plaintiff
shall have neglected to endorse upon the writ that no
bail is required, the writ is voidable for that Cause; but
he must plead this matter in Abatement, and must verify
the truth of his plea by Affidavit, or solemn Affirmation.
To this the plaintiff may reply that a non est inventus had
been ~~[illegible]~~ returned upon a Capias issued against him
in his own County; or he may take issue on the Defendants
plea without any special replication; and if issue be joined
either upon the plea, or the replication, a Jury must decide
upon the truth thereof. If their Verdict be for the Defendant
the writ is abated, and he is discharged; ~~if for the plaintiff,~~
~~[illegible]~~
~~[illegible]~~
~~[illegible]~~
~~[illegible]~~
~~[illegible]~~ So also in the district Courts,
1794 c. 66. s. 24. if the Defendant be sued in a District other than that in
which he resides, he may plead this matter specially,
by way of plea to the Jurisdiction, I apprehend, to
which

issued against him for the same cause in his own County; and the writ be not endorsed, that no Bail is required; or, if he, being a resident of one district, be sued in the Court of another district, before a non est inventus is returned upon a writ issued against him for the same cause in his own district, and he be not jointly, or jointly & severally bound with another person residing within the district where the suit is brought, in the same Obligation, Covenant, or Contract; in all these Cases, if the defendant means to avail himself of the irregularity, I apprehend it is necessary to appear, and plead the special matter in Abatement; the truth of which plea he must verify by affidavit: for the irregularity in these Cases does not appear either upon the face of the writ, or by the return, but arises from a fact to which the Court can not be supposed to be privy, and of which they can not judicially take notice, unless it be regularly shewn to them; and this I presume can only be done by a plea in abatement. In this plea the Defendant must alledge, that on the day of the writ purchased, he was a Governor, a member of the privy Council, a Judge, of one of the superior Courts, or a Sheriff, and therefore not liable to be sued by Capias; or, that he was a resident in a different County; or in a different district, at the time of the writ purchased, and therefore not liable in the former Case, to be taken upon a writ on which there is not the Endorsement, of no Bail required, pursuant to the Statute; and in the other not liable to be taken on any writ, whether endorsed or not: and here I apprehend his plea may conclude

V.L. 1794. c. 66. s. 24.

which the plaintiff may reply a non est inventus, in the proper District; or that the Defendant was jointly, or jointly and severally, bound with another person residing within that District where the suit is brought, in the same Bond, Covenant, or Contract, whereupon the suit is brought; and if upon issue joined it be found for the Defendant, the suit shall be dismissed. — Or if the Defendant be an Alien, or a Citizen of another State, or the suit relate to Lands claimed by the parties under grants from different States, if the controversy be of the value of five hundred dollars, the Defendant may now petition the Court to have the suit removed into the Federal Circuit Court, and upon his giving security to appear there & answer the plaintiff's Action, the Cause will be removed.

L.U.S. 1 Cong: 1 Sess: c. 20. s. 12.

V.L. 1794. c. 66. s. 23. c. 67. s. 18. — If the defendant be a priviledged person, that is to say, of course. — If no writ of capias ad respondendum can be regularly sued out, if the plaintiff shall have proceeded against him by capias, instead of a summons, this I apprehend may be pleaded in abatement of the writ; So also, if the true Cause of Action be not endorsed on the writ pursuant to the Statute. this may be pleaded in abatement; or by motion to the Court, at the term next after, in the same manner; or by motion to the Court, at the term next after, judgment against him for want of an appearance.

N.C. 66. s. 25. c. 67. s. 19. T. Wash: rep: pa: 153. N.C. 67. s. 17.

N.C. 66. s. 35. 37. The Defendant having entered his Appearance, it is incumbent on the plaintiff, at the next rule day (which we may remember is always one month after, in the District Courts

conclude, without going on to allledge negative matter.
as. that no non est inventus had been returned upon
a writ issued against him in the same suit in his own
County; or, that he was not bound with any other
Defendant residing within the District, where the suit
is brought, in the same bond, obligation, or covenant;
for of these things the plaintiff must be presumed to be
conusant, and if the fact be, that a non est inventus
has been returned upon a capias issued against the
Defendant in his own County, in the same suit; or if
the Defendant be in fact, bound in the same Obligation
Covenant or Contract with another Defendant residing
within the District, the plaintiff ought to reply this matter
affirmatively, and if found for him it will avoid
the plea in Abatement; so if the cause of action
actually arose within that County or Corporation
where the suit is brought, this matter must also
be affirmed by the plaintiff in his replication, instead
of the contrary being negatively alledged by the Defendant,
in his plea. And in all these cases if there be an Issue
joined upon the fact, and the Verdict be found for the plaintiff
he shall have Judgment for his Debt, or Damages; but
if there be a Demurrer to the plea, and Judgment for the plaintiff
upon the Demurrer, the Judgment is that the Defdt answer over,
respondeat

them County

Courts, and in the County Courts, on such day as the
preceding Court shall at their Quarter Sessions have appointed,
to file his Declaration; which if he fails to do, the Defendant
may then enter a rule for him to declare; and if at the succeeding
rule day he still neglects to do it, he shall be nonsuited;
and shall pay the Defendant his full costs. But this nonsuit
may for good cause be set aside, on motion, at the next Court,
but not afterwards. So also may any other office Judgment
whether for the plaintiff, or the defendant. The proceedings
in the Office being regarded as in fieri, only, and not final,
unless they be not set aside at the next term; after which they
are final. ~~and in cases of debt where the demand is ascertained~~
against the plaintiff, in all Cases; they are also final in his
favor, in actions of debt ascertaining the demand; but in
other Cases a Jury must be impannelled to assess the Plt's
damages.

~~[illegible]~~
~~[illegible]~~
~~[illegible]~~ if the issue be found for him, he shall have Judgement for his Debt, or Damages; but if there be a Demurrer to the plea, the Judgt. is that the defendant answer over, *respondeat ouster*, in the law latin phrase, to his Action; if the issue be found for the Defendant, the suit shall be abated, and he shall recover his costs.

2. Wils: 368.

L. U. S. 1. Cong: 1. Sess: c. 20. s. 12.

Where the Defendant is an *alien*, or the Citizen of any *other* State, or the suit relates to Lands claimed by the several parties under Grants from different States, and the matter in controversy is of the value of five hundred dollars, or more, if he desires to remove the suit into the federal Circuit Court, he must now petition the Court for that purpose, (or, I presume, file his petition) and must give Security to appear in the federal Court, and answer the plaintiffs suit, and thereupon the Cause will be removed, and the Bail for his appearance are discharged. But he must give bail to the Action in the federal Court, if ruled thereto.

If there be any other matter proper to be pleaded in Abatement, the Defendant ought to take advantage of it, at this Stage of the proceedings; as if an ~~[illegible]~~ Action is brought against one Executor, or one of the Obligors in a joint bond, or one of the Partners in a trading Company, where there are more, the party who is sued alone may plead this

Cark. 61. Syst: pl: 13.

the special matter in Abatement; which if he neglects to do at this time, he shall never have advantage of such a plea afterwards. And it is a general rule that nothing shall be taken advantage of for Error, which might have been pleaded in Abatement. Syst: pl: V.

Here we may be permitted to express a doubt whether, if an action be brought in a County Court against two or more Executors, or two or more joint obligors, or two or more partners in Trade, or two or more ~~Executors~~ joint Defendants in any other action, and one of them be returned no Inhabitant, whereby the writ abates as to him, the Action can be continued against the other Defendant, if disposed to take advantage of the abatement as to the first. In the case of Executors who are both one person in the Eye of the law, the rule seems to be, that if the writ must abate as to one, it shall abate as to all. And as to joint obligors, the law seems to be, that they must be sued jointly - and in England if one of the Defendants in an Action upon a joint obligation be not taken, the plaintiff cannot proceed to outlawry against him. other may abate the writ. Syst if he neglects to do so, and the plaintiff proceeds to outlawry against the other Defendant, he who appeareth shall be chargeable with the whole.

Syst: pl: 7.

5. Co: 119.

V. L. 1794 c. 66. s. 35. 36. 37.

The Defendant having entered his appearance it is incumbent on the plaintiff at the next rule day: (which we may remember is always one month after in the district Courts, and, in the County courts, on the day appointed by the Court at the preceding Quarter Session) to file his Declaration; which if he fails to do, the Defendt. may then enter a rule for him to declare; and if at the succeeding rule day he still neglects to do so, he shall be nonsuited, and pay to the Defendant his full Costs. But this nonsuit, may for good cause be set aside, on motion, at the next Court, but not afterwards. So also may any other office Judgement, whether for the plaintiff or the Defendant; the proceedings in the office being regarded as only in fieri, and not final, until after the next term is ended; when they are final in all cases against the plaintiff; they are also final in his favor in actions of debt, for money or Tobacco, if the Amount be ascertained by the specialty; but in cases where the Amount of the plaintiffs demand is not fixed by the specialty, there a Jury must be impannell'd to assess his damages. And in such cases it is every days practice to permit the Defendant to set aside the Office Judgement at any time before the Jury is sworn, upon giving bail, if bail be demandable, and pleading the General Issue, so as not to delay the trial.

These office Judgements are considered as the Acts of the party, and his Attorney, and not of the Court, and therefore, in England, if they be set aside for any

Irregularity

Irregularity after a Ca: Sa: or other Execution issued thereupon, it seems that the plaintiff and his Attorney are both liable to an action. 1. Strange 509. 2. Wilson 385. 2. Blacks: rep: 846. 2. Esp: 72.

1794 c: 66. s: 36.

One month after the plaintiff has filed his Declaration he may give a rule to plead, with the Clerk, and if the Defendant do not plead accordingly, as the Exposition thereof, the plaintiff may enter Judgement for his Debt, or Damages, and costs. ~~and~~ On the other hand if the Defendant pleads, he may give the plaintiff a rule to reply; which when he has done, he may then give the defendant another to rejoin; and so on, until an issue is joined between them. Or if either party neglects to plead, reply, or rejoin, when the rule for his doing so, has expired, the other may either enter a Judgement for his Debt or Demand, or a nonsuit, as the case may be. — As soon as an issue is joined, either upon the Law, or fact, in dispute, the Cause is then to be placed upon the Court docket, for trial in its course. And those Office Judgements, which are incomplete, and require an Inquiry of Damages to be made before final Judgement can be rendered thereupon, are in like manner to be placed upon the Court Docket, for trial in their respective order.

Examination of the Question, How far the Laws of England are the Laws of the Federal Government of the United States.

A Question has lately been agitated, how far the Laws of England are to be regarded as adopted in America, in the Establishment of the Federal Constitution. Or in other words, how far they are the Laws of the United States, as one Nation, and not as a confederacy of Republics.

Judge Elsworth* is reported to have laid it down as a general rule, that the ~~Common~~ Laws of England, is the unwritten Laws of the United States. Judge Washington† is likewise reported to have given a similar opinion on a different Occasion. Opinions from such high Authority deserve to be candidly, & respectfully canvassed, being delivered judicially, and by Persons eminent for their Talents, and filling the most exalted Stations in the judiciary of the United States. notwithstanding ~~This Question~~ This Question is of the utmost importance as it regards the Jurisdiction of the Courts of the United States. But also as it relates to the Extent of the powers vested in the Federal Government. I shall endeavour to examine with Candour. To this End it will be necessary to enquire,

1. Whether the original Colonies of Great Britain which now compose the United States of America brought over with

* In the Case of one Williams in the Circuit court at Connecticut
† In the Case of a Man indicted for Sedition in the Circuit Court of New Jersey for common Laws.

Q I shall endeavour to consider this Question. First, in an abstract, and strictly legal light; secondly, in a more general, and political point of views; and lastly, I shall examine the Conduct of the Colonies respectively (so far as I am enabled so to do) in the practical exercise of those general principles which they may be presumed to have admitted, or adopted.

It seems to be generally understood, that all the Colonies, were inhibited by the terms of their several Charters, and provincial Constitutions, from passing any Act derogatory from the sovereignty, and supremacy of the Crown of England, as the head of the nation; that such of them as had a legislature assigned by the Charter, were in general authorised to make laws adapted to their respective situations, provided that such Laws should conform as nearly as might be to the laws and Statutes of England, and not be repugnant thereto.

According to strict legal construction, all the Laws and Statutes of England, in force at the time of their migration might be considered as potentially existing in the Colonies; and as actually existing there, whenever any correlative subject occurred, upon which they could possibly operate, except so far, and so far only, as their several Charters might have permitted a

Departure

with them the Laws of the Mother-country, so far as the same were applicable to their respective situations, as Colonies, or not.

2. What part of the Laws of the Mother Country might be deemed applicable to the situation of the Colonies, respectively and as such adopted by them, severally.

3. What part of those Laws of the mother Country which might have been deemed applicable to their respective situations as Colonies, were abrogated by the revolution, or retained by the several States then become independent sovereign republics.

4. How far that portion of the Laws of England which has been retained by the several States, as the Common Law of the United States, has been engrafted upon and made a part of the C.U.S.

II. As to the first Question, whether the several Colonies of G.B. which now compose the U.S.A. brought over with them the laws of the mother Country, so far as the same were applicable to their respective situations as Colonies, or not. — This was discussed in another place (Book 1. pa: 25. &c.) and the Conclusion which we then drew was in the affirmation. And seeing no reason to distrust the propriety of that Conclusion I shall now proceed to the next point,

II. What part of the Laws of the mother Country might be deemed applicable to the situation of the Colonies, respectively, and as such, adopted by them, severally.

Q We are to recollect that the Laws of England are divided into two classes, the unwritten, and the written Laws.

The unwritten Law is said to consist, 1st. Of General Customs; 2dly Of particular Customs; 3dly Of particular Laws which by

¶ From these two copious, and opposite sources are derived all those rules and maxims, which constitute the ground and foundation of the common law, generally, so called. And it is in the admixture of these opposite principles that we discover, according as the scale of Liberty, or prerogative preponderates, a greater or less portion of the one, or the other, in every subordinate rule and maxim, which together compose the whole body of the English municipal law.

Departure from this general principle. The Colonies under this construction might be compared to Corporations within the Realm of England, many of which have power to make by-laws, for the regulation of their own internal police, but are bound to conform to the general laws of the realm, which are in all cases paramount to their own local institutions.

But this strict construction, however applicable to domestic Corporations within the realm, where the administration of Justice in a regular course was already established in Courts of the most extensive Jurisdiction; and where the defects in the existing Laws of the realm were continually subject to the Observation of the supreme

by Custom are adopted and used by some particular Courts, of pretty general and extensive Jurisdiction. The written or Statute Law consists of those acts of the Parliament, which have from time to time been made in affirmance, or Amend=ment of, or to repeal, or remedy some defect in, the unwritten law; which, must consequently have been changed, as often as a new Statute was made.

I: That part of the unwritten Laws which relates to general Customs, may be divided into the jus commune, or Folk right, of which the ancient English were so tenacious, and which they struggled so hard to maintain, under the first princes of the norman line: which subsequent princes
† 1.B.C 66. so frequently promised to keep and restore, as the most popular act they could do; † and which depending upon custom, bore the stamp of freedom, as being introduced by
† II: 74 the voluntary consent of the people; † and secondly; the Jura Coronæ, or prerogatives of the Crown, as contradistinguished to the rights and privileges of the people. ¶

The Jus commune, or Folk-right, had for its object, First the Rights of persons; and Secondly, the Rights of Things; with the means of acquiring & losing them, respectively. Thirdly private wrongs, or civil injuries. — The Jura Coronæ had for their Object, First the eminent privileges, or prerogatives of the Prince, as an Individual, over the people, as his subjects; Secondly, as the supreme Head of the body politick of the nation: in which Character the Cognizance, prevention, and punishment of public wrongs belonged to him, as the
* 1.B.C. 250. Chief magistrate, or, as he is called by Blackstone, the sole magistrate of the nation. ‡

The rights of persons considered in their natural Capacities are of two sorts, absolute, and relative; absolute are such as ap=pertain to every individual: these are reducible to three principal,

Supreme legislature of the nation, must have been perfectly inapplicable to the circumstances of remote Colonies, settled among hostile savage nations, and destitute of the means of application to the Courts of the Realm for the redress of private Injuries; or to the legislature thereof for remedy of Inconveniences of a more general and public nature; or to the Crown, as the supreme Executive, for aid, and authority to repel the Aggressions, and Incursions of the neighbouring hostile savages. Some of the first Charters, indeed, seem to have been intended to constitute a body politic, or trading Company within the Kingdom, rather than to establish foreign Governments, beyond its limits; to which circumstance we may ascribe the omission of several of those powers which were granted by succeeding Charters. These omissions the Colonists themselves, ~~[illegible]~~ endeavoured to supply by voluntary consent & agreement among themselves, as was done in Massachusetts, in the Election of a representative Body to assist in making Laws,+ an Innovation

\+ all the Colonies before the reign of Charles the second, Maryland excepted, settled a model of Government for themselves. Hutch: H. M. vol. 1. 92. minot 18. a different policy was adopted after the restoration. Ibid:

principal, or primary Articles; the Right of personal Security; the right of personal liberty, and the right of private property. The first of these consists in a persons legal & uninterrupted

+1. B. C. 129. Enjoyment of his Life, his Limbs, his Body, his Health, and his reputation+: ~~[illegible]~~ The second consists in the power of Locomotion, of changing situation, or moving ones person to whatsoever place one's own inclination may direct; without

+Ib: 134. Imprisonment, or restraint, unless by due course of Law†. The third consists in the free use, enjoyment, & disposal of all his Acquisitions without any control, or diminution, save

+Ib. 138. only by the Laws of the Land‡. The Laws for protecting, ~~for protecting~~ and securing these three principal and primary Rights, necessarily embrace the two subsequent divisions, viz, the Rights of Things; and private wrongs, or civil Injuries. The two former ~~of these primary Rights~~ the right of personal Security, and of personal Liberty are held to

\# Ib: 134 be strictly natural#: the ~~[illegible]~~ Right of property is supposed to be founded in nature; the modifications under which we find it, the method of conserving it in the present owner, and of translating it from man to man, are entirely derived from Society; and are among those civil advantages, for which every individual has

Ib: 138. resigned a part of his natural liberty. — ~~[illegible]~~ Such of the Laws ~~made for the security, preservation, and enjoyment~~ of the Mother Country, as were made for the Security, preservation and Enjoyment of these three principal and primary Rights of Man, may be supposed to be generally applicable to the Situation of a Colony about to establish itself at a Distance from the Parent State; and therefore we may infer, that the several British Colonies brought over with them, respectively, such Laws, and that they have tacitly adopted & retained them ~~[illegible]~~ as a part of their unwritten Law, except where they

+ Though all those which were not expressly given up by the Crown in its Charters, might in strictness be considered as potentially existing in every part of the nation, yet the Exercise, or Violation, of a great part of them, being perfectly impracticable in remote Colonies, such parts might be considered as in Abeyance there: with &c.

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which was not confined to that Colony, but which was not only acquiesced in, but sanctioned by the more recent Charters granted by the Crown. The highest act of sovereign authority likewise became necessary to be exercised upon criminals in the privation of life, concerning which the Charter first granted made no mention: but the Government undertook to inflict capital punishments without recourse to the Crown for additional powers. In the same manner did they supply a defect of authority to erect judicatories for the probate of wills; to constitute Courts with admiralty Jurisdiction; to impose taxes; and to create Towns and other bodies corporate†. These observations though strictly confined to the Government of Massachusetts, under their first Charter, it is believed may refer equally to the other New England Colonies, as also to Virginia.

In examining this Question, we must therefore abandon the ground

† Minot's H. M. 20.

they were amended, modified or repealed, by legislative, or constitutional Acts. 13.

Of the relative rights of persons, or such as are incident to them as members of Society, and standing in various relations to each other, such as Magistrates, Bodies politic & corporate, and such as by the favor or partiality of the prince have been invested with peculiar Ranks, privileges, and Distinctions, the Laws relative thereto, could be no further applicable to the Situation of infant Colonies, than as such artificial relations and characters existed therein; in every organized Society there are civil Magistrates; the Laws relating to such Magistrates as the political institutions of the several Colonies found necessary, may therefore be regarded as tacitly adopted and retained, except where they were amended, modified, or repealed by legislative, or constitutional Acts.

As to the Jura Coronæ; with such of them as appertained to the person of the prince, as an individual raised above the heads of the people, possessing a pre-eminence over and above all other persons, and out of the ordinary course of Laws in the Case of all others; whose person is sacred; who is incapable of doing, or even thinking wrong; who never dies; to compass or imagine whose death; or the death of his Queen, or of their eldest Son and Heir; or to violate whose Companion; or his eldest Daughter unmarried; or the Wife of his eldest Son and Heir, is high Treason; who is the fountain of Honour, of Office, and of privilege, and finally in whose Case that is Law, which is Law in no Case of a subject; with these branches of the Jura Coronæ, I say, the Colonies could not be supposed to have any thing to do, in the internal administration of their affairs; consequently the Laws respecting them though still potentially existing, may be deemed inapplicable to their remote situation, & circumstances.

On the other hand, those parts of the Jura Coronæ which regard the prince in his political Capacity, only, as the chief

chief magistrate of the nation; the representative of his people; the administrator of the laws, and general conservator of the peace of his Dominions; might be considered as in part applicable, and in part inapplicable to the situation of the Colonies: at least, there could be no room for the exercise of some, of them, in the administration of the internal affairs of the Colony; such, for example, as that the King is the supreme Head of the Church of England, as by law established; And others, although large unquestionably flowers of the Prerogative, and in England inseperable from the Kingly Office and Character, were nevertheless deemed inapplicable to the views and intentions of the Colonists, in emigrating from the parent state, and either by express stipulations in their respective Charters, or by legislative Acts, or other obvious circumstances, were never regarded as generally received or adopted by the Colonies. ~~unanimously~~ Furthermore Instances of that kind of these branches of the royal prerogative, ~~which~~ in some or other, or perhaps all, the Colonies, were considered as not in force therein, may be adduced from the Stipulations contained it is believed in every Charter, that the Colonists should hold their Lands in free, and common Socage; by which all the Burthens of military Tenures, and by consequence, we may suppose, that all the maxims of the law proceeding from that Source, were left to the Mother Country, which was not emancipated from them till near a Century after the first Charters granted to Colonies; as also, from the Establishment of various sects of religious dissenters ~~established~~ in several

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of strict, legal, technical Construction, since upon that ground the Colonies must have been immediately swallowed up in the Whirlpool of Anarchy, or have expired under the pain forte et dure of submission to rigid, and impracticable rules. We therefore shall proceed next to consider it under the more liberal light of general policy.

several of the Colonies, to the exclusion of the Church by Law established in England, of which the King is by his prerogative is supreme head and Governor; whilst in other Colonies that Church was the established religion of the Colony, and all the Laws which regarded the King as the supreme head thereof, were recognized without scruple.

As to Crimes and misdemeanours: such as are mala in se, as Murder, Mayhem, and other Offences against the Laws of God, or the Law of nature; no doubt the laws for preventing and punishing them might be deemed applicable to the Situation of each Colony, since the prevention & punishment of such Offences are among the first objects of civil polity: but, as to mala prohibita, or such offences as are against the positive laws of society, the laws by which they were defined, restrained, or punished, in the mother country could not be deemed generally applicable to the Colonies, because in some there would be a want of correlative subjects for them to operate upon; as in the Case of non-conformity to the worship of the Church of England; which, although an Offence in England, could not be deemed an Offence in a colony where the established religion, or the customary religion, if I may so express it, differed in many essential points from the Church of England. So also, the Offences against the Forest Laws, and other Offences derived from the same, or a similar source, must have been deemed inapplicable to the Situation of the Colonies. So also, all that Class of Offences which relate to the personal prerogatives, pre-eminence and sacred rights

and sacredness of Character which the British Constitution ascribes to the prince, would seem to be inapplicable to the situation of infant and remote Colonies, as there could scarcely occur an occasion, or a subject, upon which they could be committed.

2^dly As to that part of the unwritten Law of England which relates to particular Customs; these being in general local, ~~&~~ and founded upon immemorial usage, the rules respecting them were incapable of extension beyond those local limits where they prevail, according to the common law principle; they were consequently inapplicable to the situation of recent, and remote Colonies.

3^dly Those particular Laws which by immemorial usage and Custom have been adopted in some particular Cases, and in some particular Courts, and which form the last branch of the unwritten Law of England, ~~they~~ are the civil and Canon laws. By the former is meant the civil, or municipal Law . . . . of the Roman Empire, ~~as comprised in the Institutes, the Code and Digest of the Emperor Justinian, & the~~ rather, or ~~the novel Constitutions of himself and his successors.~~ The Canon Law is a body of Roman ecclesiastical law. These Laws are

+ / .B.C. pa: 83. permitted^+ (under different restrictions) to be used. 1^st In the Courts of the Archbishops & Bishops, and their derivative Officers, usually called Courts Christian, or Ecclesiastical Courts. There being no Episcopal ~~Courts~~ Establishments in many of the Colonies, nor any ecclesiastical Courts, these Laws may, so far be deemed inapplicable, generally, to the Colonies, although perhaps their Authority might have been admitted, or rather permitted, in ~~others~~ some. 2. The military Courts, to which there was nothing similar in the Colonies. 3^dly The

Courts

Courts of Admiralty; these, not being courts of common law Jurisdiction, but having cognisance of Cases arising under the Law of Nations, and the maritime laws of England, as partaking partly of those laws, and partly of statutory regulations, and other Laws which are therein adopted and made use of as the occasion may require, (as the Rhodian Laws, and the laws of Oleron;) proceed not according to the Course of the common law; but adopt the rules which those several laws prescribe in particular Cases, so far as the common law permits the use of them: the Courts of the latter preserving a strict eye, over them, to retain them within their proper limits. Upon similar principles and policy, those laws which in respect to their general admission into the codes of all the maritime nations of Europe, seem to constitute a branch of the laws of nations, may be supposed to have been in some measure applicable to particular Cases, when the Colonies began to have a maritime intercourse with other parts of the world; and in such particular Cases, we may suppose them to have been permitted among us. — 4.thly The fourth & last Courts in which the civil & canon laws were permitted in England, were the Courts of the two universities; which being merely local and qualified jurisdictions, the permission, or use of the Canon, or civil Laws therein, could not be supposed to extend the use of those laws, beyond the local limits of their Jurisdiction.

2. The written or Statute laws of England, as we have before remark'd consists of those Acts of the supreme legislature, or parliament, which have from time

to

to time been made either for the explanation, amendment, or repeal of the common laws, or to supply some defect therein. — These Acts, being made occasionally, and frequently, and being in general introductory of some new rule, and having, in process of time embraced almost every subject of civil polity in its turn, have, in many respects, gradually introduced an almost total change in the municipal laws of England. ~~in many instances~~; & ~~has~~ even where that has not been the case, have produced such Alterations in the common laws, as to make it a work of labour and difficulty, frequently, to distinguish between them, or to establish the precise period when the ancient, unwritten, immemorial rule by a less ancient written law was superseded. This circumstance in a period of one hundred & fifty years which intervened between the first Patent granted ~~[redacted]~~ by Queen Elizabeth for the Settlement of Virginia, and the patent granted by George the Second for the Settlement of Georgia, must have produced an endless Variety in the Codes of those two Colonies; as deduced from the existing Laws of the mother Country at the several periods when those Charters were granted. There could be no common rule of law between them, unless that rule could be deduced without Alteration, either by Parliamentary, or other competent Authority, from a Period

+ Queen Elizabeths patent to Sir Walter Raleigh bore date March 25. 1584. That of George II. for the Settlement of Georgia bears date June 9. 1732. a period 152. years between.

a period antecedent to the Colonization of the former. The same thing may be said as to all the other Colonies settled during the intermediate period between the settlement of the most ancient, and the most recent, of the British Colonies. For it must be remembered (and it is now a principle not to be disputed in America) that no Colony was bound by any act of parliament made after it's establishment as a Colony, although other Colonies, thereafter established, were bound thereby, so far as such acts were applicable to the Situation of remote, infant Colonies. Therefore as the several Colonies were settled at different, and even remote periods, from each other, during all which the laws of the mother Country were changing, almost perpetually; and as such Changes could not affect those Colonies which were settled before their introduction, but might, and in many instances certainly did, affect the Colonies settled posterior thereto, it follows, that there could be no common rule amongst them, which was not more ancient than any of their Charters. And as the legislative power of each Colony was competent to the Alteration of any of its domestic Laws, so as to adapt them to the particular circumstances of such Colony; which authority they were respectively perpetually exercising within their several Jurisdictions, which could not be extended beyond the limits of each Colony, respectively; so, neither could there be any common rule amongst them deduced from that, or any other Source. — The Legislatures of each Colony being continually engaged in the Attempt to adapt their several Codes to their respective Situations, and particular Circumstances, and being perfectly independent of each other, as to any political relation, or Connexion; and equally regardless of the municipal institutions, and policy, of one

+ The Legislatures of the New-England Colonies had originally not only the choice of their own magistrates, but the power of making such laws as they thought proper, without leading them to Great Britain for the approbation of the Crown. The more recent Colonies were restrained from making any laws, contrary to the laws and Statutes of Great Britain; an additional source of endless variety in their respective Codes.

one another; their municipal institutions were continually more and more dissimilar, and in many instances lost all resemblance, not only to each other, but to the Laws of the Mother Country. In one instance, indeed, they all agreed; and that, in diametrical Opposition to one of the fundamental Maxims of the common law; I mean the establishment or permission of Slavery, amongst them, after it had been totally abolished in the parent State; and in violation of one of its most sacred Laws! and yet it is pretty certain that all their Charters and provincial Constitutions [illegible] contained a prohibition against any legislative act, contrary to or incompatible with the Laws of England.

Here it may not be improper to recollect, that a part of the present United States, was first settled by a Dutch Colony, & another part, by Swedes. The tract claimed by those two nations extended from the thirtieth eighth to the forty first degree of latitude, and was called the New Netherlands. It comprehended the present States of Newyork, New Jersey, pennsylvania, Delaware, & probably a considerable part of the Eastern shore of Maryland: it was conquered from them by the English, and was confirmed to the Crown of England by the Treaty of Breda in 1667. The Dutch inhabitants remained, the Swedes, if I mistake not, were transported from Delaware to Newyork, where they likewise remained. According to Judge Blackstone, the common Laws of England, as such† 1. B.C. 109. can have no Allowance, or Authority in this portion of the United States, which was a conquered, and ceded Country, and not a Colony planted by England. and According to the principles which have been contended for in the first part of this essay, the Laws of Holland, and Sweddland were the municipal Laws of these provinces, until the time of their conquest,

perhaps nothing could demonstrate more satisfactorily than such an Enquiry the difficulty of applying an abstract, Speculative proposition to, practical Subjects, on a great, and comprehensive Scale; for although the Colonial legislatures were all inhibited from passing any Act repugnant to the Laws of England, or derogatory from the Sovereignty of the Mother Country, which perhaps was the only common rule imposed upon them all, without Exception, yet the application of this rule in the several Colonies will be found to be as various, as their respective Soils, Climates, and productions.

Conquest; and even after that period those Laws according to the Opinion of the writers on the Law of nations still continued in force, until other Laws were imposed upon them by the Conqueror. — To ascertain when, and in what Degree the Change was made reference must be had to the subsequent provincial establishments, & proprietary, or chartered rights, which were made by the Crown of England within those Limits.

From all these considerations it will appear, that in our Enquiry how far the common Laws and Statutes of England were adopted in the Colonies, or in other words, what parts of those Laws were deemed applicable to their respective Situations and Circumstances, we must again abandon all hope of Satisfaction from the Adoption of any general Theory, and resort to their several Charters, provincial Establishments, legislative Codes, and civil Histories, for information. And after all our researches, it is probable that the principal, and perhaps only, general Agreement between the general Laws respecting Real Estates held in Socage, and them would be found in the Adoption of such Statutes as are made in aid of those general Maxims which form the basis of moral obligation & civil polity in all Countries, and in the Codes of all civilized nations. The Application of which varies in different Countries as much as their respective Soils, Climates and productions, differ from each other.

Although such a research is infinitely beyond the proposed limits of this essay; and not less beyond the the Sources of information which its author, [illegible], possesses; yet it may

may not be unuseful, or uninstructive to turn our Attention for a few moments, towards the subject of such an Enquiry; from whence we may possibly be made sensible how fruitless would be the Labours of a further pursuit, after an uniform system of Laws in the Colonies.

The Legislature of Virginia, the most ancient of all the Colonies was constituted by Letters patent of March 9. 1607. in the 4th. year of James the first. The Laws of England seem to have been adopted by consent of the Settlers, which might easily enough be done whilst they were few and living all together. Of such adoption, however, we have no other proof than their practice 'till the year 1661. when they were expressly adopted by an Act of Assembly, except so far as a difference of Condition rendered them inapplicable. Under this adoption, the rule, in our Courts of Judicature, was that the Common Law of England, and the general Statutes previous to the 4th. of James, were in force here; but that no subsequent Statutes were, unless we were named in them, saith the Judges, and other particulars of the Crown, but named, or not named said them who reflected freely.* By the express Conditions of the Charter, Lands in Virginia were to be held of the Crown, in free & common Socage.†

The first Acts to be found in the Code of the Colonial Legislature provide for building Churches, appointing Vestries, and levying our Glebes, in every parish. And by an Act passed in the year 1642‡ it is provided that for the preservation of purity & unity of Doctrine & Discipline in the Church, and the right Administration of the Sacraments no Minister should be admitted to officiate in Virginia but such as should produce to the Governor a testimonial that he had received his ordination from some Bishop in England, and subscribe to be conformable to the orders and Constitutions of the Church of England

* Notes on Virginia, 240. † Ib: 197. ‡ Purvis – pa: 4.

And even in Virginia, we find the Distinction was soon made between antecedent and subsequent Acts of parliament, as will most evidently appear from the terms of an Act of the General Assembly passed in the year 1705. c. 19. which declares "That the people, commonly called "Quakers, shall have the same liberty of giving their "Evidence by way of solemn affirmation and "Declaration as is prescribed by an Act of parliament "7. & 8. Will: III. entitled an act that the solemn "affirmation and Declaration of the people called "Quakers, shall be accepted instead of an Oath "in the usual form: which said Act of parliament "so far as meant thereof as relates to such affirmation "and declaration, and for the time of its continuance "in force, and not otherwise, shall be to all intents "and purposes of force in this Dominion. The Statute 21. Jas: I. c: 27. to prevent the destroying of Bastard Children was enacted soon after; as also the Statutes of limitations 32. H. 8. c. 2. and 21. Ja: I. c. 16. with alterations in the former. The Statutes of 21. James I. c. 24: concerning persons dying in Execution, & 16. & 17. Car: 2. c. 5. for preventing delays of Executions by writ of audita querela, or by the Infancy of the Tenant, as also part of the Statute of 29. Car: 2. for preventing frauds and perjuries; & 3. W. & M. c. 14. for relief of Creditors against fraudulent, with several other Statutes, were expressly re-enacted, or declared in force in Virginia, in the beginning of the present Century. The Statute of Frauds & Perjuries 29. Car: 2.

England, and the Laws there established. - All persons not having a lawful excuse, were required to attend their parish Church every Sunday, under penalty of fifty pounds of Tobacco: "But "Quakers and other Recusants who out of non-conformity to the Church "totally absent themselves, were made liable to such fines and "Punishments, as by Stat: 23. of Eliza, were imposed on them; being "for every months absence Twenty pounds Sterling; and if they for one "a Twelvemonth then to give security for their good Behaviour, "besides payment of the penalty. And all Quakers assembling in "unlawful assemblies and conventicles, were subject to a fine of "two hundred pounds of Tobacco each." † The like penalty was extended two years after to any other seperatist whatsoever, and the third offence was to be punished by Banishment from the Colony ‡

Here then we find not only the common Laws and Statutes of England, so far as they were applicable to the situation of a Colony, but also the Hierarchy of the Church of England, in its full Vigour, established, and adopted in Virginia.

But this general Adoption of the Laws of England, and the principles of the Government of that Country, was probably confined to Virginia, which even to the period of the Revolution was distinguish'd by the Epithet of loyal, beyond any other Colony. The new England Colonies owed their establishment to that Spirit of Independency, which afterwards shone forth there in its full Lustre, and received new Accession from the aspiring Character of those, who being discontented with the established Church and Monarchy, had sought for Freedom amidst the savage deserts *. And even in Virginia

The Massachusetts Colony may be considered as the parent of all the other Colonies of New England. There was no Importation of

† Acts of Assembly of Virginia 1661. c. 9. ‡ Ibid: 1663. c. 1. passim.
* Hume's Hist: of Eng: vol. 4. 334. Hutchinson's Hist: Mass: p. 11. 12. vol. 1. Minot's Hist: Mass: p. 14. Belknap's Hist: New Hampshire vol: 1. pa: 67. Pitkin's Hist: Connecticut 7.

29. Car: 2. c. 3. requires three Witnesses to a Will of Lands, the Law of Virginia ~~[illegible]~~ 1748. c. 3 required but two — a proof the colonists did not consider themselves bound by the terms of this Statute. The Colonial Legislatures, from the nature of the case, must have been deemed by the Crown, the most competent Judges of the applicability of the Laws of the parent State, to their infant & remote situation: from whence arose that infinite Variance between the Codes of the several Colonies, which will appear in the prosecution of this Inquiry.

of planters from England. to any part of the Continent Northward of Maryland, except to Massachusetts, for more than fifty years after the Colony began.* The first settlement was attempted in the year 1607. the same year in which James the first's Charter to Virginia bears date. but was soon discontinued. So that Bigotry and persecution which prevailed at that period among Christians of every sect and denomination is to be ascribed, if not the settlement, at least the growth and future flourishing state of the Colonies. The Colony of new plymouth, which may be regarded as the most ancient establishment in New England. that has been continued without interruption, owed its Existence — to this source.† The Adventurers procured a patent from the Virginia Company, in 1620. & eight years after a Charter was obtained from the Crown; which, according to Governor Hutchison, was intended to constitute a Corporation in England, like that of the East India Company; but on the proposal of several Gentlemen of figure and Estate, who were dissatisfied with the arbitrary proceedings both in Church and State, and pleased themselves with the prospect of the Enjoyment of liberty in Both, in America, it was resolved, the succeeding year, by the general Consent of the Company, that the Government & Patent should be settled in New England.* In 1630 they established rules of proceeding in all civil actions, and instituted subordinate powers for punishing Offenders. — In civil actions Equity according to the circumstances of the case seems to have been their rule of determining; the Judges had recourse to no authority, but the reason & understanding which God had given them. In 1634. they began to think about a body of laws, suited to the circumstances of the Colony, civil and religious‡; and between that period and the year 1648, completed a System of Laws, & of Government

† Hutch: Hist: Mass: vol: 1. Preface. † Ibid: pa: 11. 12. *Ib: 19. 20. Belkn: H: N: H. vol. 1. pa. 67. Minots H. Ch. 14.
‡ Ibid: 384. 385.

Q It seems to have been a general Opinion that Acts of
^ parliament had no other force, than what they
derived from Acts made by the General Court
to establish or confirm them. Hutch. H. M. 2. 12.

the plan of which they had before laid, & began to
execute. In this they departed from their Charter; and instead
of making the Laws of England the groundwork of their Code,
they preferred the Laws of Moses †; and in that branch of Law
more especially, which is distinguished by the name of Crown
Law, they professed to have no regard to the rules of the
common Laws of England. † High Treason was not mentioned;
before they had agreed upon the Body of Laws. The Kings Authority in
England was at an End - but it was made capital some years after the
restoration ‡. Marriages from the first settlement of the Colony were
celebrated by Magistrates, & not by Clergymen. # In testamentary Causes
they at first so far allowed the civil laws as to consider real Estates,
as mere bona, and did not confine themselves to any rules of
Distribution then in use in England. They considered the family
and Estate in all their circumstances, as was before mentioned, and sometimes assigned a
greater portion to one branch than another. Executors were not
obliged to prefer a debt by Judgement, or Bond to one by simple Contract;
Estates in fee simple descended to every Child; but it was held that
in Estates tail general, the heir at common laws took, as heir of the
Body, in relation of the other Children. No forfeiture was incurred
in Cases of Treason or felony. ‡ Upon their removal they supported
their relation both to the civil and ecclesiastical Government,
except so far as a special reserve was made by their Charter
was at an End, and that they had a right to form such model of
both as best pleased them. Accordingly it was held, that there is
no Jurisdiction to which particular Churches are, or ought to be subject;
and the ordination of Ministers was, in general, by the imposition of
the hands of their Brethren in the ministry; but some Churches ordained
by the Imposition of the hands of some of their own brethren, without calling
in the Aid of Ministers. # Nothing could be more dissimilar than
these Institutions, and those of the Colony of Virginia. In the latter
was

† Hutch: Hist: Mass: vol: 2. 11. † Ibid: vol: 1. 387. ‡ Ib: 390.
# Ibid: vol. 2. pa. 392. ‡ Ib: 393. 394. # Ibid: 369. 374

we have seen that non-conformity to the Church of England was punished, as severely as it was in England. In Massachusetts they laid aside the feasts and fasts as well as the Discipline & Doctrines of the Church of England, and appointed frequently days of fasting and thanksgiving, as occasion required; and any person absenting himself from public worship on these days, was liable to a fine. — Non conformity to their independent Church, says Governor Hutchison, was attended with the deprivation of more civil privileges than in England† The persecuting spirit of their religious Institutions enforced by an equally persecuting spirit in the Courts, occasioned Complaints to be preferred against the Colony not only by Episcopalians, but Baptists, Quakers, & other Sectaries, which produced an abrogation of their Charter in 1684†. A new Charter was obtained in 1691. upwards of sixty years, after the Colony had been settled, and near half a Century from the period when a system of Laws the most discordant to those of the mother Country had been established. During this period the laws of England had undergone very material alterations, and the system of Government there, had been twice wholly changed. The new Charter contained nothing of an ecclesiastical Constitution. Liberty of Conscience was granted to all except Papists‡. This Charter, either expressly, or by Implication vacated all the laws of the Colony, and left room to question what was the rule of Laws in civil and criminal Matters, and how far the common Law and

† Hutch: Hist: Mass: vol. 1. 378. 380. † Ibid: vol: 2. pa: 11. 12.
‡ Ibid: vol: 2. pa. 17.

and what Statutes took place. An Act was soon after
passed declaring that all the Laws of the Colony of Massachusetts
and Colony of New Plymouth, not being repugnant to the
Laws of England, nor inconsistent with the Charter should
be in force, for a limited period, except where other provision
should be made by Act of Assembly.† It was proposed
that the Members of the General Court should during their recess
consider of such Laws as were necessary to be established;
instead of committing to select persons, upon a preconcerted
plan, the execution of a work that required the wisest
heads; for want of which precaution, Governor
Hutchinson informs us, the people of the province
were sufferers, down to the period when he wrote,
which immediately preceded the revolution. For want of this, he adds,
The
Construction of many Laws, has been
doubtful, and various, it being impossible to
reconcile the several parts to any general
principle of Law whatsoever. †

A Body of men receding from the established Government
and Religion of a Country, can not be supposed to have
carried with them any great affection for its Laws. To
this cause we must attribute that immediate departure
from the conditions of their first Charter, which prohibited
the making any Laws repugnant to those of England. A
strict compliance with this Condition would require the aid
of learned Council, whose professional pursuits might enable
them to point out the conformity required by the Charter

† Hutch: H: Mass: Vol. 2. 20-21. † Ibid: 63.

Charter. Of such Counsel the General Court are said to have acknowledged the want.† Had there been every disposition on the part of the Colonists to ~~have~~ adhere strictly to the terms of their Charter, it was, under such Circumstances, impossible for them to have done so. It was not at first required that the Charter Governments should transmit their Laws to England for the Confirmation of the Crown. Hence there was no practical check upon ~~the~~ their proceedings, but that of vacating their Charters, where they transgressed the limits thereby imposed. And although the vacating the Charter might in legal construction amount to a total annihilation of all the Laws made under it, yet a very large portion of them retained their primitive authority in the minds of the people,† in the Administration of the Government, and in the Distribution of Justice. It is evident that every Act which was repugnant to the Laws of England, was not for that reason deemed null & void, for otherwise the tolleration of Slavery, the partition of real Estates, and the ~~p~~ equal payment of the debts of persons deceased without regard to the priority established by the Common Law Courts in England, would not have been continued; yet these Laws, as well as some others equally repugnant to the Laws of England were continued, and approved, after the vacation of the first, & the grant of the second Charter.‡ Not to descend to further particulars these Circumstances appear to prove the Justice of Governor Hutchison's Observation, that

† Minots History of Mass: 23. — † Ibid: 52.
‡ Hutch: Hist: Mass: vol. 2. 65.

‡ The Charter of Rhode Island declared, that no person within the said Colony, at any time thereafter, should be any wise molested, punished, disquieted, or called in question, for any differences in Opinion in matters of religion, who do not actually disturb the civil peace of the said Colony. Peters tells us, that the General Assembly of Rhode Island never supported any religion; and lest any should chance to prevail, they made a law that every one might do what was right in his own Eyes; with this proviso, that no one should be holden to pay a note, bond, or vote, made or given to support the Gospel. Hist: of Con: 224.

that for want of a systematic plan in the formation of a Code of Laws subsequent to the vacation of their first Charter, "the Construction of many laws was doubtful and varying, it being impossible to reconcile the several parts to any general principle of Law, whatsoever."

The Colonies of Connecticut and New Hampshire, which, according to Governor Hutchison, grew out of Massachusetts, severally adopted Institutions, both civil and religious, which bore a great Conformity to those of Massachusetts. Perhaps the Spirit of civil Independence was higher in the former, even, than in Massachusetts; and that of religious intollerance towards all who differed from them in Discipline, or in Doctrine, was certainly not inferior in either.† Tollleration was preach'd against as a Sin in rulers which would bring down the Judgements of Heaven upon the Land.† This spirit of Intollerance in Massachusetts produced the settlement of Rhode-Island, where religious Freedom seems to have erected her standard‡. Universal Tollleration was also established, in Pennsylvania, and there flourish'd more than in any other country. — Popery, the Abomination of the religious Bigots of New England, seems almost to have obtained a preference in Maryland, over every protestant Sect. In no other of the Colonies, Rhode Island & Pennsylvania excepted, was it tollerated. It is not impossible that in every Colony the prevailing sentiments and laws respecting religion, had a corresponding effect upon many of their civil Institutions. Peters mentions a remarkable,

† Belknap's Hist: New Hampshire vol: 1. 75. 179. Peters's Hist: of Connecticut 63. 82. The latter observes, that it is a ruled Case in Connecticut that no Law or Statute of England be in force there, till formally passed by the General Assembly. 96: 83.
Hutchison vol. 1. 75. Belknap vol: 1. 84. Peters 64. 65. 67.

remarkable instance to this effect in Connecticut;
A negroe was brought to trial before the superior Court at Hartford,
~~[illegible]~~ about five
and twenty years before the revolution, for castrating his
master's son." The Court could find no laws to punish the
" negroe. The Lawyers quoted the English statute against
" maiming; the Court were of Opinion that Statute did not
" reach the Colony, because it had not been passed in the
" General Assembly. At length however the Court had
" recourse to the vote of the first settlers at New Haven, viz:
" That the Bible should be their laws, till they could make
" others more suitable to their circumstances. The Court
" were of Opinion that vote was in full force, as it had
" not been revoked; and thereupon tried the negroe upon
" the Jewish Laws, viz: Eye for Eye, and Tooth for Tooth.
" He suffered accordingly." † Mr. Swift in his System of
the Laws of Connecticut, tells us that the English common
Law had never been considered as more obligatory there
than the Roman Laws had been in England. That there
is no general rule to ascertain what part of it is binding;
that the running the line of distinction is a subject of
Embarrassment to the Courts, and that it has no other
foundation there, than the voluntary reception of it by
the general (implied) consent of the people. That the
first Settlers there instead of considering it to be the Basis
of their Jurisprudence, and in all Cases binding, have
only

† Hist: of Connecticut 83. — Castration is maihem at the
common Law, and by that Law was punished with death.
3. Inst: 62. 118. By the ancient common Law of England the Mosaical
doctrine of Retribution was adopted. 3. Inst: 118.

only considered it as auxiliary to their Statutes.
That the Consequence of the doctrine here spoken of, has been the introduction of many new rules & principles which have greatly improved the legal system of that State; from whence he adduces a second branch of what he stiles the Common Laws of that State, founded upon the adjudications of its courts, in all Cases of defect of the common Laws not supplied by Statute.+ No mention is made of the Statutes of England, as composing a part of their municipal Code; whether any respect is paid to such as were made for the Amendment of the common Laws is not mentioned. The recent establishment of American Independence creates a presumption that what is here remarked by Mr. Swift respecting the Authority and Obligation of the common Laws of England in Connecticut is equally applicable to its colonial as to its independent State.

In Newyork (if we may judge from the very small number of Acts on the general subjects of civil polity, which occur in an Edition of the Laws of that Colony published in the year 1774) Great reverence must have been had to some unwritten Laws, whether of England, or of England I pretend not to determine. How far the Statutes of England might have been admitted as altering or amending the unwritten Laws, I am equally unable to say.

The Charter granted to the Earl of Clarendon & others in the year 1662. of the

+ See Swift's System of the Laws of Connecticut 40. to 47.

of the territory lying between the ~~thirty first degree of~~ thirty ninth degree of Latitude & the Southern boundary of Virginia constituted them absolute Lords & Proprietors thereof, reserving to the King himself his heirs & Successors the Sovereign Dominion of the Country, & invested them with all the Rights Jurisdictions, Royalties, privileges, & Liberties within the same, in as ample manner as the Bishop of Durham enjoys that County palatine in England; which they were to hold of him & his Successors in free & common Socage. They were authorized to publish any Laws or Constitutions they judged proper with the assent, advice & approbation of the freemen of the Colony. Agreeable to these powers they began to frame a system of Laws: the celebrated Locke was called in to their assistance, and a model of Government was framed by him, which the proprietors agreed to establish: but the system proved useless & impracticable. Several Attempts were made to amend it, but to little purpose: the inhabitants, sensible of their Impropriety and how little they were applicable to their circumstances, neither by themselves, nor by their Representatives in Assembly ever gave their Assent to them, & therefore they obtained not the force of fundamental Laws. What regulations the people found applicable & useful they adopted at the request of their Governors; but observed them on account of their own propriety

and necessity, rather than as a system of Laws imposed on them by British Legislators.†

Discontents, arising principally from religious Dissentions among the Colonists, created infinite difficulty in the framing of Laws, the Distribution of Justice, and in maintaining public order & tranquility.†† Two parties soon after arose in the Colony, one in support of the Prerogatives and authority of the proprietors, the other in Defence of the Liberties of the people. The former contended that the Laws and regulations received from England respecting Government ought to be strictly & implicitly observed: the latter kept in view their local circumstances and maintained that the freemen of the Colony were under obligations to observe them only so far as they were consistant with the Interest of Individuals, and the prosperity of the Settlement. – This ended in the Appointment of a Committee, by Governor Colleton, about the year 1687. to consider wherein the fundamental Constitutions before mentioned were improper, or defective, and to make such alterations therein as might be conducive to the welfare of the Colony. The Committee framed a Code of standing Laws which they transmitted to England for the approbation of the proprietors, who rejected them, insisting on the observance of the fundamental Constitutions; mean time the people treated both with equal indifference and neglect.‡ Some years after an Assembly was convened by

† History of South Carolina. London printed 1779. pa. 43. 44.
†† Ibid: 97.
‡ 16: 90. 99. 100.

by whom some laws of immediate necessity were passed.* Lord Granville, when Palatine, projected the Establishment of the Church of England by a Law of the Colony, but it met with Opposition from the Colonists at that time, but was carried through some years after by the Influence and Intrigues of the Governor.† — In the year 1712. Mr. Craven was appointed Governor, and under his administration the General Assembly agreed to make several English Statutes of the same force in Carolina, as if they had been enacted there. What parts of the English Law was proper to be admitted, or necessary to be rejected was judged and determined in the first Instance by the provincial judicature, then subject to the Approbation or Disapprobation of the proprietors‡; ~~under fear of the British parliament, that nothing might be attempted derogatory to the sovereignty & supreme Jurisdiction of the Mother Country.~~ ‡ ~~This [latter part] seems to have been rather the Opinion of the Historian than an historical narrative.~~ In the year 1719. the Colonists deposed the proprietary Governor and elected another Governor, whom they invested with that Character under the Crown, and the succeeding year a Scire facias was issued from the Chancery in England to repeal the proprietary Charter.‡‡ From that period the Government was transferred to the Crown.

Among the fundamental laws established by the proprietors we find it declared that it shall be a base & vile thing to plead for

* Hist: of So. Car: 131. † Ibid: 148. 166. ‡ Ibid: 209.
‡‡ Ib: 278. 290.

for money or reward; and in order to avoid a multiplicity of Laws, or comments thereon, that all Statutes shall expire of themselves at the end of one hundred years; and all manner of comments either upon the fundamental Constitutions, or any part of the common, or statute law of Carolina are absolutely prohibited; that no marriage should be lawful, whatever Contract, or Ceremony they have used, until both the parties mutually own it before the register of the place; that Tolleration in matters of Religion be allowed to all, who allow that there is a God; that he is publickly to be worshipped; and that it is lawful, & the duty of every man being thereto called by those who Govern to bear witness to Truth; and that no person above the age of seventeen years shall have any Benefit, or protection of Laws, who is not a member of some Church. And finally, that no person shall speak any thing in their religious Assembly irreverently, or seditiously of the Government, or Governors, or State matters.+

The proprietary Charter being vacated near sixty years after the first establishment of the Colony, we are left in doubt whether any of the fundamental, or other laws, established under its authority were regarded as in force under the regal Government; nor are we left to seek what part of the laws of the mother Country were deemed applicable to the situation of the proprietary Colony; or from what period

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+ Fundamental Constitutions of South Carolina; art: 79. 80. 87. 97. 100. 103.

the Statutes of England, were considered as in force there. The royal provincial Governments in America, had before this time assumed a very different tone & constitution from the original Charter-Governments. Whatever doubts we may entertain of the effect of the repeal of the Charters of Massachusetts and South Carolina upon the original institutions of those Colonies, the Charters of Connecticut & Rhode Island were never forfeited†. The Laws of the former, however repugnant they might be in reality to the conditions of the Charter, still continued to be the laws of the land; for although it was undoubtedly an act of usurpation, as against the Crown, to enact laws contrary to the restrictions imposed by the Charter, yet the Acquiescence of the Crown therein, so long as the Crown had any thing to do with the Colony, must be considered as giving a tacit sanction to what, if so disposed, it might at any time have punished as a violation. And having never done so, until its authority was wholly determined, the Laws of the Colony, whose sanction was before inviolable against all others, but the Crown, became from the moment that the regal Government was dissolved inviolable by any authority but the Sovereignty of the State. The same may be said of the Laws of the other Colonies, which, so far as they were inconsistent with their several original Charters, may be considered as acts of usurpation upon the Crown, & as such liable to be be annulled at

† Hutchesons Hist: Mass: 1. 359.

at the will and pleasure of the Crown; but having been permitted to remain without any express act of repeal, or abrogation, their Authority, over those who made them, was unquestionable; and when the Crown ceased to have any longer a Right to question their Authority, that Authority could only be superseded by the Sovereignty of the States, which succeeded to that of the Crown.

Whoever possesses Leisure, and means of information, sufficient to pursue the enquiry (here slightly touch'd upon) through the several Charters, Constitutions, legislative acts, judicial Decisions, and civil History of the ..... Colonies, from the first Moment of their respective Establishments, down to that of the American revolution, will readily perceive that it would require the talents of an Alfred to harmonize and digest into one System, such opposite, discordant, and conflicting municipal Institutions, as were exhibited in their several Codes at the latter period. Nor will he be less sensible, that it would probably have required the coercive Arm of the Norman Tyrant, to enforce subjection to such a system, by whomsoever digested. In vain then should we attempt by any general Theory to establish the uniform Authority and obligation either of the common law, or Statutes of England in the American Colonies, at any period between the first migration to this Country, and that Epoch which annihilated the Sovereignty of the Crown of England, over it. I shall therefore proceed to consider,

III. Thirdly, what part of the Laws of England were abrogated by the revolution, or retained by the several States

States, when they became sovereign & independent Republics.

When the American States declared themselves inde=
=pendent of the Crown of Great Britain, each State from
that Moment became sovereign, and independent, not
only of Great Britain, but of all other Powers, whatsoever.
Each had its own separate Constitution and Laws, which
could not in any measure be affected, or controlled
by the Constitutions or Laws of any other. From
that Moment there was no other Law common amongst
them, but the general Law of Nations, to which all
civilized nations conform. And as no Law could be
thereafter imposed upon the people of any State, but by
the legislature thereof, so no Law could be obligatory
in one State, merely because it was obligatory in
another. And how much soever their municipal
laws might agree, one with another, yet, as it was
in the power of their legislatures respectively to alter
all such Laws, whenever they thought proper, therefore
such coincidence by no means established a common
rule amongst them: [illegible]
because the establishment of such a rule within
the Jurisdiction of one State, gave it no authority
whatsoever within the Limits of any other. Whatever
Obligation the common Law and Statutes of England, as such
=bound to have acquired among them whilst Colonies,
may be sup=
dependent

dependent on England, that Obligation could thereafter rest only upon the ground of adoption, ~~either expressly or tacitly~~, by the several States in their sovereign independent, ~~there being no longer~~ Capacities & Characters; ~~there being no longer any common sovereign, nor any common Fountain of Legislation between among them.~~

Conformable to this Idea, is the declaration contained in the Constitution of Massachusetts, viz: "that the people
"of that Commonwealth have the sole and exclusive Right
"of governing themselves as a free sovereign & independent
"State; and do, and forever hereafter shall, exercise and
"enjoy every power, Jurisdiction, and right, which is not,
"or may not hereafter, be ~~delegated~~ by them expressly delegated
"to the United States of America in Congress assembled." +

This is merely a declaration of the Law of nations;† and as such applies equally to all the other States in the Union as to the Commonwealth of Massachusetts. — And though perhaps it will be objected that the Confederation formed between the States, deprived them of a very considerable portion of that complete Sovereignty which some other Nations exercise, yet that Objection admits of ~~these~~ Answers. First, ~~until~~ the Articles of Confederation were not ratified among the several States, ~~which did not happen~~ until March 1781. near five years after the States had declared themselves independent. Secondly, That when they did ratify the proposed Articles of Confederation

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\+ Const: Mass: established March 1780.
† Vattel 9.

9 By this constitutional declaration all the Colonial Laws, however repugnant they might have been to the common law and Statutes of England were unquestionably established, and from that period, the doubts which Governor Hutchinson informs us prevailed in the Colony, a few years before must have been compleatly removed, as to the validity of such laws.

in conformity to the laws of nations *

* Vattel l. 18. Confederation, they declared thereby, that each State retains its Sovereignty, Freedom & Independence and every power Jurisdiction and right, which is not thereby expressly delegated to the United States in Congress assembled. - Thirdly, That there is no power delegated by those Articles, whereby Congress could claim any, the most remote right, to legislate upon the general subjects of the common law; or to introduce it in whole, or in part as the national code of the American States. We must therefore recur to the Codes of the several States, respectively, for information how far the common laws & Statutes of England were admitted as a part of their Codes. 34

Massachussets declared, That all laws which had been heretofore adopted, used, and approved, in the province Colony or State of Massachussets Bay, and usually practised on in the Courts of Law, shall still remain & be in full force until altered, or repealed by the legislature; such parts only excepted as are repugnant to the Rights and liberties contained in the Constitution. + 9

The Constitution of Newyork † ordains, that such parts of the common law of England, and of the Statute Law of England and Great Britain, and of the Acts of the Legislature of the Colony of Newyork, as together did form the Law of the said Colony on the 19th day of April 1775. shall be and continue

+ Const: of Mass: March 1780.
† Established April 1777.

¶ In New York very few Laws on General Subjects of civil polity had been enacted by the Legislature antecedent to the revolution, as appears by the Colonial Code published a year or two before that period. — The Laws of that State must have formed a striking Contrast to those of Massachusetts, and Connecticut, at that time.

continence the Laws of the State, subject to such alterations and provisions, as the Legislature of the State shall from time to time make concerning the same. That all such parts thereof as may be construed to establish any particular denomination of Christians, or concern the Allegiance heretofore yielded to, and the Supremacy Sovereignty, Government, or prerogatives claimed or exercised by the King of England or his predecessors, over the Colony or its Inhabitants, or are repugnant to the Constitution are thereby abrogated & rejected. ¶

The Constitution of New Jersey, established July 2. 1776. declares That the common Laws of England, as well as so much of the Statute Laws as have been heretofore practised in that Colony, shall still remain in force until they shall be altered by a future Laws of the Legislature, such parts only excepted as are ~~repugnant~~ to the Rights and privileges contained in that Constitution.

The Constitution of Delaware, established Sept. 20. 1776. declares that the common Laws of England, as well as so much of the Statute Laws as have heretofore been adopted in practice in that State, shall remain in force, unless they shall be altered by a future Law of the Legislature; such parts only excepted as are repugnant to the rights and privileges contained in that Constitution and the declaration of rights agreed to by the Convention.

The Constitution of Maryland established August 14. 1776. declares That the Inhabitants are entitled to the common Laws of England, and the trial by Jury, according to the course of that Law, and to the Benefit of such of the English Statutes as existed at the time of their first Emigration, and which by Experience have been found applicable to their

Local

At the first Session of the General assembly of Virginia, which succeeded the revolution, an report for the Revision of the Laws, the preamble to which is as follows. Whereas on the late Change which hath of necessity been introduced into the form of Govt in this Country, it is become also necessary to make corresponding Changes in the Laws hitherto in force, many of which are inapplicable to the powers of Government as now organised, others are founded on principles heterogeneous to the republican spirit, others, which long before such Change, had been oppressive to the people, could now yet be repealed while the regal power continued, & others, having taken their origin while our ancestors remained in Britain, are not so well adapted to our present circumstances of time and place. &c. Whereupon a Committee of five Gentlemen were appointed, who had full power and authority to revise, alter, amend, repeal, or introduce any Laws, and report the same to the general assembly, for their Approbation or otherwise. A report was made by the Committee in June 1779. and between that period and the adoption of the Constitution of the United States, a great part of the common Laws, and almost the whole of the Statute Laws of England, as such, was abrogated in Virginia: in 1789. and the three succeeding years a further revision was made, and now, no Act of parliament or Statute of England, as such, has any authority in Virginia, except as to some few Cases which are particularly saved by the Act which repeals them all - Edn 1794. c. 147. & the common Law is ~~almost~~ very much altered.

and other circumstances, and of such others as have since been made in England or Great Britain, and have been since introduced, used, and practised by the Courts of Law or Equity; and also to all Acts of assembly in force on the first day of June 1774. except such as may have expired, or have been, or may be altered by Acts of Convention or that Declaration of Rights, subject to the revision, amendment, or repeal of the Legislature of that State. 36

The Convention of Virginia June 1776. declared, that the common Law of England, all Statutes or Acts of parliament made in aid of the common Law, prior to the fourth year of James the first, and which are of a general nature, not local to that Kingdom, together with the several Acts of the General assembly of the Colony then in force, so far as the same may consist with the several ordinances, declarations and resolutions of the General Convention, shall be the rule of Decision, and shall be considered as in full force, until the same shall be altered by the legislative power of the Commonwealth. &

The Constitution of South Carolina, established March 19. 1778, declares, that the resolutions of the late Congress of that State, and all Laws then in force there (and not thereby repealed) shall so continue, ~~and &~~ until altered or repealed by the Legislature of the State, unless where they are temporary.

The Constitutions of the other States, so far as I have had an Opportunity of consulting them, are silent on the subject of the adoption of the common Laws or Statutes of England. But what I have here selected is apprehended sufficient to shew, that in all the States where the

the common Laws or Statutes of England have been adopted, they have the force of Laws, only, sub graviori Lege, being restrained, repealed, or annulled by the provisions contained in their several Codes, Constitutions, and judicial ~~Customs~~ Usages. And in all Cases subject the Amendment, repeal, and control of the Legislatures of the several States, respectively. The various modifications under which this adoption has been made in the several States, ~~[illegible]~~ seem to refer every attempt to reconcile them perfectly abortive; ~~[illegible]~~. As may be seen from a few Examples.

Special Verdicts not to be allowed in any Case in Georgia C. Georgia art: 41. No grand Jury Cases Exemption Vid: 95.

~~The Benefit of the Writ of Habeas Corpus, if any part of the Laws of England may be supposed to have been intended more particularly than any other to be secured to [illegible] adopted in all the States~~

If any part of the Laws of England may be presumed to have obtained a more general reception & adoption in the several States, than the rest, we may ~~[illegible]~~ select the Benefit of the Writ of Habeas Corpus, as that part, which would be entitled to ~~a general~~ the preference. This great and efficacious Writ is held to be grantable of common Right: yet, by the Common Law, if a Judge should refuse to grant it, he was not liable to any penalty, nor could the party aggrieved have any remedy against him by Action or otherwise. The Habeas Corpus Act, 31. Charles the second first imposed a Fine of £500. upon any Judge who should refuse it, in any Case where it ought to be granted. This

Act

Act was not adopted in Virginia, but the Constitution of Georgia declares that the principles of it shall be a part of the Constitution of that State. In Virginia then, until the Legislature passed an act upon the subject eight years after the revolution, a Judge was not liable to any Penalty for refusing the writ; but if he had refused it in Georgia he was subject to a Fine; — again, by the common law, a party to whom the writ of Habeas Corpus is directed may stand out to an alias, or a pluries, before he pays obedience to it; under the Statute he must obey the first writ, or it will be a Contempt of the Court, and an Attachment will be awarded immediately. ~~with Impunity~~. Which of these two Constitutional modes of proceeding shall prevail? Shall that which Virginia adopted be admitted in Georgia; ~~or~~ shall the Laws of Georgia render a Judge liable to a fine in Virginia? If in a Case where an universal Concurrence might have been expected, such irreconcilable difficulties occur, shall we expect fewer, in other Instances?

Another Case, may illustrate this subject still further. According to the principles of the common laws of England no Alien can be naturalized but by Act of parliament. By Statute of 4. Geo. 2. c. 21. which according to the principle now generally admitted in America, could only have had an operation in the Colony of Georgia, all foreign protestants & Jews upon their residing seven years in ~~a~~ the American Colonies, and all foreign protestants serving two years in a military Capacity there, or being employed three years in the Fisheries were naturalised upon taking the Oaths of allegiance & Supremacy.

Q Let us put another Case. — By the Constitution of North Carolina it is declared + that every foreigner who comes to settle ~~there~~ in that State, having first taken an Oath of Allegiance to the same, may purchase, or by other just means acquire, hold, and transfer Lands, or other real Estate; and after one year's residence, shall be deemed a free Citizen. Here we may observe that the foreigner notwithstanding the Oath of allegiance which he may have taken still remains an Alien (as at common law) until after one years residence; yet, though an alien, he may both acquire & hold Lands or other real Estate. By the common Law of England, an Alien can not hold Lands. That Law still remains, in this respect, the Law of the Land in Virginia. Does it also remain the Law of the Land in North Carolina, in virtue of the adoption of it in Virginia; ~~or in virtue of any~~ or does it retain its force & obligation there, in virtue of some transcendental unalterable property thereof, notwithstanding this express declaration contained in the fundamental Constitution of that State?

I shall add one more Case. The Consto. of Penns.a Art. 35. declares that the printing presses shall be free to every person who undertakes to examine the proceedings of the legislature, or any part of the Government." This Declaration it is presumed removes every restraint which some have supposed the common law imposed upon the press. Is this declaration a mere nullity because it may be contrary to the common law?

+ Art: 40.

The Constitutions of all the States, declare their Constitutions and the acts of their respective Legislatures paramount to the common Law & the Statutes of England, as adopted by them — this Construction makes the common Law paramount to Constitutions and Legislative Acts.

Supremacy. Perhaps this Act was still retained in force in Georgia: but it was never in force in Virginia. If a Question of naturalization should depend upon this point, only, must we ~~[illegible]~~ decide, that because this Statute was made a part of the municipal law of Georgia, therefore it should be construed as in force in Virginia; or vice versa, that inasmuch as it was never in force in Virginia, neither should it be admitted to be in force in Georgia.

Q + This may lead us to decide upon the Right which any Man has to expatriate himself. It is admitted that the English Jurists agree, that by the common law, a Man can never put off his ~~allegiance~~ natural allegiance, or that which he is supposed to owe to the Prince or Government in whose Territories he is born. — And perhaps there was not a State in the Union, except Virginia, that has ever altered this part of the common law. + This she did in the year 1783. and the Act was confirmed in 1786. two years before the adoption of the federal Constitution. ~~[illegible]~~ Will ~~[illegible]~~ it be denied that Virginia had a right to repeal this part of the common law? If Virginia could repeal it within her own Territory and Jurisdiction, did not ~~[illegible]~~ ~~[illegible]~~ ~~[illegible]~~ such repeal destroy the Unity of the Rule throughout the United States? If the Unity of a Rule be destroyed by the Act of one State, does it not cease to be a common rule? Or does the neglect of the other States to pass a similar ~~a~~ Law within their respective Jurisdictions, revive the common law rule in Virginia, non obstante, the Act of her legislature to the Contrary? If it be said that

+ pennsylvania seems to have done so — See the Consto. Art. 15.

That a Citizen ~~of the United States~~ born in Connecticut could not expatriate himself because the common law of England which ~~forbids such a~~ denies the Right of Expatriation remains in force in that State; ~~so that~~ we not might reply that a Citizen of Virginia can ~~might~~ expatriate himself, because the State of Virginia had repealed the common Law of England, and established that Right within its Jurisdiction[2]. For until it be shewn that the common Laws of England is paramount to the Legislative power of the several States, we must admit, that ~~any~~ where any rule thereof is contradicted by such a Legislative Act, such rule is from thenceforth utterly annulled. And from hence the impropriety of an interference on the part of the federal Courts in common Law Questions must be manifest: for their Decisions ought to be uniform whether they be pronounced in Connecticut, or Virginia; but how can this happen, if the Laws of Virginia pronounce that to be lawful here, which the Laws of Connecticut do not permit, in that State[2].

I shall

Whoever delights in the search after difficulties may pursue this Inquiry with confidence that he will never be without enough of them upon his hands. I shall ~~endeavour~~ endeavour to deduce one or two general Conclusions from the whole that I have said.

First, That the common Law of England, and every Statute of that Kingdom made for the Security of the Life, Liberty, or property of the Subject, before the Settlement of the Colonies, respectively, so far as the same were applicable to the nature of their Situation, and for their Benefit were brought over to America by the respective Colonies, and remained in force, in them, until repealed, altered or amended by Legislative or Constitutional Acts of the respective ~~States~~ Colonies, or States,

Secondly; That every rule of the common Law of England and every Statute thereof, which, being founded in the nature of regal Government, were in derogation of the Rights of the people, and inconsistent with the nature and principles of a Democratic Government, were absolutely abrogated, repealed, and annulled, by the establishment of the several State Governments, upon the Basis of the Sovereignty of the people, and the responsibility of those employed by them to administer the Govern[t].

Thirdly, That the ~~Acts~~ Adoption or rejection of any rule of the common Law, or Statute of England, by one or more of the confederated States, neither could nor ought to have any Operation or Effect in any other State.

1. That the common laws of England, and Statutes of that Country were, at no period antecedent to the revolution the general and uniform laws of the Land in the British Colonies now constituting the united States of America. 1st Because &c.

2. That from the period of the revolution to that of the adoption of the Constitution of the United States, neither the common laws nor Statutes of England had any other Authority in the United States, ~~as authority there at that period~~ respectively, than what was derived from the declarations contained in the Bills of Rights, Constitutions, and laws of the respective States; or in the uniform usages & customs observed by each State respectively, in its judicial proceedings and Decisions.

3. That these declarations, usages, and customs being different in the different States, and altogether independent one of another, the declarations, usages and customs of any one, or more States, can not avail in any other State, and consequently can not establish any uniform laws, or rule of Obligation in all the States.

4. That the Articles of Confederation and perpetual Union do not contain any grant of power or Authority to Congress to legislate upon any subject of common Law Jurisdiction; and consequently ~~had~~ did not authorize Congress to impose any uniform laws or rules obligatory upon all the States.

5. That there being no supreme legislature authorized to impose such uniform laws, or rules obligatory upon all the States, neither the common laws, nor Statutes of England had any Force, Authority, or Obligation in the United States as a nation, in virtue either of their intrinsic moral Obligation, nor from any other cause whatsoever, unless the same should be found to have been ~~enacted~~ established by the Constitution of the United States.

1st Because ~~as~~ those laws were continually changing; and as the Colonies were settled at different and remote periods, the same laws could not be in force in all, without ~~annulling the provisions of the~~ Supposing the more ancient Colonies bound by British Statutes made after their Establishments: a doctrine rejected on all hands.

Fourthly - That the Articles of Confederation and perpetual Union do not contain any grant of Power, or Authority to the Congress of the United States to legislate upon any common Law subject.

It remains only to enquire,

IV. How far that portion of the laws of England, which has been retained by the several States, ~~until the adoption of the Constn.~~ has been engrafted upon, or made a part of ~~the Constitutions~~ of the Constitution of the United States.

It will be recollected that the Object of the States in that Instrument was not to establish a General Government which should swallow up the State-Sovereignties, and Jurisdictions, but, a federal Government, with powers commensurate to the administration of the Concerns of the States with foreign nations, and with each other; leaving the administration of their internal Government to the absolute and uncontrollable Jurisdiction of the States, respectively, except in the Cases particularly Specified in the Constitution; and that because this principle was supposed ~~to have escaped~~ not to have been expressed with sufficient precision & certainty, an Amendment thereto was proposed and adopted, whereby it is expressly declared, That the powers not delegated to the United States by the Constitution, nor prohibited by it to the States, are reserved to the States respectively, or to the people.

The powers delegated to the Congress, are not all Legislative: many of them are usually supposed to belong to the Executive department

2dly Because the Colonial laws and usages, by which the Applicability, or Inapplicability of the Common Law and Statutes of England to the several Colonies, must be determined, were different in every Colony.

3dly Because neither the Common Law nor Statutes of England ~~do stand~~, have any intrinsic moral obligation in them, except so far as they are in Affirmance of the Laws of God & nature; which not depending upon human Laws for their sanction, can not derive their authority in the United States from the municipal Laws of any other Country. –

4. Because this intrinsic moral obligation if extended beyond the limits before mentioned, must be supposed to give a sanction to all the arbitrary laws and usurpations of the most tyrannical princes. ~~would establish the absurdities which were perpetrated in~~

5. Because, if it be supposed ~~allowed~~ to be in the discretion of Judges to discriminate between such laws (not possessing an intrinsic moral obligation for the reasons before mentioned) as ought, or ought not to be admitted ~~as to be in force in Habbacuc's time~~, as in force, such a supposition would render the Judges Legislators, as well as Judges; which is repugnant to our Constitution.

department in other Countries; such as the power of declaring War, raising Armies, granting Letters of Marque &c., none of which can be presumed to imply a grant of general powers at common Law.

The Legislative powers of Congress are confined to so few Objects, that ~~the State~~ if the Amendment just mentioned be construed to have any Effect, the States have granted with very few of their powers, except what related to their Intercourse with foreign Nations, or with each other as States. They consist in the power,

1. To lay & collect Taxes, &c. for Purposes of the federal Government.

2. To establish an uniform rule of naturalization: this being a branch of common Law Jurisdiction, its being particularly enumerated shews that the Grant of powers over the subject of the common Law was not general, but special: all others not granted being reserved to the States respectively.

3. To establish uniform Laws on the subject of Bankruptcies. This was no part of the common Law of England, the name, as well as the wickedness of Bankrupts being fetched, according to Sir Edward Coke, from foreign nations – The grant of a special authority relative to this branch of the English Statute Law, likewise shews that it was not intended that Congress should possess a power on all subjects whereon the parliament of England may have legislated, but merely upon such branches of the Statute Laws, as are positively enumerated, all others, not enumerated being reserved to the States, respectively.

4. To coin money, regulate the value thereof, and of foreign coin, and fix the Standard of weights & measures. These powers are respectively branches of the royal prerogatives in England, and being specially enumerated, shew that it was not intended to trust the Exercise of any other of those Prerogatives to the federal Government, but such as are in the Constitution expressly enumerated. All others, consistent with the nature of democratic republics, being reserved to the States respectively.

5. To provide for the punishment of counterfeiting the Securities and current Coin of the United States. The special power hereby granted to punish such offences, one of which is high Treason by the Common Law, but is not so in the United States, also shews, that the power of punishing Offences, generally, was not intended to be entrusted to Congress, but only the power of punishing particular enumerated Offences, the Cognizance of all others, being reserved to the States respectively.

6. To establish post offices, and post-roads;

7. To promote the progress of Science and useful arts, By securing to Authors & inventors, for a limited time the exclusive right to their writings and discoveries. — These determinate objects of legislation may be referred to the same Class as the subject of Bankruptcy.

8. To constitute Tribunals inferior to the supreme Court. To this we may refer what was said on the subject of Coinage &c.

9. To define, and punish piracies and felonies committed on the high Seas, and offences against the Law of Nations; The power of defining Felonies and offences committed upon Land, (except in the Cases particularly enumerated) being reserved to the States, respectively.

10. To make rules for the Government and regulation of the land and naval forces; and for organizing and disciplining and for governing such part of them, as may be employed in the service of the U.S. the Militia; 2. The power of making rules for the government of the civil State (as contradistinguished from the military & maritime States of the militia when not employed in the service of the U.S.) as also of the militia at all times, except when employed in the service of the U.S. being reserved to the States respectively.

11. To exercise exclusive Legislation in all Cases whatsoever over such District (not exceeding ten miles square) as may by cession of particular States, and the acceptance of Congress, become the Seat of Government of the U.S. — and to exercise like authority over all places purchased by Consent of the Legislature of the State in which the same shall be, for the erection of forts magazines, arsenals, Dockyards, and other needful buildings. — The exclusive power of legislating in all Cases whatsoever, except within the precincts of the Seat of Government, not exceeding ten miles square; and except within the precincts of such forts, magazines, arsenals, Dockyards, & other such needful buildings, as may be erected by Congress, with the Consent of the State in which the same shall be, being reserved to the States, respectively.

12. Lastly, to make all laws which shall be necessary and proper for carrying into Execution the foregoing powers, and all other powers vested by the Constitution in the Government of the United States, or in any department thereof.

If the reader can discover in any of the powers before enumerated, that which authorises Congress to legislate upon the subject of the Common Laws in general, our inquiry is at an end: but if he can not, we must pursue it through the other departments of the Govern^t. inasmuch as Congress are authorised to make all Laws, which may be necessary and proper to carry into Effect the powers vested by the Constitution in any department of the Government.

When the Constitution declares that the President shall be commander in Chief of the Army and Navy of the U. S. and of the Militia of the several States, when called into the actual service of the United States; that he may require the opinion of the Heads of departments in writing, upon any subject relating to the duties of their respective Offices; that he may grant reprieves & pardons for Offences against the U. S. except in Cases of Impeachment; that he may make Treaties, by & with the advice & consent of the Senate; that he shall nominate, & with the advice & and consent of the Senate appoint Ambassadors, other public Ministers and Consuls, Judges of the Supreme Court, and all other Officers of the U. S. whose appointments are not therein otherwise provided for; that he may fill up Vacancies during the recess of the Senate by a temporary Commission; that he may on extraordinary Occasions convene both Houses or either of them, and, under certain Cir=
=cumstances, adjourn them; that he shall receive Ambassadors and other public Ministers; that he shall take Care that the Laws be faithfully administered, and

commission all the Officers of the United States, can any person discover in this Enumeration any thing like a ~~grant~~ Grant of general common law powers, or that requires the Exercise of general common Law powers to carry them powers into Execution. yet there are all the enumerated powers of the executive department, except ~~as~~ where relates to his assent or dissent to the Acts or votes of Congress.

The judicial power of the federal Government extends,

1. To all Cases in Law and Equity arising,

1. Under the Constitution; the powers therein granted being specifically enumerated, the Cases which can arise under the Constitution itself, must refer to those enumerated powers, and no other subject.

2. Arising under the Laws made pursuant to the Constitution, — and

3. Arising under Treaties made by Authority of the United States; — This is merely a repetition of what was comprehended under the term Constitution; except as far as relates to Treaties made antecedent to its Adoption. These clauses being particular and restrictive can not be interpreted to convey a general common Law Jurisdiction.

2. To all Cases affecting Ambassadors, other public Ministers and Consuls: these Cases are admitted to belong to the Laws of nations, & not the common Laws.

3. To all Cases of admiralty & maritime Jurisdiction — These were never held to be within the Jurisdiction of the common Laws.

4. To Controversies, to which the United States.

+ If a Citizen of one State should be denied the privileges of a Citizen in any other State, the Question whether he ought to have been denied them, is one of the Cases to which this Clause of the Constitution may be supposed to refer. So if a person held to Service or Labour in one State, under the Laws thereof, ~~and~~ should escape into any other State, the Question whether the person so escaping should be discharged from such Service or Labour in Consequence of the Laws of that State, into which he may escape, would be another Case, to which this Clause may be supposed to refer. — And in like manner should any State coin money, & declare the same a legal tender in payment of debts, if a Citizen of any other State or any foreigner should refuse to take it in payment of a debt due to himself, the Question upon the legality of such tender may likewise be supposed to be one, to which the Clause refers; and generally, every Question which relates to the validity of any Law, either of the United States, or of any State, in respect to a subject treated of in the Constitution of the United States, or of any Treaty made under the Authority of the United States; ~~or~~ concerning the legality or of any act done by the President of the United States, or any Officer of the ~~Government of~~ federal Government must be supposed to be comprehended under ~~the words~~ of this Member of the paragraph which contains a definition of the judicial Authority of the United States.

+ So also if any State should without the Consent of Congress lay any Imposts or Duties, the Question as to the validity of such an Imposition would fall under the meaning of this Clause;

States shall be a party. — I suspect that if there be any word in the Constitution which the advocates for an extension of the Jurisdiction of the federal Courts will be ready to lay hold of, it will be this word Controversy; they will perhaps tell us, that as the King of Great Britain, is in the Eye of the common Law of England Prosecutor in all Cases of Crimes and Offences against the State, therefore, in all such Cases he is a party; and the prosecution may be deemed a Controversy between the King, and the party accused: then, by a parity of reasoning they will perhaps tell us, that the King & the United States are convertible terms; and consequently that the United States are parties in all criminal prosecutions; ~~consequently~~ wherefore all such prosecutions are within Jurisdiction of the ~~Court~~ federal Courts.

But this word Controversy, as used in the Constitution is certainly intended to apply only to civil suits; as may be collected from what follows, as well as what went immediately before. The word Cases as used in the three preceding members of the paragraph, applies generally to the enumerated powers granted to Congress in the first Article, & ~~comprehends~~ comprehends those Offences, which Congress are thereby expressly authorised to punish; towit breaches of the revenue Laws of the U. S. and the

the several Offences of counterfeiting the Securities and current coin of the United States; piracies, and felonies committed upon the high Seas, and Offences against the Laws of nations; as also such felonies or Offences as may be committed within the precincts of the Ten Miles Square, which may become the seat of Govt: or within the precincts of forts, Magazines arsenals & dock yards purchased with the consent of the State in which they may be, and finally the Offence of Treason against the United States, the Cognizance of which is given by Implication, in the third Article: the word controversies, as used in the succeeding part of the clause, is evidently confined to civil Suits, being applied to such as may arise between States, or between Citizens of different States, or between a State, & Citizens of another State, none of which can possibly be supposed to be of a criminal nature. For such a construction would take away from the States the power of punishing Murder or Theft, or any other Crime committed therein, if the Offender should happen to be a Citizen of another State or even a foreigner. A Construction too absurd to be dwelt upon. We may therefore pronounce with confidence, that as it is applied to the United States it cannot be construed to mean any more, than it does when applied to the States, or to Individuals.

5. The Judicial power of the United States, as now limited by the thirteenth Article of amendments extends — to controversies between two or more States — between a State and foreign States — between citizens of different States, — between citizens of the same State claiming Lands under grants of different States; — and between the citizens of any State, and foreign States, Citizens, or Subjects. In controversies between one State & another, or any foreign State, they must proceed according to the Laws of nations. In controversies between citizens of different States, they must be governed by the municipal laws of that State where the cause of controversy arises, unless the controversy relate to Lands granted by different States; in which Case the territorial rights of such States will fall under examination, according to their several Charters, ~~and must be determined~~ The same thing will happen in all controversies between Citizens of the same State, since no other are cognizable in the federal Courts. In Controversies between the Citizens of any State, and foreign States, Citizens or subjects, they must likewise be governed, either by the municipal laws of the place where the cause of controversy arises, or by the general laws of nations, according to the nature of the Case. None of these Cases therefore can be construed to convey a general Jurisdiction in Causes at common Law, ~~from which they are~~ or such, as ordinarily arise between Citizens of the same State. in which

† One or two instances may serve to illustrate this point: by the common law to steal a horse is felony; and by the Statute laws, the punishment is death without the benefit of Clergy. — This Offence it is presumed is stile felony in all the States; but its punishment is different in different States. In Pennsylvania the felon is punished by Imprisonment and hard labour, only. The punishment is similar in Connecticut. In Virginia it is still death without benefit of Clergy; it is probably equally severe in some of the other States. ~~If~~ Will any person contend that Congress have any thing to do with this Offence, or that the Cognizance of it, by the common law belongs to the federal judiciary: the same may be said of Burglary, Robbery, Larceny, and all other Crimes, which were heretofore against the peace & Dignity of the Crown, not less than ~~Treason~~ Sedition & Treason. The Cognizance of the latter is expressly given to the federal Judiciary; the Constitution is silent as to the former. The powers not granted to the U: S: nor prohibited to the several States, by the Constitution, are reserved to the States respectively, or to the people.

is which civil suits in general (with the single exception before noticed) are comprehended; and such as arise between a State, and its Citizens or Subjects, in which Crimes & Misdemeanours, are comprehended. And as the federal judicial power does not extend to civil suits between Citizens of the same State (except in one case) so neither can it extend to such common law Cases, as may be the subject of controversy between them. And on the other hand, as it does not extend to any Cases between a State, and its Citizens, or Subjects, so neither can it extend to such common law Cases, as may arise between a State, and its own Citizens or Subjects; that is to say, to Crimes and Offences committed within any State; at common law, as well as to civil suits, in which the State may be a party. These Cases, then, as well from the reason of the thing, as from the express declaration contained in the twelfth Article of amendments remain with the State Judicatures, exclusively. †

Having examined every passage in the Constitution which I conceived might be supposed to ~~give~~ comprehend or imply a grant of general Jurisdiction in common law Cases, and as I apprehend, found none that either ought to be, or can be so interpreted, I shall now examine one or two passages which may be quoted as implying that such a power had been granted, in some other part of the Constitution. The first of these, is that passage in the second Article which declares

declares that the privilege of the writ of Habeas Corpus shall not be suspended, unless when in cases of rebellion or invasion the public safety may require it. — This passage, so far from giving to the federal Government a general power at common law, was intended to restrain Congress from acting upon a subject where the liberty of the person might be concerned, except in cases of actual Rebellion or Invasion. The States respectively were in the plenary enjoyment of the exercise of the power of granting writs of Habeas Corpus at all times: it was considered that in cases of Rebellion or Invasion, this power might in certain cases be dangerous. Congress therefore have power at such times to prohibit the States from exercising a power which at all other times they may & ought to exercise according to their several Constitutions and laws. And as this prohibition must from its nature be construed strictly, so the Right which it prohibits, ought in favor of liberty, and the principles of our Constitution to be construed liberally. — Secondly The Constitution provides that the trial of all Crimes, except in cases of Impeachment, shall be by Jury. This accords with the common law principle, & its being made a part of the Constitution shews that it was deemed necessary to insert it specially, which could not have been the case if the common Law had been generally adopted by the Constitution; the special adoption of particular parts, were there no other reasons against it, form a strong argument against any Conclusion that

that such adoption was meant to be extended to all Cases whatsoever. For it must be remembered that although the trial by Jury, like many other branches of the common Law, was, with various limitations known in each State, individually, yet in the United States, as such, it was unknown; & had there not been such a provision for it under the new Constitution, it might have remained — equally as unknown as under the Articles of Confederation. The predilection which is entertained for the trial by Jury in America, in all Cases, as well civil as criminal, at common Law, would most certainly have occasioned an extension of this provision in favor of the trial by Jury to all such Cases, whatsoever, had it ever been intended that the Cognizance thereof should have been vested in the federal Courts. The conclusion, therefore, follows that all such Cases at common Law as are not comprehended in the grant of powers to the United States, are reserved to the States, exclusively.

It is not improbable that the ninth Article of amendments may be considered as contradicting the principles here advanced, inasmuch as it provides, "That in suits at "common Law, where the value in controversy shall "exceed twenty dollars, the right of trial by Jury shall "be preserved; and no fact tried by a Jury shall be "otherwise re-examined in any Court of the United "States, than according to the rules of the common "Law". The former part of which presupposes that the Cognizance of common Law Cases was vested

already vested in the federal Courts, and the latter refers to it, as to the known Laws of the Land. 53.

But let it be remembered that we have never contended that the Common Laws of England was not the known Laws of the Land, in the States, individually, under various modifications in them, respectively. And that that part of it which relates to the re-examination of the Judgements of Courts, was generally understood, & might perhaps have been generally adopted, in all the ~~many~~ States; but this reference I apprehend no more establishes the common Laws generally here, than the civil Law can be said to be generally established in England, because many of its Maxims, and its modes of proceeding, are admitted & established in the highest Court of Judicature in that Kingdom, viz, the High Court of Chancery. — And with regard to suits at common Law, there might well happen between a British subject & an American Citizen who had contracted a debt in England, in the strictest sense; but we need not rely upon that circumstance, since in most of the States a distinction is made, generally, between suits Cognisable by what are stiled common Law Courts, and such as are Cognisable only in Courts of Equity. The former Courts proceed in general according to the rules of the common Law of England; the latter according to the civil Law, or ~~Roman~~ imperial Roman Laws before mentioned;

¶ ~~If the bare mention of the common law course of proceeding in this article [cannot] be supposed to amount to an adoption of that law in all cases, [without defeating the design of] [illegible] for [illegible] may [illegible] [illegible] is left to the States. All these laws, made upon the most mature deliberation, must be instantly [annulled] repealed by [implication], and the whole criminal code of England, from the period of the Norman Conquest, [illegible] [illegible] [illegible]. The [illegible] of the several States [illegible] their criminal codes by express provisions in their Constitutions, & Statutes are rendered of no effect, & their Constitutions & laws [illegible] a mere nullity in favor of the common law [illegible] the Constitution is in pursuance to the State Constitutions, and laws, and [illegible] to the any laws of the United States [illegible] repugnant thereto; since all such laws must be made pursuant, and not repugnant, to the Constitution, [illegible] whoever is capable of forming such conclusions or maintaining such a doctrine, must have mistaken the understanding.~~

from this circumstance it happens that all Causes cognizable in the former Courts, are called suits at common law, as contradistinguish'd from suits in Equity. But this distinction is by no means accurate: For if a Statute creates an Offence unknown to the common law, yet the trial must be had in the common law Courts, and according to the Course & rules of proceeding at the common law; they are therefore comprehended under the general term of Suits at common law, merely as distinguishing them from suits in Equity. Therefore as the Constitution extends the federal Judicial power to suits in Equity as well as others, it was deemed proper to stipulate that the latter, which are described under the general term of suits at common law should, with certain Exceptions, be tried by a Jury.

From the whole that has been said, we may form the following Conclusion; that the common law of England, ~~and the civil~~ stands precisely upon the same footing in the ~~Courts~~ United States, as such, that the civil & ecclesiastical Laws stand upon in England; that is to say its maxims & rules of proceeding are to be adhered to in all cases of a similar nature the Cognizance of which is by the Constitution vested in the federal Courts. It may govern & direct the Course of proceedings, but can not give Jurisdiction, where it is not expressly given by the Constitution itself.

Constitution itself. The same may be said of the civil Laws; the rules of proceeding in which are to be observed in all Cases of Equity, and of Admiralty and maritime Jurisdiction – except in the Cases of Piracy & other Offences committed on the high Seas; the trial of which, by virtue of the express declaration in the Constitution to that Effect, is to be by Jury; a mode of trial unknown to the civil Laws. — In short, as the matters cognizable in the federal Courts are partly, such as must be decided according to the rules and maxims of the Law of nations; partly, such as must be decided according to the rules and Maxims and mode of proceeding by the common Laws of England, partly, such as must be decided according the rules & maxims of the civil Laws; and partly, such as must be decided according to the Laws of the State, or foreign nation, where the Contract or Cause of action may accrue, or be decided, so the Laws of nations, the common Law of England, the civil or Roman Laws, or the Lex Loci, or Laws of the State, or foreign nation, where the Cause of Action may arise, or shall be decided, must in their turn be resorted to for the Decision of every Case, which may occur, according to

to the particular circumstances of each case, respectively; so that each of those laws may, in their turn, be regarded as so far, the Law of the Land. But to infer from hence that the common Laws of England is in all cases the Law of the Land, would be as absurd, as to suppose that the civil laws, or the laws of Hamburg, of Holland, or of France, are the general Law of the Land, because in a Controversy respecting a Contract made in either of those places, the laws of such place might be referred to, to decide the Question between the litigant parties. Nor would it seem less absurd to suppose the penal Codes of those Countries or any other in force here, than to suppose the penal Code of England or Great Britain to have any other Authority here, than what it derives in each State, respectively, from the adoption thereof by their several Legislatures, or in their respective Constitutions.

One or two Instances may serve to set this matter in a clearer light. If a suit be brought in the federal Court in Virginia, upon a Bond executed, or a Bill of Exchange drawn in London, Amsterdam, Hamburg, or Paris, the Interest in one Case, and the Damages in Case of protest, in the other ought to be governed by the Laws of the Country where the Bond was executed or the Bill drawn, & not according

not according to the Laws of Virginia: in the same
Cases if the Bond declared upon was alledged to have
been executed in London, it must be actually sealed,
because the Laws of England require actual sealing;
whereas if it had been executed in Virginia, a scrole, by way
of Seal, would have been sufficient: so if the Bill of Exchange
were alledged to be drawn in London, the Declaration ought
to be in Case, upon the Custom of Merchants, and not in
debt, as it might have been if the Bill had been drawn
in Virginia. In these Cases the nature & extent of the Contract
is to be determined by the Lex Loci, where it was entered into.
But with respect to the mode of proceeding in order to a remedy
the Lex Loci where the Action is brought, I apprehend
ought to govern. Thus if an action be brought on a Bond
executed in London or Amsterdam the plaintiff may
demand bail by an Indorsement on the writ, without
any affidavit that any thing is actually due thereon,
on the Bond
which is necessary to be done in order to hold a Defendant to
bail in England. In the same Case the Defendant could
not be permitted to plead non est factum (as he might
in England) unless he swears to the truth of his plea.
In this Case, too, if the Bond be assigned, the Assignee
may bring the Action in his own name, which he is
not entitled to do by the Laws of England. Now if the
common Law of England were to govern in all common Law
Cases, the Laws of Virginia in the Instances here put must be
disregarded, a position which it is believed no one will attempt to
maintain.

Having thus endeavoured to lay before the reader the legal, and constitutional grounds upon which this important Question rests, I shall conclude this Essay with the Observations which the general assembly of Virginia, have after a mature discussion, made upon the Subject.

Report of the Committee p. 347 seq.

"In the state prior to the revolution, it is certain that the common law under different limitations, made a part of the colonial. But whether it be understood that the original colonists brought the law with them, or made it their law by adoption; it is equally certain that it was the separate law of each colony, within its respective limits, and was unknown to them, as a law pervading and operating thro the whole as one society."

"It could not possibly be otherwise. The common Law was not the same in any two of the Colonies; in some the modifications were materially, and extensively different. There was no common legislature, by which, a common will, could be expressed in the form of a law; nor any common magistracy, by which such a law could be carried into practice. The will of each colony, alone and separately had its organs for these purposes."

"This stage of our political history, furnishes no foothold for the patrons of this new doctrine."

"Did then, the principle or operation of the great event, which made the colonies, independent States, imply or introduce the common law, as a law of the Union."

"The fundamental principle of the revolution was, that the colonies were coordinate members, with each other, and with Great Britain, of an Empire, united by a common executive Sovereign, but not united by any common legislative Sovereign. The legislative power was maintained to be as complete in each American Parliament as in the British parliament. and the royal prerogative was in force in each colony, by virtue of its acknowledging the king for its executive magistrate, as it was in G. Britain, by virtue of a like acknowledgment there. A denial of these principles by G. Britain, and the assertion of them by America, produced the revolution."

"There was a time indeed, when an exception to the legislative separation of the several component and coequal parts of the Empire, obtained a degree of acquiescence. The British parliament was allowed to regulate the trade with foreign nations, and between the different parts of the empire. This was however mere practice without right, and contrary to the true theory of the constitution. The convenience of some regulations in both those cases, was apparent; and as there was no Legislature with power over the whole, nor any constitutional preeminence among the legislatures of the several parts; it was natural for the Legislature of that particular part which was the eldest and the largest, to assume this function, and for the others to acquiesce in it. This tacit arrangement was the less criticised, as the regulations established by the British parliament, operated in favour of that part of the Empire, which seemed to bear the principal share of the public burthens, and were regarded as an indemnification of its advances for the other parts. As long as this regulating power was confined to the two objects of convenience and equity, it was not complained of, nor much enquired into. But no sooner was it perverted to the selfish views of the party assuming it than the injured parties began to feel and to reflect; and the

" moment the claim to a direct and indefinite power was engrafted
" on the precedent of the regulating power, the whole charm was
" dissolved, and every eye opened to the usurpation. The
" assertion by G. B. of a power to make laws in all cases
" whatever for the other members of the empire, ended in the
" discovery, that she had a right to make laws for them in
" no cases whatsoever whatsoever."

" Such being the ground of our revolution, no support nor colour can
" be drawn from it, for the doctrine that the common law is binding
" on these States as one society. The doctrine on the contrary, is
" evidently repugnant to the fundamental principle of the revolution."

" The articles of confederation, are the next source of information on this subject.

" In the interval between the commencement of the revolution, and
" the final ratification of these articles, the nature and extent of
" the Union, was determined by the circumstances of the crisis,
" rather than by any accurate delineation of the general
" authority. It will not be alleged that "the common law" could
" have had any legitimate birth as a law of the united States,
" during this state of things. If it came as such, into existence
" at all, the charter of confederation must have been its parent.
" Here again however its pretensions are absolutely destitute of
" foundation. This instrument does not contain a sentence or a
" syllable, that can be tortured into a countenance of the idea
" that the parties to it were with respect to the objects of the
" common law, to form one community. No such law
" is named or implied, or alluded to, as being in force or as
" brought into force by that compact. No provision is
" made by which such a law could be carried into
" operation; whilst on the other hand every such
" inference or pretext is absolutely precluded, by
" article 2d. which declares "that each state to retains its
" sovereignty, freedom, and independence, and every
" power jurisdiction and right, which is not by this
" confederation expressly delegated to the united States / 61.
" in Congress assembled."

" Thus far it appears, that not a vestige of this extraordinary
" doctrine can be found, in the origin or progress of American
" institutions. The evidence against it, has on the contrary,
" grown stronger at every step; till it has amounted to a positive
" and formal exclusion, by written articles of compact, among
" the parties concerned."

" Is this exclusion revoked, and the Common law introduced
" as a national law, by the present constitution of the U. States?
" This is the final question to be examined."

" It is readily admitted, that particular parts of the
" Common law, may have a sanction from the constitution,
" so far as they are necessarily comprehended in the technical
" phrases which express the powers delegated to the government
" and so far also, as such other parts may be adopted, as necessary
" and proper, for carrying into execution the powers expressly
" delegated. But the question does not relate to either of
" these portions of the common law. It relates to the common
" law, beyond these limitations."

" The only part of the constitution which seems to have
" been relied on in this case, is the 2d section of art. III.
" "The judicial power shall extend to all cases in law and
" equity, arising under this Constitution, the laws of the
" U. States and treaties made or which shall be made
" under their authority."

" It has been asked what cases distinct from those under
" the laws and treaties of the U. States, can arise under the
" constitution, other than those arising under the common
" law; and it is inferred, that the common law is

" accordingly

" accordingly adopted or recognized by the constitution".

"Never perhaps was so broad a construction applied to a text so
" clearly unsusceptible of it. If any colour for the inference could
" be found, it must be in the impossibility of finding any other
" cases in law and equity, with in the provision of the
" constitution, to satisfy the expression; and rather than resort
" to a construction affecting so essentially the whole character
" of the government, it would perhaps be more rational to
" consider the expression as a mere pleonasm or inadvertence.
" But it is not necessary to decide on such a dilemma. The
" expression is fully satisfied, and its accuracy justified, by
" two descriptions of cases to which the judicial authority is
" extended, and neither of which implies that the Common Law is
" the law of the U. States. One of these descriptions comprehends
" the cases growing out of the restrictions of the legislative power
" of the States. For example it is provided that "no States shall emit
" "bills of credit," or "make any thing but gold and silver coin
" a tender in payment of debts". Should this prohibition be
" violated and a suit between citizens of the same state be the
" consequence, this would be a case arising under the
" Constitution before the judicial power of the U. States. A
" second description comprehends suits between citizens and
" foreigners, or citizens of different States, to be decided according to
" the State or foreign laws; but submitted by the Constitution to the
" judicial power of the U. States; the judicial power, being in several
" instances, extended beyond the legislative power of the U. States."

"To this explanation of the text, the following observation may be added.

"The expression, cases in law and equity, is manifestly confined
" to cases of a civil nature; and would exclude cases of criminal
" jurisdiction. Criminal cases in law and equity would be a language
" unknown to the law."

"The succeeding paragraph of the same section, is in harmony with this
" construction. It is in these words — "In all cases affecting ambassadors,
" other public ministers and consuls, and those in which a state shall
" be a party, the supreme court shall have original jurisdiction.
" "In all the other cases, [including cases in law and equity arising under the
" constitution] the supreme court shall have appellate jurisdiction, both
" as to law and fact, with such exceptions, and under such regulations
" as Congress shall make" "

"This paragraph, by expressly giving an appellate jurisdiction,
" in cases of law and equity, arising under the Constitution, to fact, as
" well as to law, clearly excludes criminal cases, where the trial by jury
" is secured; because the fact in such cases is not the subject of appeal.
" And altho the appeal is liable to such exceptions and regulations
" as Congress may adopt; yet it is not to be supposed, that an exception
" of all criminal cases could be contemplated; as well because a discretion
" in Congress to make or omit the exception would be improper; as
" because it would have been unnecessary. The exception could as
" easily have been made by the Constitution itself, as referred to
" the Congress."

"Once more, the amendment last added to the constitution,
" deserves attention, as throwing light on this subject. "The judicial power
" "of the U. States, shall not be construed to extend to any suit in law or
" "equity, commenced or prosecuted against one of the U. States, by citizens
" "of another state, or by citizens or subjects of any foreign power." As it
" will not be pretended that any criminal proceeding could take place
" against a state; the terms law or equity, must be understood as appropriate

" to civil in exclusion of criminal cases."

"From these considerations it is evident, that this part of the
" Constitution, even if it could be applied at all, to the purpose for which
" would not include any cases whatever of a criminal nature; and
" consequently, would not authorize the inference from it, that the
" judicial authority extends to offences against the Common Law, as
" offences arising under the Constitution.

"It is further to be considered, that even if this part of the Constitution
" could be strained into an application to every common law case,
" criminal as well as civil, it could have no effect in justifying
" the sedition act; which is an exercise of legislative and not of
" judicial power; and it is the judicial power only of which the
" extent is defined in this part of the Constitution."

" There are two passages in the constitution, in which a description
" of the laws of the U. States, is found. The first is contained in art. III.
" Sect. 2. in the words following: "This constitution, the laws of the
" U. States, and treaties made, or which shall be made under
" their authority." The ~~two~~ second is contained in the 2d. para-
" graph, of art. VI. as follows. "The Constitution, and the laws
" of the U. States, which shall be made in pursuance thereof
" and all treaties made or which shall be made under the
" authority of the U. States, shall be the supreme law of the land."
" The first of these descriptions was meant as a guide to the
" judges of the U. States; the second as a guide to the judges
" in the several States. Both of them consist of an enumeration
" which was evidently meant to be precise and compleat.
" If the common law had been understood to be a law of

" the U. States, it is not possible to assign a
" satisfactory reason why it was not expressed in the
" enumeration."

70.

4. B. C.
pa: 83.

Concerning Treason.

71.

It is probable that no part of the Constitution of the United States was supposed to be less susceptible of various interpretations, than that which defines, and limits the Offence of Treason against the U. S.; the text is short, and until comments upon it appeared, might have been deemed explicit: it is as follows,

"Treason against the United States shall consist ONLY, in
" levying War against THEM, or, in adhering to THEIR
" Enemies, giving them Aid, and comfort". C. U. S. Art: 3.

From this declaration contained in the Constitution of the U. S: the Supreme law of the Land, and the Fountain both of the Authority of the Government, and of the Crime against it, a plain man might draw Conclusions, very different from the artificial reasoning, and subtle refinement of Technical Men: and seeing that that instrument is to be regarded as the Act of the people of the United States, both collectively, and individually, it might seem reasonable that the interpretation of nine hundred & ninety nine plain men, who were parties to it, ought to serve as a guide to the thousandth man, who may happen to be called upon to expound it. But as technical men are not very apt to respect the Opinions of such as have not been educated in the same habits with themselves, the probability is that the Opinions of one man in a thousand, or rather, in an hundred thousand, will overbalance that of the rest of the Community, unless the latter should deem it an object worthy of their attention to express their Opinion in some way, that may be deemed obligatory upon the few who dissent from them.

Two additional clauses are to be found in the C. U. S. and the Amendments thereto, whereby it appears that the framers of the Constitution and those who adopted it were of opinion that too much caution could not be used upon so important a subject.

1. The Constitution declares, that "no person shall be convicted of Treason, unless on the testimony of TWO witnesses, to the same overt act." art: 3.

2. And the Amendments to the C. U. S. art: 8. provide "that in all criminal cases the accused shall enjoy the "Right to a speedy and public trial of the State and "District wherein the Crime shall have been committed; "which district shall have been previously ascertained "by Law."

The reason of these Constitutional limitations has been thus explained, on different occasions.

"As new fangled and artificial Treasons have been the spurious "Engines by which violent factions in free States have usually "wreaked their alternate malignity on each other, the "Convention have with great Judgement opposed a "Barrier to this peculiar danger, by inserting a Constitutional definition of the Crime. 2. Federalist, No. 43.

Judge Wilson, in the first charge which he delivered in the Federal Circuit Court of Pennsylvania, expressed himself thus, on this subject: "It will deserves to be "remarked that with regard to Treason, a NEW and "GREAT Improvement has been introduced into the "Government of the U: S: — Under that Government, the "Citizens have not only a legal, but a constitutional Security

* Trial of Fries: 1:123. & 161.

"security against the EXTENSION of that Crime, "on the Imputation of Treason. Treasons, capricious, arbitrary, "and CONSTRUCTIVE, have often been the most tremendous "Engines of despotic, or legislative Tyranny." 7. Mus: 40.

Judge Iredell, on a similar Occasion in South Carolina, observed; — "Treason consists in TWO articles ONLY; "levying War against the U. S. — or adhering to their Enemies, "giving them aid and comfort. The plain definition of "this Crime was justly deemed of such moment to the liberties "of the people, that it was made a part of the Constitution itself. "None can so highly prize the importance of this provision "as those who are best acquainted with the Abuses which "have been practised in other Countries in prosecutions "for this Offence. No man of humanity can read them "without the highest indignation; nor, in particular, can "they be read by any Citizen of America, without Emotions "of Gratitude, for the much happier situation of his own "Country. — Cary's Museum, vol: 12. part 2. pa: 36.

Such, probably, were the Opinions of the Citizens of America, in general, when they adopted the Constitution; but Technical Men have since made some important inferences and deductions from the use of some words, in that Definition, which are to be found in the Statute of Treasons in England, 25. Edw. 3. from whence they conclude, that the Decisions made upon that Act, in England, during a period of near five hundred years, however contradictory, or inconsistent they may be, with the Text, or with each other, have been adopted also, by the Constitution, "as a direction whereby "the Courts are to understand the Application of that Act". †

† and it

2^{d}. By those who disinherit the King of his realm, by bringing in an Army, or compass so to do. Horne's Mirror c. 1. s. 4.

3^{d}. By those adulterers who ravish the Kings wife &c. Ib:

It is on the [authority of this] passage in the Mirror, that Sir Edward Coke 3: Inst: p. 9. [illegible] lays it down, that [illegible] levying war against the King [illegible] was Treason by the common law. We find then, that the common law Sense of this obscure phrase, as Sir Matthew Hale

1. H: H: P. C. 149. calls it, was the bringing in, or raising, an Army. And in this sense it is probable that every man in America (with the exception, perhaps, of half a dozen ~~cunning~~ Lawyers, ~~& wily politicians~~) understood the term levying war, when the Constitution was adopted. And in this sense it seems to

Trial of Fries 92. 99. 139. &c. be still understood by some Gentlemen whose professional Talents are both an honour, and an ornament to their Country.+

It seems to have been taken for granted that the clause in our Constitution, which relates to the Crime of Treason,

Ib: 19. 123. 160. 161. is an exact Transcript from the Statute of 25. Edw. 3. it may therefore be not amiss to compare them.

The words of that famous Statute are as follows; "Whereas divers Opinions have been before this time in "what Case Treason shall be said, and in what not: the "King at the request of the Lords and commons hath made "a declaration, in the manner as followeth: that is to say, "When a man doth compass or imagine the death of our "lord the King &c. or if a man do levy war against our "lord the King in his realm, or be adherent to the Kings Enemies "in his realm, giving to them aid and comfort in the Realm "or elsewhere, and thereof be provably attainted of open deed, by "people of their condition. And if a man counterfeit the great Seal, "&c. [enumerating several other Cases.] And it is to be understood "that in the Cases above rehearsed, that ought to be adjudged "Treason which extends to our lord the King, and his royal majesty; "and the forfeiture &c. And moreover there is another manner "of Treason, that is to say when a Servant slayeth his master &c. "And because many other like Cases of Treason may happen in "time to come, which a man can not think, nor declare at this "present time, it is accorded, that if any other Case supposed "Treason, which is not above specified doth happen before any "of the Justices, the Justices shall tarry without any going to "Judgment of the Treason, till the Cause be shewed & declared before "the King and his parliament, whether it ought to be judged Treason "or other felony."

Upon this Statute we may here remark, that there are no negative words in it, as in the C. U. S. and that so far from declaring, as that does, That Treason shall consist ONLY in the Cases enumerated, it expressly supposes that many other Cases of Treason may happen, although the framers of that Statute could not then think of them.+ True it is, such Cases were to be reserved for the King and parliament to pass upon: but the Violence of succeeding times, the corruption and com=plying [temper] of [succeeding] Parliaments, during a Succession of more than two Centuries, left but little room for scrupulous Judges, had there been any such in those days, to apply for a parliamentary interpretation of any undefined Offence, supposed

+ vide State Trials 7th & Stamford, inserts the passage.

And it has even been advanced, on a very important Occasion, that "what in England is called Constructive levying of War in this Country must be called direct levying of War."+

Ibid: 161.

One of the Judges present upon the Occasion above alluded to, is reported to have expressed himself thus. "The Authorities from "British precedents and Adjudications are used as guides in our "Decisions. I will not enter into a discussion whether we are "bound to follow them; because they are Precedents; or "because we think them reasonable & just." Trial of Fries 205.

The distinction is, however, important; and it is therefore to be wished that the learned Judge would have condescended to give an opinion on the subject. If the British Authorities are to be regarded as Precedents, they are, I apprehend, to be considered as the laws of the land, and can not be shaken, or departed from, unless flatly absurd and unjust. But, if they are no further obligatory, than as they may be conviencing, they are no more obligatory upon the Consciences of Judges, than the reasoning of other men, who never sat in the Chair of Judgement, in any Country.

1. B. C. pa: 70.

The presiding Judge, upon the same Occasion, seems to have expressed himself in a stile somewhat different from that in which he addressed the grand Jury of South Carolina. "I must confess,

+ The Passage stands thus. "If you expunge what is a direct levying of War "there can no such thing as Treason be found; either the laws is wrong or the arguments "used on the other side. Gentlemen the laws is established, but the Arguments "vanish like Vapour before the morning Sun; what then in England is called "Constructive levying of war, in this Country must be called direct levying "of War." — Trial of Fries, p: 161. I should incline to suspect the Reporter of some mistake in this passage; but it would seem that it had been submitted to the inspection of the Counsel to whom it is ascribed.

"confess, says he, as these able and learned Framers of "our Constitution borrowed the Act in Terms from the "British Statute, alone, an Authority with which they were fa- "miliar, that they certainly at least meant that the English "Authorities and Definitions of those terms should be much "respected." — Trial of Fries, p: 167.

Judge Chase, on the subsequent Trial of Fries, declared, "That "the Court would admit, as a general rule, of quotations from "the English books; not as Authorities whereby they were bound, "but as Opinions and decisions of men of great legal learning, "and Ability. But even then the Court would attend carefully "to the time of the decision, and in no Case must it be binding upon "our Juries. Trial of Fries 180. As this was pronounced as a general rule, by the Court, and not as the Opinion of a single Judge, we may consider it as now settled, that the English Authorities are not binding as precedents; consequently, that they do not form a part of the laws of the Land; but are to be respected only as the Opinions of men of great legal learning & Ability; which may nevertheless be canvaped as freely, as the Opinions of other Men. — Neither are we now bound to suppose that the framers of our Constitution meant to adopt those Decisions as a guide to our Courts in the interpretation of the Definition of Treason against the United States.

By the old common law of England, before the Conquest, the Crime of Treason, Trahison, Proditio, (which in its very name imports Treachery, or Breach of Faith,) which was applied to the person of the King, or his Government, was called the Crime of Majesty: and, it is said, might be committed in three ways,

1. By those who kill the King, or compass so to do.

2d.

Supposed to be Treason.+

Sir Matthew Hale having enumerated several instances of arbitrary and unjust decisions respecting Treason, thus proceeds. "By these, and the like instances that might be given, it appears "how uncertain and arbitrary the Crime of Treason was before the "Statute of 25. Ed: 3. whereby it came to pass that almost every Offence "that was, or seem'd to be, a breach of the faith and Allegiance due to "the King, was by Construction and consequence, and inter= ="pretation raised into the Offence of high Treason."

"And we need, (he proceeds,) no greater instance of this "multiplication of constructive Treasons than the troublesome "Reign of Richard 2d. which, though it were after the limitation "of Treasons by the Statute 25. Ed. 3. whom he immediately "succeeded, yet things were so carried by factions and parties "in this Kings reign, that this Statute was little observed; "but as this, or the other party prevailed, so the Crimes of high Treason "were in a manner arbitrarily imposed, and adjudged to the "disadvantage of that party that was intended to be suppressed; "So that de facto, that Kings reign gives us as various instances "of these arbitrary determinations of Treasons, and the great "Inconveniences that arose thereby, as if indeed the Stat: 25. Ed. 3. had

+ See the Statutes 21. R. 2. c. 3. — 3. H: 7. c. 14. — 26. H. 8. c. 13. — 28. H. 8. c. 7. — 1. Ed: 6. c. 12. — 3. & 4. Ed. 6. c. 5. — 1. & 2. Ph: & M. c. 8. 9. 10. — 1. Eliz: c. 5. — 13. Eliz: c. 1. — 14. Eliz: c: 1. — 23. Eliz: c. 2. with many others; whereby so many Pains of Treason were ordained by Statute, "that no man knew what "he ought to know, or to do, or to say, or to speak, through doubt of "such pains" — Preamble to Stat: 1. H. 4. — And that Judges were not less complying than parliaments, the Histories of those Times fully prove. See 1. H: H: P. C. 84. 115. 119. 120. 121. &c. and the State Trials, passim.

"had not been made, or in force. And though most of those "Judgements and declarations were made in parliament; some= "times by the King, Lords & commons; sometimes by the Lords, and "afterwards enacted, as Laws; sometimes by a plenipotentiary "power committed by Acts of parliament to particular Lords, "and others, yet the inconvenience that grew thereby, and "the great uncertainty that happened from the same, was "exceedingly pernicious to the King and Kingdom." 1. H. P. C. 82. 83.

Abundance of Cases may be collected from the same Author to shew that the Judges, were rather astute in extending the Offence of Treason, than strict in the Construction of the Statutes, which has been supposed to limit it. And how much soever modern Judges, and Jurists may be supposed to have been uninfluenced by their Authority, yet the Contagion of Precedent, has come down even to these days; ~~[illegible]~~ For, I think it can not be denied, that if all the Cases of Constructive Treason, were destroyed and utterly forgotten, even the most modern decisions upon the subject of Treason would have been stript of some of their Circumstances, and Conclusions. But to proceed,

The author above cited, says, "What shall be said a "levying War, is in truth a Question of fact, and requires many "Circumstances to give it that denomination, which may be difficult "to enumerate or define; and commonly is expressed by the words: "more guerrino arraiati, arrayed in a warlike manner, in the "Indictment." 1. H. P. C. 130. — without these operative words, which are thus descriptive of the Offence of Treason, it would seem that the Indictment would be defective & vicious.

1. H. H. P. C.

1. H. H. p. C. 146. 150. Men of plain understanding would be apt to infer from hence, that the fact must be proved accordingly; otherwise that the Offence might be a Trespass, or a Riot, but could not amount to Treason, in levying War: but technical Men have discovered, that numbers will supply the want of military Array, or Weapons; & even,

1. Hale 144.

Furor Arma ministrat.

Foster 208.

The same Author further observes, "that to constitute the Crime "of Treason there must be a levying War against the King: Otherwise "though it be more querrins, and a levying of War, it is not Treason; "therefore if it be upon a private quarrel; or upon a private & particular "design; as to pull down the inclosures of such a particular common, "it is no levying War against the King, because it is not the Authority "of the King, or his Government which is attacked". 1. H. H. P. C. 131. And yet, the pulling down two or three bawdy houses, which the Law regards as nuisances, by a company of Apprentices, (as we are told by the same Author) was adjudged to be levying War against the King, and therefore Treason within the Statute. Ibid: 134. And this last Case has been cited to an American Jury, as a guide to their Interpretation of the Constitution of the United States. Trial of Fries 87.

The same Author observes, elsewhere, "The very use of Weapons "by such an assembly without the Kings license, unless in some "lawful and special Cases, carries a Terror with it, and a "presumption of warlike forces, &c. — The bare circumstance of having Arms, therefore, of itself, creates a presumption of warlike force, and may be given in Evidence there, to prove quo animo the people are assembled.

But, ought that Circumstance, of itself, to create any such presumption in America, where the Right to bear Arms, is recognized and secured in the Constitution itself

itself? In many parts of the United States a man no more thinks of going out of his house, on any occasion, without his Rifle, or Musket, in his hand, than an European fine-Gentleman without his sword by his side.

Again, in England, it is agreed on all hands, that all such as counsel, conspire, aid, or abet, the committing of any Treason, à parte ante, whether present or absent are all principals. and that in all Treasons except that which concerns counterfeiting the great or privy Seal, or Money, whosoever knowingly receives, maintains, or comforts a Traitor, is a principal in high Treason. — 1. H. H. p. C. 233. And this, upon the Construction of the Statute of 25. Edw. 3. — Ibid: 237.

To Men of plain understandings these Cases may illustrate the danger of adhering too closely to the judicial Opinions, and decisions of Judges in England, who conceive themselves bound by former precedents, even against the Conviction of their own private Judgements; and, who in Cases where the Crown has been concerned, have too often thought it a duty to support it, against all dangers, real or imaginary; and at the same time must evince the propriety of that decision of the Court, before mentioned, that in "no Case" must they be binding upon our Juries."

1. Bl: 6. p: 71.

Rejecting, then, the Authority of the Decisions in England as precedents, establishing the Law of the land; yet, respecting them, where the Reason of them applies, as the Opinions of learned Men, I shall proceed to consider the Offence of Treason in a two fold light.

1. As it relates to the American States, individually.

2. As it relates to them collectively; in the Character & Capacity of the United States.

1st. Then, of the Offence of Treason, as it relates to the several States, individually.

Upon the dissolution of the regal Government, all public Offences became Offences against that particular State, in which they were committed. Thus, Murder, Theft, Robbery &c. committed in Virginia, were in the Indictment alledged to be committed against the peace and dignity of this Commonwealth. Const: of Virga Art: 10. Many offences which depended upon the nature of the British Government, as a Monarchy, supported by Aristocracy, were annihilated by substituting in its stead a new form of Government, the principles of which were incompatible with the former. But with respect to this Offence of Treason, the State of Virginia at the first Session after the Constitution of the State was esta=blished, passed a legislative Statute declaring, "that if any "Man do levy war against this Commonwealth, within the "same, or be adherent to the Enemies of the C.W. within the same, "giving to them aid and comfort in the C.W. or elsewhere, and "thereof be legally convicted of open deed by the Evidence of two "sufficient and lawful witnesses, or their own voluntary "confession, the Cases above rehearsed shall be adjudged Treason "which extendeth to the Commonwealth". V.L. Oct: 1776. c. 3.

Now, here are the very words which have since been used in the C.U.S. but without the restrictive word, ONLY, in that Instrument; so that every Offence which can be comprehended under the terms levying War, or, adhering to Enemies, became an Offence against this C.W. if committed within its precincts. — If, therefore, the pulling down Bawdy Houses; destroying Engines for Weaving; or pulling down all Inclosures could be legally

legally construed to be a levying War, every such fact committed within the precincts of the Commonwealth, was Treason against the State of Virginia, and so continues to this day.

And, so also, every other interpretation or constructive levying War, however general, or with whatever circum=stances attended, must be, and remain an Offence against the State; unless the Object of levying the War be manifestly for some matter of a general Concern to the United States, the Jurisdiction in respect to which belongs to THEM, under the Constitution. For it is not enough that it is of a public nature, or of a great and general Concern to the Citizens of the Commonwealth; but it must be of a general, or public nature, and Concern, as it respects the UNITED STATES, and their Jurisdiction, to oust the State of that exclusive right, which it enjoyed before the Adoption of the Constitution, to enquire into and punish any such Violation of its peace and authority. Were an armed multitude, arrayed in order of Battle, to enter and burn the City of Richmond, destroy all the public records of the State, and commit every other possible outrage, aggravated with every atrocious Circumstance imaginable, if their Intention in so doing should neither be to subvert the C.U.S. nor to effect any Object in relation to the Authority of the federal Government, such Conduct, though in the strictest Sense it might amount to actual levying War, would only amount to Treason against the State of Virginia, but could never be Treason against the United States. For Treason against the latter

shall

shall consist ONLY in levying war against THEM. &c. Consequently, where the United States are not the Objects of the War, the levying it can not be Treason against THEM. Nor can it be pretended, that the levying War against the Authority of any individual State, within the same, would be levying War against the United States, in any Case; except, where in Case of Insurrection or Rebellion such State should make application to the United States for such aid as the Constitution guarantees to them in such a Cases; after which, if the Opposition should extend to the Authority of the United States, it seems, that the Treason would, also, extend to them.

Nothing can evince, more clearly than this distinction, the dangerous practice of those, who are in the habit of regarding the federal Government of the United States as the legitimate Successor, and Locum Tenens of ROYALTY in the United States of America. — For such a practice is the parent of a Confusion of Ideas, which leads to innumerable mistakes of the utmost Importance.

2.dly I shall consider the Offence of Treason as it relates to the United States, in their collective & federal Capacity.

When the federal Constitution was adopted, it was deemed necessary for the more perfect Security and preservation of the UNION, to CREATE a new Species of Treason, which might reach Cases not within the provisions of the Laws of the several States; and without which their projected UNION might be exposed to

a second branch of high Treason against the State. consists in the enemies &c.

All high Treasons, Misprisions &c. — See 1. U. 1794. c. 136. s. 2. & 7. and prosecute with secrecy

to danger, and its Authority to contempt.

But, the Framers of the Constitution clearly saw that this new Offence should be clearly defined, and strictly limited; they probably felt conscious of treading upon

"Ignes suppositos Cineri doloso";

They limited the Offence, therefore, to TWO Cases, ONLY; and comprised the whole definition in two lines: the whole legal vocabulary does not contain one more clear, precise, and determinate.

"Treason against the United States shall "consist ONLY in levying War against THEM, "or in adhering to THEIR Enemies, giving them "Aid, and Comfort."

In my Endeavour to analize this Definition I shall enquire,

1. What is levying War;
2. Against whom the War must be levied, to constitute this new Crime of Treason, against the United States;
3. Who may commit Treason against them;
4. & 5. Who are Enemies; and what is adhering to them giving them aid and Comfort;
6. The true import, and effect of the word ONLY; and of the 6th Amendment to the C. U. S. which prescribes the mode of Trial, in this, & other criminal Cases.

1. First then, what is meant by the words, levying War. 2

I have already said enough respecting the English Authorities, to shew that I do not mean to rely upon their Exposition of this Text: Happy would it have been for America, had no occasion occurred, in which her own Courts had been called upon to expound them. — I shall give the Opinions of

of our own Judges, as I find them reported, in an Account of the two Trials of John Fries, for high Treason, in the federal Circuit Court of Pennsylvania, April & October 1799. & Pp: 1800.

"The only species of Treason likely to come before you, said "Judge Iredell in his charge to the Grand-Jury, is that of "levying War against the U.S. There have been various opinions "and different determinations on the import of these words. But "I think I am warranted in saying that if in the Case of the Insurgents "who may come under your Consideration the intention was to prevent "by force of arms the execution of any Act of the Congress of the U.S. altogether, "(as for instance the land tax, the object of their opposition) any forcible "opposition calculated to carry that intention into effect, was a "levying of War against the U.S. and of course an Act of Treason. But "if its intention was merely to defeat its operation in a particular "instance, or through the Agency of a particular officer, from some "private, or personal motive, though a higher Offence may have been "committed, it did not amount to the Crime of Treason. The particular "motive must be the sole ingredient in the Case, for if combined "with a general view to obstruct the Execution of the Act, the "Offence must be deemed Treason." Trial of Fries, pa: 14.

Patterson, Justice, is reported to have expressed himself to the following effect, in Mitchels Case. 2. Dallas 355. "If the "object of the insurrection was to prevent the Execution of an Act "of Congress by force and intimidation, the Offence in legal "estimation is high Treason; it is an usurpation of the Authority "of the Government; it is high Treason by levying war". Ib: 86.

And on the Trial of Rigol. 2. Dallas 340. He is likewise reported to have said — "with respect to the Intention, there "is not unhappily, the slightest possibility of doubt: To "suppress the Office of Excise in the fourth survey of this State; and

"and particularly, in the present instance, to compel the "resignation of Wells, the Excise officer, so as to render null and "void in effect, an Act of Congress, constituted the apparent, the "avowed object of the insurrection. Combining these facts and this "design, the Crime is high Treason. — Ibid: 86.

Judge Iredell, on the first Trial of Fries, expressed his assent to the decision in Mitchel's Case. Ibid: 188.

Judge Peters, on the same occasion expressed himself thus: "It is Treason in levying War against the U.S. for persons who have "none but a common interest with their fellow Citizens, to oppose or "prevent, by force, numbers, or intimidation, a public and general "law of the U.S. with intent to prevent its operation, or compel its "repeal. Force is necessary to complete the Crime; but the Quantum "of force is immaterial." ——— "If numbers and force can "render one law ineffectual, which is tantamount to its repeal, "the whole system of laws may be destroyed in detail. All laws "will at last yield to the violence of the seditious & discontented". And again — "I do not hesitate to say, that the position we "have found established, to wit, that opposition by force and "numbers, or intimidation with intent to defeat, delay, or "prevent the Execution of a general law of the U.S. or to "procure, or with the hope of procuring by force and numbers, "or intimidation its repeal, or new Execution, is Treason by "levying War against the U.S. — And it does not appear to "me to be what is commonly called constructive, but open "and direct Treason in levying war against the U.S. within "the plain and evident meaning and intent of the Constitution." Ibid: 204. 207.

Judge Chase, on the second Trial of Fries, thus delivered the Opinion of the Court; (Trial of Fries, pa: 196. & 199)

"It is the Opinion of the Court, that ANY insurrection, or rising

" rising of ANY body of people, within the United States, to
" attain or effect, by force or violence ANY object of a great
" public nature, or of public and general (or national)
" concern, is a levying of War against the United States,
" within the contemplation and construction of the Constitution".

With all submission, this part of the Courts Opinion seems to me to be both questionable & extrajudicial.

1. It is questionable; because, taken in the latitude and Extent which the words will bear, and manifestly import, the rising of any body of people in opposition to the Authority of any individual State, or to the Laws of such State, would under this Construction, amount to Treason in levying War against the United States, which, for reasons already mentioned, I humbly apprehend, could not possibly be the Case:

2. Extrajudicial; because in the Case of Fries, the Intention, if of a public nature, was manifestly to oppose the Execution of a Law of the United States: and therefore this Opinion, as it might apply to any other Case of opposition, except an Opposition to a Law of the United States, was certainly extrajudicial.

Judge Chase proceeds thus. "On this general position
" the Court are of Opinion that any such insurrection or rising
" to resist, or to prevent, by force or violence, the Execution
" of any Statute of the U. S. for levying or collecting taxes,
" duties, imposts, or Excises; or for calling forth the Militia
" to execute

" to execute the Laws of the Union, or for any other Object
" of a general nature or national concern, under any pretence,
" as that the Statute was unjust, burthensome, oppressive, or un-
" constitutional, is a levying War against the United States,
" within the contemplation and construction of the Constitution.
" — The reason for this Opinion is, that an insurrection to resist,
" or prevent by force, the Execution of any Statute of the United States,
" has a direct tendency to dissolve all the Bands of Society, to destroy
" all order, and all Laws; and also all security for the lives
" liberties and properties of the Citizens of the United States."

"The Court are of opinion that military Weapons (as Guns &
" Swords mentioned in the indictment) are not necessary to make
" such insurrection or rising amount to levying War; because
" numbers may supply the want of military Weapons; &
" other instruments may effect the intended mischief: the legal
" guilt of levying War may be incurred without the use of mili-
" tary weapons, or military array."

This part of the opinion is, I humbly conceive, likewise extrajudicial: there being no Question as to the fact, that Fries, and his party were furnished with Arms, as Guns & Swords &c.

"The Court are of opinion, that the Assembling bodies of men
" armed and arrayed in a warlike manner for purposes only of
" a private nature is not Treason; although the Judges, or other
" peace officers should be insulted or resisted; or even great
" outrages committed to the persons, or property of our Citizens."

"The true criterion to determine whether Acts committed are
" Treason, or a less Offence, (as a riot) is the quo animo or the
" intention with which the people did assemble. When the Intention
" is universal, or general, as to effect some object of a general
" public nature, it will be Treason; and can not be considered,
construed

90.

"construed or reduced to a riot". — This part of the Opinion seems likewise to be extrajudicial; and ~~[illegible]~~ questionable, for the Reasons mentioned under the first paragraph.

"The Commission of any number of felonies, riots, or other "misdemeanours can not alter their nature so as to make "them amount to Treason; and on the other hand, if the Intention "and Acts combined together amount to Treason, they can not be "sunk down to a felony, or riot. The Intention with which any "Acts (as felonies, the destruction of property, or the like) are "done, will shew to what class of Crimes the Case belongs."

"The Court are of opinion that if a body of people conspire and "meditate an insurrection to resist or oppose the Execution of any "Statute of the United States by force, that they are only guilty of "a high misdemeanour; but if they proceed to carry such Intention "into Execution, by Force, — that they are guilty of the Treason "of levying War+; and the quantum of the force employed neither "lessens, nor increases the Crime; whether by one hundred, or one "thousand persons is wholly immaterial.

"The Court are of Opinion, that a Combination, or Conspiracy to levy "War against the U.S. is not Treason, unless combined with an "Attempt to carry such combination or Conspiracy into execution; "Some actual force or violence must be used, in pursuance of such "design to levy War; but that it is altogether immaterial whether the force "used is sufficient to effectuate the Object; any force connected with "the Intention, will constitute the Crime of levying War."

"In Treason, all the participes Criminis are principals; "there are no accessaries to this Crime. Every Act, which in the "Case of Felony would render a man an Accessary, will in the "Case of Treason, make him a principal. To render a man an "accomplice and principal in Felony he must be aiding & "abetting at the fact; or ready to afford assistance, if necessary.

+ See State Trials [illegible]3. & Bromley C.J. who may be considered as the father of this Doctrine.

91.

"necessary. If a person be present at a felony aiding & assisting, "he is a principal."

Here again, I humbly apprehend, this part of the Court's Opinion is perfectly extrajudicial. Because, Fries, if guilty at all, was guilty as a principal in the first degree; being present, and not only aiding and abetting, but commanding. And the Correctness of the Opinion (even were it not extrajudicial) ~~appears to me~~ for reasons that will be mentioned hereafter, ~~mentioned~~, when we inquire into the import of the word ONLY, likewise seems to be very highly questionable. — This doctrine is founded upon ~~that~~ artificial and abstruse reasonings, of which the English common lawyers ~~were~~ pre-eminently fond, ~~and~~ as will appear to any person who reads their ancient tracts & reports.

The Judge proceeds, thus. "It is always material to consider "whether the persons charged are of the same party; — ~~It is much to~~ "~~[illegible] that so equivocal a term as the word party had not~~ "~~found a place on this occasion~~+" upon the same pursuit; and "under the Expectation of mutual defence and support. All "persons present, aiding, assisting, or abetting any treasonable act, "are principals. All persons who are present and countenancing, "and are ready to afford assistance, if necessary, to those who actually "commit any treasonable act, are also principals. If a number "of persons assemble and set out upon a common design, as to resist "and prevent, by force, the Execution of any law, and some of them commit "acts of force and violence, with intent to oppose the Execution of any law, "and others are present to aid and assist, if necessary, they are all "principals. If any man joins and acts with an assembly of people, "his intent is always to be considered and adjudged to be the same as theirs;

+ It is much to be wished that so equivocal a term as the word party had not found a place on this occasion.

" theirs; and the Law in this Case judgeth of the intent by the Fact.
" If a number of persons combine or conspire to effect a certain
" purpose, as to oppose by force the Execution of a Law, any
" Act of violence done by any one of them, in pursuance of such
" Combination, and with intent to effect such object, is in
" Consideration of the Law, the Act of all who are present when
" such Act of violence is committed. If persons collect together
" to act for one and the same common End, any Act done by
" any one of them, with intent to effectuate such common
" End, is a fact that may be given in Evidence against them
" all of of them; the Act of each is Evidence against All
" concerned." — See Trial Fries, pa. 196. to 199.

Most devoutly is it to be wished that no future Case may occur, wherein our Courts may have any further Occasion to enquire into the true Exposition of this part of the Text of the Constitution: but if such Cases should arise, it seems to me that the safer course would be for Judges to consult the Text and Spirit of our federal Constitution and Government, only; ~~rather than dwell upon plain words which may be either partially or improperly explained~~; for otherwise the plain Text of the Constitution will be completely hidden, and lost sight of, in the Multitude of precedents, founded upon artificial Reasons and Conclusions, drawn from different Sources.

It is observable, that in all these Cases the Judges seem to have overlooked that obvious distinction before mentioned, between such acts of Force and Violence as may amount to Treason against a particular State, though not within either Head of Treason against the United States; and such as may properly fall under the latter Description

This distinction may be further illustrated by the following Case. — By the Laws of Virginia, before noticed, every person who shall erect or establish, or cause or procure to be erected or established any Government separate from, or independent of the Government of Virginia within the limits thereof, unless by Act of the Legislature of this Commonwealth, for that purpose first obtained, &c, shall be adjudged guilty of High Treason.

Now let us suppose an armed Multitude were to establish such a Government independent of the Government of Virginia within the limits thereof, by force and Violence: should such an Act be ~~construed~~ Treason against the United States?

If it would not, does it not prove that a general riot of the people, although with intention to obtain by force and Violence an Object of a great public nature may not be Treason against the U. S. though unquestionably Treason against the State of Virginia. and this will more satisfactorily appear under the next head of our Inquiry.

2dly Then, we are to enquire, against whom war must be levied, in order to constitute this new Crime of Treason against the United States.

The words of the Constitution, we must remember are, Treason against the United States shall consist ONLY in levying War against THEM, &c.

Now as every word in so important an Instrument should be so construed as to have its particular effect, especially in Cases, in which the life and liberty of the Citizen, on the one hand, & the safety of the Union, on the other, may be at Stake; and more especially where the Rights of the States which have formed this confederacy may be concerned; this word THEM, can only be referred to the United States, in their federal Character, and Capacity; and as designating

designating an Offence which might be dangerous to THEM as SUCH. A contrary construction must have for its foundation the supposition that the several States intended to resign into the hands of the federal government, the power of punishing all Crimes and offences whatsoever, against their own individual authority, and sovereignty; a Supposition which is contradicted by every days practice, in every State. If then, there be an Insurrection of the people, and war actually levied, within the limits of any particular State, whether it be for a private, or for a public and general purpose, even so far as to affect the whole People of that particular State; yet, if that purpose extends not to any Object of a general concern wherein the United States, as SUCH, are interested, such levying of War, cannot be Treason against THEM, although it might be Treason against that particular State, within whose limits it may be levied.

3dly Who may commit Treason against the United States.[2]

And here it seems to be clear, that every person whatsoever, owing Allegiance to the United States, may commit Treason against them. This includes all Citizens, of every description, from the President of the United States to the Beggar in the Streets; and also all Aliens, residing within the United States, and being under their protection.

But it will be asked, how can the president of the U. S. in whom the Executive power is vested by the Constitution, and who is the Chief Magistrate of the Union, commit Treason against them?[2]

The Answer is: The Constitution supposes a President capable of betraying the Trust reposed in him, & of misapplying

misapplying the public force, to the danger of the United States; and therefore has expressly provided for the Case, by declaring that in Case of Conviction of Treason, or other high Crimes or misdemeanours, he shall be removed from office; and shall moreover be subject to Indictment, Trial, Judgement, and punishment according to Law. C. U. S. Art. 2. 3.

If an Instance be demanded, we may put the following Case. — If a president of the U. S. should, by his own Authority, presume to raise an Army; or should, by his own Authority, keep up, and maintain an Army raised by the Authority of Congress, after the period when by Law it ought to be disbanded, such Conduct, in either Case, if coupled with Evidence of a sinister design, & Intention, in so doing, would, I conceive, amount to an overt act of Treason against the United States.

4. & 5. — Who are Enemies? And what shall be said to be adhering to them, giving them Aid & Comfort.

Happily for the people of the U. S. no Case has yet occurred in which an exposition of this branch of our Constitution has been necessary. But, as the nature of Crimes and Offences is necessary to be understood in every Country, and more especially in one constituted, as ours, by the People, themselves; I shall endeavour to investigate this point according to the best aids, which I possess.

4 B. 6. 83. By Enemies are here understood the subjects of foreign powers, with whom we are at open War: and therefore a Rebel is not an Enemy within this Clause; a Rebel being one that owes Allegiance; and, an Enemy, one who doth not owe Allegiance to the United States.

As to foreign pirates, or Robbers, who may happen to invade our Coasts, without any open hostilities between their nation and the United States, and without any Commission from any Prince

Prince or State at enmity with us, it may be doubted how far the giving them any assistance would be Treason against the

1. P.C. 164. United States; For although Sir Matthew Hale[+], and after him,

Fost: 219. Sir Michael Foster[+], have pronounced that this would be Treason in England, because such unauthorised Invaders are to be considered as Enemies, because not subjects, yet

4. B.C. 83. Judge Blackstone[‡], with great reason, appears ~~[illegible]~~ to doubt their Authority, although he concurs with them in Opinion, that it would be Treason; ~~though~~ but upon a different ground: his words are – "the giving them ~~any~~ Assistance is also clearly "Treason; either in the light of adhering to the public Enemies of "the King, and Kingdom, or else, in that of levying War against "his Majesty." 4. B.C. 83.

But these doctrines, I apprehend, should be very cautiously admitted in the Courts of the United States.

First, Because the Act for punishment of certain Crimes against the United States, in pursuance of the authority expressly given to Congress, by the Constitution, to define and punish piracies, and Felonies committed on the high Seas, and Offences against the Law of nations, declares, "that if any Seaman, or other person, shall in any wise trade with any pirate, knowing him to be such, "or shall furnish such pirate with any ammunition, stores, "or provisions of any kind, or shall fit out any Vessel, knowingly "and with a design to trade with, or supply, or correspond with any "pirate, or robber on the high Seas; or if any person shall any ways "consult, combine, confederate, or correspond with any Pirate or "Robber on the Seas, knowing him to be guilty of any such Piracy or "Robbery, such person so offending, and being thereof convicted "shall be imprisoned not exceeding three years, and fined, not "exceeding one thousand Dollars." L. U. S. 1. Cong: 2. Sess: c: 9. "Sect: 12.

So far then, as relates to pirates, the Offence of adhering to them, and giving them aid and comfort, seems to be strictly provided for by this Act. – Consequently, they are not to be deemed Enemies within this Clause of the Constitution.

Secondly; With respect to Robbers, the subjects of foreign powers, who may without any Commission or public Authority whatsoever, make a Descent upon our Sea-coasts, and commit any depredations, or other acts of hostility, on Land; this would seem to be an Offence against that particular State, only, within whose Jurisdiction such depredations may be committed, and for any reason that I can discover to the contrary, may be punished as such, by the authority of the State, if the Robber be taken[+]. And in such Case, the adhering to such Robber, giving him aid and comfort, Could at most amount to Felony; either as a principal or Accessary, according to the nature of the Case: Unless from the whole Circumstances of the Case, taken together, such Depredations, or acts of Hostility, should amount to levying War against the State, or against the United States. If, for Example, a Fort be erected and maintained by any particular State, at its own Expence, for the protection of any of its shores, or coast, and such unauthorised Robber should make a descent upon the Land, & attack such fort, those who should join him in such attack would I think be guilty of ~~[illegible]~~ levying War against the State; and if the fort should belong to the United States, then would they be guilty of levying War against the United States: but, unless such unauthorised Robber come within the meaning and Description of an Enemy,

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[+] Though the English authorities say that he shall not be punished by the civil laws – But Vattel with more reason, says, "If the offended State keeps the guilty in its power, it may without difficulty "punish him and oblige him to make restitution. If the guilty escape and return into his own "country, Justice may be demanded from his Sovereign." L. 2. ch: 6. s: 75. See Perkin Warbeck's Case 7. Co: rep: 6

(as he certainly doth, according to the English Authorities) ~~the~~ such acts of adherence as would not amount to the guilt of levying War, could not, I apprehend, be construed to be Treason, within this Clause of the Constitution.

We are next to enquire, whether under our Constitution it is necessary that War be declared, in order to constitute the Crime of Treason in adhering to Enemies, under this clause. Now the English Authorities all concur that an actual declaration of War ~~of~~ is not necessary to such a State of War, as may render two nations Enemies. 1. H. H. P. C. 162. Fost: 219. 4: B. C. 83. And yet, it seems reasonable to think there ought to be some public Act by which the Citizens of America may be warned of incurring the danger of Treason, under this Clause.

The Statute of 25. Ed: 3. in relation to this Offence is much stricter, than the words of the Constitution of the U. S. or of the Act of Congress, which substitutes a new definition of Treason, in Lieu of that in the Constitution.

The words of the Statute are, "If a man be adherent to the Kings Enemies in his realm, giving to them aid & comfort in the realm, or elsewhere." From whence it clearly appears that the Statute contemplates the Case of Enemies being within the realm, and not such as may be elsewhere:

+ vi: St: Tr: v. 1. 75. } for the word elsewhere, does not relate to Enemies, but to the act of giving them aid and Comfort.+ I know, indeed, that Judges have not construed the Statute thus strictly, although the words seem to me to require it.

The words of our Constitution, indeed, are general enough to admit of that Construction which English Judges have given to the Statute; and Congress has accordingly added the words, within the United States, or elsewhere, in the Act for the punishment of certain Crimes against the U. S.

which is giving to the Constitution ~~Definition~~ all the Latitude that the words are capable of. ~~[illegible]~~

It may afford some light to this part of our subject should we here enquire ~~[illegible]~~ what overt Acts of adherence, and giving Aid and comfort to Enemies, constitute the Offence of Treason under this head.[2]

To this Judge Blackstone answers, that such overt Act may be proved by giving them Intelligence, by sending them provisions, by selling them Arms, by treacherously surrendering a Fortress, and the like. 4. B. C. 82.

Here we may be permitted to ask; do all the Cases apply wherever aid of any kind, is given to Enemies, whether such as actually invade our Country, or such, as from their Connection with that Government with which we are at open war, may in construction be deemed Enemies, though not engaged in any actual hostility against us. It would seem that there ~~[illegible]~~ is some room for distinction between the Cases, though possibly it may be dangerous to attempt to draw the Line. — Let us, however, select the Case of sending Provisions; the doing which, if sent to an invading Enemy, or one already within our Country, ~~[illegible]~~ would certainly I presume be an overt act of Adherence and giving Aid, within this clause; and so, ~~[illegible]~~ perhaps would the wilful and advised sending of Provisions to the ports of an Enemy preparing to invade us; for that may enable them to carry their projected invasion into Effect. — But what if the Case be the sending provisions to a distant & dependent Colony belonging

belonging to a Government with whom we are at war, from whence there neither is, nor from the nature of things can be, any danger of invasion apprehended: would such a Conduct amount to an overt act of Treason in adhering to the Enemies of the U. S. giving to them aid & comfort, within this clause?

5. Cong: c: 66. The Acts of Congress passed May 28. 1798. after reciting, that armed vessels sailing under the authority of the french Republic have committed depredations upon the Commerce of the U. S. authorises the capture of any such armed vessels, by the public vessels of the United States.

From this period a State of mutual hostility may be considered as having existed between the two nations, though neither has yet declared War, against the other; the U. S. having in the mean time proceeded to further acts of reprisal, which it is unnecessary to notice.

5. Cong: c: 70. On the 13th of June following an Act passed to suspend the intercourse commercial Intercourse between the U. S. and France, and the Dependencies thereof, which subjects any Vessel committing a breach of that Act to seizure & Confiscation: and moreover requires a Bond with Security from the Owner & Master of the Ship, for the due observance of that Act: a subsequent

5. Cong: c: 103. Act limits the liability of the Security to ten thousand dollars.

Now let us suppose, that an enterprising merchant knowing of a scarcity of provisions in any of the Dependencies of France, or in any particular port in that Kingdom, after calculating his risque of Confiscation, as also the loss which he might sustain from a suit upon his Bond, & the indemnity to his Security, should send a Ship laden with provisions to such port. Would this be Treason against the United States, in the Owner, Master, and all

all others concerned in the Voyage?

If the word Enemies, be applicable to all the subjects of a power with whom we are at war, within the Intent and meaning of this clause of the Constitution, it would seem that not only the Master, and his Crew, but the Owner would be guilty of Treason, according to the maxims of the English Lawyers: and yet, perhaps such a Judgement would be deemed harsh, in the extreme, in the United States.

For, inasmuch as it belongs to Congress, alone, to declare War, it might be urged, that if they had intended by the first mentioned Act, to put the United States in a State of War, they might with the same ease have passed an Act to that effect, as to have made the Act they did: but, not having declared War, and thereby cut off all intercourse with France, and admonished their fellow Citizens of the danger of maintaining any Intercourse whatever with that nation, or its depen-
= dencies; but, on the contrary having only suspended the Commercial intercourse between them, under penalties of a fiscal, and pecuniary nature, only, it might be alledged that here was at least a tacit declaration on the part of Congress, that any breach of the second Act, should be attended by penalties of a pecuniary nature, only; and should not in any manner affect the person of the Offender.

On the contrary, it hath been said, and may be said again, that the interpretation of the Constitution belongs exclusively to the judiciary department in all Cases of Crimes & Misdemeanours†, and therefore that Congress cannot by

† See the Opinions of Judge Iredell, Judge Peters, & Judge Chase, Trial of Treas. 165. 206. 201.

by any Act of theirs alter the nature of Treason, and make that a misdemeanour, only, which the Constitution has declared shall be Treason. +

In such a dilemma, all that we may venture to say is, that it manifests the duty and obligation of those who are entrusted to administer the Government, to deal fairly, openly, and candidly with their Constituents; since an equivocal conduct on the part of the former, may involve the latter in the greatest civil guilt, and subject them to a disgraceful death, whilst they might suppose themselves in no danger of any Offence but a breach of a positive law, respecting Trade; nor of any punish= ment, but a pecuniary penalty.

According to the principles, in which the English Jurists generally agree with each other, Foreigners in our Country, and our Citizens who may remain in a foreign Country, after a War breaks out between the two nations, are not simply for that Account adherent to our Enemies: for although the subject of a foreign Power is presumed to adhere to that power to whom he owes allegiance, yet such presumptive adherence, if not accompanied with any overt Act of aid, or assistance, as in giving intelligence, and the like, does not make him an adherent within the meaning of this Clause; neither is the bare remaining in an Enemies Country, after a War breaks out such an adherence in one of our Citizens as comes within this Clause, if unaccompanied with any overt Act, as assisting our Enemies in their Wars; and even the refusing to return upon proclamation of recall is

+ But as Congress have power to prescribe the punishment in case of Treason, if by a subse= =quent law to that which first prescribes the punishment, they prescribe a less punish= =ment for an Offence which the Courts may determine to be Treason, would they be justified in inflicting the greater punishment, formerly prescribed?

1. P.C. 164. held by Sir Matthew Hale to be only Evidence of adherence, but is not simply of itself, an adherence.

6. I now proceed to consider the import and effect of the word, ONLY, in this clause of the Constitution; as also, the legal Effect and consequence of that Amendment to the C. U. S. which declares, that in all criminal prosecutions the Trial shall be in that State and District, in which the Crime shall have been committed.

This word ONLY, as used in this clause of the Constitution, is, according to my apprehension, the strongest term of limitation and restriction that our language affords. It's obvious meaning is, these cases, and no other, whatsoever. "Treason "against the United States shall consist only, in levying "War, &c. Here are both an Affirmative, & a negative in the same sentence, nay, in the same member of a Sentence. The Offence is created by the word, consist; it is li= =mited and restricted by the next word, ONLY. It seems impossible to express an Intention in stronger, and more definite terms. But to what purpose were these terms used, & this strict limitation made, if Courts, notwithstanding any such restriction may nevertheless pronounce that other Cases may by CONSTRUCTION amount to Treason against the United States. If the Authority of such explicit terms can be rejected in favor of artificial Constructions, invented by arbitrary and corrupt, or by timid and complying Judges, in the worst of times, a written Constitution, containing what was deemed a limitation of powers, has answered no other purpose but to establish an unlimited Government.

And here, it may not be improper to repeat the Remark, that this Definition creates as well as limits an offence

an Offence which had no previous existence; whereas the Statute of 25. Edw. 3. did not create, but only defined an Offence already known to the common law." "That Statute, said Stanford, afterwards Chief Justice of the Common pleas, " is but a Declaration of certain Treasons, which were " Treasons before at the common law. Even so there do " remain divers other other Treasons at this day, at the " common law which be not expressed by that Statute." State Trials, vol. 1.72. — Will any man presume to advance that there is any Treason against the United States, by the common law? That a limited, federal, Republic of yesterday, hath already appropriated to itself all the foul Corruptions of Despotism, collected from time immemorial! To infer that the Courts of the United States are left to range at large in the boundless field of CONSTRUCTION, in search of other ~~Trea~~ Cases of Treason against the U. S. seems to my apprehension, to be a doctrine equally unfounded, awful, and dangerous.

If then we are not at liberty to reject this important word, ONLY, we must assign to it some determinate signification; and if that signification be that which I have ascribed to it, towit; these cases and no other, whatsoever, its necessary Operation and effect must be, to cut up all Constructive Treasons, root and branch. If a single Scion be left, it will, like the Buonas Upas, be the parent of ten thousand others, shedding their baneful influences far & wide, poisoning and desolating the whole region where they are permitted to take root. Faction and factious

9 + factious men are not confined to any one party in a republic; and when such men have the command of the purse, the sword, and the Scales of Justice, the lives of their opponents will not weigh a feather, in competition with their own advancement, or that of their party. This the framers of the Constitution must have considered, and therefore endeavoured by the strongest terms, and the strictest limitation, to restrain within the narrowest limits. And this should serve as the polar star of Construction, to Judges, and all others who may be called upon to administer the Government.

Thus having sought, and I trust, discovered not only the literal sense, and meaning of the word, ONLY, but also, its proper Interpretation according to the true Spirit of our federal Constitution, I shall now enquire into its effect and Operation in certain cases, which might have been supposed to be Treason, had it been omitted.

1. In England it is now generally admitted, "That in Treason all the participes criminis are principals; there " being, as it is said, no accessaries to that Crime; and that " every act, which in case of Felony would render a man " an accessary, will in the case of Treason make him a Principal." This Doctrine was laid down by Judge Chase in his charge to the Jury on the Trial of Fries; page 198. but as I conceive it to have been extrajudicial, for reasons already men=tioned, I shall take the liberty now, to enquire, also, whether it be ^also^ not ^questionable^ ~~unfounded~~, ~~unsupportable~~. But before I do this, I shall endeavour to trace this copious Branch of Constructive Treason to its fountain head: and shew how small a portion of that fatal Torrent flows from ^an^

+ The ancient law of England was that they who were present " and abetting " others to do the act were accessaries & not principals. per Bromley C. J. Plowden 97. 98. — see Plowden tit. Treason, fo. 99, 100. where it seems the law was changed tempore H. 4. — 1. Hale 437.

an unexceptionable Spring. — In doing this, I shall begin with the latest authorities, and conclude with the more ancient.

This Doctrine is advanced by Judge Blackstone 4. Com: 35. & 36. for which he cites 3. Inst: 138. 1. Hale's P.C. 613. and Foster 342. — The latter, cites 3. Inst: 9. & 138. and 1. Hale 235. 237. 328. 376. — Hale himself, cites, 3. Inst: 16. & 138. Stanford P.C. 32. and the year Book 1. H. 6. 5. of which last Case I shall make particular mention by and bye.

Sir Edward Coke ~~P.C.~~ 3 Inst: 16. & 138. cites Stanford P.C. 3. — and the year Books — 19. H. 6. 47. & 3. H. 7. 10.

Stanford, P.C. 3. & 32. ~~cites the same cases~~ 40. & 44. cites the same identical Cases from the year books, that Sir Matthew Hale, & Sir Edward Coke had cited before. From these (three original) Cases we must consequently derive the Doctrine in question.

A.D. 1422

The Case of 1. H. 6. 5. is thus mentioned by Stanford, pa: 32. a man was outlawed of Felony, was imprisoned in the Kings-bench, and indicted and attainted of breaking prison, and receiving certain persons there in confined for Treason: and this was adjudged petit Treason.

Upon what principle this Case could be judged Petit Treason it might puzzle any man at this day to conjecture, and create a presumption that the Case is not very accurately reported. But there is another principle of the common Laws on this particular subject, ~~which~~ of breach of prison, which will probably lead us to understand it — it is this; if there be Felons in prison and a man knowing of it breaks the prison, and lets out the prisoners, though he knew not that there were felons there, it is felony, and if Traitors

+ This is a mistaken reference in Foster — it should be 16.

Traitors were there it is Treason. 1. Hale 606. 2. Hawk: 590. Now if the persons ~~escaped~~ released in the Case here referred to, were imprisoned for petit Treason, instead of high Treason this Judgement would be regular: but by no rule of Laws could they be deemed guilty of petit Treason, in any other Case. And if this were the Case, it would prove that there was no distinction in principle between Treason & Felony — inasmuch as the releasing a felon from jail is felony, in the same manner as releasing a Traitor from Jail is Treason. + And Sr

But, Sir Michael Foster, pa: ~~344.~~ 345. gives us a further clue to the understanding ~~this~~ of this Case; for in speaking on this subject he observes, with great reason, that the forcing of prison doors may be ~~very~~ considered as overt Acts of levying War: the species of Treason for which Beaston of whom he is speaking was indicted. And ~~probably~~ this might have been the Case, in this instance.

2.

1. + and it appears from Stanford that ~~if~~ a stranger rescuing one indicted for Felony was indicted and tried and found guilty for that Offence, before the principal Felon was tried. 16: 32. ~~Which~~ which confirms the Conclusion that the Law made no distinction at that time between Treason & Felony. A Statute was made the year after this Case was adjudged, 2. H: 6. c. xii. cited Stanford. Ibid: whereby it was declared to be Treason in any person imprisoned, to break Prison. All which circumstances united create a strong Presumption that this Case is not correctly reported, on the grounds of the Judgement perfectly understood.

A.D. 1441½

The second Case occurred thirteen years after, 19. H: 6. 47. and is thus mentioned in Brooke, Tit: Treason, 5. 9. A man was indicted for forging false money, and another at the same time: one confesses, and approves, and has a Coroner assigned him: the

the other pleads not guilty, and it was found that he was consenting and aiding in forging the false money, & so guilty. Stanford mentions the Case in the like manner; & it is evident from this State of ~~the Case~~ it that the Defendant was present aiding & assisting, and so would have been a principal in Felony, as well as in Treason; which is confirm'd by Stanford who proceeds thus. "It is the same Case in Rape, where one does the Act, " and another assists him to commit the Rape, he is by " this a Ravisher". Stanford's P.C. 44. The Law is the same in Felony, as well as in Treason, that all present aiding & assisting at the fact are principals. Neither of these Cases therefore justify the doctrine advanced at this day, that whatever Act will make a man an Accessory in Felony, will make him a principal in Treason.

A.D. 1488. The next Case is 3. H: 7. 10. and is relied on by Standford, & Sir Edward Coke as establishing the doctrine above mentioned. It was thus; One Cokker was indicted & attainted of making false money, and afterwards one J. B. was indicted for traiterously & knowingly entertaining, and comforting him, & was found guilty; and the Question was whether he could be deemed an Accessary to Cokker. — Brian, Justice, said he might be an accessary, for such counterfeiting was Felony before the Statute, and is not cut off by it; and in every Treason felony is implied, &c. ~~[illegible]~~ " Et tamen Hussey Cap: Just: dixit quod in hoc quod " factum est proditio non potest esse accessarius " feloniæ, et proditorie non potest esse Accessarius:" for which Doctrine he refers to the preceeding Case of 19. H. 6. ~~47~~ 47. — See the year book 3. H. 7. 10.

Here then we have the Opinion of two Judges in opposition to each other; and we find the latter supporting his Opinion by a reference to the very Case which we have already shewn does not authorize it.

These are all the ancient Authorities referred to either by Stamford, Sir Edward Coke, Sir Matthew Hale, or any writer on the subject; and it requires very little discernment I apprehend, to discover, that the two former do not warrant the latter, and that the latter is the dictum of a single Judge. — And Brooke, Tit: Treason, 19. cites it in that manner — " Nota, per Hussey C. J. " que accessary ne poet este a Treason, le recetment de Traitor ne poet este tantum felony, mes est Treason."

Had this been the establish'd doctrine of the common Law we might have expected that the laborious and indefatigable Sir Edward Coke (under whose Auspices it was brought to maturity, as we shall see hereafter) would have referred us to the Mirror, Bracton, Britton, Fleta & Glanville, ~~in~~ some ~~[illegible]~~ of which it would most certainly, ~~[illegible]~~, have been found.

This doctrine appears to have slept from the year 1488. to the year 1554. when it was revived ~~[illegible]~~ upon the Trial of Sir Nicholas Throgmorton, in the first year of Queen Mary. He was indicted first, for conspiring and imagining the death of the Queen — 2.dly For levying war against her within the realm — 3.dly For adhering to her Enemies within the realm giving them aid and comfort — 4.thly For conspiring & intending to depose the Queen; 5.thly for traiterously devising & concluding to take the Tower of London. — See 1. St: Tr: 63. &c.

upon this Trial. Stanford, author of the Pleas of the Crown,
and Dyer, afterwards Chief Justice, assisted in the prose=
=cution as Queen's Sargeants. Bromley Ch. Justice of
England, who appears to have been another Jeffries, &
Sir Nicholas Hare, Master of the Rolls, a fit Asso=
=ciate for him, ~~[illegible]~~ and Sir Roger
Chomley, one of the same Stamp, were among the number
of the Judges, and managed the Trial. — At this Trial
the doctrine of Constructive Treason, in its fullest extent
was insisted on by the Counsel for the prosecution and
sanctioned by the Judges, notwithstanding the Prisoner
~~&~~ reminded the Court of a Statute passed, not six months,
1. M. c. 1. before, whereby it was declared that no Offence made
Treason by Act of parliament, should thereafter be held
to be Treason, except such as were so declared by the
Statute 25. Ed. 3. which Statutes ~~they~~ he desired might
be read to the Jury. The Court told him there should be
+ 1. St: no books brought at his request: they knew the law
Tr: 71. 72. sufficiently without Book; it was not their Business
to provide Books for him; neither did they sit
there to be taught by him: + ~~[illegible]~~
~~[illegible]~~
~~[illegible]~~.
If any thing more be requisite to shew the respect due
to the decisions of this Court, it may not be amiss to
mention, that they ordered a person whom the prisoner
Ib: 70. called as a witness in his behalf, out of Court. That
one

Ib: 67 one Vaughan, who was under Sentence of Death
68 = and whose Execution was respited that he might be
present at this trial, was admitted as an Evidence
against him. — That the Confession of one Winter & Crofts, then
alive and in custody, was read in Evidence against them, the witnesses themselves not
being produced in Court. ~~That~~ These words, of the Stat: 25. Ed. 3.
"And be thereof attainted of open Deed by people of
their Condition" — which Sir Edward Coke, and every
other writer on criminal law from his time to this, expounds,
to mean by Verdict of a Jury of their peers (3. Inst: 14.)
were thus expounded by the Chief Justice, addressing
himself to the prisoner — "You deceive yourself and mistake
"these words, by people of their Condition; for thereby the
"law doth understand the discovering of your Treasons.
"As for Example, Wiatt, & other Rebels attainted for
"their great Treasons already declare you to be his
"and their Adherent, inasmuch as divers and sundry
"times you had conference with him and them about
"the Treason; so as Wiatt is now one of your Condition,
"who as the world knoweth hath committed an open
"traytrous Fact. — 1. St: Tr: 72. — The word Enemies
was likewise expounded to mean Traitors, within
the Statute — Ib: 75. And lastly, when the Jury
brought in a Verdict of acquittall, for there was no
Evidence against the prisoner, upon either point,
the Court immediately committed them all to prison
and some of them were fined £2000. some £1000, and
and the lowest paid Threescore pounds apiece before they

were discharged from their Imprisonment. Stafford who was active in the prosecution was afterwards promoted to the Bench, & published his Pleas of the Crown in 1560. six years after, in which he has laid down the Doctrine at large, as it is received at this day; but cites the Case 3. H. 7. 10. before mentioned in support of it. —— Abington's Case, was resolved when Sir Edward Coke was Attorney General, 4. Ja: 1. when the Spirit of persecution was at its height from the Terrors of the powder plot, in the guilt of which he was involved by receiving one Garnet, a Jesuit, ~~a traitor~~ ~~who was executed~~ knowing him to be guilty of the powder Treason.

It is not improbable, however, that this doctrine was aided in its progress by those Statutes ~~which~~ passed in the Reigns of Hen: 5. & H. 6. & the numerous Acts of Attainder passed in those of Ed: 4. & Rich 3. and the multiplied Treasons created in the Reign of H. 8. and his Successors, whereby the aiders, Counsellers, Consulters, abettors, maintainers, procurers, comforters, receivers, relievers, and so forth, ~~guilty~~ of persons guilty of any such Treasons, are repeatedly declared to be principal Traitors also†. These parliamentary declarations & Statutes must I conceive have had a strong influence over the Judges, in those days, when Parliaments & Courts were equally devoted to the will of the ruling Monarch. — See 1. Hale cl. 24. &c.

† See State Trials vol. 1. 73.

I should not have taken the trouble of this Scrutiny

had not the same Judge who declared that the English Authorities were not to be regarded as precedents in our Courts, on the same Occasion declared the Laws to be, "That in Treason all the participes criminis are principals; that there are no Accessories in that Crime; and that every Act which in Case of Felony would render a Man an Accessary will in the Case of Treason make him a principal." —— If the learned Judge rejects the Authority of the English precedents, where can the Laws be found? And if he relies upon those precedents, where can the reason of the Laws be found?

Both common Law, in England, & common Sense have been able to perceive and draw a distinction between the actual perpetration of a Crime, and the bare advising, or even procuring the perpetration of it, without being present when it is perpetrated: they have also been able to distinguish between the perpetration of a Crime, and the receiving and comforting one who has been himself the perpetrator, knowing him to be such: it was reserved for the astute reason of Judges appointed by the Crown to discover, that there was no distinction between these Cases, when the sacred majesty of their Masters Head was in danger, or supposed to be so: it was reserved for them to declare that to give a Meal's victuals to one guilty of Treason, was a Crime of the same malignity as levying War against the Throne, or as aiming a Dagger at the Heart of the Monarch.

This was the Case of the Lady Alice Lisle, who was indicted 1. Ja: 2. for high Treason in comforting, upholding and maintaining one John Hicks (not then convicted) by giving him meat & drink; upon which Indictment she was convicted, as a principal in high Treason, and executed. — State Trials vol: 4. 105 &c.

True it is that infamous Judgement was reversed by Act of parliament after the revolution, "because the said John Hicks was not at the Trial of the said A. L. attainted or convicted of any such Crime"; but 16. 30. the Law in other respects remains unaltered. There, and the giving a Traitor meat & Drink, knowing him to have committed Treason, is, of itself an Act of high Treason, of the same nature as that of which the Traitor himself hath been guilty.

Now, let us Appeal from this decision of Judges learned in the Laws, to Common Sense, & Reason, for a decision thereon under the Constitution of the U. S.

Let us suppose that John Hicks had been concerned with John Fries in the Northampton Insurrection; and that some weeks after the termination of that Affair, he had repaired to the House of the Lady Lisle, situated in Philadelphia, and had there been entertained by her (by giving him meat drink and lodging for one night, as was the Case, for which she suffered,) she knowing at the time that he had been concerned in that Insurrection. — Is there a man in the United States, who could under such Circumstances upon his oath say, that the Lady Lisle had levied War against the United States.[2]

I put the Question thus, because the Constitution says that Treason shall consist ONLY in levying War against the United States. And I repeat the Question. Would this Conduct in the Lady Lisle be an Overt Act of levying War against the U. S.[2]

If common Sense and reason dare not answer this Question, least they should be browbeaten by the Authority of the Sages of the Law, let us hear what one of them will say to us.

"Tho' the reciever of a Traitor, knowing it, be a principal Traitor, and shall not be said an Accessary, yet there must be partaker of an Accessary — That his Indictment must be Special of the RECEIPT, and not generally that he did the THING." — 1. Hale 238.

Now if the Indictment must not be general that he did the thing; that is that she (the Lady Lisle, in the Law Supposed) levied the War, I would fain know how she could be found guilty of Treason against the United States.[2]

If there be not a Man in the United States (and I trust there is not) who, in the Case how supposed would have joined the Lady Lisle guilty of levying War against the U. S. — nor have directed a Jury to have found her so guilty, then have I proved, that the word ONLY in the Constitution must be construed to have cut off this branch of Constructive Treason; that is, I have proved, that whatever will make a person an Accessary after the fact in felony, will not make him a principal in Treason in the U. S.

Let us now enquire whether it be true, that whatever Act will make a Man an Accessary before the Fact in Felony, will make him a principal in Treason in the United States.[2]

Let us suppose the same Lady Lisle to have been

been a resident of Maryland at the time of Fries's Insurrection, and that John Hicks, hearing of the intended insurrection in Pennsylvania had informed her of his intention to join them; and that she had lent him a horse, or Money, to assist him on his Journey.

Now, if Hicks had not gone, after this, but had kept the money, or rode away the horse, and never returned him this would not have been Treason in either; even according to the English Authorities: but if he had gone and joined Fries, he would have been guilty of treason in England. But, in neither Case could it be said that There had been War levied in Maryland. I ask then, if the Lady Lisle had done what we have above supposed in the State of Maryland, would such Act of lending a Horse or money in Maryland, have amounted to levying War in Pennsylvania, where she never was.

If she were indicted in Maryland, the Indictment must allege that War was levied in Maryland: how could it be given in Evidence to a Jury in Maryland that War was levied by John Hicks in Pennsylvania in order to charge the Lady Lisle with Treason in levying War in Maryland, by CONSTRUCTION. On the other hand, if she were apprehended & tried in Pennsylvania, where the War was levied by Hicks, could the Fact which took place in Maryland be given in Evidence to a Jury in Pennsylvania.

We might vouch the English Authorities, were it necessary, to prove that neither of these things could be done, except under the Authority of some Special Acts of Parliament. And we may with Confidence answer, that under the provisions of the federal Constitution she could not possibly be found guilty of Treason, without rejecting the word UNIV, and without spurning at that direction of the Constitution which ensures a Trial in that State, and District, in which the Crime shall have been committed. For having never been in Pennsylvania she could not be found guilty of levying War there: Evidence that a War was levied in that State, would not be Evidence to any Jury, in another State; and without a violation of the Constitution she could not be carried out of Maryland, where her Offence, whatever it might be deemed, was committed, to be tried in Pennsylvania, where she never had been, for a Construction Treason imputed to her, by relation to a fact done in another State.

By what finesse or subtility a Jefferies (were he to arise from the dead, and again to preside at the Trial of the unfortunate Lady,) would support the prosecution I should be sorry to be able to discover. But with that understanding

understanding that I suppose, I deem it impossible that he could be convicted, even in this case.

3. To proceed, then one step higher. If divers persons conspire together to levy War, this is not Treason, even in England; but if War be levied in consequence of this Conspiracy by a part of them, although the rest have nothing further to do in the Business, this is Treason in the whole of them; as well those which are ~~present and~~ absent, and do nothing, as in those which are present at the fact. A similar doctrine was laid down on the Trial of Fries. How far it might, or might not have applied to his case I will not undertake to say. But let us put the following case;

A. B. C. meet together in Baltimore and conspire together to levy War against the United States. In pursuance of this Conspiracy, A. & B. proceed to Pennsylvania, and there levy War; C. goes not with them, nor has any further communication with them, but remains peaceably at home in Maryland. Now this Conspiracy being formed in Maryland, but nothing being done in consequence of it, in that State, no Treason can be said to have been committed either by A. B. or C. in Maryland: neither could the Act of A. & B. in Pennsylvania be considered as an overt Act of levying War, by C, who was never in that State; nor could it be given in Evidence against C. in Maryland, for the reasons before mentioned. How

How then can C. be found guilty of Treason in levying War against the United States? Certainly only by overleaping the limits of the Constitution, and referring a fact committed by A. & B. in Pennsylvania, to C. in Maryland; in order to convict C. in Maryland of levying War against the United States in Maryland, where no war was ever levied; or in Pennsylvania, where C. never was.

If in the Cases here supposed it should appear that the doctrine of CONSTRUCTIVE Treasons can not stand the test of the federal Constitution, may we not conclude, that the proper Inference is, that no other Case whatsoever except those two which are expressly created, defined, and limited by the Constitution, ought to be deemed Treason against the United States?

It is of the utmost Importance to the People, that the nature and extent of Crimes & Offences, and the Limits of Jurisdictions should be perfectly understood.

July 15. 1800.