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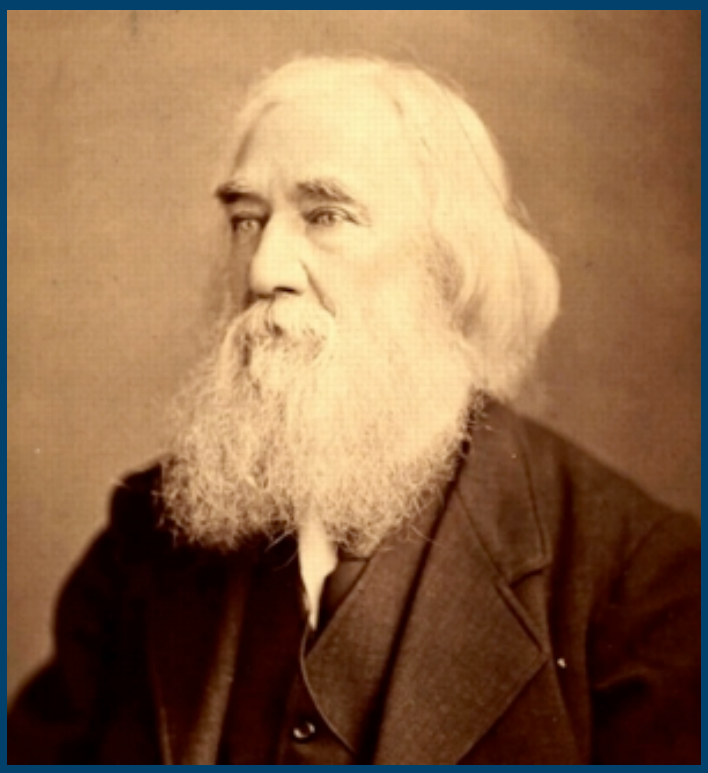

The Collected Works of Lysander Spooner (1834-1886), in 5 Volumes

Volume I (1834-1850)

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THE OLL "BLUE BOOK" ANTHOLOGIES
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THE "BLUE BOOK" ANTHOLOGIES, on the other hand, are collections of texts which we have drawn from the books in the OLL. We have taken material by a particular author or on a particular theme and created our own, original anthologies. We have done this in order to make material which was scattered and difficult to find more accessible to our readers.

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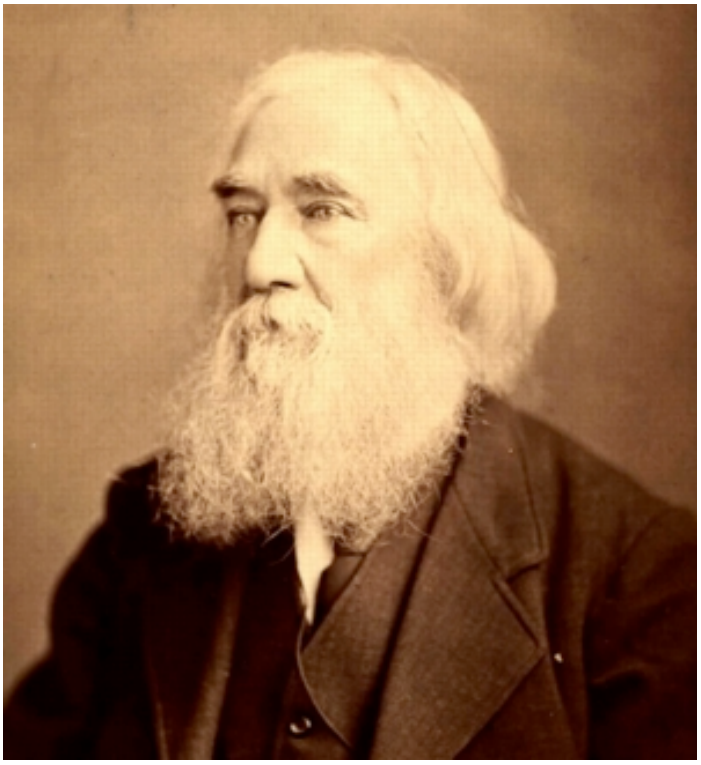

About Lysander Spooner (1808-1887)

Lysander Spooner (1808-1887) was a legal theorist, abolitionist, and radical individualist who started his own mail company in order to challenge the monopoly held by the US government. He wrote on the constitutionality of slavery, natural law, trial by jury, intellectual property, paper currency, and banking.

More information about Spooner and his work: <http://oll.libertyfund.org/person/4664>.

School of Thought: Abolition of Slavery <http://oll.libertyfund.org/collection/33>.

School of Thought: 19th Century Natural Rights Theorists <http://oll.libertyfund.org/collection/38>.

About The Collected Works of Lysander Spooner (1834-1886)

This a 5 volume collection of the works of the 19th century American legal theorist and abolitionist. It includes all his major published works as well as smaller pamphlets and tracts. They first appeared on the OLL website as individual books, such as *An Essay on the Trial by Jury* (1852) or as pamphlets, such as *No Treason. No. I.* (1867). The set was completed with a 2 volume collection of *The Shorter Works and Pamphlets of Lysander Spooner* 2 vols. (1834-1884). We thought it would be useful to arrange the texts in chronological order of date of publication which we have done here in this 5 volume collection of his works.

The Collected Works of Lysander Spooner (1834-1886), in 5 volumes (Indianapolis: Liberty Fund, 2010-2013).

- Vol. I (1834-1850) <http://oll.libertyfund.org/title/2294>.
- Vol. II (1853-1855) <http://oll.libertyfund.org/title/2295>.
- Vol. III (1858-1862) <http://oll.libertyfund.org/title/2296>.
- Vol. IV (1863-1873) <http://oll.libertyfund.org/title/2297>.
- Vol. V (1875-1886) <http://oll.libertyfund.org/title/2298>.

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A Thematic and Chronological Listing of Spooner's Works

1. Thematic List of the Works of Spooner

Religion

[1.] *The Deist's Immortality, and an Essay on Man's Accountability for his Belief* (Boston, 1834).

[3.] *The Deist's Reply to the Alleged Supernatural Evidences of Christianity* (Boston, 1836).

Economics, Money, and Banking

[7.] *Poverty: its Illegal Causes and Legal Cure. Part First.* (Boston: Bela Marsh, 1846).

[17.] *A New System of Paper Currency.* (Boston: Stacy and Richardson, 1861).

[18.] *Our Mechanical Industry, as Affected by our Present Currency System: An Argument for the Author's "New System of Paper Currency"* (Boston: Stacy & Richardson, 1862).

[20.] *Considerations for Bankers, and Holders of United States Bonds* (Boston: A. Williams & Co., 1864).

[26.] *A New Banking System: The Needful Capital for Rebuilding the Burnt District* (Boston: A. Williams & Co., 1873).

[28.] *Our Financiers: Their Ignorance, Usurpations, and Frauds. Reprinted from "The Radical Review"* (Boston: A. Williams & Co., 1877).

[29.] *The Law of Prices: A Demonstration of the Necessity for an Indefinite Increase of Money. Reprinted from "The Radical Review"* (Boston: A. Williams & Co., 1877).

[30.] *Gold and Silver as Standards of Value: The Flagrant Cheat in Regard to Them. Reprinted from "The Radical Review"* (Boston: A. Williams & Co., 1878).

[31.] *Universal Wealth shown to be Easily Attainable* (Boston: A. Williams & Co., 1879).

Slavery and Abolition

[10.] *A Defence for Fugitive Slaves, against the Acts of Congress of February 12, 1793, and September 18, 1850* (Boston: Bela Marsh, 1850).

[13.] *A Plan for the Abolition of Slavery, and To the Non-Slaveholders of the South* (n.p., 1858).

[14.] *Address of the Free Constitutionalists to the People of the United States* (Boston: Thayer & Eldridge, 1860).

[15.] *The Unconstitutionality of Slavery* (Boston: Bela Marsh, 1860).

[16.] *The Unconstitutionality of Slavery: Part Second* (Boston: Bela Marsh, 1860).

[21.] *A Letter to Charles Sumner* (n.p., 1864).

Law & the Constitution

[2.] "To the Members of the Legislature of Massachusetts." *Worcester Republican. - Extra*. August 26, 1835.

[4.] *Supreme Court of United States, January Term, 1839. Spooner vs. M'Connell, et al.* (n.p., 1839).

[5.] *Constitutional Law, relative to Credit, Currency, and Banking* (Worcester, Mass.: Jos. B. Ripley, 1843).

[6.] *The Unconstitutionality of the Laws of Congress, Prohibiting Private Mails* (New York: Tribune Printing Establishment, 1844).

[8.] *Who caused the Reduction of Postage? Ought he to be Paid?* (Boston: Wright and Hasty's Press, 1850).

[9.] *Illegality of the Trial of John W. Webster.* (Boston: Bela Marsh, 1850).

[11.] *An Essay on the Trial by Jury* (Boston: John P. Jewett and Co., 1852).

[12.] *The Law of Intellectual Property; or An Essay on the Right of Authors and Inventors to a Perpetual Property in their Ideas, Vol. 1* (Boston: Bela Marsh, 1855).

[19.] *Articles of Association of the Spooner Copyright Company for Massachusetts* (n.p., 1863).

[24.] *Senate-No. 824. Thomas Drew vs. John M. Clark* (n.p., 1869).

[35.] *A Letter to Scientist and Inventors, on the Science of Justice, and their Right of Perpetual Property in their Discoveries and Inventions* (Boston: Cupples, Upham & Co., 1884).

Political Thought

[22.] *No Treason, No. 1* (Boston: Published by the Author, 1867).

[23.] *No Treason. No II. The Constitution* (Boston: Published by the Author, 1867).

[25.] *No Treason. No VI. The Constitution of No Authority* (Boston: Published by the Author, 1870).

[27.] *Vices are Not Crimes: A Vindication of Moral Liberty* in Dio Lewis, *Prohibition a Failure, Or, The True Solution of the Temperance Question* (Boston: J.R. Osgood and Company, 1875), pp. 107-46.

[32.] *No. 1. Revolution: The only Remedy for the Oppressed Classes of Ireland, England, and Other Parts of the British Empire. A Reply to "Dunraven"* (Second Edition, n.p., 1880).

[33.] *Natural Law; or the Science of Justice: A Treatise on Natural Law, Natural Justice, Natural Rights, Natural Liberty, and Natural Society; showing that all Legislation whatsoever is an Absurdity, a Usurpation, and a Crime. Part First.* (Boston: A. Williams & Co., 1882).

[34.] *A Letter to Thomas F. Bayard: Challenging his Right - and that of all the Other So-called Senators and Representatives in Congress - to Exercise any Legislative Power whatever over the People of the United States* (Boston: Published by the Author, 1882).

[36.] *A Letter to Grover Cleveland, on his False Inaugural Address, the Usurpations and Crimes of Lawmakers and Judges, and the Consequent Poverty, Ignorance, and Servitude of the People* (Boston: Benj. R. Tucker, Publisher, 1886).

2. Chronological List of Spooner's Works

The following is a list in order of date of publication of Spooner's writings. The list also shows in what volume of this collection these texts can be found.

Volume I (1834-1850)

[1.] *The Deist's Immortality, and an Essay on Man's Accountability for his Belief* (Boston, 1834).

[2.] "To the Members of the Legislature of Massachusetts." *Worcester Republican. - Extra.* August 26, 1835.

[3.] *The Deist's Reply to the Alleged Supernatural Evidences of Christianity* (Boston, 1836).

[4.] *Supreme Court of United States, January Term, 1839. Spooner vs. M'Connell, et al.* (n.p., 1839).

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Volume II (1852-1855)

[11.] *An Essay on the Trial by Jury* (Boston: John P. Jewett and Co., 1852).

[12.] *The Law of Intellectual Property; or An Essay on the Right of Authors and Inventors to a Perpetual Property in their Ideas, Vol. 1* (Boston: Bela Marsh, 1855).

Volume III (1858-1862)

[13.] *A Plan for the Abolition of Slavery, and To the Non-Slaveholders of the South* (n.p., 1858).

[14.] *Address of the Free Constitutionalists to the People of the United States* (Boston: Thayer & Eldridge, 1860).

[15.] *The Unconstitutionality of Slavery* (Boston: Bela Marsh, 1860).

[16.] *The Unconstitutionality of Slavery: Part Second* (Boston: Bela Marsh, 1860).

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[18.] *Our Mechanical Industry, as Affected by our Present Currency System: An Argument for the Author's "New System of Paper Currency"* (Boston: Stacy & Richardson, 1862).

Volume IV (1863-1873)

[19.] *Articles of Association of the Spooner Copyright Company for Massachusetts* (n.p., 1863).

[20.] *Considerations for Bankers, and Holders of United States Bonds* (Boston: A. Williams & Co., 1864).

[21.] *A Letter to Charles Sumner* (n.p., 1864).

[22.] *No Treason, No. 1* (Boston: Published by the Author, 1867).

[23.] *No Treason. No II. The Constitution* (Boston: Published by the Author, 1867).

[24.] *Senate-No. 824. Thomas Drew vs. John M. Clark* (n.p., 1869).

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Volume V (1875-1886)

[27.] *Vices are Not Crimes: A Vindication of Moral Liberty* in Dio Lewis, *Prohibition a Failure, Or, The True Solution of the Temperance Question* (Boston: J.R. Osgood and Company, 1875), pp. 107-46.

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1. THE DEIST'S IMMORTALITY, AND AN ESSAY ON MAN'S ACCOUNTABILITY FOR HIS BELIEF (1834)

Source

The Deist's Immortality, and an Essay on Man's Accountability for his Belief (Boston, 1834).

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The DEIST'S IMMORTALITY, and AN ESSAY on MAN'S ACCOUNTABILITY FOR HIS BELIEF.

THE DEIST'S IMMORTALITY.

Deists are led to believe in a future existence, by the consideration, that, without it, our *present* one would seem to be without aim, end or purpose. As a work of Deity it would appear contemptible. Whereas, by supposing a future life, we can imagine, in our creation, a design worthy of Deity, viz. to make us finally elevated intellectual and moral beings.

They are led to this belief by the further facts, that our natures appear to have been specially *fitted* for an eternal intellectual and moral advancement; that we are here surrounded by means promotive of that end; and that the principal tendency of the education and impressions, which our minds here receive from the observation and experience of what exists and takes place in this world, is to carry them forward in that progress.

Again,—we are gifted with a desire of knowledge, which is stimulated, rather than satisfied, by acquisition. We are here placed in the midst of objects of inquiry, which meet that desire; and there is still an unexplored physical, mental and moral creation around us. Here then are supplied the means of our further *intellectual* growth. We are also the constant witnesses of actions, objects and occurrences, which call into exercise our moral feelings, and thus tend to to improve our moral susceptibilities and characters. Analogy, and all we know of nature, support the supposition, that, if we were to continue our existence in the universe, of which this world is a part, we should always be witnesses of more or fewer actions, objects and occurrences similar to these in kind. Here too then we may see evidence of means and measures provided and adopted for our future *moral* culture. Our natures therefore are capable of being eternally carried nearer and nearer to perfection solely by the power of causes, which we see to be already in operation. The

inquiry therefore is a natural one—what means this seeming arrangement? Does it all mean nothing? Is a scheme capable of such an issue as our creation appears to be, and for the prosecution of which every thing seems prepared and designed, likely to be abandoned, by its author, at its commencement? If not, then is the evidence reasonable, that man lives hereafter.

This evidence too is direct; it applies clearly to the case; it is based on unequivocal facts, such as have been named; it is not secondary; it does not, like that on which Christians rely, depend upon the truth of something else which is doubtful.

An argument against the probability that this theory of Gods intention to carry men on in an intellectual and moral progress, will be executed in relation to *all* mankind, has been drawn from the fact that many appear to have chosen, in this world, a path opposite to "this bright one towards perfection;" and it is said to be reasonable to suppose that they will always continue in that opposite course. Answer—There is, in every rational being, a moral sense, or reverence for right. This seminal principle of an exalted character never, in this world, becomes extinct; it survives through vice, degradation and crime: it sometimes seems almost to have been conquered, but it never dies; and often, even in this world, like a phenix from her ashes, it lifts itself from the degradation of sensual pollution under which it was buried, and assumes a beauty and a power before unknown. How many, whose virtuous principles had been apparently subdued by temptation, appetite and passion, have suddenly risen with an energy worthy an immortal spirit, shaken off the influences that were degrading them, resisted and overcome the power that was prostrating them, become more resolutely virtuous than ever, and had their determination made strong by a recurrence to the scenes they had passed. This has happened in multitudes of instances in *this* world.

It should be remembered that nearly or entirely all our errors and wanderings from virtue here, proceed from the temptations offered to our appetites and passions by the things and circumstances of *this* world. The sensual indulgences, which follow these temptations, at length acquire over many a power, which, *while exposed* to those temptations, they would probably never shake off. But here we see the beneficent interference of our Creator, for when we are removed from this world, we are removed also from the influence of those particular temptations, which have here mastered us. We have then (without supposing any thing unnatural or improbable) apparently an opportunity to set out on a new existence—released from those seductions, which had before proved too strong for our principles—having also the benefit of past experience to warn us against the temptations which may then be around us, and inspired by a more clear developement of the glorious destiny ordained to us.

If many have chosen and resolutely entered upon a course of virtue while in this world, and while exposed to all the temptations which had once acquired a power over them, is it not natural to suppose that the opportunity offered to men by an exchange of worlds, will be embraced by all whose experience shall have shewn them the weakness, unhappiness and degradation of a course opposite to that of virtue?

But since many are removed from this life before their moral purposes are decided by their observation and experience of evil, may we not suppose, that, to effect that object in such, and to

strengthen those purposes in all, enticements and temptations will be around us in the next stage of our existence? And who knows whether, if those temptations should ever become too strong for our virtue, the same measure of removal may not be repeated again and again in our progress—at each advance, a new and wider horizon of God's works, and a more extensive developement of his plans, opening before, and corresponding to, our enlarged and growing faculties—our intellectual and moral powers nourished and expanded by such new exhibitions of his wisdom, benevolence and power, as shall excite new inquiries into the principles, measures and objects of his moral government, and call forth higher admiration, and purer adoration, of his greatness and goodness? Was ever a thought more full of sublimity? A thought representing *all* rational beings as possessing the elements of great and noble natures, capable of being, and destined to be, developed without limit—a thought representing Deity, in the far future, as presiding over, not merely an universe of matter, or such limited intellects as ours are at their departure from this world; but as ruling over, occupying the thoughts, and inspiring the homage, of a universe of intelligences intellectually and morally exalted, and constantly being exalted, towards a state high and perfect beyond our present powers of conception.

Compared with these views and prospects, how puerile is the heaven of Christians—how enervating to the mind their languishing and dreamy longings after a monotonous and unnatural bliss. Many of them do indeed believe in the eternal progress of the soul—but they obtain not this belief from the Bible. It was the much scoffed at theology of reason and nature, that taught to them this doctrine, which is, above all others connected with the future, valuable to man while here, and honorable to Deity.

The impression, made by the representations of the Bible, is, that men are removed from this world to a state, in which their intellectual faculties will always remain the same as they were immediately after their entrance thither. They are there represented as eternally praising Deity for a single act, viz. their redemption—an act, which, if it could be real, could have been performed only in favor of a part of the human race, and which could, neither from any extraordinary condescension, benevolence or greatness in the act, entitle Deity to an homage in any degree proportionate to what he would be entitled to, if the theology of reason, on this point, instead of the theology of Christianity, be true.

How absurd too is it to suppose that Deity, who must be supposed to have willed the existence of our homage towards him, should will only that which should spring from so scanty a knowledge of his designs, and which should be offered by intellects so incapable of appreciating his character, as Christianity contemplates.

Finally the Christian's heaven is an *impracticable* one, unless God shall perform an eternal miracle to make it otherwise. The nature of our minds is such that they cannot always dwell upon, and take pleasure in, the same thought or object, however glorious or delightful it may be in itself.—There is in them an ever-restless desire of change, and of new objects of investigation and contemplation, and it is by the operation of this principle that our eternal intellectual advancement is to be carried on. But Christianity offers to us, in its promised heaven, one prominent subject only of reflection and interest—a subject, which, if it were real, although calculated

perhaps to excite gratitude for a time, could never, without the aid of a miracle, operate upon our present natures so as to produce an eternal delight.

But it will probably be said that our natures will be so *changed,* as to be *fitted* to forever receive pleasure from the same source. Answer 1st. Such a change would be a *degradation* of our *present* natures, and *that* we cannot believe that Deity would ever cause. Answer 2d. If our natures are to be so essentially changed as always to rest satisfied with one subject of contemplation, to always receive their highest and constant pleasure from one fountain, and to have their *intellectual* thirst forever quenched, we should not then be the *same beings* that we were. Answer 3d. Such a change in, or rather annihilation of, our mental appetites, is inconsistent with our further progress, because the principle, which is to urge us on, will then be removed—therefore a belief in the Christian's heaven is inconsistent with a belief in the eternal progress of the soul.

The theory of successive existences is rendered probable, by the obvious necessity of having our situations, and the objects of investigation and reflection, by which we are to be surrounded, correspond to the state of our capacities. The same condition, which, like this world, is suited to the infancy of our being, would not be best adapted to the improvement of one who had existed for a series of ages.

Further—it is difficult to account for the temporary character of our present existence, otherwise than by supposing it the first of a series of existences. The idea that it was intended as a state of *probation* is one of the most absurd that ever entered the brains of men. It is absurd, in the first place, because the fact, that so large a portion of mankind are removed from it before their characters have been determined by influences calculated to try them, is direct evidence from Deity himself that he did not intend it for that purpose; and, in the second place, it is absurd, because the *utility* of a state of probation is not the most obvious thing in the world, when it is considered that the consequence of one is admitted to be, that a part of mankind become eternally miserable and wicked, whereas, without one, it must be admitted that all might become such beings as I have previously supposed them designed to be.

AN ESSAY, ON MAN'S ACCOUNTABILITY FOR HIS BELIEF.

The Bible threatens everlasting punishment to such as do not believe it to be true—or to such as do not believe that a certain man, who grew up in the town of Nazareth, was a Son of the Almighty! Is it *just* to punish men for not thinking that true, which is improbable almost beyond a parallel? If not, the Bible defames the character of Deity by charging him with such conduct.

Is our belief an act of the will? If it were, the threat might operate as a motive to *induce* us to believe, or to persuade us to make up our minds that we would believe. But no one pretends that a man can believe and disbelieve a doctrine, or think it true and false, whenever occasion seems to require.

Our minds are so constituted that they are convinced by evidence. Sometimes too they believe a thing, and in perfect sincerity too, without being acquainted with any real evidence in favor of its truth. *Such* a belief comes naturally of the impressions, which the minds of some persons receive from the circumstance that the thing is generally believed by others with whom they are acquainted, or from the fact that it has *long been believed* by others. These circumstances, although they can hardly be considered as evidence, yet have the effect of evidence in satisfying many. There is a *fashion* in religion, by which men's minds are carried away. We may see it every where. Such, it will by admitted on all hands, is the case in Pagan countries, and it is also more or less the case in civilized and enlightened nations. Although the evidence of Mahomet's having been a Prophet of God, is probably insufficient to convince any enlightened, impartial mind, possessed of common strength, still, it entirely satisfies the mind of a Turk of the strongest intellect. The reason is, that the little real evidence is aided in its influences by the associations and impressions of his whole life.

When the mind is thus *completely satisfied* of the truth of a thing, is there any obligation of morality, which requires a man to look farther? If it were so, men could never safely come to a conclusion on any subject; it would be their duty never to consider any thing to be settled as true. But God has so constituted our minds that when they are convinced, they rest satisfied until their doubts are excited by opposite evidence or impressions. Until *then* it is not in the power of man to doubt. If therefore there be any moral wrong in resting satisfied in a belief, of which the mind is convinced, there is no alternative but to say that God, by having so constituted our minds, has made himself the author of that wrong.

One, who is entirely satisfied of the truth of a matter, although he be in reality mistaken, *feels* no moral obligation to inquire further into its evidences, and, of course, violates no moral obligation by not inquiring—therefore he cannot be morally guilty. In such an instance, if there were any wrong on the part of any one, it could be only on the part of God for having so constituted the individual, as that, in such a case, he would have no moral sense to direct him aright.

It is only when a man's doubts are excited, that his moral sense directs him to investigate. Supposing then a Pagan or Mahometan were to feel entirely satisfied that his system were true, is there any moral obligation resting upon him to spend his time in inquiring into other systems? Is he not acting uprightly in considering his faith as certain until his doubts are excited? Is it then just to punish him? If not, then Jesus could never have been authorized by Deity, in the manner he imagined, to threaten punishment to such an one on account of his belief.

It is so likewise, when men are entirely convinced that a narrative, for example, is untrue—they have then no moral sense that commands them to inquire into its evidences, and, of course, do not violate their moral sense in not inquiring. Christians feel no moral obligation to investigate the evidences of Mahometanism, because, without any investigation, they are convinced that it is untrue. Mahometans are in the like condition in respect to Christianity; and whether Christianity, or Mahometanism, or neither, be true, the Mahometan is as innocent on this point as the Christian.

If a man read the narratives of the miracles said to have been performed by Jesus, and his mind be perfectly convinced that the evidence is insufficient to sustain the truth of such incredible facts, his moral sense does not require him to go farther—it acquits him in refusing his assent. So if he be not entirely satisfied, and his moral sense dictate further investigation, and he then make all which he thinks affords any reasonable prospect of enlightening him, and his mind then become entirely convinced of the same fact as before, his conscience is satisfied, and he is innocent.

How many have done this, and have become Deists. We have the strongest evidence too, that, in their investigations, no unreasonable prejudice against Christianity has operated upon their minds. Vast numbers of men, living in Christian countries, where it was esteemed opprobious to disbelieve Christianity—men, whose parents, friends and countrymen were generally Christians, and whose worldly interest, love of reputation, love of influence, and even the desire of having bare justice done to their characters, must all have naturally and strongly urged them to be Christians; and whose early religious associations were all connected with the Bible—men, too, of honest, strong and sober minds, of pure lives and religious habits of thought, have read the Bible, have read it carefully and coolly, have patiently examined its collateral evidence, and have declared that they were entirely convinced that it was not what it pretended to be—that the evidence against it appeared to them irresistible, and that by it the faintest shadows of doubt were driven from their minds. Their consciences rest satisfied with this conclusion—their moral perceptions tell them that their conduct in this matter has been upright—they know, as absolutely as men can know any thing of the kind, that if they are in an error, it is an error, not of intention, but of judgment, not of the heart, but the head; and yet the sentence of the Bible against such men is, "the smoke of your torments shall ascend up forever and ever!" The enormity of the punishment, and the monstrousness of the doctrine, are paralleled by each other, but are paralleled by no doctrine out of the Bible, in which enlightened Christians believe. Men can hardly be guilty of greater blasphemy than to say that this doctrine is true. And yet the Bible employs these unrighteous and fiend-like threats, to drive men to believe, or to close their minds against evidence lest they should disbelieve, narratives and doctrines as independent of, and as unimportant to, religion and morality, as are the histories of Cæsar and Napoleon—narratives, which set probability at defiance, and doctrines, which do injustice to the characters of God and men.

Many Christians say the reason, why men do not believe the Bible, is, that they do not examine it with an humble mind—and an humble mind, as they understand it, is one which has prepared itself, as far as it is able, by prayers, and fears, and a distrust of its own ability to judge of the truth of what it ought to believe, to surrender its judgment, to suppress its reasonings, to banish its doubts, and then believe the Bible on mere assumption, in spite of the incredibility of its narratives, the enormity, impiety and absurdity of its doctrines, and the contemptible character of its evidences.

They are accustomed to say that the doctrines of the Bible are too *humiliating* for the pride of men to acknowledge. But Deists acknowledge as strong religious obligations, and as pure moral ones, as Christians. As for the humiliation of believing Christianity, there certainly is nothing

more humiliating in believing that Jesus performed miracles, or that he was prophesied of before his coming, than there is in believing any other fact whatever. If it be humiliating to believe one's self that wicked animal, which the Bible represents man to be, it is because it is contrary to nature and reason to be willing to consider ourselves wretches worthy of all detestation, especially when our own knowledge of the moral character of our intentions gives the lie direct to any such supposition. Every human being knows, or may know, if he will but reflect upon the motives which have governed him, that he never in his life performed a wrong act *simply from a desire to do wrong.* No man loves vice, because it is vice, although many strongly love the pleasure which it sometimes affords. Men are induced to wrong actions by a *variety* of motives, and desires, but the simple desire to do wrong never inhabited the breast, or controlled the conduct, of any individual. Yet in order to prove that men's natures are in the slightest degree intrinsically and positively wicked, it is necessary to prove that individuals are, at least, *sometimes,* influenced by a special desire of doing wrong. To prove that men are led, by any *other* desires, to commit wrong actions, only proves the natural strength of those desires, and the comparative weakness of their virtuous principles, or, in other words, it proves the imperfect balance of their propensities and principles—an imperfection, which, of course, ought to be guarded against, because it often leads men to do wrong, and which may *need,* though not *deserve,* the admonitory chastisement which God applies to men—but it does not prove any positive wickedness of the heart. So that, even if a man were (as no man ever was) entirely destitute of all regard to right, still, if he had not any special desire of doing wrong, whatever other desires he might have, and to whatever wrong conduct they might lead him, he would nevertheless be *intrinsically* only a sort of moral negative—he would not be at heart positively wicked.

But the very reverse of the doctrine of intrinsic wickedness is true of every man living, for every man's character is more or less positively good—that is, he has some regard to right—and that regard is as inconsistent with wickedness of heart, or a desire to do wrong, as love is with dislike.—In a large portion of mankind, this regard to right is one of their cardinal principles of action, and shows itself to be too strong to be overcome by any but an unusual impulse or temptation. Now is a man, who, as far as he knows, and as far as he thinks, *means* to do right, whose general intentions are good, and who is generally on his guard *lest* he should do wrong, to stultify his intellect, and discredit the experience of his whole life, in order to believe a book, written two thousand years ago, in scraps by various individuals, and whose parts were collected and put together like patchwork, when it tells him that he is a "desperately wicked," depraved and corrupt villain? A man might as well tell me that I do not know the colour of my own skin, or the features of my own face, as that I do not know the moral character of my own intentions, or, (if theologians like the term better,) of my heart—and he might as well tell me that my skin is black, or my eyes green, as that my inclination is to do wrong, or that my heart is bad. He would not, in the former case, contradict my most positive knowledge any more directly than in the latter.

Were I to say that all men's *bodies* were corrupt and loathsome, every one would call me a person who had been in some way so far deluded (and what greater delusion can there be?) as that *I would not believe the evidence of my own senses.* Yet, had I always been told by my parents, my friends, and by every one about me, and had I read in a book, which I believed to be the word of God,

from my earliest years, that such was the fact, and that corporal substances were above all things deceitful, there can be no doubt that I should have partially believed it now, or, at least, during my childhood and youth. Still, my senses, and my experience do not more clearly disprove that fact, than they do that men's hearts or intentions are intrinsically wicked. But Christians believe the contrary, and simply because it has been dinging in their ears from their childhood; because they have habitually read it in what they supposed the word of God, from a period prior to the time when they were capable of judging of men's characters; because they have thus been taught to attribute every wrong action of men to the deplorable wickedness of their hearts; and because they have been taught to consider it a *virtue* to look upon their own and others' characters, through the dingy medium of the Bible.

The humiliation therefore of believing the Bible, is principally the humiliation of believing a detestable falsehood for the sake of holding one's self in abhorrence—an humiliation calculated to destroy that self respect, which is one of the strongest safeguards of virtuous principles—an humiliation, to which no person ought to submit, but into which many of the young, the amiable and the innocent have been literally driven.

Again. The facts, that many honest, enlightened and religious men have disbelieved Christianity; *that many, who saw the supposed miracles, disbelieved it;** that the inconsistencies of the Bible have given rise to hundreds of different systems of religion; that every sect of the present day, in order to support its creed, is obliged to deny the plain and obvious meaning of portions of the Bible; and that the truth or importance of almost every theological doctrine contained in it is denied by one sect or another, which professes to believe in the inspiration of the book itself, if they are not proof that this pretended light from God is but the lurid lamp of superstition, are, at least, sufficient evidences that a man may *reasonably disbelieve* it to be what it pretends to be, viz. a special revelation of luminous truth. But is it credible that Deity has made to men a communication, on a belief or disbelief in which, he has made their eternal happiness or misery to depend, and yet that he has made such an one, and has made it in such a manner, that men may *reasonably* disbelieve it to be genuine?

Even if we attribute men's unbelief to the perverseness of their dispositions, still, the greatest of sinners are the very ones whom this system professes to be more especially intended to save—and would these then be left unconvinced? How absurd is it to suppose that Deity would go so far as to violate the order of nature in order to save men of perverse minds *by* bringing them to a knowledge of the truth, and that he should then fail of doing it by reason of the very obstacle, which he had undertaken to remove. To say that he has done *all in his power* to convince men, is to say, that, in a comparatively momentary period from their birth, minds of his creation have become too powerful for him to control. To say that he has *not* done all in his power, is to attribute to him the absurdity of adopting means for the purpose of accomplishing the greatest object (in relation to this world) of his moral government, when he must have been perfectly aware that those means would be insufficient.

Is it credible that, if God have made to men a communication, on a belief in which depends all their future welfare, he would have interlarded it with so much that is disgusting and improb-

able, as that the whole would be disbelieved, rejected and trodden underfoot, by well-meaning men? On the contrary, would he not have made is so probable as to have carried conviction to every mind that could be benefitted by it? Was he not bound by every principle of parental obligation to have made it self evidently true? Ought he not, when such tremendous consequences were at stake, and if need there were, to have written this communication over the whole heavens, in letters of light, and in language that could not be misinterpreted, that man of every age, nation and colour, might rend and never err? Would he not have completely established, in the mind of every accountable being, by a sufficient and immoveable proof, the truth of every syllable essential to their salvation? If he would not, then, according to the best judgment, which the perceptions he has given us will enable us to form, he must be what I will not name.

But this is not all. The Bible requires of a certain portion of mankind, not only, that they believe *it* a revelation from God, but that they violate their consciences in order to to believe it. For example, by requiring all men, without exception, to believe it or be damned, it requires the believers in the Koran and the Shaster to renounce those books as false. This it is impossible for them to do, unless they first investigate the evidences against their truth. Now, I think no candid man will pretend, either that those believers would not feel as much horror at the supposed impiety of disbelieving those books, as a Christian does at that of disbelieving the Bible, or that it would not require on their part as great a struggle with their consciences to go into the investigation of the evidences *against* the truth of those books, as it would on the part of the Christian to go into the investigation of the evidences against the truth of the Bible. Yet the Bible, by demanding of them that they believe *it*, virtually demands that they thus violate their consciences *in order* to go into such an investigation as is necessary to lead them to disbelieve those systems, which they now revere as too sacred to be doubted; and it demands this of them too on the threatened penalty of eternal damnation.

If there be any conduct more wicked than any other which can be conceived of, that, which is here ascribed to Deity, must, it appears to me, exceed in wickedness any other that the human mind ever contemplated. Its wickedness is, in fact, no less than that of hereafter punishing men through eternity, for not having done in this world that which they most religiously believed to be wrong.

And what is it to believe the Bible, that men should merit the everlasting vengeance of the Almighty for not believing it? Why, setting aside its secondary absurdities and enormities, it is to believe in these giant ones, viz. that when Deity created an universe, in pursuance of a design worthy of himself, he created in that universe a Hell—a Hell for a portion of the beings to whom he was about to give life—a Hell for his children—a Hell that should witness the eternal reign of iniquity, misery and despair—a Hell that should endlessly perpetuate the wickedness and the wo of those who might otherwise have become virtuous and happy; that he then, after having created men, and given them a nature capable of infinite progress in knowledge and virtue, by placing them in a world full of enticement and seduction, deliberately laid the snare, made the occasion, fed the desire, and instigated, invited and seduced to the conduct, which he knew certainly would issue in the moral ruin of that nature, and the endless wretchedness of the individuals:

and, finally, that all this was *right,* that such a Being is a good Being, and that he merits from us no other sentiment than the highest and purest degree of filial and religious emotion.

And what is the evidence, on which we are called upon to believe all this? Why, it is this. Some eighteen hundred years ago, a few simple individuals, from among the most ignorant class, in a most unenlightened, superstitious and deluded community, where a supposed miracle was but an ordinary matter, where miracle-working seems often to have been taken up as a *trade,* and where a pretended Messiah was to be met, as it were, at every corner, said that they had this story from one of the wandering miracle-working Messiahs of the day, who performed many things, which appeared to *them* very wonderful; although they admit that these same things, as far as they were seen by others, (and nearly all the important ones, except such as were *studiously concealed,* were seen by others,) did not, to those others, appear very wonderful or unusual. They also expressly admit that, of those who had once been induced to follow him, nearly all very soon changed their minds in relation to him, and deserted him. They also, by themselves deserting him when he was apprehended, virtually acknowledge that their own confidence in him had then gone to the winds, and would never have returned, had it not been, that, after having submitted to a *part* of the usual forms of an execution, and being taken down for dead, (at three o'clock or later in the afternoon,) he, as soon, at the farthest, as the next night but one, (not "three days" after, be it remarked) and how much sooner we know not, returned to life, (as men are very apt to do who have been but partially executed,) and had the extraordinary courage to lurk about for several days, and shew himself, not openly to the world, but *in the evening,* and *within closed doors,* to some dozen who had before been his *very particular friends.* This is altogether the strongest and most material part of the evidence in the case,* and the question, which arises in relation to it, is, whether it be sufficient to sustain such an impeachment, as has been alluded to, of the character of the Almighty?—A question, which, if the march of mind continue, men will sometime be competent to settle.

Endnotes

[*] John 12-37—"But though he had done so many miracles before them, yet they believed not on him."

[*] It will be recollected that no one of the twelve ever speak of having witnessed, or heard of, any *ascent into heaven.*

2. "To the Members of the Legislature of Massachusetts." (August 26, 1835)

Source

"To the Members of the Legislature of Massachusetts." *Worcester Republican. - Extra.* August 26, 1835.

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TO THE MEMBERS OF THE LEGISLATURE OF MASSACHUSETTS.

Gentlemen, I feel personally interested to procure a change in the laws relating to the admission of Attorneys to the Bar; and since no one, unless he be thus personally interested, will be likely ever to take the trouble thoroughly to inquire into, or fully to expose the injustice and absurdity of the restraints now in force, I take the liberty of addressing and sending to you this letter, and respectfully asking your consideration of the subject.

By the Statute of 1792 Ch. 4, establishing the Supreme Judicial Court, it is provided (See. 4) that said Court "shall and may, from time to time, make, record and establish all such rules and regulations with respect to the admission of Attorneys ordinarily practising in the said Court, and the creating of barristers at law, as the discretion of the same Court shall dictate—provided that such rules and regulations be not repugnant to the laws of the Commonwealth."

Pursuant to this authority, the Supreme Judicial Court have established such rules (see Bigelow's Digest—Title, Counsellors and Attorneys,) that it is now necessary for a graduate to spend *three* years, and a non-graduate *five* years, in the study of the law, before he can be admitted to practise in the Common Pleas, and then to practise *four* years in the Common Pleas before he can be admitted a Counsellor of the Supreme Court.

These rules, as to the *time* of study, are peremptory—and the custom is, (whether the rules contemplated it or not,) after this time has been nominally passed in study, whether it really have been passed in study or in idleness, to admit the applicant as a matter of course, without any further inquiry as to his attainments. It is true that the persons, with whom he has studied, certify that he has been "*diligent*" in the pursuit of the education proper for his profession—but this certificate is no evidence that such has been the fact, and is not so considered by the Bar, because it is given, and is understood to be given, indiscriminately as well to those who have been grossly and notoriously negligent, as to those who have been diligent. So that, in fact, the *time and money,* expended in *nominally preparing* for the profession, and not the acquirements or capacity of the candidate, constitute the real criterion, by which he is tried when he applies for admission.

The Bar in this (Worcester) County, and I suppose also in the other Counties, have improved, in letter if not in spirit, upon the unjust and arbitrary character of the rules of the Court. The 12th of the Rules of the Bar in this County is in these words. "No Student shall commence, or defend any action, or do any other professional business on his own account; and no Student shall be employed for pay, *in any business* for himself." And the Bar have substantially the *power* to prevent the admission of any one, who shall infringe this rule; because the Court will not take upon itself to admit any one, who is not recommended by the Bar, unless the Bar shall "*unreasonably refuse* to recommend" him, (Rule 7th of S. J. C. See Bigelow's Digest, as before—also Rule 6th C. P. See Howe's Practice—appendix,) and it probably would not consider the conduct of the Bar, in refusing to recommend one, who had spent a part of his noviciate in earning his subsistence, unreasonable. The Court would undoubtedly say that the *spirit* of their own rule required that the Student's exclusive business, during his noviciate, should be the acquisition of the necessary qualification, for his profession.

Although we have the evidence of experience, yet we need it not, in order to demonstrate that it must be a necessary operation of these rules, to exclude from the profession a class of young men, who, as a general rule, would be more likely to excel in it than any other—I mean the well-educated poor. I say this class would be more likely to excel in it than any other, because they generally do excel all others in whatever they undertake, that requires energy and perseverance. The access of this class to the profession, and their success in it, are made, by these rules, actually impracticable. In the first place, if they have the perseverance to go through the extreme and long continued toil and exertion, that must be gone through, if they would defray, as fast as they accrue, the expenses of so long a course of preparatory studies as are now required, they must, of necessity, by that time have exhausted, in a great degree, the energies, that are indispensable to success in the laborious profession of the law; because it is not in human nature that a man should acquire, and at the same time earn the money to pay for, so expensive and long a course of education, and retain his energy fresh and unbroken. He must also, even after he has made all this effort, be so far advanced in life, that he must enter the profession under great disadvantages on account of his age, and must be little short of insane to imagine that, with his wasted powers, he can then set out and compete with those who commenced fresh and young.

Take another case—that of a poor young man, who may be (what few can ever hope to be) fortunate enough to obtain credit and assistance, while getting his education, on the condition that he shall repay after he shall have engaged in his profession—so long is the term of study required, and such is the prohibition upon his attempts to earn any thing in the mean time for his support, that he must then come into practice with such an accumulation of debt upon him as the professional prospects of few or none can justify. Experience has shown the result to be what any one might have foreseen that it would be. The class of young men, before mentioned, the well-educated poor, have been, almost without a solitary exception, excluded from the profession, which many of them would have chosen and adorned, had it been open to them, and have been actually *driven* into other pursuits—and the profession is now filled, with few exceptions, by men, who were educated in comparative ease and plenty; who have neither the capacity nor the energy necessary to success; who chose this profession, not because their minds were adapted to it, but

because, having received a liberal education, it was necessary that they should choose *some* profession, whether they were fitted for it, or not.—You, Gentlemen, as well as I, must be aware that as often as *one,* with the requisite talents for a lawyer and advocate, can be found in the profession, five, if not ten, others can be found in it, who have not these talents—who are in fact palpably incompetent to anything but the minor and almost formal parts of professional business. I think you must also be aware that the present lack of able lawyers is not owing to any scarcity of talent among the people—but is to be attributed solely to the fact, that the laws of the State, and the rules of Courts and Bars are such as operate to admit many, who are unfit for the profession, and to exclude many who are especially fitted to excel in it.

Among the well-educated poor there are many, who have a passion for the profession, who have also an equal talent for it, and at least equal, if not more than equal perseverance, with those few, who now stand at the head of the Bar—and were the access to the profession made as easy as it might be, there cannot be a doubt that in a little time the wants of the whole community would be supplied with lawyers of a grade equal to that of the few able ones, who are now to be found but here and there.

If Attorneys were permitted to practise, and thus to do something for their support as soon as they could qualify themselves for doing the minor business of the profession, few young men of character and talents are so destitute of resources as to be unable to obtain the necessary education—*and why is it not as much a man's right, to avail himself of his earliest ability to earn his living by this employment, as by any other?*

I am aware that there is a statute, (1790 Ch. 58,) that provides that any person of decent and good moral character, who shall produce in Court a power of Attorney for that purpose, shall have the power to do whatever an Attorney regularly admitted may do, in the prosecution and management of suits. But if he once commence in this way, he must always continue in it, for the Bar or Court will never admit him afterwards on the strength of any qualifications that he may acquire by practising in this way. (This fact shows how utterly arbitrary and reckless of right are the rules that are made to govern in this matter, and how inveterate is the determination, on the part of this mercenary and aristocratic combination, to exclude, from competition with them, all who are unable to comply with certain conditions, which have no necessary, or (as experience has proved) even *general* connexion with an individual's real fitness for the profession.)

It is imposing upon an Attorney, who has any considerable business, a great and unnecessary inconvenience to oblige him always to take from his client, and carry with him a power of Attorney. There is also another objection—the people are unaccustomed to give powers of Attorney in such cases, and if a practitioner inform them that *he* must have one, before he proceeds in his cause, they do not exactly understand why it should be necessary—they are afraid there is something in the matter more than they know—the circumstance creates a distrust against the counsel, and is therefore injurious to him.

The change I would propose is this—that a law he passed that any person, above the age of twenty-one years, of decent and good moral character, on making application either to the Common Pleas or Supreme Court for admission as an Attorney, and paying to the Clerk his re-

cording fees be admitted, without further ceremony or expense, to practice in every Court, and before every magistrate in the State, and that he then have the same right, that an admitted Attorney now has, of appearing in actions without a power of Attorney.

I would, however, have in the law a provision of this kind—which nearly resembles the provision now contained in the 27th rule of the Court of Common Pleas, (see Howe's Practice, Page 572)—that "the right of an Attorney to appear for any party, shall not be questioned by the opposite party, unless the exception be taken at the first term," (or, I would add, at the second term, when the opposite party lives without the Commonwealth,) "and when the authority of an attorney to appear for any party shall be demanded," such attorney shall be sworn or affirmed to speak the truth, and if he "declare that he has been duly authorized to appear, by application made directly to him by such party, or by some person whom he believes has been authorized to employ him, it shall be deemed and taken to be evidence of an authority to appear and prosecute or defend, in any action or petition"—reserving however to the opposite party, on his or his counsel's making oath or affirmation that he has, in his judgment, reasonable grounds for supposing that such Attorney has *not* been duly authorized, the right to continue his action, and at the term to which it is continued, to contest, by evidence, the right of such Attorney to appear in the action—provided he give to the attorney reasonable notice that his right to appear will be contested—the party making the objection, being held liable for the costs that may arise in consequence of his objection, if he fail to sustain it.

The principle argument,—and it is of itself, as I think, a sufficient and invincible one—on which I would insist in support of such a law as I have suggested, is that of *strict right.* If the admission be to any one a *privilege,* all, who desire that privilege, have as good a right to it as any *one* can have. None of us are entitled to exclusive privileges; and therefore, if this privilege be granted to one, the obligations of equity are imperative that it be also granted to each and every other one, who may desire it. Even the ability, learning, or other peculiar qualifications of an individual for the practice of the law, cannot with justice, be made a matter of inquiry *by the Courts or the Legislature,* as a condition of his being permitted this privilege—because those are matters, with which neither the Courts nor the public have any concern—they concern solely the lawyer himself and his clients. Any man, who is allowed to have the management of his own affairs, has the right to decide for himself whom he will employ as counsel—and if he choose to employ one, whom the public at large would not think the best or ablest that could he found, it is the right of the person so employed to have the same facilities afforded to him for discharging his service as counsel, that are afforded to others, whom the public may think much better or abler lawyers.

It may be proper however that a decent moral character be made a requisite for admission, and for this reason solely, as far as I can see, that otherwise individuals might sometimes put themselves there, from whom the Court would be in danger of insult.

Another ground, on which I would advocate a change in the law, is, that the present rules operate as a protective system in favor of the rich, or those who have at least a competency, against the competition of the poor. Some people have thought that a protective system *in favor of the poor,* against the competition of the rich, was a wise policy—but no one has yet ever dared advocate, in

direct terms, so monstrous a principle as that the rich ought to be protected by law from the competition of the poor. And if such a principle is to be sustained by the laws of this Commonwealth, it would justify an open rebellion to put down the Government.

My own doctrine also is, and I have no doubt it is also that of the most of your number, that the professional man, who, from want of intellect or capacity for his profession, is unable to sustain himself against the free competition of his neighbors without the aid of a protective system, has mistaken his calling—and the public ought not, looking solely to their own interest and rights, to tolerate laws, that shall place them under any necessity whatever of employing such incompetent men, when abler once can be procured.—They (the public) ought, on the contrary, to have the most full and unqualified liberty of employing in their service, without let, hinderance, or any invidious distinction or disadvantage whatever, the best talent they can command. The present laws and rules, considering them as the acts of the community, are in fact specimens of the most wretched and self-cheating policy—for while they probably have the effect to invite into the profession few or no able men, who would not otherwise enter it, they exclude many able ones, who, but for them, would enter it. The community therefore take the trouble to *make* laws, whose natural and necessary operation is to produce a scarcity, where there would otherwise be an abundance of the very services, which they want—they actually go out of their way to do themselves an injury.

Another consideration entitled to weight in favor of the change, is, that if the profession were made accessible by the poor, the practice of the Bar would be likely to be more uniformly humane (I mean no imputation upon the profession at large) than it now is. Who are the Attorneys, whose rapacity has heretofore filled our jails with honest debtors? Who are they, that have ever been ready to extort, in the shape of bills of costs, poverty's last shilling, and to feed and clothe, if not to pamper and bedeck, their own families, with food and dresses snatched and stripped from the mouths and bodies of the poor man's children? I think they will rarely, if ever, be found to have been those, who had been reared in poverty themselves; who had known by experience the difficulties of that condition, and who had witnessed and participated in the disheartening embarrassments, occasioned to the poor man's family, by the deduction of the lawyer's bill from their scanty earnings. The poor, and those who have been poor, have too much fellow-feeling to get wealth, or even their subsistence, by grinding each other's faces.

The present rules ought to be abolished for the further reason that a compliance with them, by those who can make good lawyers at all, is not necessary. I have heard, from men of great experience at the Bar, sentiments equivalent to this, that as an almost universal rule, it is not until after a person has entered the profession, and has a character to maintain, and business of his own to attend to, that he studies the law with any considerable intentness or effect. Now it this be so, much of the time, that is now spent in preparation, is little better than wasted.

But further—in a considerable portion of the cases, the compliance with the rules, when it is observed, is more nominal than real. The time, designed by the rules to be devoted, to study, instead of being thus devoted, is, probably by a majority of students, given much more to amusements than to books. Indeed a really industrious law student would generally be considered, by

other students, a great curiosity. But even if all did study diligently and zealously, that fact would be no evidence that they were suitable persons to be admitted, in preference to others; because, to excel in the profession of the law, abilities are required, as peculiar almost, as those that are necessary to enable one to excel in painting, music or mechanics; and if a man have not these peculiar abilities, they cannot be acquired by three years study, if indeed they can be by the studies of a whole life. On the other hand, if a man have them, he will succeed, even though he should commence practice before he has studied half the time that *our* laws require—as is proved by the cases of some of the most eminent lawyers and advocates, that the country has ever produced. According to the criterion in Massachusetts, Henry Clay, Patrick Henry, William Pinkney and Chief Justice Marshall, when they commenced their career, must have been pronounced unqualified for a place, which the next moment would have been given perhaps to some *stupid fop,* whose only recommendation was, that he had spent three years, not in attending to his brains or his books, but in twirling his cane and brushing his whiskers. Indeed I think experience has proved that the direct tendency of our present rules, is to introduce into the profession more fops and fools than lawyers. The lawyers would enter it, without the rules—but the fops and fools would not find it profitable to do so. These facts illustrate the miserable policy of prohibiting one set of individuals from the pursuit of that art or profession, for which nature and inclination fit them, and of attempting to supply their place by offering to others, who have naturally neither the capacity nor inclination to fill it, exclusive privileges, as an inducement to make the trial. These restrictive and protective rules effect the double evil of shutting out some individuals from their natural and appropriate sphere, where they would be useful to themselves and the community, and of enticing others into what is to them an unnatural one, where they can do little for themselves, and little or nothing for the public. It would hardly be possible to devise rules, that should more uniformly prevent nothing but good, and accomplish nothing but evil, than these which are authorized and upheld by the Legislature.

I will now answer some of the objections, which I suppose will be made, to the passage of such a law as I have proposed.

One is, that there would he too many lawyers.—I might, in answer to this objection, ask how can there be *too many* lawyers, when the number of practising ones must, of necessity, be limited by the business and convenience of those, who have occasion to employ them?

But I think there is another answer—and that is, that, although there might be more than there are now, (which is very doubtful,) who would become nominally attorneys, and would occasionally fill writs in cases of necessity, there would yet not be *so many,* who would devote themselves steadily to the profession as their regular business. The reason why there would not be so many of this class, is, that there would be more men of talents in the profession, and they would of course receive all, or nearly all, the patronage. It would be of no use for an incapable man to attempt to establish himself as an attorney at all—because the people would give him no business—and no more *able* ones would enter the profession than could get a good living from the business, which the community would afford, because it is not characteristic of capable men to engage in any business, from which they cannot derive a good support. Whereas we know multi-

tudes of weak men now enter the profession, and make it their regular business, although they derive only such a pittance from it as no spirited and able man would be content with.

Another objection, which I have heard made, is that if every man were allowed to commence actions, it would give rise to barratry. But how would it give rise to barratry? None, but men of decent and good moral characters, could commence actions—and is not the good moral character of one man as good a security that he will not commit barratry, as is the good moral character of any other man? Does loitering about a lawyer's office three or four years, raise a man's moral character so high above that of ordinary men, as to afford the community any security for his good behaviour, which they have not in the case of other men? Besides, barratry is a crime—an indictable offence—punishable by fine and imprisonment—and is it necessary, in addition to this, to go so far as to deprive certain men "of decent and good moral character," of privileges, which—on certain conditions, that have in them no tendency whatever to prevent barratry—are granted to others to an indefinite extent, and have been granted to them until the country is overrun with lawyers so poor that, if poverty could induce men to commit barratry, we should have had enough of it long ere this?

But further—all that is necessary to enable a man now to commit barratry, and to have the profits of managing the suits, is for him just to take a power of attorney—yet we have no barratry, unless it be in the ranks of the profession.

And I think it may here be a very pertinent inquiry—whether the present rules do not favor, rather than obstruct, the commission and concealment of barratry by the members of the Bar? The members of the Bar have become an organized, associated body—the society, in the mass, exercising a discipline over the members, and professing to the public that they tolerate among their number none unworthy of the public confidence. The members of the association have thus taken to themselves, in some degree, a common character. In the preservation of this common character from suspicion, all are interested. And I think all will admit that the experience of the world has been, that such associations, in guarding their associated character, uniformly pursue the policy of not being the first to expose the faults or crimes of their associates to the world, and generally of hushing suspicion if possible. It is natural that they should, for they have a strong personal interest to do so. But after public suspicion has once become so strong against an individual member that the character of the whole body is in danger—or when a case of criminality has become too notorious to be concealed, then the association become suddenly virtuous—affect a great deal of astonishment—probe the matter terribly—and if they find it necessary, expel the offender, and would then make the public believe that they have purified the association as with fire. Now is not all this farce? a mere humbugging of the community?

What then is the remedy? It is this. If the profession were thrown open to all, this combination of lawyers would doubtless be broken up—they, like other men, would hold themselves severally responsible for their own characters alone—they would have no inducement to wink at or attempt to hide the mal-practices of others—individuals, who should suppose themselves injured by the practice of an attorney, instead of laying his complaints before the Bar, would lay them before the grand jury, or some other tribunal—and it is no uncharitableness, it is only supposing

lawyers to be like other men, to say, that it is probable the community would sometimes fare the better for it.

Another objection, which I suppose may be made by some, is that if the profession were thrown open to all, young men would be likely to enter it before they should be so qualified that they could he safely entrusted with the transaction of business—and that therefore those who should employ them, would be imposed upon.—And I suppose the present rules were established on the ground, that *some* rules, *coming from the Court,* were necessary in order to prevent men from being imposed upon by those, whom they might otherwise see fit to employ to do their business. Now it was really very kind, no doubt, on the part of the Court, thus to take the people's business out of their hands, and assume so fatherly a control of it themselves, in order to avert from the people the natural consequences of their incapacity to judge of these things for themselves; yet, however benevolent their intentions undoubtedly were, I seriously suspect that their rules actually *cause twice* as much imposition as they prevent; because, one, admitted under them, is ostensibly admitted on the ground of his being qualified for practice—whereas, in reality, his qualifications have nothing to do with his admission. After the candidate has been nominally a student the requisite time, he is admitted without inquiry, as a matter of course. Yet the forms of admission are such that his admission *amounts* to an indorsment and certificate, by the Bar, of his capacity and fitness to be entrusted with business. The Bar, in fact, actually *recommend* him to the confidence of the public, wherever he may go. Many, who are ignorant of the deceptive and fallacious character of this proceeding, repose confidence in the man on account of this indorsement and recommend then, and, in consequence, they too often find themselves to have been imposed upon with a vengeance. In short, this whole affair of rules, recommendations, admissions &c., although observed professedly to *prevent* imposition, is yet, in practice, little less than an organized *system* of imposition.

Let us now look on the other hand. If men were admitted, without regard to their qualifications, their admission would be no recommendation to the confidence of the public, and the client would ascertain for himself what a lawyer was made of, before he would entrust him with business at all. Every lawyer would then of necessity stand on his own merits and resources—he would have no recommendation from his brethren of the Bar to prop him up, or to shield him from his just responsibility for his errors. Young men, under these circumstance, would commence and proceed in their practice with much greater caution then they now do, and far this plain reason, *that it would be necessary, both for their reputation and their interests, that they should do so.*

But supposing that incompetent men should attempt to get professional business, and should succeed, and that those, who employed them, should suffer in consequence—on what principle must the Legislature proceed in sustaining laws to prevent such occurrences? Why, they must proceed on this principle—that the people are not to be allowed the management of their own affairs—that they are not to he trusted with the selection of agents to do their own business—but that if they want the services of a lawyer, for instance, the *Legislature and the Courts* will so far look after their interests as just to prescribe to them whom they must employ, if they wish to have their

lawyer enjoy the ordinary facilities for doing their business. A fine doctrine this to preach to the people of Massachusetts.

I have another objection to a law or rule of Court, that shall make it necessary that the qualifications of a candidate, other than his moral character, be in any way whatever inquired into, as a preliminary to admission. It is that if the inquiry be made at all, it must be made by a board of lawyers, who are interested to keep him out, and who also, in some cases, may have special objects to accomplish by frustrating the success of particular individuals—in which contingencies they would be very likely to abuse their power to effect their purpose. Suppose, for example, that an individual, before applying for admission, should have avowed a determination, that, if admitted, he would not enter the combination of the members of the Bar, to keep up the prices, and throw obstacles in the way of competitors, in the profession—can there be a doubt that such an individual, on an examination as to his attainments, would be in much more than ordinary danger of being found to be not qualified for admission? I therefore object to having my rights, or my interests, or my feelings, or any other man's rights, interests or feelings thus unnecessarily placed in the keeping of interested men, who have no claim to the guardianship of them.

If a young man should find that, in order to obtain the confidence and patronage of the community, he needs a certificate from the members of the Bar, of his qualifications, he would perhaps think it worth his while to go to some of them, and ask of them, as a favor, to examine and recommend him; but if he should be able to get along as well without their assistance, he has a perfect right, and, in some cases perhaps, would much prefer to do so. He ought therefore to be left at perfect liberty on this point, without having any other of his privileges affected by the course he may choose.

Another objection, which may be made to the law I propose, is, that the Courts might be incommoded and delayed by the arguments of ignorant men. I have already indirectly, given one answer to this objection, in showing (if I have shown it) that the active part of the profession would probably be more, rather than less, intellectual than it now is. Another answer is, that the people will of course, then as now, (because it will be for their interest to do so) employ the ablest lawyers that can be obtained—and if those, who spend four years in college, three years in an office, and £2500 in money, in fitting themselves for the Bar, are more intellectual than those can be, who may spend less time and money, or spend them in a different way, for that purpose, the presumption is that the people will find it out without the aid of the Legislature, and that, in consequence of it, the former class of practitioners will still have all, or nearly all the business, and young men, who are fitting themselves for the Bar, will still find it for their interest to pursue the same course of education as that now required—and the result will be that the Courts will have the pleasure of listening only to the same kind of arguments as those now addressed to them. But a better, and more conclusive answer to the objection, is that the Courts were made for and by the people, and not the people for or by the Courts. Suitors, when in Court, are the people, and it is their right to present their causes to their own Courts, by whatever counsel they may think it for their interest to present them, (provided it he done with civility,) and the Court must hear them without murmuring, or resign their seats.

I ought here to say, that I do not suppose that these arguments, to which I have alluded, will be put forward in purely good faith. They are too shallow to be honestly relied on by men capable of just and liberal views of the subject. They will be used, if used at all, by those, who dare not avow their real objections to the change. The true source of the opposition, if any should be made, will be, that there are those, who, either for themselves, or for some dear *Son*Johnny or Josey, want the aid of a protective system to give them a living, or make them respectable.

Having thus attempted to answer the objections, that occurred to me as the most likely to be brought against the law, which I have suggested, I wish now to state some further objections of my own to *other portions* of the existing laws. I object to the oath, that is required of attorneys, in all its particulars. (See St. 1785 Ch. 23)

In the first place, I object to the oath to bear true allegiance to the Commonwealth, and to support the Constitution. The right of rebelling against what I may think a bad government, is as much my right as it is of the other citizens of the Commonwealth, and there is no reason why lawyers should be singled out and deprived of this right. My being a friend or an avowed enemy of the constitution has nothing to do with the argument of a cause for a client, or with any other of my professional labors, and therefore it is nothing but tyranny to require of me an oath to support the constitution, as a condition of my being allowed the ordinary privileges for getting my living in the way I choose. It will be soon enough, after I shall have been convicted of treason, to refuse me the common privileges, or take from me the common rights of a citizen. It is the right of the citizen to decry and expose the character of the constitution, and if possible to bring it into contempt and abhorrence in the minds of the people, without forfeiting any of the ordinary privileges of citizens—and the recognition of this right constitutes one of the greatest safeguards of the public liberty. And if any one class of men, the moment they attempt to prove that our constitution is not a good one, and ought to be abolished, are to be denied any of the ordinary rights and privileges of citizens, then has that class been singled out for the especial tyranny of the government. There would be just as much propriety in requiring a farmer to take an oath to support the constitution, as a condition of his being allowed the privilege of entering his deed of record in a public recording office, as there is in requiring it of me, as a condition of my being allowed the privileges of an attorney. There would also be the same propriety in requiring this oath of the members of a manufacturing corporation, as a condition precedent to their receiving an act of incorporation, as there is in requiring it of me.

I object, in the next place, to the oath, which the attorney is required to take, that "if he know of an intention to commit any falsehood in Court, he will give knowledge thereof to the Justices of the Court, or some of them, that it may be prevented." I do not choose to be made an informer in this manner, against men with whose matters I have nothing to do. That is not what a lawyer goes into Court for—he goes there to defend the rights and interests of his clients, and for nothing else—and he has a right so to do, and to have all the ordinary facilities for doing it afforded to him, without this odious service being exacted of him. There would be just as much reason in requiring of the members of a manufacturing corporation, as the price of their charter, an oath that they will act as informers against all their neighbors, whom they may suppose to be

dishonest in their dealings, and that "if they know of an intention," on the part of one man, to cheat another in the price of a horse or a cow, "they will give notice thereof that it may be prevented." I object to being made in any way an officer or servant of the Court, as a condition of my being allowed the ordinary privileges in doing the business of my clients. Any other service, such as taking charge of a Jury, ringing the bell or sweeping the court-room, (which, by the way, would be services a thousand times more honorable) might be required of me on the same ground as is this of an informer.

I object, in the last place, to the oath of the attorney, that he "will do no falsehood, nor consent to the doing of any in Court, that he will not wittingly or willingly promote or sue any false, groundless or unlawful suit, nor give aid or consent to the same; that he will delay no man for lucre or malice; but will conduct, in the office of an attorney within the Courts, according to the best of his knowledge and discretion, and with all good fidelity, as well to the Courts as to his clients." I object to the whole of this oath for several reasons. First, it singles out lawyers as men worthy of especial suspicion—as men of doubtful honesty. If a lawyer is guilty of mal-practice, he is amenable to the laws; or if he is unfaithful to his clients, he is answerable in damages, in spite of his oath—and, if he is not guilty of mal-practice or unfaithfulness, he ought not to have the invidious suspicion, implied by this oath, fastened upon him. Without this oath, the community have the same security for the honesty of lawyers, that they have for the honesty of other men, and what more have they a right to demand? Clients also have the same security for the fidelity of their attorneys, that other men have for the fidelity of their agents, and what more have the laws a right to require that they shall have? If any individual client want the oath of his lawyer, is a security for his fidelity, let him make to him the insulting proposal, and persuade or purchase a compliance with it, if he can. But if he is satisfied to trust him without the oath, it is base business for the Legislature to interfere and say that the man ought not to be trusted except he be sworn.

Why should not physicians, before they are permitted to practice, he required to take an oath that they will always practice in good faith, and knowingly injure none of their patients? Why are not the members of manufacturing corporations, before they are allowed a charter, required to take an oath that they will defraud no man in the quality of the goods, that they may manufacture under that charter? Why is not the farmer, before he is allowed the privilege of securing to himself his property in his farm, by entering his dead in the public recording office, required to swear that he will never defraud any man in the price or quality of the produce of that farm? There would be as much reason in it as there is in requiring of a lawyer an oath that "he will not wittingly or willingly promote or sue any false, groundless or unlawful suit."

The truth is that legislatures and Courts have made lawyers a privileged class, and have thus given them facilities, of which they have availed themselves, for entering into combinations hostile, at least to the interests, if not to the rights, of the community—such as to keep up prices, and shut out competitors. The natural result of such combinations also is, that the mass of the members will do more or less to screen individuals from suspicion. The consequence is, that the people have imbibed an extreme jealousy towards them, and exact from them oaths, containing such

divers significant specifications, that, were he not kept in countenance by others, a man would consider them too humiliating to be taken. Now if the profession were throw open to all, lawyers would be no longer a privileged class—they probably could no longer enter into combinations that would be of any avail to them, and the jealousy of the people towards them would be at an end.

I object lastly to the statutes, (1814 Ch. 178, Sec. 2,1795, Ch. 80, Sec 4, and 1822, Ch. 51) requiring an attorney, on his admission to the Common Pleas, to pay $20, and on his admmission to the Supreme Court, $30 to the Law Library Association. If I wish to have the benefit of the Law Library, it is of course right that I should contribute to the pay of the Librarian, and also something for the increase of the library; and perhaps $50 is a reasonable sum, although I think few, unless obliged by law, would ever pay it. But—whether the sum itself be reasonable or unressonable—if, either because I live remote from the place where the library is kept, or because I have library enough of my own, or have not the $50 to spare, or for any other reason whatever, I do not *choose* to join the association, or avail myself of the use of their library, the association have no more claim upon me for $50 than have the Missionary or Bible Society.

Our Bill of Rights declares (Art. 18) that "the people have a right to *require,* of their law-givers and magistrates, an *exact* and constant observance of the principles of *justice.*" I have endeavoured to satisfy you that our existing laws in relation to the admission of Attorneys, are unequal and unjust; and if I have so satisfied you, I have a right to require—in defiance of all such pleas as expediency, utility and public good, if any such unanswered ones can be invented in defence of such laws—that they be abolished.

With respect, &c.

LYSANDER SPOONER,

Worcester, Aug. 26, 1835.

3. THE DEIST'S REPLY TO THE ALLEGED SUPERNATURAL EVIDENCES OF CHRISTIANITY (1836).

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The Deist's Reply to the Alleged Supernatural Evidences of Christianity (Boston, 1836).

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THE DEIST'S REPLY TO THE ALLEGED SUPERNATURAL EVIDENCES OF CHRISTIANITY. BY LYSANDER SPOONER.

Presented to the clergy generally in Boston.

BOSTON: 1836.

CHAPTER I. The Early Spread of Christianity.

There are some believers, who place little confidence in the evidence of the miracles said to have been performed by Jesus, who yet say that the establishment of such a religion as his, by such means as were employed after his death, is of itself a convincing miracle. They say it is incredible that the preachers of a religious system, the most prominent doctrine of which was that the Son of God, its founder, was slain, should have met with such success, unless God had miraculously aided them. They, in short, say substantially, that the very idea of the Son of God and the Saviour of the world being put to death ignominiously and like a criminal, is on the face of it so absurd, and so repugnant to all men's notions of what is probable, and of what would consist with the proper character for such a being to assume, that unless some supernatural influence had been exerted to aid in gaining for it belief, men never would have believed it.

Now, the absurdity and improbability of this doctrine, in the abstract, being acknowledged, let the question be put, whether it be any less absurd or improbable on account of its having been *believed?* If not, then here is an alleged miracle to be inquired into, of a different kind from those, on the evidence of which the Bible professes mainly to rest its claims to credit; a sort of incidental miracle, in fact, apparently not at all intended to furnish evidence of the truth of the Bible.

It is a little remarkable that any, professing to believe the Bible, should abandon, as insufficient, the evidence which its authors represent to have been expressly designed to convince men

of its truth, and should thus seize upon an after circumstance of so doubtful a character as this. Yet one, who attempts to meet believers on their own grounds, must of necessity answer many arguments no more rational than this, or suffer them to believe on; for very slight and flimsy evidence is sufficient to satisfy the minds of such as are both determined to believe, and afraid to disbelieve.

But if it shall appear that this system, absurd and improbable as its main doctrine is, might have been propagated without its having, or being aided by, any miraculous power, then the argument, against the truth of the doctrine, to be drawn from its absurdity and improbability, will be entitled to what would have been its just weight, independent of the system's having been believed at all. The only ground, that believers of the present day could then take, on this point, would be this, viz, that their astonishment, that men should ever have been so credulous as to believe so improbable and absurd a system, is so great, that they themselves will now believe it too.

Let us then inquire into the causes of the success of the Apostles, and see whether they were not natural ones.

One of the most efficient of these causes, was the *manner* in which they preached. That alone was calculated to make a very strong impression upon the minds of such as were too ignorant or simple, (and such the first converts will hereafter appear generally to have been,) to judge rationally of the truth of the statements they heard, and the soundness of the religious doctrines, that were taught. The manner of all the Apostles must have exhibited a great deal of sincerity and zeal, (for they were undoubtedly honest in their faith,) and nothing makes so favorable an impression upon the minds of men in general, in favor of those, who advocate new doctrines; nothing inclines them so much to listen willingly to all they have to say, as an appearance, on their part, of perfect sincerity and simplicity.

Another trait in the manner of some of them, particularly of Paul, who appears to have been by far the most efficient apostle, was boldness. The exhibition of this quality always powerfully affects the imaginations of the weak and ignorant, of whom the early converts were evidently composed.

The question is often asked, how is the boldness and zeal of the Apostles to be accounted for, when they knew they had no worldly honors to expect, but, on the contrary, persecution, and the contempt of a large portion of the community, wherever they should go? To answer this question, it is necessary to refer to what was the condition of these men, (with the exception of Paul) when they first became the disciples of Jesus. They were obscure, illiterate, simple and superstitious men—men of no importance as citizens either in their own own eyes or the eyes of others. They had never looked to worldly honors or promotions; but evidently had expected from their youth up, to pass their days in the obscurest paths and humblest walks of life. The contempt of those above them had no terrors for such men as these—they had never aspired to be their equals, and they were willing, because, in whatever situation they might be, they had always expected, to be despised by them as a matter of course, on account of their degraded conditions of mind and fortunes. Still, at the same time, to be at the head of even little sects and bands of those, who had once been their equals, and to be looked up to by them as guides, was a distinc-

tion adapted to excite most powerfully the ambition of these men, however much they might be despised by all but their followers. They, by becoming, and being acknowledged as, the teachers of others, acquired an importance, of which a few years before they had never dreamed. They owed whatever of worldly consequence they possessed entirely to the fact of their being esteemed leaders by their prosclytes. Simple, artless and sincere as these men were, such circumstances were calculated to attach them strongly to the cause in which they were engaged, although they might not be aware of being so influenced.

They also attached the greatest importance to a belief in the doctrines, that they preached. They esteemed themselves the agents of God, commissioned to save men's souls. They looked upon their employment as of the most momentous consequence; and their imaginations, unbalanced by reason and reflection, were intensely excited by such views of their duty.

But there was another cause, perhaps more powerful than all these together. These simple men had been convinced that Jesus was no less a personage than the Son of God. They had been honored, as they thought by being made his bosom friends, while he was on the earth, and his immediate and most conspicuous agents after his death, for accomplishing a design, which to their minds, was the most magnificent that could be conceived. He had, by telling them beforehand of the dangers and difficulties, and obloquy they were to encounter from those whom they had been taught to consider the enemies of God, and by promises that he would always be with them on earth, and that he would extravagantly reward them in heaven, if they should persevere and be faithful, wrought them up to a pitch of fanaticism calculated to make them look on all the opposition of men as unimportant nothings. "Blessed are ye," said he, "when men shall revile you, and persecute you, and shall say all manner of evil against you falsely, for my sake. Rejoice, and be exceeding *glad*, for great is your reward in heaven—for so persecuted they the prophets, which were before you." Can any considerations be imagined more likely to render these simple fanatics alike indifferent to every thing worldly, whether of hardship or comfort, of prosperity or adversity, of honor or shame? Yes. Jesus found pictures, even more inflammatory than these, to operate upon their untutored imaginations. He said to them, "ye are they, which have continued with me in my temptations, and I appoint unto you a *kingdom*, as my father hath appointed unto me, that ye may eat and drink at *my table, in my kingdom*, and sit on Thrones, judging the twelve tribes of Israel." (Luke, 22—28 to 30.)*

It is useless to comment upon the natural effects of such language as this, upon such men as those, to whom it was addressed, and who implicitly believed in the reality of what was promised to them. Perhaps no other picture can be imagined, that would have so powerfully fired the imagination of these credulous men, as this, offered to them, as it was, by one whom they believed to be the Son of God! It all looked probable to them, notwithstanding its extravagance. They had on earth sat with him at table—why should they not also in heaven? They knew too that there were twelve tribes of Israel, and their own number was also twelve, apparently selected with reference to the number of tribes to be ruled over. The whole prospect must have been, to them, a gorgeous reality. The effect was such as might have been expected. These men had their minds engrossed by the grandeur of their designs, and the grandeur of their promised reward.

They had nothing to attach them to this world, or to make them regard the esteem of men. One great purpose forever stimulated and urged them on, and hurried them from place to place, wherever a convert could be made. It made them fearless of death, fearless of men, fearless, in fact, of all worldly consequences. It gave to them vastly more of boldness, zeal and perseverance, than could have been easily inspired by other means, in men naturally so timid and spiritless.

Perhaps it will be said that the writings of the New Testament display talents inconsistent with the idea that their authors were intellectually so weak as I have represented them. To this objection I answer, that from the beginning to the end of the New Testament, there is displayed little wit or wisdom for Christians to be proud of. Besides, it should be recollected that these writings were not executed until the authors had generally, for several years, been engaged in the employment of preachers—an employment adapted to call into exercise, and thus to increase, the little powers they originally possessed. And yet the benefit of this long course of education has only enabled them, with a few exceptions, to furnish narratives and epistles, which, with all the advantage they may be supposed to have derived from the translations of such learned men as would be likely to improve upon the style and expressions of the original, come very near being the most simple, and the most destitute of thought, of any to be found in the English language.

If men were but to read the New Testament with the same tone and emphasis, with which they do other books, and were to keep out of mind the idea of its being sacred, they would be disgusted with the credulity, and the want of intellect, reason and judgment, that is apparent in it. The imaginations of believers have dressed up and exaggerated the excellence of the style and matter of the New Testament *generally,* in the same manner, in which they have the moral instructions of Jesus. They have done this in the same manner, in which we may suppose the imaginations of the people of all nations, that have books esteemed sacred, gloss over and exaggerate the excellence of their contents.

The larger portion of the "Acts of the Apostles," separate from the insipidity of the narrative, contain the most extraordinary exhibitions of lack of judgment and intellectual resource, that can easily be found on record.

To support these assertions, let me ask those, who have been accustomed to look at the writings of the New Testament as *inspired,* to look at them for once as uninspired, (which is the only proper way of regarding them until their inspiration be clearly proved;) to read them with no more reverence than they would read any other book; to read them as being what they really purport to be, viz, nothing but narratives, and letters of exhortation and instruction; let them, in short for once read the books critically, discarding all idea of their being sacred, and I have little doubt their opinions will then concur with those here expressed.

Paul was in some respects distinguishable from the other Apostles. He had some talents, although a muddy intellect, and little judgment. He was violent, precipitate and unreflecting. He was bigoted, superstitious and dogmatical in his first faith, and little less so in his last. He was self-confident, boastful* and dictatorial to a disgusting degree. His *forte* was in teaching doctrines, the utility or reason of which, in as much as nobody else has understood, he probably did not understand himself. He was also crafty and deceitful, without appearing to reflect at all upon the char-

acter of such conduct; and this fact shows, either that he was not a rigid moralist in principle, or that he had very obtuse moral perceptions. His readiness to practice deception is exhibited in the following instances. He circumcised Timotheus to cheat the Jews, as appears by Acts 15—3. "Him would Paul have to go forth with him, and took and circumcised him, because of the Jews which were in those quarters, for they knew all that his father was a Greek." When imprisoned at Phillippi, he falsified, and said he was a Roman, (Acts 16—37, 38) to alarm and impose upon those who had imprisoned him, supposing him to be, as he really was, a Jew. (Acts 16—20 and 21—Acts 22—3.) He repeated the same falsehood afterwards, and declared that he was a Roman "freeborn," (Acts 22—27, 28). This lie appears to have been told because some expedient of the kind seemed necessary to extricate him from the trouble he had got himself into.† Moreover he was ambitious, and appears to have been disposed in some cases, to turn his labors to a better worldly account than the other Apostles.‡ He was also revengeful, as appears by his second Epistle to Timothy 4—14. "Alexander the coppersmith did me much evil, the Lord reward him according to his works." A wish, in which superstition and a vulgar spirit of revenge are more ludicrously combined, was perhaps never recorded, or even expressed.

That his pretence, before alluded to, of *having been caught up into heaven,* was all a fabrication, (instead of an account of a dream, which I suppose christians will think it to have been,) is rendered probable by the nature of the story, by the fact that he would not relate what he heard there, by his own bad character for veracity, by the necessity he was in of telling a marvellous story of some kind, and the circumstance that he thought it best to preface it (2d. Cor. 11—31) with the declaration that "the God and Father of the Lord Jesus Christ, which is blessed forevermore, knew that he was *not* lying."

Let us now look at the character of the people who became converts. In the first place, the people, *in general,* among whom the Apostles preached, are proved to have been a simple, spiritless race of beings, from the facts that they appear to have had no laws, but to have been governed entirely by the will of a single deputy of the Roman power, who ruled over them merely for the purpose of sponging from them as large a share, as he could, of their property, for the support of the grandeur of the Roman nation. It is probable, too that few could read, since but few in the most enlightened parts of the world could at that time read. Printing not being known, the books that then existed must have been in manuscript, and of course, must have been few and but little circulated. The people generally having no concern in the management of the affairs of government, and considering themselves, as they really were, the despised subjects or slaves of the Romans, they had no national or individual spirit to keep them from sinking into the most contemptible intellectual degradation. It is probable that few people are now to be found on the earth more destitute of every thing like character, than were the great portion of those, among whom the apostles preached. We see, by the accounts in the Acts of the Apostles, that they were addicted to the most petty and contemptible vices, and the most ludicrous and disgusting superstitions—believing in ghosts, and devils, and visions, and dreams, and evil spirits, and sorcerics, in *prophetesses!* (Acts 21—9) in the power of speaking with tongues, in miracles, in witchcraft, and apparently in all the other absurdities that superstition ever gave rise to. They were always agog for something new and marvellous in religious matters—indeed they appeared to care for little

else. These credulous beings were continually imposed upon by men "boasting themselves to be somebody," as, for example, one Judas, and one Theudas, who got sects after them, (Acts 5—36 and 37.) Their readiness to believe in every thing, that appeared to them to be miraculous, cannot be more plainly, or perhaps more ludicrously shown, than it is in Acts 5—15 and 16, where it appears that they brought the sick into the streets and laid them on beds, so that "at least the *shadow* of Peter passing by might *overshadow* some of them." It appears also by Acts 19—12, that sick persons were *cured*, and *evil spirits* cast out by the efficacy of *the handkerchiefs and aprons that had been about the person of Paul!* What sort of "evil spirits" were probably cast out by the sight of Paul's *handkerchiefs?* Or how bad was the "sickness" that could have been cured by these means? Can any one doubt, that if the handkerchiefs of another person had been used, and had been *called Paul's*, so as to deceive the diseased person, the same *miracles* would have been wrought? Or can a man of common sense want any further proof that this affair of being possessed of devils, of which there are so many stories in the New Testament, and the supposed miraculous cures of diseases, were all shams—the mere works of the imaginations of those, who were of the number of the veriest simpletons that ever bore the name of men?

There is another account equally ridiculous, beginning at the 13th verse of Acts 19th, which shews what a stupid, superstitious and senseless race of beings some of those were, among whom Paul preached. It seems that some vagrant Jews attempted to cast out these evil spirits by uttering, over those that were supposed to be possessed of them, these magical words, "we adjure you by Jesus whom Paul preacheth." It appears that they had adopted this method with one, and that "the evil spirit answered and said, Jesus I know, and Paul I know, but who are ye?" and then, instead of coming out of the man, it caused him (as the lookers-on supposed) to fly pell-mell at these impostors, and bruise, and beat, and strip them, and drive them out of the house. Now any yankee boy, a dozen years old, would see through such an affair at once; but when this came to be noised abroad, people looked upon it as an *awful judgment from God*, upon those who had attempted, for their own benefit, or without proper authority, to use the name of Jesus as a word of magic to exorcise devils. And the writer adds that this affair converted many, that "fear fell on them all," "that the name of the Lord Jesus was magnified," and he closes the account by saying, "so mightily grew the word of God and prevailed!"

It would be using the name of God profanely to introduce it into so contemptible a display of the credulity and superstition of those half-witted creatures, and of the manner in which they were imposed on by their own imaginations, were it not that it is necessary to do so, in order to expose the almost incredibly ridiculous absurdities, that men of the present day, without reflection, and as a matter of course, take for sacred and important truth.

In this case we have an exhibition of the *amount* of argument and evidence, that was necessary in the Apostles' time to make a convert to Christianity. And unless the Clergy can deny this transaction, I should think it might be well for them to say no more about the difficulties of propagating the Christian religion.

The fact also, that a large portion of the early Christians believed the books now composing the "Apocryphal New Testament," tells a tale that cannot be gainsayed for a moment. It confirms

all I have said, and more than I have said, of the simplicity, credulity and superstition of those, who first embraced Christianity. It is no answer to these facts to say that there were some enlightened men in the countries where Christianity first spread. The mass were otherwise. And especially those, who first became converts, were such as I have described. And any man of common mind, who will read the "Apocryphal New Testament," must say that men, who would swallow such stories, could easily be brought to believe any thing whatever, that fanatics or impostors could ever wish to make them believe.

With such a people, the more extravagant and marvellous a doctrine or narrative was, the better. In fact it was absolutely necessary that it should be so to a great degree, else they would not have listened to it for a moment. Imagine then such a reckless, headstrong, violent man as Paul, travelling from place to place, sometimes with his head shaved, (Acts 18—18;) preaching even in the streets of cities, wherever he could get a crowd of the populace around him, telling men that the Son of God had been on earth in the form of a man, and had been cruelly slain; but that he had returned to life again; that he himself had been supernaturally converted, and had been appointed to preach for Jesus, to cure the sick and to cast out devils; telling them also that he was ready to cast out all the devils and heal all the sick they would bring to him; and is it strange, or unnatural, any thing more than might have been expected, any thing more than a matter of course, that multitudes should have been, some of them enraged, and others astonished, attracted and deluded, by such a strange innovation, and such an unaccountable attempt to upturn their accustomed religious observances, by the introduction of such novel and unheard-of notions? Such *was* the effect. If any one wish to form an idea of the excitement, that Paul sometimes caused, let him read the 19th chapter of Acts, and see what a hurly-burly and uproar was occasioned at Ephesus by his having preached there, and got a sect after him.

The novel character of the doctrines taught by the Apostles, and the marvellous nature of their stories about Jesus, constituted the bait, by which the people were caught at every step. And the success of this bait was aided by that credulousness, which brought the imaginations of those who were sick, or who only imagined themselves sick, (for such an abundance of sick people has seldom been heard of in any other case,) and the imaginations of those, who supposed themselves possessed of devils, to assist in working what they called miracles.

When we consider that there were *twelve* of these preachers, all engaged in preaching the same doctrines in various places, and that these doctrines were different from all others then believed, it is natural, if each preacher made the number of converts, which he would be likely to, that in a few years this sect must have become numerous, and from being widely scattered over the country, must have attracted the notice and curiosity of all.

Such then was the manner in which this sect was *planted*—other means afterwards contributed to cultivate and rear it. The soil we have seen was adapted to the nature of the plant—it was a rich compost of ignorance, superstition and credulity. During the lives of the twelve, they, by their personal labors, accomplished much, and it appears that they authorized many of the new converts to become their fellow laborers. In process of time the gospels were written, and these writings gave the Christians a decided advantage over those whom they were laboring to supplant.

They thus became supplied with something, to which they could refer as an *authority* for what they preached. They could then produce *written* evidence, and such evidence too as would be likely to be satisfactory to a very large number of the credulous persons of that day. Since few books were then written at all, and since the greater portion of the people had probably no acquaintance with such as were written, they (if they were like those of the present day who are equally unlearned) would not presume to doubt or scrutinize the truth of any thing, which should appear in the form of a *book*. Not having any religious books of their own, the fact, that the religious doctrines of the Christians, and that the accounts of the marvellous circumstances under which those doctrines were communicated, should be *written,* was doubtless of itself, to them, a very wonderful affair, and was remarkably calculated to impress them with the idea that whatever the Apostles had told them must be true.

Another circumstance, which most powerfully contributed to the spread of Christianity, was, that the importance, which the Christians attached to a belief in their faith, was so great as always to keep awake among them a fanatical spirit of proselytism—a circumstance, which before their time had probably never been known to exist, on an extended scale, in favor of any other system.

The natural effect of these various causes would be to build up a great and numerous sect of Christians even in a few years. At length they began to be persecuted, and if persecution had the effect then, that it invariably does *now,* it must have powerfully aided the progress of their cause.

Another circumstance, which prevents the spread of Christianity, in the early periods of its existence, from being any thing remarkable, is, that it had nothing like a regular system to contend with, in those places where it spread. The few heathenish notions, that men had about "the Gods," and about religion, had no foundation in any written authorities, but only in the vague and unaccountable traditionary superstitions of the people of those times. The Jews had a written system of theology, and Christianity could make few converts among them, although it pretends to have been more especially designed for them. In modern times it has made no considerable progress among any people, who have a written system of their own to appeal to—whereas if it had the least particle of miraculous power, it certainly would triumph over all other systems, whether they were written ones or not.

If any further evidence be wanted that the spread of Christianity was not supernatural, look at the spread of Mormonism, and see how, even at this day, and in this country, a miserable vagabond of a "Joe Smith," in a short space of time, can put a large community in an uproar, and raise up a numerous sect of followers, full of faith and fanaticism, eager to believe any thing marvellous in relation to the book of Mormon, and the Mormon prophet, and ready to make any effort and any sacrifice for the propagation of the momentous truths of their Revelation. Look also at the success of Edward Irving's attempts to make persons "*speak with tongues,*" &c. in England, and at the spread of St. Simonianism in France. Look even at the camp-meetings and revivals here in New England, and observe to how great a degree the timid and superstitious will surrender their understandings to the guidance of any ranting parson, who has impudence, hypocrisy, and coolness enough to put on a solemn cadaverous face, and talk judiciously to them

about hell, the devil, and other kindred matters. These things illustrate the credulity of mankind in matters of this sort, and the case with which a system might succeed in a superstitious and ignorant age, especially if the propagators had a few marvellous stories to relate, and could perform works that would pass for miracles; and after it had succeeded for a time, it would become so incorporated into the institutions and customs of the people that it would thereafterwards be believed as a matter of course, and without inquiry; in the same manner, for example, as Christianity is now by the great mass of those who believe it at all.

The fact, that some of the Apostles suffered martyrdom rather than renounce their faith, has been looked upon as evidence that they were engaged in the cause of truth. But martyrdom is evidence only of a man's honesty—it is no evidence that he is not mistaken. Men have suffered martyrdom for all sorts of opinions in politics and in religion; yet they could not therefore have all been in the right; although they could give no stronger evidence that they believed themselves in the right.

The Apostles undoubtedly supposed they had seen Jesus perform miracles, and that, in circulating their accounts of him, they were telling the truth. They undoubtedly believed that they themselves could perform miracles of a certain kind, such as casting out devils, and healing the sick; although in reality, as I think has been shewn, the imagination must have, in many instances, and probably in all, created the malady, and as really, in all cases effected the cure, if there were any cure. But the Apostles, being simple men, understood nothing of the power of the imagination; and therefore honestly believed that all that appeared was real. They themselves were as superstitious as those to whom they preached. This fact is proved by such circumstances as these, viz. Paul *had his head shaved because he had a vow*, (Acts 18—18). Paul considered resigned himself forbidden by the Holy Ghost to preach in particular places, (Acts 16—6 & 7). The Apostles commanded the converts to abstain from things strangled, as if there were a wickedness in eating such, (Acts 15—28 & 29). When a young man had fallen from a window he was taken up apparently lifeless, (as persons frequently are after a fall); but on his reviving, it was esteemed a miracle, as well by Paul himself, it would seem, as by the bystanders. (Acts 20—9). Peter imagined himself delivered from prison *by an angel*, (Acts 12—5 to 11); although the conduct of the supposed angel was precisely such as we may reasonably suppose would have been that of a man, who should have attempted to liberate him. For example, a *light* shone in the room, (as would have been the case if a man bad gone in, for he would have undoubtedly carried a light in with him); the supposed angel struck or touched him on the side, (to wake him evidently, just as a man would have done); "*raised him* up," and said to him, "arise up quickly, gird thyself, and bind on thy sandals, cast thy garments about thee, and *follow me*," (precisely as a man would have directed him). It is evident that the guard must have been asleep, whether the being, who liberated Peter, were an angel or a man; for Peter was not detected in going out, although he would as likely have been when in the company of an angel, who should *walk before*, as this one is said to have done, as in the company of a man. Peter supposed that the gate opened of its own accord; but he was liable to be mistaken as to this fact, because a man would be very likely to leave it open as he went in; or if he did not leave it open, he would undoubtedly leave it in such a condition that he could open it readily, and without any such effort as a person walking behind him would be likely to

observe. After they had thus left the prison, and "*had passed on through one street,*" the supposed angel "departed from him"—probably he took one street, as a man would have done, and that Peter took another.

Now although this supposed angel conducted precisely as a man would have done, and although Peter said, at the time, that the whole transaction appeared to him like a dream, yet afterwards he said he knew certainly "*that the Lord had sent his*angel to deliver him." This fact shews the superstition of the man, and his readiness to attribute, to the supernatural interference of Deity, occurrences that could be accounted for in a natural manner.

A paragraph, beginning at the 23d and ending at the 28th verse of Acts 28th, shews by how simple an affair Paul was led to imagine that the Lord had given up to destruction the Jews, whom theretofore Jesus had been supposed to be sent more especially to save; and that it was his (Paul's) duty to abandon them, and preach to the Gentiles.

If any one wish for further evidence of the weakness and superstition of the Apostles, or their converts, let him read the Acts throughout, and if he be an unprejudiced man, he will see evidence enough of these facts at every step.

I must now suppose that the manner in which Christianity was propagated, has been pointed out so as to make it apparent that there was nothing miraculous in it. But if any will still insist that Christianity is a revelation from God, made to men to save their souls, let him, if he can, account for the fact that God did not cause it to be spread over the whole world at once, in a year, or day. It was as important, if this system be true, that it should be spread, as that it should be revealed, and God could have miraculously spread it, as easily as he could have miraculously revealed it. There is no sense in saying that he has committed to *men* the business of spreading this religion; for it is manifestly absurd to suppose that he would entrust to men the completion of a design, which he had *himself commenced,* and which it was so immensely important to have completed at once; when he must have known the beggarly success that men would meet with. How happens it then that the Christian, after eighteen centuries, is a religion of such limited prevalence? How happens it that this wonder-working Revelation, which set out to revolutionize and reform society, and save the human race, has not become more generally known in the world? Why, one reason is, that it is not, after all, quite so wonder-working an affair as it has been cried up to be. And another reason probably is, that the Almighty, instead of miraculously aiding its progress, *never has* miraculously aided it.

But, above all, how comes it to pass that such a sovereign cure for souls has not been more universally adopted *where it is known?* One reason may have been that men have often doubted whether souls have any mortal diseases; and another has been, that this alleged specific has found somewhat of an obstacle in the common sense and reason of mankind. Sensible men, particularly in modern times, have generally had *doubts,* or some thing more than doubts, whether this pretended revelation was after all any thing more than the offspring of superstition, delusion, or imposture. In short, they have *not believed* it. A considerable portion of the *male adults, who pretend to be Christians,* do not believe it. They wish to believe it; they think it *best* to believe it (because they think it useful)—they dread to disbelieve it—they have a sort of lingering reverence for it—they

perhaps persuade themselves that, on the whole, they do believe it—yet they do not in reality. They have a *prejudice* in its favor—not a conviction of its truth founded on evidence. They cannot help suspecting that it is a thing not to be inquired into; that it is neither reasonable in itself, nor founded on reasonable evidence. One proof of this is found in the fact that they are afraid to have the community inquire into the evidences against it, or to have these evidences propagated, and this at a time too when it is the established policy of society to encourage discussions on other matters as being the surest means of eliciting the truth. The Clergy especially would shut out every thing like light, and stifle every thing like inquiry on this subject, and the miserable rant and declamation, to which, instead of arguments, they resort to effect these objects, shew that they are aware that Christianity will not bear an examination. Although they know that a large portion of the male part of the community are unbelievers, they choose to let them remain such, if they will but keep silent, rather than to run the risk of a more general overthrow of Christianity by a discussion, which they might awaken for the purpose of establishing it. When they are pressed with arguments against the *truth* of Christianity, they attempt to divert the public mind to the question of its utility, as if its truth was not the first thing to be settled. Why this mean unmanly practice of subterfuge and shuffling? this refusal to meet argument? This shrinking from the responsibilities of their station? It is, as I believe, because that, like other hired troops, they have no principles which require them to put at hazard their interests. It is because their cowardice, selfishness or prejudices are too strong for their consciences and reason. It is because they are but too certain that if a free discussion of this subject be permitted, truth, operating on their own minds, or the minds of the people, will require them to abandon their calling, and surrender their consequence in society. It is, in short, because that, at the bottom of all their other opinions and feelings on this subject, there is a lurking apprehension, (I dare almost say *conviction,*) that their disgusting system is but chaff.*

CHAPTER II. The Nature and Character of Jesus.

Before proceeding to the examination of the alleged miracles of Jesus, it is desirable that we form an established opinion in relation to his personal nature and character; for if we suppose him a mere man, we shall be the more ready to suspect that his alleged miracles were not real; on the other hand, if we give him a super-human nature, we shall be more inclined to believe the contrary. What evidence then is there, previous to his beginning to work miracles, that tends to show that he was possessed of any other than a human nature?

We are told, in the first place, that he had a miraculous origin; that God (or the Holy Ghost) was his father, (Mat. i. 20—Luke i. 35), and Luke (i. 35) gives this fact as the reason *why* he was to be called the Son of God. But let us see whether this fact were so.

It is clear, on the one side, that if he had such an origin, no single human being could have had personal or absolute knowledge of the fact except his mother. Now, if we had the direct declaration of the mother that such was the truth, it would be idiocy to pretend that a fact, admitted

to be contrary to the order of nature, and such as the whole world never witnessed before or since, ought to be taken as true, on the bare assertion of a single person, and of a person too, who, on the natural supposition in relation to her case, must have been under one of the strongest of all possible earthly temptations to deceive.

But we have not even *her* testimony to this point. We have only the simple declarations, made by two men (Matthew and Luke) more than forty years afterwards—men, who could not have personally known the truth of what they stated; who unquestionably never heard a syllable of the matter until thirty or forty years from the time when it was said to have occurred; who give us no account, either of the manner in which, or of the persons from whom, they obtained their information; and who differ widely in their account of the circumstances attending the transaction—Luke relating many marvellous preliminaries of which Matthew makes no mention, although they are such as *he* too would be likely to have related, if he had ever heard of them. Now he must have heard of them, if he had obtained his information of the principal fact from Mary, who was the only person that could have absolutely known that fact, if it were true.

It is evident, therefore, that each of these men took up some one of the unattested stories, floating in that superstitious, credulous, ignorant, and deluded community, forty years after the supposed transaction.

After Jesus had begun to preach, many believed him to be a super-human personage, and it is easy to see that that circumstance alone would give rise, among those simple men, to many conjectures about his origin; and every one of his followers would be desirous to believe that it was supernatural, and would, for the sake of thus believing, catch at the slightest suggestion, conjecture or circumstance, as sufficient evidence that it was so. Stories, thus originating, would at once circulate and gain currency among such a class of men as his followers were; and the marvellous character of the stories, instead of being an objection to their credibility, would only make them the more credible to the minds of those who were ready and eager to believe any thing supernatural, in relation to one, whom they considered the most marvellous personage that had ever appeared on earth.

But there is no ground for any pretence that he had a miraculous origin, unless he derived it *in the particular manner* related in the Bible; and in order to believe that he derived it in that manner, it is necessary to believe—what? Why, that *Deity* became physically a parent! (Luke i. 35). The verse is here simply referred to, without being quoted; for it is fit only to be recorded with some of the fabulous accounts of the Jupiter of the ancients.*

As to the miraculous occurrences at his birth, such as the appearances of angels in the air, &c. there is no more reason to believe that they actually took place, than there is to believe that those did, which are related to have happened at the birth of Mahomet—nor even so much (if there can be the slightest reason in the world for believing either); for those people among whom Christianity first spread, were probably even more simple and superstitious than those among whom Mahometanism first spread, and consequently such marvellous accounts, if equally untrue, would be more likely to gain currency among them than among the latter.

But the Bible itself contains the most direct proof that the accounts about his origin, and about the supernatural appearances at the time of his birth, are both untrue.

If either of these circumstances had been true, his own parents must have preserved the remembrance of it, and would forever after, have looked on him as an extraordinary being. But the story, which is told of his conduct at Jerusalem when twelve years old, would, if true, entirely prove that, up to that time, they had not so viewed him. This story (Luke ii. 48 to 50) represents his parents as being "amazed" at seeing him in the temple; and when he asked them, "wist ye not that I must be about my father's business?" "they understood not the sayings which he spake to them." Now, if the accounts in relation to his birth were true, they must have forever after viewed him as the Emanuel, and must, of necessity, *have* understood what he meant by being about his father's business. So that either Luke's story of his origin and birth, or the one of his conduct at Jerusalem, must necessarily have been false; and if *either* of them be false, the Bible is not a Revelation from God. There is no room for reasonable doubt, that one story is as false as the other, and that these ignorant and simple biographers, who have related so many things, (of which these are a part,) that they could not have known to be true, even if they were true, picked them up thirty, forty or fifty years after they relate them to have happened, from among the thousand unfounded ones, that would naturally be in circulation about him.†

Again. If even the story of his conduct at Jerusalem alone had been true, he must from that time have been viewed with astonishment by his family, and regarded by them as an uncommon being. If they had been, (as they probably were,) as superstitious as the ignorant part of their countrymen generally, this single incident of his conduct at Jerusalem would have made him, in their eyes, an inspired man. Yet there is not, that I am aware of, the slightest evidence that, after this time, until he began to preach, they did so look upon him. On the contrary, there is the most direct proof that his *brothers* did *not*—for when he pretended to be able to work miracles, they taunted him with his pretensions, (John 7—3, 4 and 5) by telling him, if he could do such things, to show himself to the world, and also (evidently out of contempt towards him for the course *he* had taken) that *no* man, who sought to make himself publicly known, performed his miracles in secret. This disrespect and contempt they never would have exhibited towards him, if they had ever been informed by their parents, (as they undoubtedly would have been, if the circumstances had actually happened, and that too for the very purpose of procuring him respect from them,) either of his having had a miraculous origin, of any remarkable circumstances attending his birth, or that he had ever exhibited to them any of that precocity, which he is related to have displayed at Jerusalem.

Furthermore, if God were ever to violate the order of nature, he would not be likely to do it unnecessarily—and an occurrence, such as that in which Jesus is said to have had his origin, must have been useless, on the supposition that men would act rationally in judging of its reality from the testimony of the only one, who could have had absolute knowledge of the fact.

Finally, Jesus was human in all his appearance, from his youth up; he is supposed to have laboured like a man; he lived like a man; he looked like a man; his own brothers esteemed him as

nothing but a man; *he was born of a woman;* and unless God were his father, he was a man and nothing but a man.

But Christians say there is still other evidence—separate from the miraculous—which tends to sustain the divinity of Jesus. We are told by them that the moral grandeur and importance of the object, at which he is said to have aimed in his public career, is of this kind. Now, as it is possible that a mistake exists as to the nature of this object, some inquiry in relation to it is proper.

There has always been a disagreement between the Jews and Christians, as to the real design of Jesus in attempting to gain followers in the manner he did. The Jews always contended—and they surely had the proper means of knowing—that he was only one of many, who started up nearly at the same time, and claimed to be entitled to reign over the Jewish nation as temporal, or perhaps rather as semi-temporal, semi-spiritual kings—as such kings, in short, as the one, whom the Jews, who Jepended specially upon the Almighty to send them rulers, expected would, about that time, be sent to them.

It had been predicted, by those, whom the Jews considered prophets, that an extraordinary king, to be called the Messiah, would be sent to that nation.

What the particular terms of all the predictions were, need not here be set forth, since it is admitted by Christians that they were such, as that the *universal* opinion, gathered from them by the Jews, to whom they were addressed, was, that this Messiah was to be at least a temporal, though perhaps also a religious, ruler.

It is admitted by Christian writers that, at and about the time of Jesus, a large number of persons appeared in Judea, who claimed to be the Messiah that had been predicted as about to come, and who went about attempting to gain adherents by pretending to work miracles, &c.*

It is further admitted by all Christians, that the Jewish nation *en masse* looked upon Jesus as having the same object in view as these other pretended Messiahs; and it is also admitted by *many* Christians, that up to the very time when Jesus was taken and crucified, even his own confidential and immediate adherents, who, if Jesus had been honest towards them, must have known his real purposes, so far looked upon him in the same light as did the Jews, and in the same also as it is supposed the followers of the other pretended Messiahs looked upon them, as to believe that he was aiming at the acquisition of the temporal government of the Jews. And yet Christians now say that it is reasonable to believe that Jesus, although he claimed to be the Messiah, aimed at an object widely different from what was universally expected of that Messiah, and at an object widely different from what, during nearly the whole of his career, his own adherents supposed him to be pursuing.

Now it is clear that these admissions of Christians, as to what were, up to the time of his crucifixion, the *ostensible* designs of Jesus, and their pretensions as to his *real* designs during the same period, can be reconciled only by supposing, that, for so long a time, at least, he knowingly cheated and deceived his best, truest, and most intimate friends. It is preposterous to say—as christians are obliged to do, in order to extricate their case from this dilemma—that these disciples were such dunces, (although that they were simple men I agree) that, for a year and a half or

more, (the time he is supposed to have been with them), Jesus found it impossible to make them *understand the difference* between a being, who came to establish an universal religion, and one who came merely to govern, as a king, the little territory of Judea; because men so foolish as that supposition would make them, could never have been educated so as even to be what some of these disciples afterwards became; and because also men could hardly be so simple as to be unable to distinguish between things so widely different.

It may be true, and probably is, as John says, (18—36,) that, *after his followers had deserted him, and he found himself in the power of his enemies,* he told Pilate that "his kingdom was not of this world;" but he appears to have been himself brought to that conviction just at that time, and solely by the fact that his former supporters had abandoned his cause, for he immediately adds, "if my kingdom were of this world, then would my servants fight, that I should not be delivered to the Jews; *but* now *is my kingdom not from hence.*"

But whatever may have been his opinion of himself, or whatever may have been his own ideas of the destiny for which he supposed God had designed him, *after* he was apprehended, the evidence is abundant as to what had *previously* been his purpose.

One important part of this evidence is, that Daniel—the only one, I believe, of the supposed prophets, who mentions a Messiah by that name—had evidently described him (Chap. 9—25, 26,) as one, who was to be the temporal king of the Jews; and Jesus, imagining himself to be this Messiah, would naturally try to fulfil the prediction by making himself answer the description as well as he could. And we accordingly find that he not only continually represented himself as the Messiah, but that there is also an evident attempt, on the part of his biographers, to make it appear that he had fulfilled the predictions, which had been made concerning the Messiah.

Another piece of evidence, to the same point, is found in John, (6—15,) where it is related that the people, who followed him, wished then "to take him by force, and make him king;" a thing, that, it would naturally seem, they never would have thought of, had he not intimated to them that he was, at *some* time, to become their king.

Another fact, which shows that he expected to have become the king of the Jews, is, that he once rode from Bethany to Jerusalem in a very triumphal and kingly manner, attended by a great body of men, who were shouting in a manner clearly indicative of their belief that he was a descendant of David, and was about to take possession of the throne which David had occupied. (Mat. 21—1 to 11. Mark 11. Luke 19—28 to 44. John 12—12 to 15.) Now if he did not intend to become their king at this time, as they expected, he was fraudulently sanctioning the mistake, under which he must have known they were acting, and must have knowingly led them on in a delusion. The only supposition therefore, that is consistent with his honesty, is, that he himself expected at this time to be made king.

It appears also (John 12—14, 15) that "it had been written," that a king of Jerusalem should come to that city, "sitting on an ass's colt," and Jesus at this time took pains to have an ass's colt obtained for him to ride on, (Mat. 21—1 to 7.)

John himself acknowledges (12—16,) that even "his disciples understood not these things at the first;" that is to say, at the time when they not only saw, but *joined in,* all this pageantry, they did *not* understand that they were paying homage to one, who was to be a spiritual king; and if they did not so understand, there can be no doubt as to what kind of a person they thought they were honoring. So that Jesus, according to the express acknowledgment of his own advocate, must either have deceived this whole crowd of followers, or he expected at this time to have been made king; because the impression, that he was about to become their king, could not have become so universal, and continued so long, among this crowd, unless he had directly countenanced it. John indeed represents (12—16) that after "Jesus was glorified," (or risen, as they supposed, from the dead,) they understood exactly what these things, which at the time of their occurrence, they did not rightly understand, must have meant. But this was all an after thought, on the part of the disciples, and is therefore good for nothing to the advocate of Christianity, although it enables the unbeliever to see how it was, that the *re-appearance of Jesus after his crucifixion,* (a thing for which they could not naturally account) turned the heads of his followers, and made them see every event, which had previously taken place, in a very different light from that true and natural one, in which they had viewed it at the time of its occurrence. After *he* was "glorified," *they* "glorified" and spiritualized every thing that he had previously said or done, and, by so doing, they gave to this benighted world a Revelation fit for use.

When Jesus, in this triumphal ride, had come near to Jerusalem, (Luke 19—37 to 44) some of the Pharisees told him to "rebuke his disciples," (meaning undoubtedly, by 'his disciples,' the crowd generally who were attending him,) and they would be likely, under such circumstances, to say to him many other things, which his biographers would not choose to tell to us. But the fact, that the Pharisees, who were among the principal men of the Jews, told him to rebuke his followers, shows that they had no idea of receiving him, and he was probably thereby convinced that he could not be made king, for he immediately falls into a lamentation for the fate of the city—*not* for the *souls* of the Jews, as he would naturally have done, had he designed to be only a spiritual redeemer—but for the fate of the city itself. He virtually says that if the Jews would have accepted him as king, their city would have been safe; but now, he says, that "its enemies shall cast a trench about it, and compass it around, and keep it in on every side, and lay it even with the ground," &c. Now this is not the language of a purely spiritual *teacher;* it is precisely such language as we might reasonably expect to hear from a man, who wished to be the ruler of a people, but who, on being rejected as such, should endeavor to alarm their fears for the fate of their city. Or it is such language as we might reasonably expect to hear from a man so deluded as to imagine that he had been appointed by God to be the deliverer of a city, but, who, on finding that he could not become its deliverer, should suppose, as a matter of course, that it would fall into the hands of its enemies and be destroyed.

The desertion of Jesus, by his followers, furnishes an argument in support of the supposition that he attempted to be king of the Jews, rather than that he was a superior being. There was a time when he had a company, estimated at about five thousand, following him, (John 6—2, 10). Yet they soon began to leave him, (John 6—66, 67) and but a handful finally remained. Now it would be nothing strange that the followers of a man, who was attempting to make himself king

of the Jews, should, after a little time, desert his cause; but it would be very strange if a Son of God should either be unable to make proselytes of all who should come to hear him, or should fail to keep them after he had once made them.

When he was finally taken prisoner, the universal charge against him was, that he had claimed to be the "King of the Jews." The people scoffed at, and insulted him, on that very account. They placed a mimic crown on his head, put on him a purple robe, and jeered him with "Hail, King of the Jews." How are this unanimous opinion of him, and sentiment towards him, to be *accounted for,* otherwise than by supposing him to have attempted to make himself a king? The answer is obvious—they cannot otherwise be accounted for.

Luke says also, (23—1, 2) that men declared before Pilate, that they had "found that fellow perverting the nation, and *forbidding to give tribute to Cæsar,* saying, that he himself is Christ, a King." Yes, he even went so far as to forbid his adherents any longer to pay tribute unto Cæsar, and gave as a reason why they should not, that he himself was *a* king, (*their* king). But Christians will probably say that these men did not speak the truth. And what reason have we to believe that they did not? Did any one contradict what they stated? No—every body, at that time, acquiesced. Still, because they told a natural and probable story about Jesus Christ, instead of a marvellous and improbable one, they are not to be credited; because they made neither a God, nor a Son of God, out of "this fellow," they must be set down as "false witnesses;" because there were several, who said that they heard the same language, they must all have conspired to destroy him by false testimony; because their statements corroborate, and are corroborated by, what had already become notoriously the public belief, they must of course be untrue; because, in short, these men testified against Jesus, instead of testifying for him, they are not to be believed. This is the kind of reasoning to which Christians must resort.

Jesus once told his disciples (Luke 22—23 to 30) in substance, that as a reward for their fidelity to him through all the difficulties and opposition he had met with, he should give each of them a *kingdom,* and that they should "sit on thrones, judging the twelve tribes of Israel." Now if he meant earthly thrones, he of course was himself to be an earthly king, for his language evidently implies that his twelve disciples were to be kings *under him.* His language is, "I appoint unto you a kingdom, as my Father hath appointed unto me; that ye may eat and drink at my table, and sit on thrones, judging the twelve tribes of Israel." Observe, they were to eat and drink at his table at the same time that they were to be kings over the tribes of Israel; of course, if their *thrones* were on earth, his table must have been on earth too, and he must have been an earthly king. But the Christian will reply that these thrones were to be thrones in heaven. Well, be it so—what then is the inference? Why, that they have kings in heaven.

The evidence already offered ought, as it seems to me, to be decisive; but there is one additional fact, which, if it do not prove that he attempted to make himself king, does, nevertheless, put it beyond a reasonable doubt, that, up to the time when he was seized, he had had no such object in view as Christians pretend. It appears (Luke 22—26, 37, 38.) that in the evening before he was apprehended, and after Judas had left the room under circumstances, which led Jesus to suppose that he was going to prove treacherous, he directed his remaining disciples to provide

themselves with *swords,* evidently in order that they might be prepared for any danger, that might ensue. And when his disciples told him ' "here *are* two swords"—(an incident, which shows that after their affairs began to grow desperate, they kept swords by them) he assented to their taking them by answering "it is enough;" and it appears afterwards that the swords were accordingly taken. Now I suppose it can hardly be necessary to go into an argument, even with Christians, in order to prove that a *real* "Prince of Peace," a purely religious or moral teacher, or any Divine Being, just as he was about to offer up his life *voluntarily* for mankind, would not be very likely to put *swords* into the hands of his followers. The single fact, that Jesus should ever authorize his followers to arm themselves with swords, brushes away, at a single sweep, all the *subsequent* conjectures and assertions of the ignorant, simple and deluded men, who followed him, that he intended only to be a moral or religious teacher. The confidence too, with which, when he was about to be seized, his disciples appealed to him with "Lord, shall we *smite* with the sword?" and the manner in which Peter rushed on and struck off an ear of one of the party, show that Jesus had given them other lessons than that of turning the other check also. Nor is the inference, naturally to be drawn from these facts, to be avoided, by saying that Jesus forbid the further use of the swords, after Peter had thus employed his; because it is evident that he encouraged their use until he found the numbers against him too great to be resisted with safety. These circumstances show that his command to his disciples, to desist from further violence, was a matter of policy instead of principle.

There can be no doubt as to the fact, that this party *had* swords with them at this time, for it does not rest on the testimony of Luke alone. Matthew and John, who were of the twelve, and probably were on the spot at the time, both say that a man's ear was cut off with a sword.

It is clear, therefore, from these facts, that Jesus could not have been such a personage as Christians believe him to have been; and if he was not, it is of no consequence to us what he may have been, although the evidence may leave us in no doubt in relation to it.

Taking it for granted then, that the evidence has settled the question, so far as it was necessary to be settled, in relation to his object in his public career, we come now to another matter, to which Christians refer as evidence of his divinity, viz, the alleged perfection of his personal character. This point will be examined, although somewhat of his personal character has already been developed.

Perhaps the most conspicuous defects in his personal character were, 1st, his readiness to resort to subterfuge, when challenged to work miracles, by those who doubted his miraculous power: 2d, his propensity to practice concealment; and 3d, his notorious cowardice. A few instances only of conduct, illustrative of each of these characteristics, need be referred to.

As evidence of his readiness to resort to subterfuge, when challenged to work miracles by those who doubted his miraculous power, the following cases are deemed sufficient.

On one occasion (Mark 8—11 to 13) when some of the Pharisees came to question him, and asked him to show them a sign—apparently that they might judge of the justice of his claims to be the Messiah—he pretended to his disciples that these Pharisees were a very unreasonable set

of men to ask such a thing of him, and said he would give them no sign, but left them and departed.

Mark says that their object was to entrap him, or to work some mischief with him—but how did Mark know that they had any other design than their question implies? The biographers of Jesus were very good at conjecturing reasons, finding apologies, and hunting excuses for the dastardly conduct of their master.

At another time, (John 2—13 to 21) when he had been attempting to drive the Jews from the temple, and they had asked him—as they reasonably might do—what sign he could give them as evidence of his right to do so, the only sign he proposed to show them was this, that if they would destroy their beautiful temple—a thing which he knew of course they would not do—he would rebuild it in three days. Is it possible to *imagine* an evasion more mean or contemptible?

John says that Jesus, in this instance, referred to "the temple of his body." But if he did, he acted the knave outright, because he must have known that he was deceiving those whom he addressed.

Once (Luke 4—16 to 30) in his travels he came to "Nazareth, where he had been brought up," and where he was probably known. He here told the people that he was the one who had been prophesied of, but virtually acknowledged that they had a right to expect he would work miracles, for he said, "ye will surely say unto me, whatsoever we have heard done in Capernaum, do also here in thy country." But, as an excuse for not working any miracles, he made use of this despicable pretence, viz: that "no prophet is accepted in his own country"—inuendo, that it would be of no avail even to work real miracles before those who knew him. It appears—putting the natural construction upon the remainder of Luke's story—that the people thereupon thrust him out of the place, dragged him to the brow of a hill, frightened him by pretending to be about to cast him headlong down it, and then let him go. And, in my judgment, he had no reason to complain of the treatment he received.

On another occasion John says (6—30) that the people put the question to him directly, "What sign showest thou then, that we may see, and believe thee? What dost thou *work?*" It appears, from the context, that these men had taken much pains to find him, and had come from a distance to see him; and although their question indicates an intention to be convinced by nothing less than a miracle, they, at the same time, declare their intention to believe in him, (the very thing he desired of all men,) if he would but work one plainly. In all this they asked nothing which was not entirely reasonable. They desired only that he should exhibit the credentials, which he professed to carry with him, as evidence of his authority. They, in fact, offered him just such an opportunity as a real miracle-worker would have desired. But Jesus, instead of working a miracle, chose to talk about something else, about their motives in following him, about his being "the bread that came down from heaven," &c., and went on talking about one thing and another, that had nothing to do with the miracle which they had challenged him to work, until (John 6—60, 61, 66, and 67) the company left him in evident disgust.

I suppose Christians would say, as John says that Jesus intimated, (John 6—26) that he had already wrought miracles before them, and since they did not give him credit for them, it was not his business to go on working them. Now this apology is but a poor compliment to the character of his miracles, for it assumes that they did not convince eye-witnesses. But—leaving that consideration—how did Jesus *know* that these particular men, who had now come so far, apparently for no other reason than to ascertain whether he could work miracles, had ever before seen him work what he called miracles? Besides, their question implies that they never had seen him work a miracle, and their declaration is, at least, as good, in such a case, as his. Admitting it therefore to be true—as we must do until the contrary be unequivocally proved—that they never had seen a miracle wrought by him, he was without excuse in refusing them, and his conduct is to be accounted for, only by supposing that he could not work miracles before those who were disposed to insist upon seeing a real miracle, and not to be satisfied with one of the common kind of pretended miracles, such as great numbers of persons, at that time, were in the habit of performing.

Another defect in his character, which was to be mentioned, was his propensity to practice concealment. He again and again, when he had done something, which his biographers have called a miracle, charged those, who were with him, "to let no man *know* it." In one instance (Mark 1—40 to 44) where he is said to have cured a leper, after he had done it, "ho straitly charged him, and saith unto him, see thou *say nothing* to any man."

In a case, (Mark 8—22 to 26) where it is said that he cured a blind man, "*he led the blind man out of the town*" to do it; and not satisfied with that, he told the man, when the work was done, "neither to go into the town, nor tell it to any in the town."

In the case (Mark 5—37 to 43) where he is said to have restored to life the dead daughter of Jairus, he suffered none but Peter, James, John and the father and mother of the child to go into the room with him, although others desired to go in; and when the scene was over, he even "charged" those, who had been witnesses, "that no man should know of it;" and John in his biography of Jesus, says not a word about it; and we are indebted, for such a story as we have, to those who were not eye-witnesses.

In another instance, (Mark 7—32 to 36) where he is said to have cured (after a great deal of apparently unnecessary ceremony) a man, who "was deaf and had an impediment in his speech," "he charged" those, who had been present, "that they should tell no man."

In still another case (Mat. 9—27 to 30) where it is related of him that he cured two blind men, after the work was done, "he straitly charged them, saying, See that no man know it."

Is there any excuse for such conduct as this in a real miracle-worker? Was not the taunt of his brothers well applied, when they said to him, (John 7—4) in substance, that no man did his works in secret, when he was seeking to make himself publicly known, and told him, if he could work miracles, to do it before the world?

His brothers appear to have been men of some understanding—for, although they, like the rest of their countrymen, believed in miracles, yet they saw readily enough that for a pretended miracle-worker, either to avoid the scrutiny of those who doubted his miraculous power, to select

the right kind of witnesses of his acts, or to be careful to have no witnesses at all, was "no way to do things."

He appears also to have been very cautious, in the early part of his career, that the public should not know that he claimed to be the Messiah. He once (Mat. 16—13 to 20. Mark 8—27 to 30. Luke 9—18 to 21) asked his disciples, "Who say the people that I am?" And when they had told him that men had different opinions about him, "He saith unto them, But who say ye that I am?" Peter then expressed his belief that he was "the Christ." Whereupon "he charged his disciples that they should tell no man that he was Jesus, the Christ."*

Cowardice was another defect in his character, and it is made so manifest that it cannot be concealed. He repeatedly betrayed it by fleeing from his enemies, and by so doing, he must have brought himself, and his pretensions into public contempt.

When his disciples came to him, and told him that John the Baptist had been beheaded by order of Herod, (Mat. 14—12, 13) "he departed into a desert place apart;" or, in plain English, *he fled.*

John says, (10—39, 40) in speaking of another occasion, "Therefore they sought again to take him, but he *escaped* out of their hands, and went away beyond Jordan, and there he abode;" that is to say, he run away, and stayed away.

On another occasion also John says, (11—53 and 54) "Then from that day forth they took council together for to put him to death. Jesus therefore walked no more openly among the Jews."

Matthew says, (12—14, 15, 16) in still another case, "Then the Pharisees went out, and held council against him, how they might destroy him. But when Jesus knew it, he withdrew himself from thence, and charged his followers that they should not make him known:" that is, he took himself off, and told his friends to let nobody know where he had gone.

John says again, (8—59) "Then took they up stones to cast at him; but Jesus *hid* himself, and went out of the temple," &c. Yes, it seems that this Son of God, in a case of emergency, could even "*hide*" himself.

But the most contemptible instance of the cowardice of Jesus is related by John, (7—1 to 10) who says of him, that "he walked in Galilee, for he would not walk in Jewry, because the Jews sought to kill him." He then adds, that the feast of Tabernacles was at hand, and that his brothers wished him, if he could work miracles, to go up to the feast and perform them openly. They also taunted him with doing his works in *secret.* But neither solicitations nor taunts could induce him to go *with them.* He attempted to excuse himself by saying that the world not him; and said to them, "Go *ye* up to this feast, I go not up yet unto this feast, for my time is not yet full come." What then did this man do? This bold reformer? This pretended Messiah? This man, who afterwards (Mat. 26—53) said that he could call upon his Father, and he would give him more than twelve legions of angels to protect him? Why, he remained behind until his brothers had gone, "but (to use John's own language) when his brethren had gone up, then went he also up to the feast, not openly, but as it were in *secret.*"

The man, who can read these accounts of his secresy, his cowardice, and of the miserable subterfuges to which he would resort to prevent an exposure of his incapacity to work miracles before scrutinizing eyes, and *not* feel "ashamed of Jesus" as a Master, must not only be quite content to have a master, but very indifferent in his choice of one. And be it not forgotten, that those, who, after having had their attention called to this conduct of Jesus, shall continue to advocate Christianity, must practice the effrontery of pretending that this creeping, skulking, *hiding*, fleeting fellow was acting a part appropriate to a Son of God, and exhibiting a perfect pattern of moral greatness.

Such, be it remembered, is one part of the character given to this man by his best friends. It is no "enemy that has done this." It all comes from men, who evidently did not intend to let out any thing, which would make against their cause, but who happened to be too simple always to know what it would be expedient to keep back. And we can easily judge, from the character given to this man by his friends, what an one would have been given to him by an unbelieving eye-witness, if such an one had cared enough about him to take the trouble of exposing the whole of his conduct.

Christians have the opinion that Jesus, at last, delivered himself up, magnanimously and willingly, a martyr for the benefit of mankind. Now this opinion is founded entirely upon the improbable, to the rejection of the probable, part of the contradictory testimony in relation to his conduct on that occasion. The probable part of the testimony (and there is enough of it for my purpose,) goes, directly and manifestly, to show that Jesus skulked and endeavored to escape in this instance, in the same manner he had so often done before.

But before introducing this testimony, let us look at the absurdity of that which Christians adopt. The latter is, that at the supper, on the evening before Jesus was taken, it was *understood* between him and Judas, that the latter should *betray* him; that Judas thereupon left the room, obtained a *posse* of men, went in search of Jesus, and found him, not in the room where he had left him, but concealed in a garden; that he approached him, addressed him as a friend, and kissed him; that Jesus then addressed Judas as a friend, saying to him, "Friend, wherefore art thou come?" (Mat. 26—49, 50.) Now is it to be supposed that such a solemn farce of affected friendship would have been acted over between two men, if it had been previously understood with certainty, that the one would turn enemy, and deliver the other into the hands of those who would put him to death?

It is nevertheless probable that, previously to the supper, Jesus had seen reason to *suspect* the fidelity of Judas, and that, when he saw him leave the room, he apprehended that an immediate attempt was to be made by Judas to have him seized. This supposition accounts for Jesus's leaving the house, after the departure of Judas, and going as he did, in the darkness of the night, into the concealment of a garden. (John 18—1.) It is natural too, that, when Judas approached him in the garden, Jesus, seeing that escape was impossible, should return a friendly reply to the salutation of his suspected enemy, because he might have irritated one whom he feared, if he had showed any suspicion of his malicious design. But it is beyond credibility, if it had previously been explicitly

understood between them, that Judas should act the enemy, that Jesus should thus seriously address him as a friend.

This particular story about Jesus's conversation with Judas at supper was probably made up or "glorified," by these apostles, out of something that had passed, as some other conversations appear to have been, for the purpose of making it appear that their "Divine Lord and Master" could not have met with any disaster, which he had not forseen, and intended to meet. Jesus's alleged predictions (which none of his disciples appear to have understood at the time they were made) that he should rise again, were probably manufactured, or "glorified" out of something or other, and in the same way, to meet the necessities of the case, or to make every thing correspond with the ideas, which they had come to entertain of Jesus, at the time they wrote.

Perhaps it will be thought strange that Judas should have *found* Jesus in the night, if there had been no previous concert between them. But John says (18—2) that Judas knew where this garden was, and knew also that Jesus often went there with his disciples. He therefore, after having procured men to go with him, probably went first to the house where he had left Jesus and his disciples at supper, and on not finding them there, suspected this garden to be the place of their concealment.

There are several items of testimony, which tend to show that Jesus intended, at this time, to escape the danger, which he apprehended to his life. One is, (Mat. 26—24) that, at the supper, he said, *in the presence of Judas,* (whom, as was before remarked, he probably *suspected* of having a design against him,) "wo unto that man by whom the Son of man is betrayed! it had been good for that man if he had not been born." What was the occasion for such a remark, unless it were intended as a menace to deter Judas from any attempt against his life?

Another is, (John 18—1) that after Judas had left the room, Jesus and his disciples left it also, (although it was a dark night, as is proved by the fact that those, who came to take him, carried lanterns and torches, (John 18—3) for the purpose of finding him,) went away, crossed a brook, and took up quarters for the night in a garden. Now can any reason be imagined why this man should leave a house, and go into a garden, in the darkness of the night, and remain there, unless it were for concealment and safety?

But there is less reason to suppose that Jesus had any other motive than that of concealment and security, in this instance, than there would be in the case of many other persons in the like circumstances; because it was a common thing for him to hide himself from his enemies: and, moreover, if he had wished, as Christians would have it, to offer up his life at this time, he would have had this special reason for remaining where Judas had left him, viz: that he might not *fail* of *being found* by those who were seeking to destroy him.

Another fact, too unequivocal and decisive to admit of argument, is, that in this crisis of his affairs, he directed his followers to provide themselves with *swords,* and assented to their taking with them the two, which they had. (Luke 22—36 and 38).

The fact also, that some of his disciples, when they saw that Jesus was likely to be taken, evinced so much readiness to *fight,* and appealed to him to know whether they should not "smite

with the sword," show that they had looked forward to such an exigency, and had made up their minds to defend themselves, if it should be practicable, and that he had no idea of just then offering himself up, or of being offered up, as a sacrifice for mankind—at least, if he could prevent it.

Another item of the same kind of testimony is, that after he had come into the garden, he directed his disciples to "watch," (keep guard), while he went and prayed, (Mark 14—34). When he returned also, and found them asleep, he said unto Peter, "What, could ye not *watch* with me one hour?" (Mat. 26—40).

Still another item is, that when Jesus discovered those who had come to take him; he said to his disciples, "Rise up, let us go: Lo! he that betrayeth me is at hand." (Mark 14—42). What is this but saying, "*Let us run, we're going to be taken*?" But it was too late to escape, for Mark adds, that "*immediately,* while he yet spake, Judas and a great multitude, with swords and staves, came," and, after Judas had designated the one to be seized, "laid their hands on him, and took him."

Here is evidence enough, one would think, to satisfy any candid mind, possessed of common discernment, that Jesus, in this case, as he had so often done before, sought, in the most cowardly manner, to escape the fate that overtook him. His disciples indeed would represent him as having courted death, and perhaps, at the time when these accounts were written, the authors had brought themselves to believe, that he had actually desired to die for the benefit of mankind. But we are to judge from the facts themselves, and not from the subsequent construction put upon those facts by simple men, who, as we can easily see, may have been, "after Jesus had been glorified," and all that, in a state of perfect delusion in relation to the meaning of the whole affair.

The manner of Jesus, while upon the cross, is in strict accordance with the supposition of his being a weak spirited victim, rather than a voluntary martyr, conscious of the importance and necessity of his dying, and refutes the pretence that he died for the purpose which Christians allege; for if such were the purpose of his dying, there was more in that purpose, to one who could appreciate it, to sustain a man through the scene, than any other martyr ever had. But this man sunk under the infliction, said that God had forsaken him, and throughout, disclosed the weakness of his character.

His conduct too after his recovery from his crucifixion, if he did recover from it, corresponds well with his conduct before it. He lurks about privately. He does not, as Peter, one of his disciples, expressly acknowledges, (Acts 10—41), "show himself to all people," but to a few friends only—and to these he shews himself, as far as appears by the evidence, but a few times during forty days, and at those times "in the evening," and within closed doors, (John 20—19 and 26), or in some other private and stealthy manner.

One other trait in his character deserves an allusion. We have some little evidence that the notoriety, which he acquired among the ignorant, produced upon him somewhat of the effect which it frequently does upon vulgar minds, and none others, viz: an idea that the happiness of those, who were once their equals, is not now to be considered in comparison with their own pleasure or convenience, and also an inflated assumption of superiority over them. He seems to have sometimes considered himself entitled, solely by the elevation of his rank above that of his

followers, to servile and degrading manifestations of reverence from them, and to have been very willing to receive this kind of incense even at the expense of the "weightier matters of the law," if it but served to raise the estimation of his superiority in the minds of his followers. Look, for example, at the self-complacent assumption of dignity and importance, with which, when Mary had lavished the costly ointment on his head, he replied to the remonstrance against the foolish waste of what might have been made so valuable to the poor, (John 12—2 to 8.) He did not point out any good that was to come of the act, but silenced the objector by intimating that what had been done was only a proper manifestation of reverence towards so wonderful a being as himself; and added, in substance, that there were always so many poor, that it was of no importance to attend to their wants when he was present, and when his followers were blessed with an opportunity of appropriating their funds to demonstrations of devotion towards him. And yet this man was the author of a religion "*peculiarly adapted to the poor.*"

On another occasion (Luke 7—38,) this delightful fellow permitted even a *female* to "Kiss *his* Feet,—*to wash them with her tears*—and to wipe them with the hairs of her head," and yet women are now told that the author of this elegant act of gallantry was the founder of a religion, which their *self-respect* and a proper regard for the dignity of their sex, imperiously require them to embrace.

But Christians have a saying that Jesus "went about doing good." Well, supposing he did for a year or two give his attention to "doing good"—is there any thing so remarkable in the fact that it can be accounted for only by supposing him a divine being? But how was this matter? Did he really "*go about, doing good?*" Was he "doing good" when he consented to the foolish waste of "three hundred pence worth of ointment, which might have been sold and given to the poor?" Was he "doing good," when he suffered Mary to "kiss his feet?" Was he "doing good," when he sneaked up to the feast at Jerusalem in *secret?* Was he "doing good," when he rode an ass's colt to Jerusalem, to make the people believe that he had been appointed by the Almighty to be their king? Was he "doing good," when he told his followers to arm themselves with swords? Was he "doing good," when practising the mean evasions, the subterfuges and the secresy, which have been before referred to? "Why, no, perhaps not," the Christian will probably answer, "but then he healed a great many sick folks, and cast out a great, great many devils." But it is a supposable case, and perhaps it will hereafter satisfactorily appear, that he could work only such miracles as these, (where doubtless the imaginations of men did the business,) and that he wrought such more for the purpose of gaining adherents, and thus making himself king of the Jews, than of "doing good."

But Christians will say that there is one kind of evidence, by which the divinity of Jesus is unequivocally proved, and that is furnished by his moral and religious instructions.

Now one objection to the moral and religious precepts and doctrines ascribed to Jesus—considering them as evidence of his divine nature—is, that a part of the moral ones are very silly, and a part of the religious ones are very blasphemous and absurd—as any person may see, who will take the trouble to read them with the view of seeing whether they are or not—and another objection to them is, that it is not likely that many of them were ever uttered by him.

Besides, if a man, who should set himself up in opposition to a portion of the community, in the manner Jesus did, and should attempt to lead those whom he could persuade to join him, should now and then utter a sentiment somewhat original and singular, and correct withal, it would be no more than might reasonably be expected. We generally see such things in every one, who has never had his mind moulded by intercourse with the many, and who attempts to lead the few. Such a man generally has something original and peculiar in his ideas.

One reason for believing that Jesus never uttered many of the sentiments ascribed to him, is, that a person attempting to prove himself such a Messiah as the Jews expected, and to make himself their king, would not be likely to give such instructions as are many of those ascribed to Jesus—but he *would* be likely to give such as could very easily be "glorified" into such as these are. For example, when he was addressing those, who followed him, on the subject of that combined temporal and religious government, which he pretended to be appointed by God to establish, he would naturally speak of his kingdom in terms, which could easily be "glorified" into "the kingdom of God," "the kingdom of heaven," &c. And the Evangelists, although, at the time he spoke, they understood him as referring to his kingdom among the Jews, would yet, at the time they wrote, when their ideas of the nature of his kingdom had been changed by his supposed resurrection from the dead, consider every thing, that he had previously said, as referring to a different kingdom from what they had before supposed, and would record it accordingly.

Many of his moral precepts are such too as would naturally be thrown out to his hearers by such a man as I have supposed him to be; because it would be necessary that one, who proposed to make himself such a king as the Jews expected, one who was to control both their civil and religious affairs, should give to those whom he was persuading to join him, some idea of the social regulations, and the moral and religious observances, which he intended to establish among the people.

Another reason for believing that many of the sayings, attributed to Jesus, were never uttered by him, is, that the time, when they were recorded, was so long after they are represented to have been spoken, as to forbid the belief that there is any great accuracy in them. It is preposterous, to pretend that these men should remember conversations in the manner they assume to have done.*

Still another reason is, that these narrators, at the time they wrote, had probably become more capable of being themselves the authors of whatever would seem to be above the capacity of a very simple man, (if indeed there be any such sentiments in the New Testament), than Jesus himself, for they had then had much intercourse with mankind, they had travelled extensively, and had spoken and labored much as preachers, and their talents must have been improved by such an education. And of their readiness to relate the best and the most they could either remember or *imagine* of the sayings of Jesus, having the semblance of similarity to any thing that he had ever uttered, it seems to me there can reasonably be little doubt in the mind of any man who reads their stories.

In order to show how little reliance is to be placed upon the pretended authorship of the sentiments ascribed to Jesus by the Evangelists, nothing more need be done than to exhibit the

authority, on which his talk to the people on the mount has come down to us. Matthew would have us believe that he has given us the matter of a discourse, which Jesus held to his followers at this time. And yet, as I shall attempt to satisfy the reader, Matthew not only was not present when the speech was made, but was not even a disciple of Jesus at the time.

The seventh chapter of Matthew closes the speech; the eighth gives accounts of miracles, &c., the first verse of the ninth then says, that "he catered into a ship, and passed over, and came into his own city," (Nazareth.) It would appear from the remark here quoted, and from the last fourteen verses of the *fourth* chapter, that this harangue was made in Galilee, on the other side, from Nazareth, of the sea of Galilee. By the ninth verse of the ninth chapter, it appears that Matthew was found in Nazareth, and called to be a disciple, *after* Jesus had returned from Galilee. It is probable, from the fact that Matthew was found in Nazareth, that he *lived* there, and of course, at a distance from the place where the speech was made. This fact, and the fact that he was not called to be a disciple until after the speech was made, render it improbable that he was present at the delivery of the speech, or that he knew any thing about it until it was over. And yet, some ten, twenty or thirty years afterward, he pretends to give us the substance of a discourse, containing remarks upon a great variety of subjects, having no connection with each other.

Even if he had heard them uttered, it is preposterous to suppose that he could have remembered so great a variety of disconnected remarks. But when we consider that he probably did not hear them, all confidence in the correctness of his report vanishes. So that, whether we consider this production either as heard, or only as *heard of,* by Matthew, it comes to us in the shape of a thing mainly fabricated or "glorified," years afterwards.

But there is another and stronger objection to the instructions, which are attributed to Jesus, than has yet been mentioned. This objection is, that the whole system of morals and religion is based upon the selfish principle. The system throughout, is one of rewards and punishments—the most debasing, to men's motives, of all imaginable systems. In it, right and wrong are not recognized as fundamental principles of action, but are made referable to ulterior considerations of personal pleasure and pain. Jesus never instructed men to do what was right, *because it was right;* yet this is the true reason why they *should* do it. Nor did be instruct them to avoid what was wrong, for the reason that it was wrong: yet that should be the fundamental and principal reason in every man's mind, because it is the moral reason. But the Bible, by the uniformity, with which it makes the selfish inducement, the promise of reward, or the threat of punishment, follow the moral precept, *impliedly admits* that the principal reason why we should do right, is, that we shall be rewarded for it, and the principal reason why we should not do wrong, is, that we should be punished for it. How much real honesty of principle, or how much of purely virtuous sentiment, can be infused into men's minds by means of such mercenary inducements, I leave to others to determine.

Men's moral principles are weak enough without their being made subordinate to selfishness; and their selfishness is quite active enough, without any such effort as Christianity makes to constitute it the mainspring of all their conduct. There are *natural* sentiments of justice, rectitude and virtue, in men's minds, which, *when directly appealed to* as motives to action, are generally found ca-

pable of being cultivated and strengthened, and of controlling the conduct of any of mankind. There are few, (if indeed there are any,) men, who cannot be persuaded to do what is right, by having it urged upon them that it *is* right; and there are but few men, who cannot, in any particular case whatever, be dissuaded from a wrong action, by having it urged upon them that it is wrong. Yet a great portion of the same men, who are thus easily persuaded to do what is right, by the argument that it is right, and dissuaded from doing what is wrong, by the argument that it is wrong, would consider it, and justly too, a despicable and degrading descent, to yield to, or act under, the influence of such hopes of reward, and such fears of punishment, as the Bible and its advocates attempt to awaken. And the very men, whose trade and incessant effort it is to bring others under the control of these base and mercenary and false motives of action, would consider it an imputation upon their virtue and their characters, to insinuate that they themselves are governed by such means; and would take it in high dudgeon to have it intimated that their natural sense of right was scanty, or that it would in general be insufficient to control their conduct. But they have great fears for the virtue of their fellow men—it is entirely unsafe to trust mankind in general with no motives but such as truth would furnish—their fellow men are generally either such simpletons that they must be wheedled by prospects a thousand times too extravagant to be probable, by promises of "sweet things" hereafter, or they are such perfect monsters that they must be set upon and overawed by menace, or enslaved by fear; they are utterly incapable of appreciating any consideration of right or reason; and hence the *absolute necessity* of Christianity.

CHAPTER III. The Alleged Miracles of Jesus.

If it has now been reasonably shown, that up to the time when he began to work miracles, Jesus had exhibited no other than a human nature; and if neither the probable object of his public career, his personal character, nor his religious and moral instructions, give any evidence of his divinity, we are to inquire as to the reality of his alleged miracles, not only without any previous assumption or bias in their favor, but with the same suspicion and incredulity that we should feel towards the pretended miracles of any other person, and with a determination to scrutinize them as closely as we would any others, and to detect their falsehood, if any falsehood can possibly be detected in them.

It has been argued that no amount of human testimony can be rational evidence of the reality of an alleged miracle; because such testimony must always be liable to this objection, viz: that experience has proved that it is more probable that any number of men would lie, or would be deluded, imposed upon, or mistaken, than that a miracle would be performed. And this objection seems to be a good one, because we do know that persons have, in cases almost innumerable, been imposed upon by pretended miracles, but we do not know that a real miracle has ever been wrought by the agency of man, or that any miraculous occurrence has ever taken place since the order of nature was established. It probably might also be maintained, that a man's own senses could not be reasonable evidence of a miracle; because men's senses have, in thousands of in-

stances, deceived them in regard to pretended miracles; but we know certainly of no instance where they ever proved the reality of a miracle.

Nevertheless, the following attempted explanation of the alleged miracles of Jesus will not insist upon these arguments, but will proceed upon the supposition that human testimony *can* be sufficient evidence of the reality of a miracle—assuming, however, the soundness of this principle, viz: that we are not to believe a miracle on human testimony, so long as we can [Editor: illegible word] *discover* an inconclusiveness in that testimony, or can *detect* a possibility of mistake or falsity in the witnesses. The correctness of this principle I suppose Christians themselves will [Editor: illegible word] the face to dispute.

One other principle also they must admit, viz: that the *object, for which* the alleged miracles of Jesus are [Editor: illegible word] to have been wrought, can weigh nothing in favor of their reality; because, if we say that [Editor: illegible word] caused them to be wrought for the purpose of proving a Revelation, we thereby *assume* that a Revelation exists—which is the very thing in dispute, and which is to be proved *by* the miracles, if proved at all, and therefore is not proved at all until the miracles are established. If we attempt to prove the Revelation by the miracles, and also the miracles by the Revelation, we reason in a circle. The alleged miracles of Jesus therefore must stand exclusively upon the *historical* evidence, which tends to sustain them, without any regard being had to the purpose for which they were wrought, if they really were wrought. And they must be supported by evidence as strong as would be necessary to prove the reality of miracles, for the working of which no reason at all could be assigned.*****

But to proceed with the evidence. It is worthy of especial remark, and should be constantly borne in mind, that at the time of Jesus, a miracle was considered, among the Jews, *a very common occurrence.* Jesus acknowledges that others could perform some of the same kind of miracles, which he himself did, viz: casting out devils. "If I by Beelzebub cast out devils, by whom do your children cast them out? Therefore they shall be your judges. But if I cast out devils by the spirit of God, then the kingdom of God is come unto you, (Mat. 12—27 & 28. Luke 11—19 & 20.) Jesus here impliedly admits, as I understand him, that others performed deeds *similar* to some of those, which, by himself possibly, and by his disciples unquestionably, were believed to be miracles, and which he professed to perform for the purpose of proving his Messiahship. He however would make a distinction between his supposed miracles, and those of others, by pretending that his were done by the help of the spirit of God, and that those of others were wrought by the help of a different power. But the Pharisees had just been charging *him* with working by the power of Beelzebub, and how is an impartial person to judge who works by Beelzebub, (supposing there were a Beelzebub,) and who by the power of the Almighty, when both persons perform the same miracles, and each charges the other with working by Beelzebub? or how is an impartial person to know which are real miracles, and which are false, when both are apparently alike? What reason then is there for supposing that the works of Jesus were any better miracles than the works of others?

Jesus also admits (Mark 9—38, 39 and 40) that the man, whom his disciples told him they had found casting out devils on his own account, was performing *real miracles.* True, this man used

the *name* of Jesus; but he did so without authority—so that the miracles must be considered as much his own, as if he had used his own name, or no name at all.

Now, if, as Jesus himself acknowledges, the miracles of others were real ones, the inference is inevitable from these facts, that the power to cast out devils was no evidence that a man was commissioned by God. But, if these performances were not *real* miracles, Jesus, like the rest of his countrymen, was so ignorant as not to know it, because he expressly acknowledges that they were real.

Again Jesus says (Mat. 24—24) that *false* Christs "*shall show great signs and wonders, insomuch, that if it were possible, they should deceive the very elect.*" Now this is equivalent to acknowledging that false Christs could perform works so wonderful that it would be exceedingly *difficult* to distinguish *them* from such as he himself wrought. Indeed it is equivalent to acknowledging that an impartial observer would be as likely to believe those to be real, as to believe his to be so. But he evidently believed that there was some *supernatural* cause why the "elect" would not be deceived by them, for he says, "if it were possible" they would be. And he found it necessary, by declaring such works to be the works of false Christs, and by cautioning his disciples in the strongest manner against them, to prevent them from regarding, or giving any credit to, those works, which, to unbiassed minds, would appear equally miraculous with his own, and would furnish equally strong evidence as his, that each of the authors of them was the real Messiah instead of himself.

If the works of Jesus were so much more wonderful than man could perform as to deserve to be called miracles, was it not nonsense to caution his disciples so strongly against being deluded by the works of others?*

What the works of these pretended Messiahs (of whom it is admitted by Christians that there were about seventy, who lived about the time of Jesus), were, I know not—but it is related, on such authority as Christians admit to be true, that some of them got large sects after them. The Rev. John Newton, in his Dissertations on the Prophecies, (Chap. 19) says that one of them obtained thirty thousand followers. This number is probably many times larger than that of those, who believed in Jesus, *during his life time.* The largest estimate, which I have found of his followers at any one time, is, "about five thousand men, besides women and children," (Mat. 14—21), and this estimate is undoubtedly a great exaggeration. Besides, it would appear that of those, who sometimes followed him about in the early part of his career, nearly all soon abandoned him. If then, those, whom Jesus calls false Christs, were so much more successful than himself in gaining adherents, it is in the highest degree probable that *their* works gave evidence, to those who saw them, of greater miraculous power than his did. So that if we believe there ever was such a being as a real Messiah, we ought, judging from the testimony of the eyewitnesses, (whose testimony alone is good for any thing), on every principle of reason, as far as the evidence of miracles is concerned, to believe that Jesus was not the actual one—but that the one, who obtained, *during his life time,* the greatest number of followers, was the true one; because these followers, were the eyewitnesses whose testimony constitutes the evidence in either case, and by following a man they expressed their belief in the reality of his pretended miracles. Of course the witnesses must have been more numerous, who could testify to the reality of the miracles of others, than of those of

Jesus; and we ought certainly to believe the testimony of a large number rather than the testimony of a few.

The number of those, who were *not* eyewitnesses, but who might believe on a particular one of these pretended Messiahs *after his death,* and simply upon the testimony of others, is no evidence at all that one was the real one; because there might be many circumstances, which had nothing to do with the reality of the miracles, that would nevertheless make the pretended miracles of one believed after his death, when those of another would be forgotten. For example, if the followers of one should spread the accounts of his doings, after his death, such an one would continue to be believed after his death, when another, whose disciples should neglect this step, would naturally be forgotten, although his works might be even many times the more wonderful of the two. This was the case with Jesus. He had few followers, in his life time, compared with those of others; but some of his followers circulated the story of his doings, after his death, and by that means his memory was preserved.

It appears to me that even what little has now been said, would be sufficient to satisfy men that Jesus never performed any real miracles, if they would but judge of the probabilities on this subject, as they do on any other subjects of history. But it is not with the Bible as it is with other books, in respect of being believed. There are few men, and probably no women, who believe it because it is probable, (for they do not know, nor dare they inquire, whether or not it be probable), or for any other reason that has any thing like evidence or argument in it. They believe it, almost universally, for one, or the other, or both, of these very potent reasons, viz: either simply because it *is* the Bible, or because they expect they should be damned if they were to disbelieve it, however improbable it may be—thus virtually charging their Maker with being wicked enough to torture men through eternity, for not having believed, in this world, what was improbable. That "he that believeth not shall be damned," appears to be the strongest of all arguments, in the minds of the many, in support of the Bible. It is thus that Christianity, by seizing upon men's fears, and thus making dupes and slaves of their understandings, has preserved its credit in their minds, and its power over their reason, has brought down with it, to this day, some of that credulity for the marvellous, in which it was first established, and has thus prevented men from inquiring, in a rational manner, as otherwise the enlightened portion of the world probably would have done, as to what was probable, and what improbable, in relation to the designs and government of God.

Since then a further examination of the subject of miracles is necessary, I will go into an examination of the separate evidence of each and every miracle, that Jesus is said to have performed, and of which there is any particular account in either of the four narratives of his acts and preaching. The number of these is thirty-three, and no more. Some of these are mentioned by one of the narrators, some by two, some by three, and a single one of them by the four. There are many other general and indefinite accounts of his miracles, such as that, in particular places, he "cured all manner of diseases," or that "he healed all, who were vexed with unclean spirits," or "those who were tormented with plagues," &c. But since many of these thirty-three were recorded by Matthew thirty years afterwards* —and as many of the same were recorded many

years afterward by Mark, who was a follower of Peter, and probably knew nothing of Jesus personally,† and by Luke also, who was a citizen of Antioch, converted by Paul, and who of course never had any personal knowledge of Jesus,‡ there can be no doubt that these were considered the most remarkable that he was ever supposed to perform; otherwise they would not have been remembered and circulated so as to be the most remarkable ones that should come to the knowledge of each of these three different persons.

Many of these supposed miracles will be attempted to be accounted for, by showing them to have been the work of the imagination. Such ones will be examined first, and the others afterward.

The influence of the imagination upon sick persons is known to be very great, and in many cases of modern date, it has been observed and recorded by physicians to have been surprising. There are perhaps few adults, who have ever attended a sick person, that have not observed the sensible and sudden effect of a newly excited hope upon him. All know the importance of sustaining the hopes of a sick man. The reason of this, is, that his nervous system is then, vastly more than in health, susceptible to the influence of particular states of the mind. It is one of the most common observations, in relation to a person dangerously ill, that "if his courage be maintained, and he *think* he shall recover, he *will* recover, but if he *think* he shall die, he certainly will die." The frequent expression of such opinions shows that we are all aware of the influence of the imagination upon the sick, although the philosophy of its operation is perhaps not known to all who know the fact.

There is perhaps no man, even at the present day, who, when sick, although he perfectly well understood every thing about the power of the imagination, is not nevertheless in a very great degree under its influence. Physicians understand this principle in physiology, and many of them avail themselves of it, by holding out encouragement whenever they can do it without running too great a risk of occasioning an injurious effect by a disappointment of the expectations thus raised. It requires very little of the excitement of hope to string the nerves of a sick man, because they are exceedingly susceptible. Thus many physicians will often give to a sick man medicines, which are simple and powerless of themselves, merely for the sake of the beneficial influence, to be derived from his *imagining* that he has taken something which is benefitting him.

We all know, too, how little excitement of the feelings, upon a man, who is sick, and apparently destitute of all strength, will occasion insanity, and cause him to exhibit wonderful power. Now he really has no more strength in his muscles, during his insanity, than he had before; but his nervous system has been excited by the operations of his mind, and his latent strength thus called out. It is by the operation of the same principle, that other excitements of the feelings, as a newly imspired expectation of recovery for example, often calls out the latent strength of a sick man to a considerable degree, without making him insane, unless a man may be always properly called insane in just so far as his imagination deceives him.

Further evidence of the power of the imagination to operate upon the sick, and to cure diseases, is furnished by the following extracts, taken from Rees's Cyclopædia—article, Imagination.

"In the year 1798, an American, of the name of Perkins, introduced into this country (England) a method of curing diseases, for which he obtained the royal letters patent, by means of two small pieces of metal denominated *Tractors.* These were applied externally near the part diseased, and moved about, gently touching the surface only; and thus multitudes of painful disorders were removed, some most speedily, and some after repeated applications of the metallic points. Pamphlets were published, announcing the wonderful cures accomplished by this simple remedy; and periodical journals and newspapers teemed with evidence of the curative powers of the *tractors;* insomuch that in a few months they were the subject of general conversation, and scarcely less general use. The religious sect of the Quakers, whose benevolence has been sometimes displayed at the expense of their sagacity, became the avowed and active friends of the *tractors;* and a public establishment, called the "Perkinean Institution," was formed under their auspices, for the purpose of curing the diseases of the poor, without the expense of drugs or medical advice. The transactions of this institution were published in pamphlets, in support of the extraordinary efficacy of these new instruments. In somewhat less than six years Perkins left the country, in possession, as we have been informed on good authority, of upwards of ten thousand pounds, the contributions of British credulity; and now (1811) the tractors are almost forgotten.

"We by no means intend to impeach the veracity, of those, who attested the many extraordinary cures performed by the application of the *tractors;* on the contrary, we have no doubt that many of them were actually accomplished, at least temporarily: after what we have already stated, when treating of *animal magnetism* (such as the sudden cure of the artist's head-ache, on the bridge, by M. Sigault's gestures), and what we shall proceed to state respecting the effects of *counterfeit* tractors, it were impossible not to admit the truth and correctness of the majority of the accounts of the efficacy of *Perkinism.* We must observe, however, that the efficacy was founded on the delusion; and had not the scientific world been at that time in a state of comparative ignorance respecting the principle of which Galvani had recently obtained a glance; had they been in total ignorance of that principle, or possessed of more than that "little knowledge" of it, which "is a dangerous thing," such an imposture would scarcely have gained ground for a day, among those who were acquainted with the proceedings of the French Commissioners in the affair of Mesmer.* But Perkins associated the idea of the Galvanic principle, or animal electricity, with the operation of his tractors, by constructing them of two different metals, which the Italian philosopher had shown to be necessary to excite the operation of the agent, which he had discovered: and the obscurity, which hung over this subject, left a new field for hypothesis, and the anomalous character of the facts contributed to induce even philosophers to listen to the relation.

"But Dr. Haygarth, to whom his profession and his country are deeply indebted for more important services, suspected the true source of the phenomena produced by the tractors, from the first promulgation of the subject. Recollecting the development of the animal magnetism, he suggested to Dr. Falconer, about the end of the year 1798, when the tractors had already obtained a high reputation at Bath, even among persons of rank and understanding, that the nature of the operation of the tractors might be correctly ascertained by a pair of *false tractors,* resembling the real ones: and it was resolved to put the matter to the test of experiment in the general hospital of that city. They therefore contrived two *wooden tractors,* of nearly the same shape as the

metallic, and painted to resemble them in color. Five cases were chosen of chronic rheumatism, in the ancle, knee, wrist and hip: one of the patients had also gouty pains. All the affected joints, except the last, were swelled, and all of them had been ill for several mouths.

"On the 7th, of January, 1799, the *wooden* tractors were employed. All the five patients, except one, assured us that their pain was relieved; and three much benefitted by the first application of this remedy. One felt his knee warmer, and he could walk much better, as he showed us with great satisfaction. One was easier for nine hours, and till he went to bed, when the pain returned. One had a tingling sensation for two hours. The wooden tractors were drawn over the skin so as to touch it in the *slightest* manner. Such is the wonderful force of the imagination.

"Next day, January 8th, the true metallic tractors of Perkins were employed exactly in like manner, and with similar effects. All the patients were in some measure, but not more relieved by the second application, except one, who received no benefit from the former operation, and who was not a proper subject for the experiment, having no existing pain, but only stiffness in her ancle. They felt, (as they fancied) warmth, but in no greater degree than on the former day." Of the imagination as a cause, and as a cure of the disorders of the body, exemplified by fictitious tractors and epidemical convulsions. By John Haygarth, M. D. F. R. S. &c. Bath, 1800.

"Such were the experiments attempted with the view of ascertaining the nature of *Perkinism.* But Dr. Haygarth's pamphlet contained an account of still more decisive trials made in the Bristol infirmary, by Mr. Smith, one of the surgeons to that establishment. This gentleman first operated with two *leaden* tractors, on Tuesday, April 19th, on a patient, who had been some time in the Infirmary, "with a rheumatic affection of the shoulder, which rendered his arm perfectly useless." In the course of six minutes no other effect followed the application of these pieces of *lead* than a warmth upon the skin: nevertheless the patient informed Mr. Smith, on the following day, that "he had received so much benefit, that it had enabled him to lift his hand from his knee, which he had in vain several times attempted on the Monday evening, as the whole ward witnessed." But although it was thus proved that the patent tractors possessed no specific powers independent of simple metals, he thought it advisable to lay aside metallic points, lest the proofs might be deemed less complete. Two pieces of wood, properly shaped and painted, were next made use of; and in order to add solemnity to the farce, Mr. Barton held in his hand a stop watch, whilst Mr. Lax minuted the effects produced. In four minutes the man raised his hand several inches, and he had lost also the pain in his shoulder, usually experienced when attempting to lift any thing. He continued to undergo the operation daily, and with progressive good effect, for on the 25th, he could touch the mantle-piece.

"On the 27th," Mr. Smith continues, "in the presence of Dr. Lovell and Mr. J. P. Noble, two common iron nails, disguised with sealing wax, were substituted for the pieces of mahogany before used. In three minutes the same patient "felt something moving from his arm to his hand, and soon after he touched the Board of Rules, which hung a foot above the fire place. This patient at length so far recovered, that he could carry coals, &c. and use his arm sufficiently to assist the nurse: yet previous to the use of the spurious tractors, "he could no more lift his hand from his knee than if a hundred weight were upon it, or a nail driven through it," as he declared in the

presence of several gentlemen. The fame of this case brought applications in abundance, indeed it must be confessed, that it was more than sufficient to act upon weak minds, and induce a belief that these pieces of wood and iron were endowed with peculiar virtues." See Dr. Haygarth's Pamphlet, p. 8.

"Many other equally striking instances of the curative operation of the imagination, when excited by the sham tractors, might be quoted from the pamphlet in question. * * * * *

"After having perused this abundant evidence of the powers of the imagination, not only in producing various affections of the body, but in removing others which exist, we can have no difficulty in crediting many relations of cures performed by persons supposed to be gifted with extraordinary powers, or employing other pretended agents, all of which may be refer red to the same common principle. One of the most singular instances of this kind, both from the number of cures performed, and the rank, learning and character of the persons, who attested them, is to be found in the person of Valentine Greatraks, who flourished in the latter part of the 17th century.

"The proceedings of this pious and apparently sincere man are very interesting, as affording a history of the power of imagination and confidence over certain disorders of the body. He was the son of an Irish gentleman of good education and property, who died in his childhood. Disgusted with the religious and political contentions of his country in the time of Cromwell, he retired from the world, apparently in a state of melancholy derangement and bad health, which had nearly terminated fatally. On recovering, he became one of the puritans of the day, and after having acted sometime as a magistrate, he had "an impulse of strange persuasion" in his mind, which continued to present itself, whether he was in public or in private, sleeping or waking, "that God had given him the blessing of curing the king's evil." Accordingly he commenced the practice of touching for this disease about the year 1662, which he continued for three years; at this time the ague became very epidemical, and the same impulse within him suggested "that there was bestowed upon him the gift of curing the ague," which he also practised with success, by laying his hands on the patients. At length he found his power extended to epilepsy and paralytic disorders, &c.; but he candidly acknowledges that many were not cured by his touch Nevertheless the unbounded confidence in his powers, and consequently the facility with which the imaginations of the ignorant would be acted upon, must be manifest from the following statement, which he sent to Mr Boyle. "Great multitudes from divers places resorted to me, so that I could have no time to follow my own occasions, nor enjoy the company of my family and friends; whereupon I set three days in the week apart (from six in the morning till six at night,) to lay my hands on all that came, and so continued for some months at home. But the multitudes which came daily were so great, that the neighboring towns were not able to accommodate them; whereon, for the good of others, I left my home, and went to Youghall, where great multitudes resorted to me, not only of the inhabitants, but also out of England; so that the magistrates of the town told me, that they were afraid that some of the sick people that came out of England might bring the infection into the place: whereon I retired again to my house at Affane, where (as at Youghall,) I observed three days, by laying my hands on all that came, whatsoever the diseases were (and many were cured,

and many were not;) so that my stable, barn and malt house were filled with sick people of all diseases almost, &c."

"We shall not extend this article by quoting the histories of cases certified by several physicians, as well as by divines and philosophers; among whom were the names of Robert Boyle, Dr Cudworth, Dr. Whichcot, &c. We may remark, that some of the cases of headache and rheumatism resemble most accurately those which were cured by the spurious tractors abovementioned; and that the hand of Greatraks can only be conceived to have operated in the same way. The influence of the imagination was likewise obvious in several convulsive affections, in the same manner as in the woman at Passy, who fell into the *crisis* before the magnetism was applied. Greatraks mentions several poor people that went from England to him, "and amongst the rest, two that had the falling sickness, who *no sooner saw me, than they fell into their fits immediately;*" and he restored them, he affirms, by putting his hands upon them. Nay, he tells us, that even the touch of his *glove* had driven many kinds of pains away, and removed strange fits in women; and that the stroking of his hand or his glove had, in his opinion, and that of other persons present, driven several devils, or evil spirits, out of a woman, one after the other, "every one having been like to choke her (when it came up to her throat,) before it went forth." Now this whole description contains a pretty accurate picture of an ordinary hysterical fit, with its attendant *globus,* terminating with the discharge of flatus.

"About the same period, a Capauchin friar, whose name was Francisco Bagnon, was famous in Italy for the same gift of healing, by the touch of the hands only; and was attended wherever he went by great multitudes of sick people, upon whom he operated numerous and surprising cures, which were deemed true miracles. So general was the belief in his curative powers, that even a prince of Parma, who had labored under a febrile disease for the space of six months, was induced to apply to him, and was immediately cured by his voice only. The prince himself, and many others that were present, afterwards bore public testimony to the fact." * * * * * * * *

"But it is unnecessary to enumerate the individuals, the De Mainaducs, the Prescotts, &c. who have at various times been distinguished by the possession of various occult methods of healing the sick. The practice has occasionally prevailed in almost all ages; and we have seen, in the details of experiments above related, that the faculty of the imagination, in certain habits and conditions of the body, and especially in the irritable female constitution, is actually capable of producing all those effects on the corporeal frame, which have been deemed the result of occult agency and extraordinary powers."

"Admitting this, then, as an established principle of the human constitution, and making due allowances for the exaggerations and misrepresentations of ignorance and superstition, we are enabled to give a rational explanation of many historical relations, which have been considered as altogether fabulous, or as direct violations of truth. We are well aware of the facility with which the imagination is excited in an uninformed person, and more particularly in an age of profound ignorance, which is, for that reason, commonly an age of superstition. We know, too, that in the middle ages, when every form of science was almost unknown, and the laws of nature had not been investigated, the smallest discovery in natural philosophy, chemistry, or astronomy,

was deemed the result of supernatural communication with the world of spirits; and the discoverer or possessor of the knowledge was looked upon as a being gifted with supernatural powers. In such a state of the human mind, when natural philosophy, meagre as it was, was disguised with the name, and clothed with all the supposed agencies of *magic;* and when every person, with a little more knowledge than his neighbors, was master of so many *magnets*, so many *tractors*, by which he could rule the imaginations of the multitude; it cannot be the subject of our wonder, that the magician's rod (or the philosopher's cane) should produce such mighty operations, or that a scrap of his writing should be a remedy for many maladies. These only executed what was afterwards performed by M. Deslon's extended fingers, and Valentine Greatrak's glove! The effects, then, of the *incantations*, *amulets*, and all the arts of magic, witchcraft and astrology, by which the more artful pretenders to superior knowledge imposed upon the people, may be allowed to have actually occurred, and to have been the result of natural causes; and they are plainly referrible to one common source, with those of animal magnetism, Perkinism, and various other modifications of the imagination in fetters.

"It is scarcely necessary to add, that during the same periods of ignorance and superstition, those extremely pious and comparatively learned persons, who have been enrolled in the catalogue of saints, must necessarily have obtained the most complete veneration and confidence from the multitude; and hence, after their death, every relic of their bodies or clothing, the shrines in which they were entombed, fragments of the instruments of their execution (in cases of martyrdom,) and every other object that could excite, by association, those reverential feelings, usually called up by a contemplation of their characters, would become so many agents upon the imaginations, by which all the extraordinary changes in the animal economy above described, might be effectually produced. Thus we cannot doubt that there is much foundation for the histories of recovery from various diseases, occasioned by removing the sick to the tombs of celebrated worthies, or placing them before the statues and images of these persons, or by touching them with nails taken from the coffins, or rings from the fingers, or the bones of the fingers themselves of these saints, or by the influence of an infinity of relies of this sort, which cannot be supposed to possess less power over a superstitious mind, than the painted *tractors* of a surgeon, or the glove of an enthusiast."

In the New Edinburgh Encyclopædia, (Am. Ed.) in the article on Animal Magnetism, we find the following, among other testimony to the power of the imagination in curing diseases.

The pamphlet of Dr. Haygarth, on the metallic tractors, "amply confirms the general principle, that the power of the imagination in the cure of diseases is almost without limits; so that, except a complete and sudden alteration of physical structure, or the restoration of lost parts, there is scarcely any change so considerable, which may not be effected through its intervention. It not only possesses an indefinite power over what are styled nervous diseases, where the primary affection consists, as far as we can judge, in some change in the action of the brain and its appendages; but even diseases of the sanguiferous system, and of the different organic functions, appear to be by no means exempted from its influence."

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"In proof of his hypothesis, and of the power of magnetism over the human body, Mesmer" (the pretended discoverer of animal magnetism,) "and his adherents confidently appealed to their success in the cure of diseases; and so great did this appear, and so unquestionable was the evidence, on which it seemed to be founded, that, for some time, scarcely any opposition was made to it, and it was regarded as the most unreasonable scepticism to doubt of its reality."

And yet after this method of curing diseases had had this astonishing success, and had obtained this astonishing reputation, it was completely ascertained, by experiments made upon persons blindfolded, and upon those who doubted the system, (whose imaginations of course would not be so easily affected), that the previous cures had all been but the work of the imagination. These experiments were conducted by nine Commissioners, men of learning and science, appointed by the French King in 1784 to investigate the matter. Of this board of Commissioners, Dr Franklin, then American Minister at Paris, was one.

Many other cases, of wonderful cures wrought by the imagination, are cited in the article in Rees' Cyclopædia, from which a part of the foregoing extracts are taken. But enough have been quoted to establish, beyond cavil, I trust, that the imagination is capable of exerting a sudden and very exciting power over the nervous system, and of thus producing, what, by the ignorant and superstitious, would be considered *miraculous* effects in the restoration of the sick.

Now there probably have seldom, if ever, been causes in existence calculated to operate so strongly upon the imagination of a sick man, without making him actually insane, as were those which must have operated upon such as, for the time, thought themselves cured by Jesus; and perhaps the world never furnished a people more easily to be operated upon by the method and pretensions of Jesus, than were those among whom he preached. They were simple and superstitious to a degree hardly to be conceived of by us, as is proved by the fact of their running all agog after so many of those pretended miracle-workers, that infested Judea at that time.

The nation of the Jews at large, believed themselves the peculiar favorites of God; they believed that God often sent messengers to them, and in order to prove such to be his messengers, gave them miraculous powers. About the time of Jesus they expected a remarkable one to be called the Messiah. They supposed he would possess these powers in an unusual degree. Those, who followed Jesus, and supposed themselves benefitted by him, believed him to be this Messiah. It was evidently necessary, in order to be benefitted by his power, that they should believe, *in advance,* that he possessed it, as appears from Matthew 18—58, "and he did not many mighty works there because of their unbelief." At another time, (Mat. 9—28 and 29,) when two blind men wished to be cured, he asked them, "Believe ye that I am *able* to do this? They said "yea, Lord." Then says he, "according to your faith, be it unto you." The same inference is fairly deducible from numerous other passages and circumstances.

Keeping these facts in our minds, let us look at the cure of the palsy, as described by Matthew, (9—2 to 8,) Mark (2—1 to 12,) and Luke (5—17 to 26)—by Luke the most minutely.

Imagine Jesus surrounded by a multitude, who came to him from every quarter, who believed him to be the Messiah, and to have miraculous power; imagine him to have been going from

place to place, preaching as if by the authority of God—the report going before him that he cured all manner of diseases wherever he went; imagine so great a crowd about him that the man sick of the palsy could not be carried in at the door of the house, and that it was necessary to uncover the roof to let him down where Jesus was; imagine this palsied man having full faith, from the moment he heard of Jesus, in his ability to cure him; imagine him carried on a bed by four, to the place where Jesus was, full of the highest expectations; imagine him waiting, and witnessing the crowd around full of the same extravagant expectations with himself, witnessing also the preparations being made to let him down through the roof of the house, to bring him into the presence of the wonderful being who was to restore him at a word—(during such a scene, if he had a spark of nervous vitality in him, it must have been set most powerfully at work;) imagine him at length, laid in the presence of this messenger from God, this Messiah; imagine Jesus pardoning his sins with the assumed authority of God; imagine him telling the bystanders, *in the hearing of the sick man,* that he could cause him to rise up and walk as easily as forgive his sins; (certainly, at this time, the man's nervous system must have been wrought to an extraordinary degree of excitement, if he had life in him)—then hear Jesus pronounce, in his oracular and confident manner, "That ye may *know* that the Son of Man hath power on earth to forgive sins, I say unto thee, *arise;* and take up thy couch, and go thy way into thy house;" and is there any thing strange in the fact that he should receive strength, should rise up and walk? or that he should take with him his bed (such a sack of straw as it probably was, judging from the circumstance of its being let down through the roof of the house)? To my mind there is nothing in all this, which cannot be accounted for on the well known principles of physiology, even supposing the restoration to have been a permanent one. Here are plain and obvious causes, sufficient to produce the effect, without any supernatural agency whatever.*

If these views are correct, here was no miracle at all, even supposing the man really to have had the palsy. But suppose (a thing to my mind exceedingly probable) that this man only *imagined* himself to have the palsy—or that he had some slight infirmity, which he, knowing nothing of diseases, as the ignorant and simple people of that age and nation probably did, brought himself to believe to be the palsy;—and what sort of a miracle do we have here to prove that Jesus possessed supernatural powers? I say it is probable that the disease was not a real palsy, because ignorant, superstitious and timid men, such as were those among whom Jesus preached, *generally* magnify a slight infirmity into a grievous disease, particularly if there is any person going about the country pretending to cure diseases in a wonderful manner. Persons, who live within the circuit of such a man's travels, generally have diseases more malignant, and more in number, than the rest of the human family.

Besides, Luke, after relating the fact of Jesus's being where he was, of there being a great assemblage, &c., says, that a man was brought, who "*was taken* with *a* palsy." This language naturally conveys the idea that the man was taken *just at that time,* and if so, there are a thousand chances against one that these simple men, who would make something marvellous out of every circumstance that could, by the aid of an enormous gullibility, he made so; who probably knew no more about diseases than they did about astronomy, and who would be imposed on by any numbness of a limb, or cramp of a muscle, were *mistaken* about the character of the attack, rather

than that it should be the real palsy; because that is an illness, that very rarely occurs. The patient himself too, would be as likely to be mistaken as the bystanders, and if he *thought* he had the palsy, (and if such a suggestion had been made, he would be very likely to think so,) and that Jesus would take the trouble to display his miraculous power upon him, he would most surely keep up the appearance of a palsied man as well as he could.

Further, if the bare conversation, of those around, *about Jesus performing strange cures,* should make a simple man imagine he had some disease which needed curing, when he had no real illness or difficulty at all, it would be no very remarkable instance of the power of the imagination.

Reader, decide upon this testimony before you go farther. Is there, or is there not, here, unequivocal evidence that a genuine miracle was performed? Decide upon this case separately, and independently of all others. Each alleged miracle must stand solely upon its own evidence; for even if Jesus performed any real miracles, there is no doubt the country would be full of stories about miracles which were not real, and therefore we are not to believe there was a real miracle in any particular case, if there be a *discoverable* inconclusiveness in the evidence relating exclusively to that case. I will answer for the reader, that there is not room for even a decent pretence that here was a miracle.

The second supposed miracle of Jesus, that will be examined, is related by Matthew, (8—14 and 15,) Mark (1—30 and 31,) and Luke (4—33 and 39.) It is the cure of Peter's wife's mother. The stories here leave quite too wide a latitude for doubt as to the reality and severity of the disease; for these simple beings probably did not know a fever from any other trivial complaint. Luke indeed says it was "a *great* fever." But Luke was not there, and possibly before the story reached his ears, several years afterwards, the truth might have been a little exaggerated. This too is precisely such language as one would use, who wished to make it appear that a miracle was actually wrought, when the supposed miracle was of such a sort, that, unless there were some qualifying word, as "great," in this instance, inserted, those, who should read the account, would see at once that there was doubtless no miracle at all.

But, independently of the word "great," Luke's whole account goes to show that this fever was all imaginary, and brought on (as diseases sometimes are now) by the vicinity of a physician, who was thought able to cure any thing. He says that Jesus "entered into Simon's house," and immediately he adds, "that Simon's wife's mother *was taken* with a great fever." It would appear from this account that she was taken *after* Jesus had entered the house. If she were thus suddenly taken and thus suddenly cured, both the sickness and the cure were undoubtedly the work of the imagination.

But supposing the affair not to have been quite so farcical as it probably was, and supposing that when Jesus entered the house, she thought herself somewhat ill, and lay on the bed, and that when he "stood over her and rebuked the fever," pretending to have miraculous power, she felt able to rise and do what she is said to have done, still here is no evidence fit to be thought of to prove a miracle. From the greatness of the number of sick, whom Jesus is said to have cured, it is evident that the diseases were either trivial or entirely imaginary; and this was undoubtedly a case of the common kind, and one that could have been cured as well by the sight of Paul's handker-

chief, or by the shadow of Peter, as those that were thus cured. (Acts 19—12—and 5—15 and 16.)

The third case to be examined is that of the woman, who had "an issue of blood," (menorrhagia undoubtedly.) It is related by Matthew (9—20 to 22,) Mark (5—25 to 34,) and Luke (8—43 to 48.) This case affords an excellent illustration of the manner in which miracles were wrought upon the sick. This woman not only believed that Jesus had miraculous power to cure diseases, but she even believed that a miracle would be wrought upon her simply by her touching his garment, without his knowledge, and, of course, without *his* power being exerted. And so the event proved, if Mark and Luke are to be believed. It was the simple touching of his garment, as they say, that healed her. Mark says that "straightway" after touching, "she felt in her body that she was made whole of that plague," and also, that after Jesus had made the sagacious discovery that "virtue had gone out of him," and inquired who touched him, the woman "knowing what was" (already) "*done in her,*" came forward and told him the truth. He then told her that her "*faith*" had (already) made her whole.

Luke also says that the issue of blood staunched *immediately* upon her *touching* his garment. Then he goes on to relate that Jesus made the inquiry, who had touched him, and that the woman then declared to him, before them all, that *she* had touched him, and "how she was" (*had been*) "healed immediately." There is no room to quibble upon this language. Either his garments possessed miraculous power, or it was her imagination that healed her, or she was not healed at all—for though an Evangelist say it, and though Jesus himself may have said it, (which is not very likely,) no reasonable being can believe that he was filled with a sort of miraculous "virtue," which, when a person touched his garment, passed out of *him,* as electricity passes out of a cylinder, and that he would feel it leave him, as he is represented to have done, and that too when he did not know beforehand that any person was going to touch his garment.

But—to throw this disgusting nonsense about his "virtue" out of the question—there is a rational and obvious explanation of this matter. It is this. Her faith, in the efficacy of simply touching his garment, was so strong, that when she had touched it, she immediately did imagine, or did "feel in her body," that she was healed, and told the bystanders so. They took her word that it was really so, without ever troubling themselves afterward to ascertain whether she were permanently healed. There were too many of these cures going on before their eyes for them to inquire a second time in relation to one, which they supposed had once been well performed. From the moment of the supposed cure, the story would circulate, and these narrators afterwards recorded it as it came to them—having probably never heard of the condition of the woman after the time of the transaction; yet not doubting that there were both a permanent cure and a miracle.

The fourth case, which will be examined, is that of the man, who was said to have a withered hand. It is related by Matthew (12—10 to 13,) Mark (3—1 to 6,) and Luke (6—6 to 11.) Independent of the improbability that a miracle was ever wrought on earth, there are two palpable ones against the truth of this story. One is, that a withered limb is met with so rarely, that the chances are as an hundred to one, that those ignorant persons would call a limb withered, when it only had some slight affection, rather than that it should be in reality withered. Another im-

probability of the change, in the man's power to use his hand, being so great as to afford any evidence of miraculous power, arises from the circumstance, that of the Scribes and Pharisees, who were among the most enlightened part of the community, and of course the least likely to be imposed on, in any case of an attempted or pretended miracle, there were some present, and they, when they saw the act which others supposed to be a miracle, were enraged at Jesus for what he had done. The narrators of this event attribute their anger to the fact that this act was done on the Sabbath day. But it is most manifestly absurd to suppose that men, such as they undoubtedly were, could look on and see a man's hand, that was actually withered, restored and made whole by a word, and then have the hardihood to attempt violence, or plot mischief against the being who had done it. *Men* are not such monsters. But if the fact was, as all the probability of the case goes to show it to have been, viz, that in consequence of some slight infirmity, this simple man imagined his hand to be withered, and had not used it as usual, but, when commanded by Jesus, in whose miraculous power he had confidence, to stretch it forth, he used a little more effort than he was accustomed to, and stetched it out, and then, that many of the more ignorant ones, such as his disciples, should say a miracle had been wrought, it is perfectly natural that the Scribes and Pharisees should be enraged at seeing men thus duped by a fanatic and mere pretender.

Jesus made few or no converts among the enlightened part of the very nation that he pretended to be sent more especially to convert. Instead of working his miracles freely before such that *they* might be convinced, he, when in another instance, they had asked him to show them a sign—apparently for the express purpose of enabling them to determine whether he were the Messiah—called them (probably not to their face however) a wicked and adulterous generation for seeking a sign, by which they might ascertain that fact, (Mat. 16—4.) He was also continually fomenting the most narrow, illiberal and spiteful prejudices against them, in the minds of his ignorant followers. Such conduct, on his part, can be accounted for only by the fact, that when they saw, with their own eyes, those acts, which he called miracles, they, instead of being satisfied that he was the Messiah, were satisfied that he was an impostor.

The Bible represents the Jews as having been a people, upon whom God had bestowed peculiar privileges, with a view of making them the depositaries of the true religion, and of preparing them for the reception of the Messiah. Now if these representations in the Bible were true, and if Jesus were the Messiah, whom God had been preparing the minds of the Jews to receive, it is absolutely absurd to suppose that they would not have been the very first to have been convinced—and the fact, that they were not convinced, can be accounted for only by supposing, either that God was defeated and disappointed in his attempts to prepare them to receive the Messiah, or that Jesus was not the Messiah.

But to return. After Jesus had performed this supposed miracle, "he withdrew himself from thence," (evidently through *fear* of the Jews,) "and charged" the people that had followed him, "that they should not make him known," (Mat. 12—14 to 16.) Very dignified conduct, indeed, for a Son of God, or a Saviour of the world, and one too who could work miracles! But such was *his* course continually; and such cowardice reveals the character of the man, and shows us how much credit is due to his pretensions. If he had really been what he claimed to be, or had had

any thing like moral courage, he would have better sustained the character he had assumed, and would have scorned that practice of skulking, which he so often adopted—another still more contemptible instance of which, related by John (7—1 to 10,) has been before referred to.

The fifth case, that related by John (5—2 to 9) only, of the "impotent man" at the pool of Bethesda, was probably like the last. The man, as simple ones generally, and others sometimes, do, probably magnified his infirmity, in his imagination, to a degree beyond the reality, and when he was commanded to rise and walk, he made more effort, and walked better, than usually, and that was a miracle.

The man evidently had full faith that he should be restored by being put into the pool, as is shown by the fact of his being at the pool for that purpose; and if he had been put in precisely at the time when he supposed the angel had troubled the waters, he would probably have been restored in the same manner that others were. But if he had been put in at any other time, he would have received no benefit—and for the very good reason, that he would not have expected to receive any.

The facts that a "*great multitude* of impotent folk, of blind, halt and withered," waited at this pool for the angel to trouble the waters; that every one was cured of whatever disease he had, by being the first then to step in; and that none were cured, except such as stepped in *first*, prove that both the diseases and the cures were entirely, or in a great degree, imaginary. There was apparently just as much efficacy in the supposed troubling of the pool by an angel, and in the diseased person's being the *first* to step in after that had been done, as there was in the command of Jesus to rise up and walk, and no more. They both affected the imaginations of the superstitious, and that effected all the cures there were in the cases.

Here too we are enabled to see how much of a miracle Jesus performed in restoring the "withered hand," for John says that the "withered" could be restored by stepping into this pool, *after* the angel had troubled it, and before any other had been in. If then the withered, or those who supposed themselves withered, could in any case be cured by the power of the imagination, they would as likely be when Jesus pretended to work a *miracle* upon them, as when they stepped into the pool.

The circumstance too that there were *so many* withered people, as it is intimated by John that there were, at this pool, shows that there is no reason in believing that they were actually withered; because that is an affection, that is exceedingly rare. Yet those at the pool, who imagined themselves withered, are as likely to have been really so, as the one whose hand Jesus is said to have restored.

The sixth case, that of the woman, who had "a spirit of infirmity," being "bound by Satan," as Jesus said (Luke 13—11 to 16); also the seventh case, the cure of one leper, (Mat. 8—2 to 4, Mark 1—40 to 44, Luke 5—12 to 14); also the eighth case, the cure of ten lepers! (Luke 17—12 to 19), (who ever saw ten lepers at a time?) also the ninth case, the cure of the dropsy, (Luke 14—2 to 4), were all undoubtedly cures of the same kind as those that were performed by Valentine Greatrak's glove, or by stepping into the pool of Bethesda *first* after it was supposed that the wa-

ters had been troubled by an angel. It is very probable that nine, out of the ten, of these lepers, did not consider themselves restored, for although one returned to thank Jesus for what he had done, the nine did not take that trouble.

We here have an opportunity to see on how slight a pretence these narrators would make up a story of a genuine, undoubted miracle. These lepers are represented as standing "afar off," from Jesus, and calling to him to be healed. He simply tells them to go to the priest. They go, and nine of them do not return. Yet Luke says the whole were cleansed. Now, if they did not return, how did he know whether they were cleansed or not? Why, he *inferred* they must have been, and related it for a fact that they were, although he *knew* nothing about it.

There is no reason for supposing that any of these cures were any better ones than those effected at the pool, and it is clear that the cures at the pool were all the work of the imagination, or that the diseases themselves were so, and that there was no efficacy in the waters; because, if there had been any efficacy in the waters, people would have learned that the second one, who should step in after the gurgling of the water, could be healed as well as the first. If the imagination cured, at the pool, diseases, that were supposed to be real, the persons, whom Jesus cured, it is reasonable to suppose, had no diseases more real, or more difficult of cure, than the others, and were restored, or apparently restored, solely by being made to imagine themselves miraculously operated upon.

There are four different cases recorded of the cure of *blind* persons, viz: one in Matthew (9—27 to 30), where two were cured; one in Mark (8—22 to 26), where one was cured; one in John (9—1 to 7), where one was cured; one in Matthew (20—30 to 34), Mark (10—46 to 52), and Luke (18—35 to 43), where one, according to Mark and Luke, and two, according to Matthew, were cured. The accounts of Matthew, Mark and Luke, in the last case, refer to the same transaction, as appears by the context—for it took place, as they all say, when Jesus was near Jericho; and the similarity of the language, quoted by all, as having been used by the blind person or persons, confirms the fact. True it is, these cautions and credible historians disagree as to the *number* cured; but in relating so probable facts as miracles, such a slight discrepancy does not at all impair the credibility of the men, a sto all important particulars. Such a disagreement is not, in fact, at all material, for blind men in those days, judging from the Bible, were nearly as frequent as those who could see.

These also were probably cured in the same way as were those "blind" persons, who, John says, (5—3 and 4), were cured at the pool of Bethesda—and they were probably just as blind as those, and no more so. How did it happen that the blind were so numerous? Was the blindness real, feigned, imaginary, total or partial? To give a correct answer to this last question, it is only necessary to take into consideration the *number* of those called blind, and the manner in which those at the pool were cured.

Some of these blind men also seem to have had a power of locomotion rather unusual, to say the least, in really blind persons. On one occasion, (Mat. 9—27, 28), "two blind men *followed* Jesus, and when he was come into the house, the blind men *came to him.*" On another occasion (John

9—7) he told the blind man to "go, wash in the pool of Siloam," and the blind man "went his way."

In some cases it appears that Jesus cured the blind *on certain conditions.* For example, in one case (Mat. 9—28 and 29), he required of the blind men that they should believe, *in advance,* that he was "able" to restore their sight, and consented to heal them only in proportion to their faith. It requires but half an eye to see that the object of this condition was, to have something to attribute his failure to, in case his miraculous power should not "work well." He, in that case, would unquestionably have said "O ye of little faith, why did ye doubt?" and would thus have made those asses believe that the failure was owing to their doubts. In other instances he used more jugglery and ceremony than would seem to be necessary, if he were a real miracle worker. In the case related by John (9—6 and 7), "he spat on the ground, and made clay of the spittle, and *anointed* the eyes of the blind man with the clay, and said to him, go, wash in the pool of Siloam." In the case, which is related by Mark only (8—22 to 26), *he led the man out of the town to do it;* he then *spit* on his eyes, and put his hands on him, and then asked him if he could see. The man could not then see clearly, although he could see well enough to discover that a man looked like a tree. Jesus then put his hands upon his eyes again, and *bade him look up!* whereupon the man saw distinctly. Jesus then commanded him, "neither to go into the town, nor tell it to any in the town"—a very singular command to be given by one, who was working real miracles in order to prove to the *world at large* that he was the Messiah.

We, of course, cannot say absolutely that there *could* not have been real miracles performed here; but, if there were, any but "*blind men*" can see that they were not wrought in a workmanlike manner.

The next case, being the fourteenth, that will be examined, is that of the alleged restoration of the daughter of Jairus from the dead, and is related by Matthew (9—18 to 26), Mark (5—22 to 48), and Luke (8—41 to 56). Now, supposing the story true, that the child arose, when Jesus "took her by the hand," that does not prove that a miracle was performed, because we do not know that she was dead. These narrators say only what is equivalent to saying, that those in the house *believed* her dead; but it would appear, from Luke's account, that *after* Jesus had seen the child, *he* said she was *not* dead, but that she slept.

The child, say the accounts, was twelve years old. How often is it that children of that age have fits, which, for a short time, cause them to appear dead, and are, immediately afterward, restored to health? How *soon,* after Jesus went into the room, she arose, we cannot know, because those who give us the story, did not see the transaction—they expressly say that, of his followers, only Peter, James and John were suffered to go with him. Whether Jesus lifted her up, as he did Simon's wife's mother, we do not know, but there is ground for the strongest presumption that he *did,* because "he took her by the hand."

The most rational supposition that can be formed from the three disagreeing, indefinite and and carelessly told stories, which come from men who did not see the transaction, is, that the child had a fit, (perhaps only a common fainting fit), and lay *apparently* dead at the time the father ran for Jesus; and that when he arrived *at* the house, and before he went into the room where the

child was, those, that had been in the room, but had then come out, told him that she was dead; but that, by the time he had come to the child, the fit had left her, and she lay asleep; and that then, in the course of the time he remained in the room, (*how long* that might be is uncertain), he spoke to her, took her by the hand and lifted her up, and that she then had in a considerable degree recovered. If such were the case, the story has come to us in just the shape we should suppose such a story would, coming, as this does, from men, who did not see any thing that they relate, but who honestly believed, from what they *heard*, that a miracle was performed.

But there are two or three circumstances, which render it extremely doubtful whether there was any thing in this occurrence, which, to the eyes of the actual witnesses, appeared even so marvellous as the case, above supposed, would have been likely to do. One is, that Jesus, when they came to him first, and told him the child was dead, would permit but three of his disciples to go in with him; and after the transaction (whatever it might be) was over, he charged them, and the parents also, *to say nothing of it to any* one. Another link in this chain of suspicious circumstances, is, that John, who, as the others say, was an eye-witness, says not a syllable about the matter. Now since Jesus would permit but three of his disciples to go in, and charged all, who were eye-witnesses, to reveal nothing, and as John, in his narrative, obeys this injunction, the fair presumption is, that Jesus, when he heard she was dead, doubted his ability to restore her, and did not choose to have too many witnesses to a failure; and that after he had come into the room, the transaction was not of such a kind, that he thought it safe for his reputation as a miracle-worker, that it should be known abroad; but that Matthew, Mark and Luke afterward obtained an inkling of the affair, which in some way leaked out, and which proved sufficient to enable them to make such a brief account of a supposed miracle as they have done.

Are we to believe a revelation on the testimony of works done in secret, and ordered to be kept secret?

The fifteenth case is related by John (4—46 to 54) of the cure of the son of a nobleman of Capernaum. It appears that Jesus did not *see* the subject of this miracle, He was at home; the father came to Jesus, and was told by him that his son lived; he (the father) then went away alone, and, as John says, met his servants, who told him that his son was better, &c. Now, since John did not go with the father, nor see the son, or know any thing *personally* about the time of his beginning to amend, all the testimony, that we have here to support the slightest possible pretence of a miracle, is simply John's virtual declaration that he *heard* (how, or from whom, he heard it, the deponent saith not), that at the same hour when Jesus told the man his son should live, the son began to amend; and that he (John) had no doubt, from these circumstances, that Jesus wrought a miracle upon the sick man. But I suppose the day has gone by when such "circumstantial evidence" as this, is sufficient to prove a miracle.

The sixteenth case, is that related by Matthew (8—6 to 13) and Luke (7—2 to 10), of the Centurion's servant at Capernaum, and is probably the same one as the last; but as the accounts differ a little, I thought proper to consider them as referring to different transactions. Here too the person sick was at a distance from Jesus; so that even if Matthew were with Jesus at the time, (which, if true, is not stated), he could not have personally known any thing about the cure, and

could only have *heard* of it, as John did in the other case. But I suppose few men would now (although many would at the time of Jesus) believe a miracle was wrought, simply because a man, who believed in miracles, should say that he had *heard,* in a particular case, of such circumstances as satisfied his mind that there was one. Besides, another part of Matthew's story cannot be true. The man said his servant was "sick of the *palsy,* grievously tormented." This could not be the case, because palsy, instead of grievously tormenting folks, never *occasions* pain, but generally deprives them of all sensibility to pain.

But supposing the servant did have a sudden and painful attack of some sort, which alarmed the Centurion, and then, while the Centurion was gone to Jesus, did actually recover from it, that is no proof of a miracle, because such temporary illnesses are frequent occurrences.

I now come to the examination of those cases, where Jesus is said to have cast out devils. But we will first inquire whether there ever were such a thing as men's being possessed of devils. There is perhaps not an enlightened Christian in America, who, notwithstanding he may believe that, at the time of Jesus, men were possessed of devils, believes that they ever have been in any other instance, either before or since. And those, who believe that such was the fact then, believe it simply because a *particular set* of superstitious men, in a superstitious age, believed so, and have related some circumstances about it, which they say happened at that time. The testimony of the whole Jewish nation, *who did not also believe in Jesus,* would not have made them credit it for a moment. If the same thing had been stated in any other book than the Bible, men now would no more credit it, than they would an assertion that men were inhabited by the spirits of oxen and horses. Yet such is the unparalleled gullibility of some men in relation to every thing related in the Bible, or connected with Christianity.

There are indeed many Christians now, who do not pretend to believe in this matter literally. They will say that they suppose those individuals, out of whom Jesus was said to cast devils, were *insane,* or had some disorder, which the people of that nation, being ignorant of diseases, *attributed* to the influence of "evil or unclean spirits;" and that whatever that disorder may have been, Jesus cured it miraculously. But if such men will look at the accounts as they are told to us in the New Testament, taking the collateral circumstances, which are related, as facts, it is absolutely out of the power of the human mind, either by sophistical interpretation of language, or by any possible perversion of intellect, to believe that those persons were insane, or that they had any disorder, unless an imaginary one, other than that of being actually and unequivocally inhabited by such evil spirits, as, if they really existed, might more properly be denominated devils than any thing else. The narratives of the doings of Jesus state the *precise number* of devils, that went out of particular individuals—thus leaving no chance for equivocation, or any apology for the pretence that the persons were insane, in the ordinary acceptation of the word. For example, out of Mary Magdalen there actually went *seven devils*—seven individual spirits, or this affair of being possessed of devils was all a delusion. In other cases, Jesus is said to have cast out one, and in one instance a legion. If therefore men will believe the Bible, they must believe in devils too.

These accounts say further that these devils would *speak.* Mark says (5—12), after having spoken of a legion of devils being cast out, that "all the devils besought him, saying, send us into the

swine, that we may enter into them." If we believe the truth of these narratives, there is no escape from believing that there were such living and speaking creatures as devils, who inhabited both men and—swine!

Here the believer, or rather the one who wishes to be a believer (for I do not think it possible for any person of common knowledge and common sense any longer to be actually so) may perhaps, in the height of his embarrassment, put the question, how then are these accounts to be explained, unless we believe that those, who relate them, were knaves and liars? To answer this question is very easy. The people of that nation were superstitious enough to believe in devils, (as people have sometimes believed in witches), and to believe that they entered into men, and then controlled them as they pleased. When such a belief was prevalent, it is to be expected that among the more ignorant, who composed the great body of the community, there would be multitudes, who would imagine themselves to be possessed of them, just as some person, who have believed in witchcraft, have imagined themselves bewitched. A person, who should suppose himself under the dominion of devils, would imagine himself actually compelled, by a power which he could not resist, to such unnatural and strange conduct as he believed an evil spirit would instigate men to. And this fact accounts for the conduct of the man, (or men, for here again the stories disagree), spoken of by Matthew (8—28 to 34), Mark (5—1 to 17), and Luke (8—27 to 36), who was said to live among the tombs, to be driven by the devil into the wilderness, &c. A man in this condition, could be restored in no other way than by some deception of the imagination. This man *was* so restored. He believed Jesus to be the Son of God, as is proved by the fact that he addressed him as the "Son of the most high God." He believed also that Jesus had power over evil spirits, as is proved by the circumstance that he "besought him not to torment him." When therefore this powerful being should command the devils to go out of him, he, of course, would suppose that they had left him, and would then appear the sane. As for the rest of the circumstances related, such as that of the devils talking, going into the swine, &c., they are only such *embellishments* as a story of that kind would naturally gain by a very little circulation in such a community as that—and these historians, who give us the accounts, having, like the rest of their countrymen, perfect faith in the reality of such circumstances, would relate them, as they heard them, without in the least doubting their truth. It is evident that they only recorded the flying story of the times, from the fact that they disagree as to the number healed. Matthew says two, Mark and Luke but one. That their different accounts refer to the same transaction, is evident from the similarity of the stories, and the language of each, and also from the circumstance that they are related by each immediately after the story of Jesus's calming the tempest.

Besides the above, there are five different instances of Jesus's casting out devils. One is related by Mark (1—23 to 26), and Luke (4—33 to 35). From both these accounts, it appears that the man, out of whom the devil was supposed to be cast, considered Jesus "the Holy one of God;" and that circumstance is sufficient evidence that the cure, like the disease, was the work of the imagination.

Another case is related by Mark only, (7—25 to 30). All that Mark knew of this case, as appears from his account, was, that he *heard*, (for *he* is not supposed to have been with Jesus), that a

woman came to Jesus, and told him that her daughter, who was at home, was possessed of a devil; that he told her the devil had gone out; and that when she arrived at home, she found her daughter lying on a bed. To Mark's mind, and perhaps also to the minds of some men in more modern ages of the world, these facts, thus obtained, proved a miracle.

Another case is related by Matthew (17—14 to 21), Mark (9—17 to 29), and Luke (9—38 to 42). According to Mark's account, Jesus "rebuked the foul spirit, saying unto him, Thou dumb and deaf spirit, I charge thee, come out of him, and enter no more into him." (Can any thing be imagined more ludicrous or disgusting than such a speech? Verily, "never man spake like this man"). Still, after he had said thus, "the spirit cried, and *rent him sore*, and came out of him, and he was as one dead, insomuch that many said he is dead. But Jesus took him by the hand and lifted him up, and he—arose!" and from the circumstance that he did arise, and probably appear more calm than before, they all inferred that he had been delivered of a real devil.

This wonderful exhibition of miraculous power so astonished Jesus's disciples, that they afterwards asked him why *they* could not cast him out? (They, it seems, had attempted it, and failed, (Mark 9—18). He answered—doubtless with an air and manner becoming the solemn nature of the case—that "this kind (of devils) can come forth (be brought forth) by nothing, but by *prayer* and—*fasting!*"

Another case is related by Matthew only (9—32 to 34), of the cure of a *dumb* man, possessed of a devil. I will here add nothing, but a note of admiration, which appears to be very much needed, to the following brief, but graphic description of this affair by Matthew himself. "And when the *devil* was cast out, the dumb spake, and the multitudes marvelled!"

The last case of this kind of miracle-working, that remains to be mentioned, is that of the cure of the man, who, according to Luke (11—14), was dumb, but, according to Matthew (12—22), was both *blind* and dumb. Both accounts refer to the same transaction, as may be seen by the context following each. The difference in the accounts, of course, proves only the *honesty* of the writers; it does, *by no means*, prove their lack of inspiration, their carelessness about particulars, or their readiness to record any idle story, which they might hear, without inquiring cautiously into its truth. Each one supposed that future generations could only wish to know the simple fact that a miracle was wrought; and therefore, not imagining that they themselves could ever be suspected of having been mistaken as to the reality of the miracle, did not trouble themselves to relate many of those circumstances, that would enable men now to judge whether they actually were or not.

Matthew says that "they brought unto Christ one possessed with a devil, *blind* and dumb, and he healed him, insomuch that the blind and dumb both spake and saw." Luke says, "and Christ was casting out a devil, and it was dumb. And it came to pass, when the devil was gone out, the dumb spake, and the people wondered."

Language could hardly be selected, that should tell a stronger tale of superstition, than is conveyed in these brief lines. Men imagining themselves possessed of a *devil!* and that the devil

prevents them from *seeing!* and speaking! others standing around to see the Son of God dislodge a devil, as boys stand around to see the tricks of a juggler.

If the Bible has accomplished enough of good to atone for the numerous and mischievous superstitions, which, in various ways, it has entailed upon, and introduced into, men's minds, it has done more good than, I think, is apparent to most impartial observers of the *whole* of the history of Christendom, as compared with that of other nations of the same degree of intelligence. Even if it has not originated, it has, at least, justified, spread, and probably prolonged a belief in witchcraft and sorcery—it has introduced superstitions about a *Son* of God; about his visiting the earth in the disguise of a man! about a Holy Ghost, or Holy phantom; about a fictitious atonement, and a barbarous and useless sacrifice, which have for ages and centuries engrossed the minds of the few learned men, who otherwise might have been engaged in liberal schemes for improving society. And finally, it has spread wide a belief in angels, and miracles, and evil spirits—in a devil and his ten thousand deputies prowling about the universe.

I must now think that, of the thirty-three miracles of Jesus, twenty two have been disposed of in a manner, if not satisfactory to, at least, unanswerable by, the most resolute believer. Eleven remain to be examined.

One is that of calming the tempest, recorded by Matthew (8—24 to 27), Mark (4—37 to 41), and Luke (8—23 to 25). Matthew says "the ship was *covered* with the waves." Mark says "the waves beat into the ship, so that it was now *full.*" Luke says "they were *filled* with water." Now we know that these accounts cannot be true, because Jesus would not have remained asleep, had this been the case. These errors are mentioned merely to show the propensity these men had to exaggeration—a propensity, that, in many other instances, is manifest enough; but which is here so palpable that it cannot be denied.

Matthew says "there arose a great tempest," and Mark says "there arose a great storm of wind." But since these men have already been convicted of exaggeration, we may now judge for ourselves how great a "tempest" would be likely to arise on a little petty lake; (fourteen miles long, and five wide;) and, unless we have a very strong desire to believe in miracles, we shall probably come to the conclusion that a slight squall arose, such as generally continues for a few minutes; that, it being in the evening (as Mark says, and as is probable from the circumstance that Jesus was asleep,) these timid and superstitious men thought they should certainly be drowned; that Jesus, being called, commanded the waves of this mighty sea to be quiet; that when this sudden squall had passed, which probably happened very soon, the waves subsided, and they then thought the act of Jesus a miracle. These narrators, although they generally appear very fond of using the word "immediately," when relating any occurrence, which they themselves could not have seen, but in relation to which that word is necessary in order to make out a good miracle, have, nevertheless, in this case, neglected, for some reason or another, to tell us how *soon,* after the command was given, quiet was restored—the fair presumption is then that the wind and waves took their own time in this matter, as they always have done in every other of the same kind.*

Another is that of Jesus's walking on the sea, related by Matthew (14—24 to 32,) Mark (6—47 to 51,) and John (6—15 to 21.) John says that after Jesus had entered the ship, "immediately it

was at land whither they went"—of course, it must have been *near the shore* when Jesus came to it. Furthermore, they all agree that it was in the night; John says it was dark. Now, inasmuch as Jesus never shewed any inclination to trust himself on the water in the *day*-time, without any thing to bear him up, is it not probable that he had at this time a plank, a slightly built raft, a small boat, or something else to stand on, which those in the ship or large boat did not see, or that he walked *in* the water instead of *on* it, rather than that he attempted to perform a miracle of that sort, and at that time, when none but his disciples, and probably not even these, would observe it? If he really could walk on the water, why did he not, at least once in his life, do it in the day-time, and in the presence of a concourse of people? He surely had opportunities enough.

But perhaps it will be asked, how did Jesus get to that side of the lake, unless he walked across the water? and a person, who should simply read the accounts of this affair, without looking at the map, would probably be misled into the supposition that the boat had *crossed* the lake, to the other side from where the disciples had left Jesus, and therefore that he could not have come to them unless he had crossed the lake also. But according to John (6—23,) it was at or near Tiberias, that the disciples left Jesus, and they landed (Mat. 14—34) in "the land of Genessaret;" and it so happened that Tiberias and Genessaret are on the same side of the lake, (See Ingraham's map of Palestine) adjoining each other. Jesus, therefore, undoubtedly walked from one place to the other, (perhaps a mile or two) on the land, while the disciples went in the boat.

The third one of the eleven is that of the fig-tree, related by Matthew (21—17 to 22,) and Mark (11—12 to 23.) Matthew says the fig-tree withered away "*presently.*" Mark says that as they passed the *next morning* they discovered that it was withered away. But they agree as nearly as we can reasonably suppose two such persons would, who should relate miracles upon hearsay. Since the story has nothing probable about it, and since the accounts disagree, it is probable that they both differ a little from the truth, and that the fig-tree was withered away *when* they *first* came to it. This supposition is rendered more probable by the fact that Luke, who speaks of Jesus being at Bethany (19—29 to 40,) and of some other circumstances mentioned by Matthew, says nothing about the fig-tree. It is also rendered probable by the fact that there were no figs on the tree. Mark pretends to account for there being no figs on it, by saying that the time of figs had not yet come—but this is clearly a falsehood, for if such were the truth, why did Jesus go to the tree at all? Or way did he manifest so much disappointment at not finding figs, as to "curse" even a tree?"†

The fourth, related by Mark only (7—32 to 36,) is that of the cure of a man "who was deaf, and had an impediment in his speech." Jesus, in order doubtlessly to have a *fair opportunity* to perform this miracle, and to do it in a manner to furnish evidence to the *world* of his *miraculous power,* "took the man aside from the multitude." When he had done this, he "put his *fingers* into his ears;" "then *spit,* and touched his tongue;" then "looked up to heaven, and *sighed,*" and uttered the word Ephphatha, and thus, as Mark heard the story, opened the man's ears, and loosed the string of his tongue so that he spake plain, and then "*charged* them that they *should tell no man*" of the occurrence.

The fifth, related by John (2—1 to 10,) is that of turning the water into wine. John says that this was the first miracle that Jesus ever performed; but does not say that *he* saw it done; and if it were his first attempted miracle, it is entirely improbable that John was present. Besides, towards the close of the preceding chapter, John speaks particularly of Andrew, Peter, Philip and Nathanael, as having become disciples of Jesus; but mentions none others as such, previous to this wedding. We must therefore suppose that John here only tells us a hearsay story. Now it would be nothing strange if Jesus were to go to a wedding—nor would it be any thing strange if they were to have wine there—nor would it be strange if Jesus should there make some pretensions to miracle-working—nor would it be strange, if, out of these circumstances, after he had obtained a little notoriety in his way, a story should be got up and circulated similar to that told by John; but it would be very strange if a man should work a miracle; and it would also be very strange that neither Matthew, Mark, nor Luke should ever have heard of this miracle, if there really were one wrought, (if they had heard of it, some of them would undoubtedly have recorded it, since they have taken the pains to record so many things of no consequence at all); and it would also be very strange if the saviour of a world should perform either his first or last miracle of this kind. We should as naturally expect a Son of God would exhibit his powers by making broomsticks dance cotillions, as by such a miracle as this. Still—as was before remarked—such a man as I have supposed Jesus to have been, would, when first beginning hesitatingly to think about working miracles, be very likely to have made an attempt or pretension of this kind—and if he but made such an attempt or pretension, that circumstance alone would afford sufficient materials for a future story.

The sixth, related by Luke (7—11 to 16), is that of raising from the dead the son of the widow of Nain. This story is told by none but Luke. He, as I have said before, was a citizen of Antioch, and was converted to Christianity by Paul—of course, he never knew any thing personally of Jesus or his miracles; he must therefore have depended entirely upon the stories of others for his information. Of whom he obtained it in this instance we know not. He wrote his narrative some thirty or forty years after the death of Jesus. So that all the evidence we have here to prove an occurrence so wonderful as that of a man's being restored to life after he had once died, is a simple declaration, made many years afterward, by a man living remote from the place, and who could not have personally known any thing about what he was writing, but who has been shown heretofore to be credulous enough to believe miracles on the testimony of others.

Furthermore, neither of the other narrators, although two of them were of the twelve, give us any account of such an occurrence, although, if it really happened, they would most surely have heard of it, and if they had heard of it, they would as surely have related it; for, in order to make their stories as marvellous as possible, they have already gone so for as to relate for undoubted miracles many things, which they could not have known to be true, even if they were true.

The seventh case, that of raising Lazarus from the dead, is related by John only, (11 chapter). John does not say that he *saw* the act. If then we believe that, in this case, a man really died, and was then restored to life again, we must believe a fact, such as we could not now be made to believe if ten thousand of the most respectable men of any nation on earth should solemnly testify

that they saw it. We must believe it too on the testimony of a single individual—one who gives the account forty years after the transaction is alleged to have been performed; who does not even say that he saw it; who is not supported by a single one of the many alleged eye-witnesses, nor by the testimony of any other person.

If the ten thousand should testify as I have supposed, we should then say, either that the man had not been actually dead, or that some deception or another had been practised upon the witnesses—and we should say so with perfect confidence too, because we should know, as absolutely as it is possible for us to know any thing, that such an occurrence could not have happened. Yet we are called upon to believe it in this case, upon such testimony as I have mentioned. Is it possible that the attempt can be made at this day, to impose upon men's understandings by such stuff as this?

But there is evidence tending to discredit this story of John.

One part of this evidence is, that neither Matthew, Mark nor Luke speak of the affair. Yet Luke heard of, and even related (10—38 to 42), so small and unimportant a circumstance as that of Jeaus's once being in Bethany, at the house of Martha, the sister of Lazarus, and yet he never heard (as we may safely infer from the fact that he never related it) of this miracle wrought upon Lazarus—a miracle too, that is so much more wonderful than Jesus was generally supposed to perform.

If Jesus had actually raised Lazarus from the dead, and the act could have been well authenticated, (hardly a supposable case however), it must have been evidence of the strongest character of any that his works had ever furnished, that he possessed miraculous power—and so his disciples must have considered it, if they had possessed common understandings. Yet it was never noised abroad so as that any except John ever heard of it.

Matthew (26—6 to 13), Mark (14—3 to 9), and Luke (7—37 and 38) also heard of, and related, the circumstance of Mary, whom John says (11—2) was the *sister* of Lazarus, anointing the head of Jesus with ointment, yet they neither of them utter a syllable about his raising her brother from the dead. It is difficult to account for this fact, unless we suppose that John was actually dishonest, or that he took up, believed and recorded a flying story, which an occurrence of some kind had given rise to, but which was without any foundation in truth.

Furthermore, John says (11—45, 46 and onward) what is equivalent to saying, that a part of the eye-witnesses themselves, not only disbelieved that Jesus raised Lazarus from the dead, but believed that he was attempting to practise some imposition upon them. He says, "then *many* of the Jews, which came to Mary, and had seen the things which Jesus did, believed on him, *but*," he adds, (and this "but" spoils his story) "*some* of them went their ways to the Pharisees, and told them what things Jesus had done." He then represents that the Pharisees forthwith attempted to apprehend him, on account of the stories that had been told them by some of those who had witnessed the transaction.

It seems hardly possible to vindicate John from the charge of actual dishonesty—for he pretends to relate even the *conversation*, which the Pharisees held on this subject, when he certainly

could not have known it. He also attributes to them motives and designs, which it is impossible should ever inhabit the breasts of human beings, viz: such as wishes to take a man's life because he had raised a person from the dead. It is also incredible that they should *dare* attempt such an act, even if they wished to have it performed.

I think it would not be difficult to show that John's love of distinction, his hatred of the Pharisees, and his determination to spread Christianity, led him to dishonest lengths in other cases. He was the one, (Mark 10—35 to 41), who was so eager to obtain from Jesus a promise of preference over the rest of his disciples, in heaven, (or more probably in the earthly kingdom), as that they were offended at him. He shows the same disposition afterwards, in his own narrative, by speaking of himself, in four or five different places, as "that disciple whom Jesus loved,"—thus pretending that he himself was the favorite over the others.

He also equivocates, (21—22 and 23), by pretending that Jesus, or the one whom he supposed to be Jesus, did not mean what his words most plainly import, and what John acknowledges that the disciples at the time understood him to mean. His motive for this equivocation may be traced to a circumstance related in his Biography in Lempriere's Biographical Dictionary, where it is said that he wrote his narrative for the purpose of proving that Jesus was not a *man,* and in opposition to what he deemed an error, viz: a belief, at that time avowed, that he was but a man. This equivocation was necessary in order to make it appear that Jesus did not intend to intimate that certain things would happen, which had not happened, and were not likely to.

This purpose, in writing his narrative, accounts for his superior carefulness in relating, in connexion with the supposed miracles, any circumstances that might tend to discredit their reality; and also for the *conversations* which he relates as attending them; although it is evident that he must either have invented much of them, or adopted them from the mouths of others, without any thing like reasonable evidence of their genuineness—the former of which suppositions appears the more probable, both from his own character, (for he could then invent such conversation as would suit the circumstances of the case), and also from the fact that he could not, forty years afterward, have remembered such full, connected and unbroken conversations as he has pretended to relate.

John also (12—10 and 11) shows his bitter malignity, and his readiness to make the most diabolical charges, against such as did not believe Jesus to be the Messiah, by saying that the Chief Priests "consulted that they might put Lazarus also to death."

Finally, he has more unmeaning theological cant in his narrative than all the other three together.

Nevertheless, it is possible that John has told an *honest* story in this case of Lazarus, and one too that is true in its main features. But if he has done so, he has implicated a man, whose character is of much more consequence to the Christian religion, than his own; and that man is Jesus. Several circumstances are related in this story, which, if they are considered to have really happened, furnish palpable and glaring evidence of collusion between Lazarus and Jesus. For example—Jesus knew, *before* he went, at this time, to Bethany where Lazarus lived, that *Lazarus was*

dead, (John 11—14). Now how did he (being, as appears by the context, at a considerable distance off) know this fact, unless there had been a previous understanding between them that Lazarus should die about that time? He had heard (11—3) that he was *sick*, but there is no evidence that he had *heard* of his death. On the contrary, the disciples were utterly ignorant of it (11—11, 12 and 13) until the information unexpectedly came from Jesus himself. How came Jesus by this information without the knowledge of his disciples? If a messenger had brought it, they must have known it too, for some of them were undoubtedly all this time with him. We have no right to say that he obtained it supernaturally, because it is not yet proved that he had any supernatural power. Yet *he* knows the fact, when they do not, and there is a way by which he may have obtained this knowledge. That way is this—Lazarus may have directed his sisters to send this message to Jesus, that he was sick, and this may have been agreed upon as the signal by which Jesus might know that Lazarus was about to die. If such were *not* the purpose of this message, why was it sent? We are told that Jesus *loved* Lazarus. But why then did he not go to him immediately on hearing that he was sick, instead of waiting, apparently without any necessity, for two or three days? The reason is obvious—he waited for him to die, and he knew that he would die. But he could not have known that he would die, unless it had been previously agreed that he should die. I repeat that it cannot be said that Jesus knew, by means of his *supernatural power,* that Lazarus would die; because that would be attempting to defend the miracle, on the *evidence* of his supernatural power, instead of proving the supernatural power by the miracle. Besides, if he could know, by means of his supernatural power, either that Lazarus was dead, or that he would die, he could also, in the same way, have known that he was *sick*, and it must therefore have been unnecessary to send the information of his sickness to him. Is there then any way, other than by supposing collusion, in which this matter can be explained?

Again. Jesus declared (11—4), when he first heard of the sickness of Lazarus, that one object of this sickness was, "that the Son of God might be glorified thereby," (that is, that he himself might get some credit by it). Now, how did he know that it would terminate so as that he should get credit by it? We cannot, I again repeat, say that he knew it by means of his supernatural power, because that would be assuming him to have supernatural power, and then attempting to prove the miracle by it; whereas the power must first be proved by the miracle. Besides, there are too many cases of his making inquiries for the sake of ascertaining what his inquiries imply that he did not know, to leave any apology for pretending that he knew any thing supernaturally. There is then but one answer to the question, how he knew beforehand the manner in which this sickness would terminate? and that answer is, that it had been agreed between him and Lazarus how it should terminate, and Jesus *inferred* that he should gain some credit by it.

Again. There is something very suspicious in the manner, in which he communicated to his disciples the fact, that Lazarus was dead. He communicates it to them as if it were something, which he was aware would surprise *them*, but which nevertheless was *not* new to him. The manner, in which he *introduces* the matter, is peculiarly suspicious. He does not at once come to the point; but speaks allegorically, says Lazarus is asleep, &c., and that he must go and wake him.

Another suspicious circumstance is, that Lazarus was buried neither in a grave, nor a tomb, but in a *cave.* The man might live very well in a cave; he might himself have deposited provisions there beforehand, and he might have told his sisters where and how soon to bury him, after he was dead. He seems also to have had a very short sickness: his sisters send word to Jesus that he is sick, and the next thing we know of him is, that in about two days, (as it would appear from the story, although it is not explicitly stated), he is dead. He seems too to have been *buried* in a great hurry; for when Jesus arrived, "he had lain in the *grave* four days."

Another suspicious circumstance is, that the stone, that lay upon the cave, must be removed, (11—39), by hand too, before the supernatural power could operate so as to bring the dead man out. A stone, laying over the mouth of a cave, must be a great obstacle in the way of a miracle.

Another circumstance, of the same import, is, that when Jesus came to the work of raising Lazarus, "he cried with a *loud* voice," to call him out. Now it might be necessary to speak loudly to make a *living* man, who was in a *cave,* hear; but a dead man could have heard a less labored tone equally well.

Again. There was an altogether *unusual* ostentation about this miracle. Jesus talked a great deal about it beforehand; spoke of it as an affair that was to accomplish great things in the way of glorifying God, and *himself* too.

Another circumstance against the reality of this resurrection from the dead, is, that Jesus never raised any others from the dead. (I here take it for granted that it has been shown that there is no sort of reason for pretending that he raised the son of the widow of Nain, or the daughter of Jairus). If he could really raise men from the dead, why did he not show his miraculous power again and again, in this way, so as to place it beyond dispute; instead of curing sick folks, casting out devils, spitting in men's eyes, filling them with clay, touching their tongues, putting his fingers in their ears, and such like disgusting farces, ten thousand of which would be no evidence of any thing except that he was an impostor or a fool? If he could really raise men from the dead, he could have established himself at once on the credit of his miracles. And yet one solitary case, and that too surrounded by circumstances of the strongest suspicion, is all the evidence he ever gave, in his whole career, of his power to raise the dead.

Again. Judging *naturally* of a portion of this story (11—45 and 46) we have abundant evidence that a part of the eye-witnesses themselves detected the hoax on the spot. The story is that *some* of them believed, but that others went forthwith to the Pharisees—known enemies of Jesus—and made such representations that measures were immediately taken to have him apprehended. How is this conduct of these witnesses to be accounted for, unless they discovered the cheat?

It appears also (John 12—10), that the Chief Priests were satisfied—probably by the story of the same witnesses—that Lazarus also was a knave, for they are said to have consulted to put him to death—a thing, which they never could have dreamed of doing for the cause which John assigns.

The world has been full of alleged miracles, but I do not believe another record of one can be produced, containing such irresistible evidence of fraud as this.*

To proceed with the examination of the remaining miracles. There are two cases, where Jesus is said to have fed the multitude miraculously. One case is mentioned by Matthew (14—15 to 21), Mark (6—41 to 44), Luke (9—12 to 17) and John (6—3 to 14), where five thousand (an undoubted exaggeration—another "great tempest") were said to have been fed from five loaves and two fishes. The other instance, where he is said to have fed four thousand, is mentioned only by Matthew (15—32 to 38) and Mark, (3—1 to 9). All that is necessary to reply to such accounts as these, is, first, that neither of those, who tell the story, says that he himself was present, and even if any one of them had said so, they have all been convicted of so much exaggeration and misrepresentation, that they would not deserve to be credited so far as to have a miracle, or any other improbable story believed on their testimony—and secondly, that if Jesus ever had any thing to do in distributing food to five thousand men, who believed in his miraculous power, there were then five thousand probable chances; and if he ever had any thing to do in distributing food to four thousand of the same sort of believers, there were then four thousand probable chances, that stories respecting the circumstance would be told, and would get magnified into a miracle, although there were none, and that these stories would be believed by all his followers—these narrators among the rest—who should not absolutely know the contrary, and who were eager to believe every marvellous story about him, of which there was to their minds a possibility of truth.

In the last of these two cases, a very good reason can be conjectured, why the fragments, that remained, should be *equal* to the amount distributed. It appears (Mat. 15—32, Mark 3—2) that this company had been in "the wilderness" three days, and it is probable that the loaves and fishes had been there the same length of time. The climate of Judea is warm.

Another case is that of the miraculous draught of fishes. It is related by Luke only (5—4 to 11). He says that fishes enough were caught in one net, at one draught, to fill two "ships" so full that they began to sink. (Mr. Luke, that's a great story to tell). Matthew (4—13 to 22) and Mark (1—16, 18) both speak of the same occasion, and of some of the incidents related by Luke, yet neither says any thing about any fishes being taken—the probability is, therefore, that Luke was misinformed in this respect. Besides, Luke says (5—9 and 10) that John was there, and that he "was *astonished* at the draught of the fishes which they had taken"—yet, for some reason or another, John did not see fit to vouch for this miracle, or even to allude to it—perhaps he had a little more discretion than Luke.

One miracle only remains. This is related by Luke only (22—50 and 51). He says that when a servant of the High Priest had his ear cut off, Jesus touched it, and healed it. It is a sufficient answer to this, to say that Luke was not there, and probably never heard even of the ear being cut off until many years afterward—that during this time a story about so insignificant an incident as the cutting off of a man's ear, would very naturally gain the appendage, which is here attached to it, viz: that it was also healed. But there is another answer, which, even if it stood alone, would be sufficient. That is, that although Matthew, Mark and John (two of whom were of the twelve, and were probably at or near the spot at the time) relate the fact of the ear being cut off, neither of them says a word about its being healed.

Thus much for the reality of those miracles, that have imposed on a larger proportion of enlightened men, in *modern* times, than at the time when they were supposed to have been performed. If an hundredth part of the effort, which has been made to prove these events to have been really supernatural, had been directed (as on the plainest principles of reason it should have been) to the accounting, in a *natural* manner, for the *stories respecting them*, the difficulty would have long since vanished.

Honesty of *intention* may, nevertheless, in general, fairly be accorded to these writers, in circulating these stories about miracles, for the truth of which they do not explicitly vouch as eyewitnesses. Some of these transactions were probably supposed by Matthew and John, who were of the twelve, to have occurred when they were absent; and they, having often seen him, as they believed, cast out devils, and heal the sick, which, to their minds, were as real miracles as the raising of the dead, or the removal of a mountain, would not in general doubt in the least the truth of any stories that they might hear. Mark and Luke, not being of the twelve, but being, Luke certainly, and Mark probably, subsequent converts, of course depended upon the stories of others for every thing they relate. Luke, depending upon this source of information, has gone so far as to relate (Chap. 1), for realities, even the *conversations,* that *angels* were said to have held with persons on earth fifty or sixty years before the time when he wrote his narrative. Can any stronger evidence be desired to prove that many of those conversations and circumstances, which these narrators recorded so many years after the transactions, were such as their own imaginations, from having long dwelt upon those occurrences, and the imaginations of others, among whom the stories had previously circulated, furnished as appendages to the truth? Or can any stronger proof be required of the credulity and superstition of these writers, or of their readiness to adopt any story, however improbable in itself, that should be floating in that community? a community, the very atmosphere of which, it would seem, must have been saturated with reports of the marvellous works of the various Christs or Messiahs, who each appear to have been attempting to prove their pretensions by the same kind of means. Yet it is almost entirely this kind of hearsay testimony, such as would be scouted at in a Court of justice, if offered for the purpose of proving the most common and natural events, upon which men believe in occurrences vastly more improbable than any that ever resulted from natural causes.

One argument, that is frequently alluded to in support of the reality of the miracles of Jesus, is perhaps worthy of a notice here, in addition to what has been said. This argument is, that even the opposers of Jesus acknowledged that he wrought true miracles. One answer to this argument is, that their admissions are not at all binding upon us: and therefore even if they did make them, we have an undoubted right to inquire whether they may not have been mistaken. And if we make this inquiry, we shall unquestionably find that they may have been, because among them a miracle was considered to be a very common occurrence, and capable of being wrought apparently by almost any one who was disposed to attempt it. It would be nothing strange therefore if some of the opposers of Jesus should acknowledge that he wrought miracles. He himself virtually acknowledges (Mat. 24—24) that the false Christs could work miracles, and also that the man, who used his name to cast out devils (Mark 9—38, 39 and 40), wrought real miracles.

Another answer is, that these admissions generally appear to have been made, if made at all, not upon actual observation, but upon the representations of others. They also appear not to have been *heard*, by these writers who relate them, but simply to have been *heard of*, or *inferred*, by them; as they evidently must have been in the case of Lazarus (John 11—47), because these disciples could not have been present at the consultations held on this subject by the Priests and other leading men. What then would a million of such facts be worth to prove miracles?

There are a few additional circumstances tending, so obviously, to confirm the views I have taken of the miracles of Jesus, that they are not to be omitted.

Luke says (23—8 and 9) that when Jesus was brought before Herod, Herod *desired* to see him work some miracle, and asked him many questions; but that Jesus answered nothing. It appears that Herod intended to deal uprightly with Jesus, and was also prepared to believe the evidence of miracles. Why then did not Jesus, if he possessed miraculous power, take advantage of such an opportunity, to do something before this assembly to prove that he was what he had professed to be?

At another time the Jews (John 2—18 to 21) asked him to show them some sign (miracle) as an evidence of his right to attempt to drive them from the temple—and a very reasonable request it was. But the only miracle, that he proposed to work, was to rebuild the temple in three days, provided they would first destroy it. But they, like rational men, had not sufficient confidence in his power to do it, to induce them to demolish it, for the sake of giving him an opportunity to try the experiment.

John says that Jesus here referred to "the temple of his body." This is evidently another of John's equivocations, for if he did refer to his body, he was a cheat and an intentional deceiver, since he must have known that he was, by his language, causing them all to understand him as referring to the temple, in which they then were.

In the early part of his preaching, when he was at Nazareth, (Luke 4—16 to 30), he went into the synagogue, and pretended that he was the one who had been prophesied of, but virtually acknowledged that they had a right to expect that he would show them some miracle, by which they might know that he was what he pretended to be—and the only reason he assigned for not performing one, was this potent one, viz: that a prophet would not be respected in his own country. Those, who heard him, were so offended at what appeared to them (reasonably too) an attempt to dupe them, that they thrust him out of the city, and led him to the brow of a hill, as if they intended to cast him down headlong; but when they had come there, "he, passing through the midst of them, went his way"—which language, if we had the true version of the affair, would probably read thus—"when they had frightened him by pretending to be about to cast him headlong down the hill, they let him go."*

John, speaking of another occasion, says (12—37) "though he had done so many miracles before them, yet they believed not on him." It appears *extremely* probable that God would send a messenger on earth, and, in order to prove him to the world to be his messenger, should give him

miraculous power, and that then this messenger should not be able to perform miracles of such a kind as would convince even eye-witnesses.

In another instance Matthew says (13—58) "and he did not many mighty works there because of their unbelief." Now if it was the great purpose of his mission to bring men to believe on him, when he found any incredulous, that circumstance, instead of furnishing a reason why he should *not* work miracles before them, was only an additional reason why he should not fail to work such as would inevitably convince them.

Mark, (6—5 and 6), speaking of the same occurrence, says, "and he *could* do there no mighty work, save that he laid his hands upon a few sick folk, and healed them, and he marvelled because of their unbelief." This declaration of Mark virtually denies his miraculous power *in loto*, because if he possessed it, he could certainly, wherever he might be, have found something beside sick folks upon which to exert it.

When the Pharisees wished to see some evidence of his being what he pretended to be, (Mark 8—11 to 13), he appeared (to his disciples at least) *deeply afflicted* that men's hearts should be so *hard* as not to believe without evidence, and said he would not show them any sign, but "left them and departed." Mark says the Pharisees asked him the question "tempting him." But the question was certainly a proper one, and what evidence is there, that their motives, in asking it, were not of the same character?

For some reason or another, Jesus was very suspicious of the enlightened part of the community—a little more so: it seems to me, than a genuine Messiah would have any occasion to be. He was continually apprehending some trap, or design against him. He was also continually laboring to excite the prejudices of his disciples against them—conduct not very consistent with the idea that he was really a superior being.

Again. Jesus told his disciples (Mark 11—23), that if they were to command a mountain to move, *and should not doubt in their hearts that it would move at their bidding*, it actually would move. Now why did not he himself remove a mountain, if it could be so easily done, and thus present to all future generations a convincing and eternal monument of his Messiahship? One such miracle would be worth a million performed upon persons that pretended to be sick, or possessed of devils. It would have been worth a million of those pretended miracles, that, like all the other pretended miracles with which the world has been filled, vanished at the moments, and left no trace behind. But one answer readily occurs to such a question, viz: he could not.

Some may say that it did not become him to perform miracles, that would not accomplish any physical good—but if he were such a being as he pretended to be, and his doctrines were true, it was of more importance to bring men to believe these facts, than it was to cure all the sick people that ever lived. He ought therefore to have adapted his miracles to the accomplishment of the most important purpose he had in view.

John says (6—30), that on a certain occasion, the people asked him directly, "What sign shewest thou then, that we may *see*, and believe thee? What dost thou *work?*" This was putting the question home to him, and why did he not meet it, if he could, as he evidently ought? Could any

request have been more reasonable, or more candid? Or could any combination of circumstances whatever have called upon him more urgently to display his miraculous power, if he had any, than did those in which he was then placed? It appears by the context, that there was an assemblage of people present, who had taken much pains to find where he was, and to come to him, and their question implies a readiness to be convinced by miracles. Yet all the satisfaction, which this man, who went about the country boasting what he *could* do, gave to these honest, proper and candid demands, was to evade *them*, to stand on his reserved rights like one who had nothing else to stand upon, and then to run into a long fanfaronade about his being the bread that came down from heaven, about his being better bread than the manna that was given to the Israelites, about the effect of eating his flesh, and drinking his blood,* and such like stuff, disgusting enough to sicken any one except such as have made up their minds, in advance, to swallow, as a delicious morsel of divine truth, any thing, and every thing, that may be found in the Bible, be it whatever it may.

John also (6—66), after having related the above affair, adds, "From that time many of his *disciples* went back," (as well they might) "and walked no more with him. Then said Jesus unto the twelve, will ye also go away?" The terms of his question to the twelve seem to imply that *all* his disciples, who were present, except the twelve, deserted him at this time. But whether all deserted him, or not, there can be no reasonable doubt, judging from John's account, that a large portion of them did. Now it appears, by the former part of the chapter, that but a short time before, he had five thousand persons following him—and yet he now finds himself so nearly destitute of friends, that he is afraid that even his chosen few will desert him also. It has been said by the advocates of Christianity, that we ought not to consider the reality of the miracles of Jesus as resting solely on the testimony of the narrators, but as being supported by the convictions of great numbers of eye-witnesses. How, let it be asked, will those advocates pretend to meet the fact above referred to? Here were "many" men, who had followed Jesus so long, that John calls them "his disciples,"—men, who undoubtedly had seen as much evidence of his miraculous power as he was able to exhibit—who were undoubtedly credulous enough to have been easily deceived by pretended miracles, and who yet desert him, and refuse to follow him any longer. The testimony therefore of "many" of his own followers, credulous and simple as they were, instead of being in favor of the reality of his miracles, is directly and positively against them. The inquiry may now safely be put, whether Christians have it in their power to put into their case, any evidence that can control this otherwise decisive testimony, which comes from those whom they had all along claimed as their own witnesses?

If any one wish now to determine whether a sufficient answer have been given to the alleged miracles of Jesus, he has but to look back, and see whether he can put his finger upon any individual case, and say that the evidence relating solely to that case is conclusive that there must have been a miracle. Unless it be *conclusive* of that fact, it is unreasonable at all to regard it; because the probability must always be against the miracle so long as there is a discoverable lack or uncertainty in the evidence.*

The supernatural occurrences, that are said to have taken place at the death of Jesus, may properly be referred to in connexion with the miracles.

Matthew (27—45), Mark (15—33) and Luke (23—44) say that while Jesus was on the cross, there was, for three hours previous to his death, "*darkness* over all the land" The testimony of Mark and Luke to this matter is not worth noticing, because there is no reason to suppose that they state any thing but a hearsay story. As respects Matthew, he has said enough to prove, that, if there were any darkness at all, there was none that was so extraordinary as it must be supposed, from the fact of his mentioning it, that he intended to have people believe it to be. In the first place, if it had been thus extraordinary, the Jews must have been alarmed, and have desisted from the execution; but the fact that they did not desist, although by so doing, at any time during these three hours, they might have saved the life of Jesus, is sufficient evidence that there was no such darkness. Matthew (27—36 to 49) says also what is equivalent to saying, that those, who witnessed the crucifixion, felt a curiosity to see whether any thing extraordinary, or supernatural would happen, but saw nothing of the kind.—"Sitting down, they watched him there." He then adds that some of them said, "Thou that destroyest the temple, and buildest it in three days, save thyself. If thou be the Son of God, come down from the cross." The "Chief Priests, Scribes and elders" also said "he saved others, himself he cannot save. If he be the king of Israel, let him now come down from the cross, and we will believe him. He trusted in God; let him deliver him now if he will have him." And again, but just before his apparent death, when he had cried "Eli, Eli," &c., and one had then run to put a sponge to his mouth, "the rest said, Let be, let us see whether Elias will come and save him." These things show that there was such a curiosity felt as I have mentioned, and that this curiosity continued until they supposed him dead. Now, is it to be believed that these men would have remained there, on the look-out for marvels, up to the very moment of his last gasp, as they supposed, and would then have so coolly said "Let be, let us see whether Elias will come and save him," when they had been witnesses, for three hours, of a continued and surprising "darkness over all the land," at mid-day? The thing is incredible—the falsehood is too bare to be disguised for a moment. John makes no mention of this darkness.

Matthew says also (27—50 to 53) that when Jesus *died*, "the earth did quake, and the rocks rent, and the graves were opened, and many bodies of the saints, which slept, arose, and went into the holy city, and appeared unto many." But he does not say that he *saw* these things. Now is the word of this man Matthew—a man, nearly half of whose narrative appears to have been but the work of a "terrible-accident-maker"—to be taken for such facts as these? Who but he had ever heard of the earth's quaking, the rocks rending, graves opening, dead rising, &c.? No human being on earth, that we have any evidence. Besides, even John, who says (19—25 to 27) that he stood by the cross, and that Jesus, while on the cross, spoke to him, says not a word of any such events; yet there is not room for a reasonable doubt that he would have done so, had they ever happened.

Besides, it is incredible that the Jews, who knew that Jesus pretended to be the Messiah, and who were among the most superstitious people that ever lived, should not have been appalled by such a scene, if any such had happened, end have been converted; yet they were not converted;

nor did they, although as I have said before, they were on the look-out for marvels, see any thing to change their minds in relation to him.

This story again shows the extent of the delusion among the followers of Jesus, and that Matthew was ever ready to relute, for truth, not only every thing, however impossible, that he heard spoken of, but probably also some things which he did not hear spoken of.

CHAPTER IV. The Prophecies.

Of those predictions in the Old Testament, which are sometimes regarded as prophecies, only one, beside such as are said to relate to Jesus, will be particularly noticed; and that, not because it has any reasonable claims to be considered a prophecy, but because it is frequently mentioned as such.

It is said to refer to the present state of the Jews. It is contained, I believe, principally, in the 28th chapter of Deuteronomy, and the 26th of Leviticus—and was uttered by Moses—how many centuries before the time of Jesus, I leave to others to calculate. I have refered to these chapters, and if the reader attaches a feather's weight to the predictions interspersed through them, I ask him, before going farther, to turn to the chapters, and read the whole of them. I hardly believe there is, in the country, a man of common sense and common intelligence, who will read them, and will then look an unbeliever in the face, and say he believes that Moses had any, the most distant, reference to the state of the Jews at this time, or that he intended the most remote intimation that any of those punishments, which he threatened, would be visited upon the Jews on account of their rejection of any Messiah, or any being like a Messiah.

Moses was in the habit of pretending to have personal communications from Deity, in private, and to receive (Mahomet-like) from him those instructions, which, as the pretended agent of God, he imparted to the ignorant, superstitious, simple and credulous Israelites.* In this way he imposed upon, and preserved his influence over them. He was in the habit also of promising to them every variety of worldly prosperity, if they would obey the commands, which he, as if in the name of God, enjoined upon them, and of threatening them apparently with all the worldly evils that he could conceive of, in case of their disobedience.

In the context immediately preceding these chapters, he gives the Israelites various commands as usual, and then follows them with such promises and threatenings as would naturally appear to him necessary to insure obedience. Among a variety of other threatened calamities, he enumerates dispersion by their enemies, and, on the other hand, among the promises, he enumerates, in palpable, and almost literal, contrast to the threat, success in putting their enemies to flight; but in all this he says no more about a Messiah than he does about Vulcan or Neptune. And those predictions, which some would fain have understood as intended to refer to the present condition of the Jews, are such as would not now be thought of by Christians, as having any reference to any thing but the case then in hand, had not the advocates of Christianity, in order to

support the truth of the Bible, been driven to the necessity of grasping at shadows instead of realities.

But there is one way, in which every man can settle all questions in relation to these predictions, viz: by answering to himself the question, whether, if the Jews had *never been dispersed,* he would consider these predictions intended as prophecies, and as having so *failed,* as that their failure would be substantial evidence against the truth of the Bible? If such a *failure* would not have been evidence *against* the truth of the Bible, such a fulfilment, as is set up for them, cannot be evidence in support of it.

The idea that God dispersed the whole nation of Jews, and that he continues them in that dispersed state, simply because they were and are not convinced that Jesus was the Messiah, or because a few of their nation, many centuries ago, put him to death, is consistent with the Old Testament doctrine that God punnishes the children for the iniquities of the parents, and also with the New Testament doctrine that God will punish men for not believing what appears to them improbable—but it is not consistent with the views that unbiassed minds have of the nature of justice.

Many people think the present temporal condition of the Jews is evidence that God is pun(n-ish)ing them for their obstinacy in not believing in Jesus. Now the condition of many millions of Africans is far worse than that of the Jews; but can any one of those, who know so much about God's designs in bringing calamities upon particular nations, tell us what he is punishing the Africans for?

Do the ancient and modern conditions of the Jews furnish any more evidence that they were once God's *favorite* nation, (as the Bible pretends), or that they are now the objects of his dislike, than do the ancient and modern conditions of the Africans, of *their* having once stood, and of their now standing, in the same relations to God?

Suppose the inhabitants of some petty province in India should pretend that their ancestors had once been the favorites of Deity, could they not, by referring to their history, and to the Shaster which they suppose God has given them, support their pretensions to that distinction just as strongly as the Bible does those of the Jews? And could not we, in their present condition, find as much proof that Deity had become offended with them, as we can, in the present condition of the Jews, that God is offended with them?

Let us now look at those predictions, that are said to foretell a Messiah, and to have been fulfilled by Jesus. I know of three only that are worthy of notice.

The first commences at the thirteenth verse of the fifty-second chapter of Isaiah, and extends through the subsequent chapter.

It is a sufficient answer, for the present, to this description of the "servant of the Lord," as he is called, to say, that it is so indefinite, that it would apply to many others as well as to Jesus—and even if it delineated the character and history of Jesus a little more nearly than those of any other person, still it is entirely too indefinite to furnish any thing like reasonable grounds for believing that Isaiah foresaw either a Messiah, his character or history. Almost every paragraph, that ap-

plies with any justness to Jesus, would also apply equally well to a great number of those men who pretended to be prophets, and who were killed by the Jews.

In the twenty-third chapter of Matthew (30th, 31st, and 34th verses). Jesus accuses the Jewish nation of having "persecuted, scourged, killed and crucified the prophets, the wise men and scribes, which had been sent unto them." In the thirty-seventh verse he says, "O! Jerusalem, Jerusalem, thou that *killest the prophets,* and stonest them that are sent unto thee," &c. It appears from these declarations, that if Isaiah intended by his description of a "servant of the Lord," only a general description of the characters and fates of those, who, in different ages of the Jewish nation, professed to speak to the Jews in the name of the Lord, his language would apply to them, with the same propriety that it would to Jesus; and it is far more probable that he should have had those men in his mind than a Messiah, because he had personal opportunity of observing their characters and fates. They were men, to whom the Jews not only refused to listen, but whom also (as appears by the language of Jesus before quoted) they treated with the greatest indignity, insult and cruelty. *They,* far more than Jesus, might be said to be "men of sorrows and acquainted with grief," for they could have had but few friends or followers. *They* "had no form, or comeliness, or beauty, that caused them to be desired"—*they* were "brought as lambs to the slaughter"—*they* must have been, by those who believed in them, "esteemed stricken, smitten of God, and afflicted"—*they* were "cut off out of the land of the living"—*they* had "done no violence, nor was any deceit found in *their* mouths." They were probably inoffensive, deluded men, whose imaginations were filled with extravagant notions about God's intercourse with men, and his method of governing them; and, owing to this cause, they were continually dreaming that God came to themselves, and commanded them to declare to the Jews that this evil, and that evil, would come upon them, and that this and that great and important religious event was about to happen. But the Jews, having no confidence in them, persecuted and destroyed them.

Isaiah speaks of the Almighty making the soul of his "servant an offering for sin"—and this language perhaps may at first view appear to have more relation to Jesus than it could have to a prophet. But, if—as all men of common sense, who disregard authority, believe—sacrifices are of no avail, and the doctrine that God requires them imputes to him, not only absurdity, but injustice also, and unnecessary and barbarous cruelty, then this intimation, that the soul of the "servant of the Lord" was to be made an offering for sin, is one, which Isaiah could not have been dictated by God to have uttered, and it could with truth apply neither to Jesus, nor any one else.

But should it yet be contended that Jesus *was* made an offering for sin, (a supposition, which certainly cannot be proved), it might then be replied that there can be little doubt that Isaiah, who, of course, believed in the utility of sacrifices, believed that every one of those, who were slain for preaching (as he supposed) in the name of the Lord, were made offerings for sin. It was perfectly natural that he should believe so. How otherwise would a man, with his views about God, about the moral condition of the Jews, about the necessity of sacrifices, and about the *religious character of those who were slain,* account for the fact that God permitted them to be slain, than by supposing that they were made offerings for sin?

If he considered them offerings for sin, it was then perfectly natural for him to believe that these sacrifices would redeem many, and that the individuals, supposed to be offered as sacrifices, would "see their seed," (for those redeemed by them could be called *their* seed, with the same propriety that those redeemed by Jesus could be called *his* seed)—that *they* "should see the travail of *their* souls and be satisfied," &c. So that considering this description of the "servant of the Lord," in whatever light we may, it will still apply to many of these supposed prophets with nearly, if not entirely, the same force that it would to Jesus, even if he were what Christians suppose him to have been.

There are strong reasons for believing that Isaiah referred to such, *generally,* as he esteemed the servants and prophets of the Lord, but who were despised and persecuted by the Jews. If he meant a Messiah, and if he himself were actually a prophet, why did *he* not (as well as Daniel) use the word Messiah, instead of one so indefinite and general in its application as servant? If he meant a Messiah, why did he not tell us more about him—when he would appear, &c.? Above all, why did he not describe him so that, when he should appear, he might be identified by the Jews, and distinguished from all others?

But suppose he did actually mean a Messiah—what then? The fact that Isaiah expected a Messiah, or that he dreamed or imagined that the Lord told him a Messiah was to come, does not prove at all that there ever was to be a Messiah. The fact, that the whole Jewish *nation* expected a Messiah, is no evidence that a Messiah was actually to come. The *combined* facts, that a Messiah was predicted, that a Messiah was generally expected by the inhabitants of Judea, that he was expected near a particular time, and that, about that time, one or seventy appeared, each pretending to be the Messiah, do not prove, or have any sort of tendency to prove, that there ever was, or ever was to be, any such being as a Messiah. Judging naturally on all these facts, they are only evidence that some superstitious man, whose head was full of marvellous thoughts about what God would do for those whom the individual supposed to be his favorite nation, *dreamed,* or imagined that God told him, that He would send a Messiah; that this individual proclaimed what he supposed God had told him; that the nation, who were always ready to expect some extraordinary interposition in their behalf, were favorably struck with the idea of a Messiah; that the belief, that one would come, became prevalent; and that, in consequence of that general belief, a great many, were so infatuated as to imagine, or so dishonest as to pretend, (knowing the contrary), that they themselves were the individuals appointed by God to be Messiahs, and did actually claim to be such: There is nothing mysterious, or supernatural, or improbable, in such a combination of facts. They all, in a community so superstitious as that of Judea, would *naturally* follow the simple one, that some priest, or some one whom the people regarded as a prophet, imagined that God would send a Messiah, or dreamed that God told him he would send one.

This idea of a Messiah is one, that would be very likely to occur to the mind of a priest, or one who should believe himself a prophet, among a people like the Jews, who believed in sacrifices, believed themselves the special favorites of God, and believed also that God frequently interposed miraculously for their welfare. This priest, from the nature of his office and employment, would naturally have his mind occupied with thoughts about God's intentions respecting

his favorite people, and his designs in relation to their religious welfare. It would be nothing remarkable if such an individual, who should imagine that there was a necessity for some *new* interposition of God in favor of his people, and should believe that God frequently sent messengers to them, should hit upon the idea that God, in order to meet this new and uncommon necessity, would send an extraordinary messenger to them, and, (since this priest believed in the necessity of sacrifices), that he should also believe that this messenger would be made a sacrifice for the sins of the nation. Nor would it be remarkable, if such an idea, expressed by a priest, for whom the people had some veneration, or by a supposed prophet, should strike the minds of so superstitious a people as the Jews so favorably, and as being so probable, that the belief should become prevalent, that God had supernaturally conveyed this idea to the mind of the priest, or supposed prophet, and, of course, that it would be realized. If such were the fact, it would then be very natural that, among a people where many were so infatuated as to imagine themselves prophets, there should be many, who should imagine themselves, or claim to be, Messiahs—and if a supposed prophet had predicted the time of the coming of this Messiah, that would be the time when these deluded or dishonest Messiahs would appear, and proclaim their characters, and set up their claims.

Supposing such to have been the cause of the appearance of all the pretended Messiahs that appeared about the time of Jesus, and supposing him to have been one of these deluded or dishonest men, the mystery of the fulfilment (such as it was) of the prediction is then all explained in a natural and probable manner, with the exception of Jesus's being put to death,—a fact, which cannot be explained by the existence of any general belief that the Messiah was to be cut off—since Jesus was not crucified on account of any intention, on the part of those who crucified him, to make good the prediction. Still, if it be said that his being slain is a proof of the prophesy, and of his being the Messiah, then, the answer is, that *others* of these pretended Messiahs were also slain—so that by this means also it is impossible to identify the real Messiah.

One of these pretended Messiahs was killed by order of Festus;* another was burnt alive by Vespasian.† One Theudas got a sect after him (probably under the pretence of being the Messiah), and was then slain: also one Judas, (Acts 5—36 and 37). How many others were slain I know not. It is probable however that a considerable number of them were. (See Josephus, Book 2d—Chap. 13).

The prediction then, that the Messiah should be offered as a sacrifice for sin, (if in reality there were any such prediction), would doubtless apply to some, and perhaps to many, others, as well as to Jesus. So that here too there is a complete failure of identity.

But I apprehend that Christians, who may read this book, will, before they have gone through with it, find still another difficulty in the way of their making Jesus answer the description of their predicted Messiah. That difficulty will consist in their inability to prove that Jesus was ever slain at all. I think they will find that the evidence, instead of proving that he *was* slain, comes much nearer proving directly the reverse, viz: that he was *not* slain. If such should be the case, their Messiah will then most surely be "cut off." Should the fact of his death be left, by the evidence, in the least *uncertainty,* the prediction, as applicable to him, must be considered to have failed; be-

cause prophecy, no more than any other supernatural event can be reasonably proved by *doubtful* evidence. Both the prediction and the fulfilment must be incontestibly established, or no prophecy is shown.

Another prediction, that was to be noticed, is in Daniel 9th,—25 and 26.* It is here stated that the Messiah shall appear in sixty-nine *weeks* "from the going forth of the commandment to restore and build Jerusalem," which appears, from the context, to have been about the time of the prediction. Commentators have said that a week here *means* seven years. Whether they have sufficient authority for saying so, I neither know nor care. Still, if by calling it seven years, instead of seven days, the prediction can be made to look any more nearly like a prophecy, why, then call it seven years. The time for the appearing of the Messiah would then be fixed at the period of four hundred and eighty-three years from the time of the prediction. Did Jesus appear *precisely* at that time? The little search I have made does not enable me to settle that question, or to say certainly whether any one else ever did. I can only say that I have never known it to be even hinted that he did. He undoubtedly appeared *about* that time, as did a great number of others; and the reason why all appeared near that time, undoubtedly was, that that was the time when a Messiah was expected.

In the twenty-sixth verse it is said that "after three score and two weeks, Messiah shall be cut off." Calling the week seven years, in this case as in the other, the true Messiah ought then to have lived four hundred and thirty-four years; (He was to have been a marvellous personage in point of age as well as in other respects)—but Jesus lived to be only about thirty-two or thirty-three years old—leaving the slight deficiency of four hundred years.

There is no way, that I have discovered, by which the believer can get rid of this dilemma. If the week mean but seven days, Jesus did not, in the first place, appear at the proper time for the true Messiah, and he also lived too long; but if we call the week seven years, then he did not live long enough.

But this prediction fails in another particular. Daniel calls "the Messiah, the *Prince.*" He then says, after having previously spoken of "the commandment to restore and build Jerusalem," that "the street shall be built again, and the wall even in troublous times." It is evident from this language and the context, that Messiah was to be a *temporal* prince, and it is probable that *he* was to restore and build Jerusalem.

Daniel says also, that "after three score and two weeks, Messiah shall be cut off, and the people of the prince that shall *come,* shall destroy the City and the sanctuary," &c. It is evident from this language also, that Messiah was understood to be a temporal prince, and that he was to be *succeeded* by a foreign prince and an enemy.

Passages also in the New Testament, applied to Jesus by his biographers, show that a temporal prince had been expected. Matthew (2—6) represents one of the old supposed prophets as saying that "out of Bethlehem should come a Governor, that should *rule* God's people Israel." Luke also (1—69, 71) puts into the mouth of Zecharias a prediction, that the nation was to be saved by the

Messiah "from their *enemies,* and from the *hand* of all them that hated them." Such things could be spoken only of a temporal ruler or deliverer.

There can be no doubt, indeed all Christians admit, that the Jews *expected* a temporal prince, (although perhaps one, who was also to be made a spiritual sacrifice, *after* having liberated the nation from all its temporal dangers and calamities), and the language of Daniel, above quoted, most clearly authorized that expectation. To say that it did not, is to say no less than that since that time words have changed their meaning. If then such were the true meaning of the prediction, Jesus certainly fulfilled it not in the least tittle, and of course was not the Messiah. But if such were not its meaning, the least that can then be said of the prediction, is, that it was made in such deceitful language as to cheat the Jews, and prevent their identifying the true Messiah, whenever he might appear.

Unless the prediction described the Messiah so accurately that he could be unequivocally identified, certainly it was no prophecy. Such *was* the case here. The very people, to whom it was predicted that he should be sent, and whom he was to redeem and reign over, did *not* identify him in the person of Jesus. He did not in any important particular, or at least in any greater degree than many others, answer the description; and therefore, even if he were the true Messiah, the Jews did rightly in rejecting him, because it was their duty to be governed by the description.

Furthermore, it is evident, from various circumstances, that Jesus himself originally understood the prediction as did the Jews, and that he did, at one time, expect to have become a temporal prince.

The particulars of his journey from the mount of Olives to Jerusalem, recorded by Matthew (21—1 to 11), Mark (11), Luke (19—28 to 44) and John (12—12 to 15), show that he at that time expected to have been received, as King of the Jews. Matthew says "a very great multitude" attended him; that they spread even their *garments* in the way; that they cut down branches of trees and strewed them in the way, and that they cried, "Hosanna to the Son of David. Blessed is he that cometh in the name of the Lord." Mark says they cried "Blessed be the Kingdom of our father David, that cometh in the name of the Lord." Luke says they cried "Blessed be the King that cometh in the name of the Lord." John says that *much people,* that had come to the feast, when they heard that Jesus was coming to Jerusalem, took branches of *palm-trees,* and *went forth to meet him,* and cried "Hosanna, blessed is the King of Israel, that cometh in the name of the Lord." Is there here room for the slightest reasonable doubt that this multitude believed him to be a temporal prince, specially sent by God to rule over the Jewish nation? There certainly can be none, justified and authorized as such a belief was, in relation to the Messiah, by the predictions of those whom the Jews supposed to be prophets. The question then arises, how came this multitude, at this time, to believe him to be their temporal king? Why, in this way only, viz: he himself must have directly or indirectly given to their minds the impression that he was to be, or it could not have become so general among them—and if he did either create or sanction that impression, he must himself have expected to be a temporal prince, or he intentionally deceived this multitude. By barely *consenting to be attended* by this great body of men, by these shouts, and these hosannas, and by approaching Jerusalem in this triumphal and kingly manner, he proves that he

either expected to have been made a king, or that he practised a deception on the people—for, be it remembered, *he* could not have been ignorant that these demonstrations of loyalty were offered to him, by his attendants, solely because they thought he was about to become their king. John has removed all doubt that they were so offered. He says (12—16) that even "Jesus's disciples understood not these things at the first," that is, at the time, and on the spot, they did not understand that he was to be a *spiritual* king—and if they did not, there is but one answer to the question, what did they understand him to be? But John adds, in substance, that "when Jesus was glorified," they then saw what their conduct had meant, and how they had in reality been paying their homage to a *spiritual* prince under the mistaken apprehension that he was to be an earthly one. The amount of this ridiculous equivocation is, that Jesus took to himself, at this time, the Hosannas which he must have known were intended for another, and trusted to the future, when he should be "glorified," to set the matter right—or, in other words, that, for the time being, he practised a little pious deception, for the glory of God, and the good of that spiritual kingdom, which he was laboring to establish.

If Christians would save the character of Jesus for honesty and plain dealing, they must disclaim for him this miserable trick that John attributes to him, and must acknowledge that he intended to have become a king. All the accounts of this transaction go to show that such was the fact, that he expected to have been received as king at that time; that he rode that ass's colt solely because he knew that "it had been *written,* Behold thy King cometh, sitting on an ass's colt," and that he supposed the Jews would therefore consider his being mounted on an ass good evidence of his right to be their king.

It is manifest also that he was disappointed in the reception he met with as he approached Jerusalem. Luke says (19—39) the Pharisees told him to rebuke his followers. This incident shows that the Pharisees would not acknowledge him as king. From this occurrence, and from what follows, it seems hardly possible to doubt, that Jesus then saw that he could not be king. He then, as he naturally would if such were the case, (I here, on account of its importance, repeat substantially what I have said in a former chapter), "falls into a lamentation for the fate of the City—*not* for the *souls* of the *Jews,* as he would have been likely to do, if he had intended to be only a spiritual redeemer, but for the fate of the City itself. He virtually says (Luke 19—42 to 44) that if the Jews had but received him as king, their City would have been preserved; but since they had rejected him, the City would he destroyed. He says that "enemies shall compass it around, shall cast a *trench about it,* and keep it in on every side, and lay it even with the ground," &c. This is not the language of a purely spiritual deliverer—it is precisely such language as we might reasonably expect to hear from a man, who wished to make himself the ruler of a people, but who, on being rejected as such, should endeavour to alarm their fears for the safety of their City. Or it is such language as we might reasonably expect to hear from a man so deluded as to imagine that God had specially appointed him to be the deliverer of a people, and the preserver of a City. Such an one, on finding that he would not be accepted as king, would naturally infer, that inasmuch as the deliverer, whom God had appointed to save the city, had been rejected, the city would of course be destroyed."

In these facts too is to be found the secret of the prediction, that he made *soon after,* (Mat. 23—37 to 39, and c. 24—Mark 13—Luke 21), respecting the destruction of Jerusalem, and which has been regarded as wonderful evidence of his power of prophecy. How wonderful the evidence is, here clearly appears. The fact, that Jerusalem was afterwards destroyed, has nothing to do with the prediction; because we can see the grounds, and probably the only grounds, on which he *formed his opinion* that it would be destroyed—grounds *sufficient* to lead such a man, as I have supposed him to be, to believe that it would be destroyed, or to predict that it would, whether he thought so or not—and we are not to suppose him possessed of the power of prophecy, when his language can be accounted for without such a supposition.

But to return to the inquiry—did Jesus ever attempt to make himself king of the Jews? Another important item of testimony to prove this fact, is, that it was very soon after this triumphal ride from the Mount of Olives, to Jerusalem, that he was apprehended and crucified, and the universal charge against him then was, that he had set himself up to be King of the Jews.

As the *remaining* evidence of his design to make himself king of the Jews, has probably been sufficiently set forth in the former chapter on the nature and character of Jesus, it need not here be repeated.

Perhaps some persons may think it rather extraordinary that a man like Jesus should have conceived such a design as that of making himself a king. But if such persons look at Josephus (Book 2d—Chap. 13, &c. &c.) and at Newton on the Prophecies, Chap. 19,—they will find that, about the time of Jesus, characters very much like him, were no great novelties among the Jews.

If these views are correct, Jesus did not, although he labored to do so, answer the prediction concerning a Messiah, viz: that he was to be a temporal king—but was simply a deluded or dishonest man, like many others, who set up similar pretensions, and all his talk about being "sent of God," &c., was but the insane gibberish of a deluded fanatic, or the knavish pretences of an impostor.

But supposing the predicted Messiah to have been intended only as a spiritual prince—even then Jesus does not answer the description. This Messiah was to be "the glory of God's people Israel." He was "to save God's people from their sins." By "God's people," as then understood by the authors of the Bible, were meant the Jews. Jesus also himself virtually predicted that he should redeem the Jews, for he appointed his disciples in number corresponding with the number of the original tribes of Jews, and he also promised to these twelve disciples that they should sit (Christians must say, *in heaven,* although he at the time probably meant on earth) on twelve thrones, judging the twelve tribes of Israel. He, by these acts, and by his whole conduct, showed that he expected to have redeemed the Jews. But none of these predictions or expectations have been fulfilled. Some Christians believe that the Jews will sometime be converted to Christianity—but where is the foundation for such a belief? Jesus can never answer the description given of the Messiah any better than he did while on earth, and therefore there is no reason why the Jews should ever believe him to have been the Messiah. Even if we suppose that the Jews, at the time when Jesus was alive, were mistaken as to his character, still, if eighteen centuries do not afford a sufficient time for them to discover their mistake, how long a time will probably be necessary?

But, further, if a Messiah were necessary to redeem the Jews, was it not just as important to redeem those Jews who have died during the last eighteen centuries, as to redeem any that may live hereafter?

Since the time of Jesus about sixty generations of Jews have died, *without being redeemed*, as believers must say; and yet these same believers virtually say, that if the Jews should hereafter be converted to Christianity, Jesus will then *fairly* answer the description of that Messiah who was to be the Saviour of the Jewish nation. Every generation is a nation of itself, and if Messiah was not to save either of the first sixty nations of Jews that should succeed him, the prophet ought to have been more explicit in designating *what nation* of Jews he would save.

To say that Jesus *would* have saved the Jews, if they would but have received him, is no answer to the objection. If a man predict that a certain event will come to pass, he virtually predicts that every *necessary intermediate* event will also happen. And if a supposed prophet predicted that a Messiah should redeem the Jews, such a prediction was equivalent to one that they *would* believe on him—and if they did not believe on him—no matter for what reason—the prediction then failed as essentially as if no pretended Messiah had ever offered to save them.

Jesus, then, did not come in the same character, (of a temporal prince) that it was predicted Messiah would come in;—nor has he been received by that nation, who, it was predicted, would receive the Messiah. We therefore have no authority, on the ground of prophecy, for believing that he was the expected Messiah; on the contrary, we have much express authority for believing that he was no Messiah at all.

The remaining prediction relating to a Messiah, which was to be noticed, is, that he was to be of the family of Jesse, and a Son of David. Matthew (1) and Luke (3) have attempted to show that Jesus was a descendant of David—and how have they attempted to show it? Why, solely by pretending to trace the genealogy of Joseph, who, as they both agree, was *not his father,* but simply became the husband of his mother a short time before the birth of Jesus. They might therefore with the same propriety have traced *their own* genealogies, in order to prove that Jesus was a descendant of David, as that of Joseph.

This blunder, it would seem, besides proving that there is not the slightest ground for the pretence that Jesus was a descendant of David, must also be considered as having a slight tendency to show how much those two stupid blockheads knew.

These chroniclers, who, with all good fidelity, did so much for posterity, have also shown, *in attempting to trace the genealogy of Joseph*, an accuracy, a *faithfulness*, and a knowledge of the importance of being exact in all matters of revelation, corresponding to the character of their intellects. Luke makes there to have been forty generations between Joseph and David, while Matthew connects the two by a chain of less than thirty, and running through an almost totally *different* list of names. Even if Joseph had been the acknowledged father of Jesus, a disagreement of this kind would prove that there was no more reason for pretending that Jesus was a descendant of David, than for pretending that he was a descendant of any other Jew, who might be named at random from among those who lived in the times of David.

The necessary falsehood of one or the other, and the probable falsehood of both, of these pretended genealogies, would tend to discredit any but an inspired book.

Let us now examine Jesus's own predictions, and see how *he* sustained the character of a prophet.

His only important predictions, that I have discovered, are included in the twenty-fourth chapter of Matthew, and in the last three verses of the preceding chapter. Mark also in his thirteenth, and Luke in his twenty-first chapter, have recorded a part of the same predictions, although not so fully as Matthew.

The only one of his predictions, which has been fulfilled, and which is definite and important enough to have any claims to be noticed, is that which foretels the destruction of the temple.

It is evident from the whole of Matthew's record of the prediction, (beginning at the 37th verse of the 23d chapter), that Jesus did not intend to convey the idea that the temple was devoted to any particular destruction, distinct from that which was to befal the City at large. He merely speaks of the destruction of the temple, because they happened to be standing by it, and speaking of it—but he only conveys the idea that it would be involved in the general ruin.

I attempted, on a former page, to account for this prediction, in this way, viz: Jesus had read in the Old Testament, that Messiah was to be a temporal prince, who was to be raised up specially by God for the purpose of saving the Jewish nation, perhaps from their sins, but especially from their enemies, and he inferred, as he reasonably might from these premises, that some great temporal danger threatened the nation, and that an extraordinary deliverer was necessary to save them from this danger. He believed himself to be, or dishonestly wished to make others believe him to be, this Messiah, this appointed deliverer and king. When then he found himself *rejected* by this nation, whom he supposed, or dishonestly pretended, that he was to have saved, he inferred as a matter of course, or threatened as a matter of policy, that the calamity would come upon them. He would also, in such a case, naturally infer, if honest, or threaten, if dishonest, that this calamity should come *soon,* and therefore he ventured to predict that it would come in the course of one generation.

The last three verses of the twenty-third chapter of Matthew tend strongly to confirm this view. The language of Jesus, as there recorded, evidently means this. "O! Jerusalem, I would have protected thy children as a hen protects her chickens under her wings, *but they would not suffer me to do it*—now therefore their house (homes, or possibly temple) shall become desolate, for I say unto you they shall not see their deliverer, until they will receive the one that was sent to them by the Lord (to wit: myself").

If such be a correct view of his thoughts, and a fair interpretation of his language, the question is at an end, for here we see sufficient causes to induce a man like him to make such a prediction—and we are not to suppose him a prophet, if we can account for his language in any other way, because it is unphilosophical to attribute, to supernatural causes, things that might have been naturally produced.

But beside the reasonableness, and the manifest probability of the above supposition, there are one or two other circumstances, that corroborate its truth. One is, that but a short time before this prediction was made, (as appears by the order in which the two events are recorded both by Matthew, Mark and Luke), and *immediately after* his triumphal ride from the mount of Olives to Jerusalem, and his (unquestionable) rejection as king by the Pharisees and principal men of the Jews, he, apparently in the midst of the disappointment or chagrin occasioned by that rejection, uttered a prediction or threat almost precisely similar to the one we have now been considering, (Luke 19—39 to 44).

Another circumstance tending most satisfactorily to confirm the above view of this matter, is that he could not *fix the time when* the temple should be destroyed. He only ventured to say that it would be in the course of that generation, but expressly told his disciples (Mark 13—32) that he *did not know* either the day or the hour when the event would happen.

If he had the power of foreseeing future events, why could he not have known the *time* of the occurrence, as well as the occurrence itself?

Let us now look at some of his predictions, that were *not* fulfilled.

He predicted (Mat. 24—3, &c.) that "the end of the world" should come in the course of that generation. But here we are met by the reply, that he did not *mean* that the end of the world itself would come, or, in other words, that he said what he did not mean, (a practice, to which, according to modern Christians, he was very much addicted). But if he did not mean what he said, what did he mean? "I don't know," says the Christian, "but I think he must have meant this, or if he did not, *perhaps* he meant that—but I am *sure* he could not have meant the *end of the world*, because if he had, the end of the world would have surely come." This logic is so satisfactory, that I might perhaps despair of convincing a believer on this point, were there no *external* evidence tending to prove that Jesus, in this particular case, meant as he said. It therefore very fortunately happens that such evidence is to be found. For example,—*he had told his disciples the same thing before.* In Matthew 16—28, he holds to them this solemn and unequivocal language, "verily, I say unto you, there be some standing here, which shall not taste of death, till they see the Son of Man coming in his kingdom.

We have also further evidence that the twelve understood him to mean the end of the world, and what *they* understood him to mean, Christians cannot deny to be his true meaning. Peter declares (Acts 2—16 and 17) on the day of Pentecost, that the conduct, which the apostles had there exhibited, was that, which it had been predicted by Joel, should happen "in the *last* days." Peter also, in his first epistle 4—7, says, "the end of all things is at hand." Paul also (1 Thess. 4—15 to 17) speaks of Christ's coming as an event, that was to take place during the *lifetime* of some of those whom he was addressing. John also (Rev. 1), speaks of it as an event near at hand.

Jesus also said that the time of the destruction of the temple should be the time of *his* coming, (Mat. 24—3, &c). It is manifest from this circumstance too that he supposed the end of the world, and the destruction of the temple would happen at one and the same time, for he would not, of course, have fixed the time of his coming before the end of the world.

It was *natural* also that he should suppose the end of the world and the destruction of the temple and city of Jerusalem would happen at the same time, because both the temple and the city were esteemed sacred, and as under the special protection of God, and it was therefore natural for those, who believed thus, to suppose that God would not permit *them* to be destroyed *before* the rest of the world.

And here too we find another false prediction, viz: in relation to the time of his coming. He has here left no doubt of his meaning, for he particularly described the *manner* of his coming—and this manner is just such as we might reasonably suppose a deluded man would picture in his imagination, or an impostor conjure up to impose upon the miserable dupes who were his followers. He said (Mat. 24—30 and 31) that "all the tribes of the earth should *see* him, coming in the *clouds of heaven,* with power and great glory." And, said he, "he shall send his angels with a *great sound of a trumpet,* and they shall gather together his elect from the four winds, from one end of heaven to the other."

That his disciples understood this prediction as one that was to be fulfilled *literally,* is sufficiently proved by Paul's declaration before referred to, (1 Thess. 4—15 to 17), where he says explicitly that "the Lord *himself* shall descend from heaven *with a shout,* with the voice of the Archangel, and with the trump of God, and the dead in Christ shall rise first: then *we,* which are alive, and remain, *shall be caught up* together with them in the *clouds,* to *meet* the Lord, in the *air.*"

His predicting also that he should "gather his elect" at the time of the destruction of the temple, shows that he intended to say that the end of the world would then come. But he has never thus come to gather his elect. and this is the third false prediction.

There is still a fourth. He said (Mat. 24—14) that before these occurrences should happen, "this gospel of the kingdom should be preached in all nations, and to this declaration, as well as to the others, he adds this sweeping clause, that "this generation shall not pass till *all* these things be fulfilled." None pretend that in the course of that generation his gospel was preached in all nations. The most that is pretended, is, that some one or other of his apostles preached in all the *principal* nations with which *they* were *acquainted.* But the prediction was that it *should* be preached in *all* nations, and if it were not so preached, the prediction failed, let the cause of the system's not being preached, be what it may. Jesus himself was probably as ignorant of what nations there were in the world as his apostles, for he gave them no directions unless this general one, to preach every where.

But not only the *letter* of this prediction failed, but the *spirit* of it also failed even in relation to those countries that were known and visited by the apostles. The great mass of men in those countries, during that generation, had no proper opportunity to hear the doctrines of the apostles, to learn the character of their system, and to judge of its truth. A great portion probably, so general was the ignorance that prevailed, did not, for the first forty years after the death of Jesus, know any thing of consequence respecting him. The apostles just set foot, as it were, in various countries, but the mere setting foot in a country did not spread a general and full knowledge of Christianity throughout that country—yet it ought so to have done in order to fulfil the spirit of this prediction. Jesus undoubtedly meant, that within the period mentioned, his religion should

be made so universally known, that all, who would, might have an opportunity to embrace it, and be saved.

Here then are four several predictions, viz: that the end of the world would come—that he himself would come *visibly* in the clouds of heaven—that his angels should gather his elect from the four winds,—and, that his gospel should be preached in all the nations of the earth, in the course of the then present generation—all of which predictions proved false nearly eighteen centuries ago.

There is no room for any quibble on his language, or for pretending that these predictions were carelessly or thoughtlessly made. After having described the events in plain and unambiguous terms, he adds (Mat. 24—34) "verily, I say unto you, this generation shall not pass, till all these things be fulfilled." He goes still farther, and follows even this declaration with one of the most solemn asseverations that man could utter. Says he (Mat. 24—35) "Heaven and earth shall pass away, but my word shall *not* pass away."

This dishonest or infatuated man was predicting events, of the occurrence of which he knew nothing, for time has *proved* that those various predictions, and that solemn asseveration were falsehoods.

These predictions of Jesus, in relation to his gospel's being preached throughout the world, his coming, his gathering, his elect, &c., have thus far been considered as having reference to events of a *religious* character, and as such have been shown to be false. But there is another and more probable interpretation to be given to them, and that is, that they refer to a *second attempt,* which he then had in contemplation, to make himself king of the Jews.

There are many circumstances tending strongly to confirm this view. One is, that this prediction, that he should come again, was made very soon after he had once attempted to get himself accepted as king of the Jews, and had failed. It is natural that he should have it in his mind to make another effort, if he saw any possibility of his doing it with better prospects of success. And as he was looking forward to a time when the nation would be in danger from their enemies, it is natural that he should suppose that such a season of peril and calamity would be a favorable one for the triumph of his scheme.

A great part of his account (Mat. 24) of the scenes that were to precede his coming, indicate that he expected only a *temporary calamity* to the *Jewish nation,* and that the declaration ascribed to him, that the "end of the world" was then to come, must be a misrepresentation.

His prediction that he should come "in the clouds of heaven, with power and great glory," (if indeed he made such an one—which Deists are not at all bound to believe), is not inconsistent with the supposition that he intended to come as a temporal deliverer; for such a pretension was hardly more extravagant than ought to have been expected from such a man; nor was it too extravagant to gain credit among his disciples; and it was indispensably necessary that he should hold out a *very* extravagant expectation of some sort in order to keep up the delusion and faith of his ignorant followers until his arrival. Besides, he said that his competitors (whom he called "false Christs") "should show great signs and wonders," and it was necessary that he should represent

that the pageantry of *his* coming would be still more marvellous than that of theirs, otherwise he could not have sustained his own reputation, in the eyes of his disciples, for being the true Messiah. He must also promise something corresponding with the *dignity* of a Messiah, else his disciples would not have cared to wait for *him,* when they should be in the way of having so many opportunities and inducements, as he expected they would have, within the ranks of other pretended Messiahs. Finally, a man, who, like Jesus, could have the likelihood to assert, without ever putting any thing of that kind to the test of experiment, that he could rebuild the temple of Jerusalem in three days, (John 2—19), or that if he were but to question his father, the Almighty, he should immediately receive from him more than twelve legions of angels to protect his person, (Mat. 26—53), or that his followers, if they had faith could move mountains, and cast them into the sea, (Mark 11—23), would not be [Editor: illegible words] when, as in this case, his circumstances required a large story of some [Editor: illegible words] the foolish dupes, that followed him, and were ready to swallow anything from his lips, that he should sometime make a second appearance among them, and should then come in the clouds of heaven, &c.—especially if he could tell them, as he did in this instance, that it might be many years before the thing would happen.

Another circumstance worthy of especial notice, is, that (Mat. 23—37 to 39) a short time before his prediction in relation to a second coming, after having declared how willingly he would have protected the people of Jerusalem, and how they would not permit him to do it, he proceeded to say that calamity should come upon them, and that "they should not *see him thenceforth,* until they should say blessed is he that cometh in the name of the Lord." What is the meaning of such language as this, unless it be that he had resolved to *absent himself,* until the nation should find itself so involved in danger that they would receive him *gladly* as their deliverer? Here then is an express intimation that he expected, at a future time, to come and be *received* as the temporal deliverer of the nation. Now when was this second coming as a temporal deliverer to be, unless it were at the time of the destruction of Jerusalem, as spoken of in the very next chapter, when he should come with power and great glory?

He tells his disciples also (Mat. 24—14) that before the time of his next coming, "this gospel of the *kingdom* shall be preached in all the world, for a witness unto all nations." It was expected by the Jews that under the reign of their Messiah, their nation would acquire great temporal splendor, and great importance and high rank among the nations of the earth, and that people from all nations would flock together at Jerusalem. What then did Jesus mean, when he said that "this gospel of *the kingdom* should be preached in all the world for a witness unto all nations," before the time of his coming? Did he not mean that his *project of an earthly kingdom,* or the good news of the earthly kingdom, which he designed to establish should be so proclaimed abroad, that all, who should desire it, might, at the time of his coming to take the throne, assemble and become subjects of his government? The terms used indicate most strikingly that such was his meaning. He does not say merely *his gospel,* nor does he say his *spiritual* gospel, nor his system of religion, nor the gospel of a future world; but he says "this gospel of the *kingdom.*" Besides, we ought to suppose that when he spoke of *the* kingdom, he alluded to some particular kingdom, with the idea of which his disciples were familiar—and yet, with the idea of what kingdom were they then fa-

miliar, except the kingdom of their expected Messiah, which, as they all understood, was to be an earthly one? They had, at that time, as Christians themselves admit, never dreamed of his kingdom being an heavenly one.

He said also (Mat. 21—31) that his angels* "should gather together his *elect* from the four winds, from one end of heaven to the other." Now who were these "elect," that were to be "gathered *together,*" from the four winds? Why, it is clear that they were *living men,* and that they were to be gathered together at some place *on the earth;* for after describing the tribulation that should come upon Jerusalem as being so great, that unless the duration of it should be shortened, no "*flesh* should be saved," he adds (22d verse) that "for the *elect's* sake those days shall be shortened"—that is, this time of calamity shall be shortened that the *elect* may not *die* in consequence of it. If therefore the "elect" were to be exposed to the distress attending the destruction of Jerusalem, and the time of that distress was to he shortened that *then* might be saved, from death, and if they wore to be thus saved, they of course were living men. It is perfectly absurd to speak of any others, than men living on the earth, being saved from death at the sacking of a city. Now, these "elect," who were to be saved at the destruction of Jerusalem, were undoubtedly a *part* of those "elect," who were to be "gathered together" immediately afterwards, at the time of his coming; and those, that were to be gathered from other nations, or "from the four winds," were doubtless of the same kind of "elect," that is, living men.

Considering it settled, therefore, that these elect were *living men,* and that they were to be gathered together *on the earth,* what could be the object of Jesus in thus gathering them together, unless it were to compose his kingdom? He, of course, would not wish to carry these living men's bodies to heaven, and if he wished to carry their souls there, it probably would not be absolutely necessary to "gather them together" for that purpose—much less to gather their living bodies together, as it appears that he intended to do.

That the Jews expected that, under the reign of their Messiah, people would be gathered from all nations to compose his kingdom, the following passages, selected from the many of similar import in the Old Testament, are abundant evidence.

Isaiah 27—13. And it shall come to pass in that day, that the great trumpet shall be blown, and they shall come, which were ready to perish in the land of Assyria, and the outcast in the land of Egypt, and shall worship the Lord in the holy mount at Jerusalem.

Genesis 49—10. The sceptre shall not depart from Judah, nor a lawgiver from between his feet, until Shiloh (Messiah) come; and unto him shall the gathering of the people be.

Isaiah 2—2. And it shall come to pass in the last days, that the mountain of the Lord's house shall be established in the top of the mountains, and shall be exalted above the hills; and all nations shall flow unto it.

Isaiah 11—10. And in that day there shall be a root of Jesse, which shall stand for an ensign of the people; to it shall the Gentiles seek.

Isaiah 11—12. And He (the Lord) shall set up an ensign for the nations, and shall assemble the outcasts of Israel, and gather together the dispersed of Judah from the four corners of the earth.

Isaiah 55—4 and 5. Behold I have given him for a witness to the people, a leader and commander to the people. Behold, thou shalt call a nation that thou knowest not, and nations that knew not thee shall run unto thee.

Is. 60—10, 11 and 12. And the sons of strangers shall build up thy walls, and their kings shall minister unto thee.

Therefore thy gates shall be open continually; they shall not be shut day nor night; that men may bring unto thee the forces of the Gentiles, and that their kings may be brought. For the nation and kingdom that will not serve thee shall perish; yea, those nations shall be utterly wasted.

If these passages were designed as predictions that Jerusalem was to be built up, as a *temporal* kingdom, under the reign of the Messiah, by accessions from foreign nations, we have here additional evidence that Jesus, when he predicted that his angels should gather his elect from the four winds, had in his mind the building up of a temporal kingdom; because he evidently had always intended to be guided by, and had always pretended to be destined to fulfil, the predictions which had been made concerning a Messiah.

Another most important fact, and one which appears to me decisive evidence that Jesus, at his second coming, designed but to renew his attempts to make himself king of the Jews, is, that he expected to have *competitors*, (Mat. 24—23 to 28). It is admitted and asserted by Christians, and proved by history, that these pretended Messiahs, whom Jesus called "false Christs," were men who attempted to obtain the temporal government of the Jews. Yet these are the men, against whose pretensions Jesus found it necessary, in the strongest manner, to warn his disciples, lest they, mistaking one of these for himself, or for the true Messiah, should espouse the cause of a wrong one. The question here arises, whether a man, who is undisguisedly engaged in endeavoring to acquire temporal power, so nearly resembles a genuine Son of God and spiritual Saviour, that men, who should once have been intimately acquainted with the latter, would not afterwards be able, without difficulty, to distinguish between him and the former? A further question also arises, viz: whether men must not have the same object in pursuit, in order to be such rivals to each other?

Look now, but for a moment, at the monstrous absurdity involved in the interpretation, that must be given to this affair by Christians. They must admit that Jesus, at the very time when he made these predictions in relation to his second coming, must have foreseen his *crucifixion*, *resurrection* and *ascension;* and that he must also have known that these events would open to the understandings of his disciples (what until then they are said never to have understood) the spiritual nature of his kingdom. He must have known that as soon as these events should have happened, all their former misapprehensions as to the nature of his reign would immediately vanish; that all, that they had before misunderstood, would then become to their minds perfectly clear and certain; that they would then know, with the most absolute knowledge, that he never had designed to

be, and never would be, an earthly deliverer or king; that Messiah was never to have been an earthly monarch; but that *he* was the genuine Messiah, and that his kingdom was solely spiritual, and he a purely moral deliverer, redeemer or saviour. Christians must say also that at this time, (that is, at the time of making these predictions), Jesus also knew that in a few years these very disciples would have, in a measure, established a religion, bearing his name. And yet these same Christians must say further, that although he foresaw all these things, he yet was troubled with fears lest these disciples, after they should have come to all this light, after they should be possessed of all this certain knowledge as to his character and the nature of his kingdom, and even after they should have witnessed his resurrection from the dead, and his ascension into heaven, and should have labored years for the establishment of his religion, might yet *forget* all these things, and be deceived by some one of those vagabond leaders (for such, or little better than such, these false Christs were), of insurgent bands of Jews, into the belief that such leader, and *not* Jesus, was the Christ; that they might be so hoaxed as to espouse the cause of some one who should be attempting to become a *temporal* king; might be cheated into the delusion that such an one was the real Messiah instead of himself; and might be duped into the conviction that some one, who should be notoriously aiming at an earthly throne, was the "Sent of God," who was destined to fulfil all that was expected to be done by their *spiritual* Saviour, Messiah, Redeemer, &c., in relation to the *spiritual* redemption of the human race.

When before was such a bundle of absurdities ever offered to the credulity of men?

But if we suppose that Jesus designed only to absent himself for a while, (as he intimated that he intended to do, when he said (Mat. 23—37 to 39) that the people of Jerusalem should not see him again until they would be glad to receive him), and then to come again and renew his attempt to make himself king of the Jews, his conduct in warning his disciples against being enticed, in the mean time, into the train of the other pretended kings, is all perfectly explained; because it is perfectly natural, that under such circumstances, he should have fears that before his return, his followers might suspect, either that he would not return at all, or that he was not the genuine Messiah, and might therefore abandon their hopes of him, and be persuaded to attach themselves to some of his rivals.

CHAPTER V. The Resurrection.

We come now to the question of the resurrection of Jesus—the last of those alleged supernatural events, the truth of which it is necessary to inquire into.

Two solutions of this occurrence may be given, either of which, I apprehend, will be a sufficient answer to all the evidence tending to prove a real return from death to life.

The first, and perhaps most probable solution is, that the person seen by the disciples was really Jesus, but that he had never been actually dead.

The instances have been numerous, where criminals, who have submitted to all the forms of execution, and have been supposed to have died as really as any others, have afterwards been found alive. The cases are also, as it were, of daily occurrence, where soldiers wounded in battle, or persons sick of some common disease, have apparently died, and have afterwards returned to full life. Now what does the circumstance of their being thus afterwards alive, prove? Why, it proves that the apparent death was only a temporary suspension of animation, and that they have never been really dead. It proves those facts positively, and it proves nothing more. Now will any man say that, in the case of Jesus, a supernatural event is proved by evidence, which, in other cases, proves only a natural one? Or that, in his case, we are to presume an event to have been supernatural, when there have been millions of natural ones precisely like it? If not, then he must admit, that the re-appearance of Jesus, is, of itself, positive proof that he had never been dead.

But perhaps it will be said that the prediction of Jesus before his crucifixion, that, in three days after that event, he should rise from the dead, and the fact that, in three days he was found alive, furnish too extraordinary a coincidence to be attributed to any natural cause. One answer to this objection is, that there is no impossibility of such an event's taking place *naturally*, and that any thing, which is naturally *possible*, is in the highest degree probable, in comparison with an event, that is *naturally* impossible. Another answer is, that he did not rise in *just* three days, as he ought to have done to have properly fulfilled such a prediction. He died (or was supposed to die) about three o'clock in the afternoon of Friday, and he left the tomb at least as soon as sometime in the course of Saturday night; whereas he ought to have remained in it until the middle of the afternoon of the next Monday, in order to make the coincidence as remarkable as believers would have it understood to be. The probability is, that the time, during which he was in the tomb, instead of being three days, was even less than half that time. Still another answer to this objection is, *that it is not probable that Jesus ever predicted that he should rise from the dead at all.* His alleged predictions of this kind all appear to have been made in such manner, as that none of his disciples *so understood them*, at the time. When the news first came to them that he was alive, it occasioned the greatest surprise among them. They considered the reports as but "idle tales," (Mark 16—10 to 13. Luke 24—11), "and they believed them not." They appear to have been wholly unprepared for such an occurrence. John also acknowledges (20—9) that *previous* to the resurrection, they had not known "the scripture that he must rise from the dead." But when they find that he is really alive, they brush up their memories, and recal some things, which he had said, and which they now construe to have *meant* that he should rise again, although they had gathered no such idea from them at the time they were uttered. Is it not sufficiently manifest, from these facts, that all his alleged predictions in relation to his resurrection, either were never made at all, or were made in some such language as that in relation to his rebuilding the temple? a prediction, which John, after the re-appearance of Jesus, sagaciously construed to have referred to "the temple of his body," instead of the temple in which they stood when the words were spoken, (John 2—19 to 21).

But it may be asked, if he did not mean to predict his death and resurrection, what did he mean, when he said, at the supper, the evening before he was taken, (John 13—33), "yet a little while I am with you. Ye shall seek me, and whither I go, ye cannot come?" and again (John 14—

28) when he said "I go away and come *again* unto you. If ye loved me, ye would rejoice, because I said, I go unto the father?" and again (John 16—16) when he said "a little while and ye shall not see me: and again a little while, and ye shall see me, because I go to the Father?" It may be asked, I say, what he meant by these remarks, if he did not mean that he was going to die, and rise again? And it so happens that I have but this poor answer to give, viz: that if he did not mean that he was going to die and rise again, he probably meant something a little more nearly like what he said: and that is, that he was going to be off for a while and then return again. Nothing would be more natural under the circumstances in which he was then placed—he had found that he was in imminent peril of his life—his enemies were on the watch for him—Judas had already left the room to go and disclose to the Chief Priests (as Jesus supposed) where he was; and he saw that it would not do for him to remain there longer. He therefore determined to abscond, as he had sometimes done before, and return again to his disciples when the danger was over. But as he probably considered it unfavorable to secrecy to have a dozen men accompany him, he must give his disciples some reason why it was necessary for him to go alone—he therefore very *judiciously* told them "he was going to the Father."

Now, if Jesus wished to have us believe that he intended, at this time, to predict that he was about to die and rise again on earth, why did he not predict it *plainly?* Why did he not do it in language that his disciples would have *so understood at the time?* Why did he leave this prediction to be tortured, conjured or "glorified," after the events should have happened, out of some remarks, which, when uttered, the disciples understood, and ought to have understood, as having reference to something else? "Undoubtedly for some *wise reason,*" will be the believer's wise answer.

I have thought of but one other objection that can be made to the supposition that Jesus had never been dead. That objection rests upon the facts, that, after his re-appearance, he still claimed to be the Messiah. And it may, perhaps, be said, that if he had never been dead, he was *dishonest* in continuing to make these pretensions. One answer to this objection is, that it is a supposable case, and much evidence has already been exhibited tending to show, that he was a dishonest man; and a second answer is, that if he had always been honest in imagining himself to be what he pretended to be, his return to life would naturally appear as wonderful and miraculous to himself, as to his disciples, and would tend to confirm, rather than weaken, the delusion which had previously occupied his mind.

But there is no lack of evidence tending to prove that Jesus did not die, at the time of his crucifixion. Circumstances enough are related, to render it in a high degree probable that, when he was taken down from the cross, *an intelligent person would not even have supposed him dead.*

In the first place, it does not appear that he received any mortal wounds. Those in his hands and feet, of course, were not; and as respects the one in his side, we know not that it was a dangerous one. It is certain that his apparent death was caused solely by his protracted torture on the cross, because it took place before his side was pierced. It is also certain that, if he died at all, he did not die so soon as the bystanders supposed, because they thought he was dead before his side was pierced; but when that came to be pierced, his blood was still in circulation. (John 19—33 and 34). Now this suspension on the cross appears to be precisely that kind of torture, that would

naturally cause fainting, a suspension of animation, and apparent death, before real death. And it is further evident that Jesus was taken down very soon after the first swooning, or indication of death, for Mark says (15—44) that when Joseph of Arimathea went to Pilate to get permission to take the body into his care, "Pilate *marvelled* if he were already dead," but being told by the centurion that he was dead, he thereupon gave Joseph permission to take the body, which he would undoubtedly do immediately. Now the fact, that when Joseph came to him, Pilate marvelled that Jesus could have died so soon, is sufficient evidence that he had but just then given signs of death. There can therefore be no reasonable doubt that he was taken down very soon after the first swooning, that was caused by his suspension on the cross. Would any intelligent man now-a-days suppose that a person, in this situation, and at this time, was dead beyond recovery?

Let now the following facts be considered, 1st, that Pilate marvelled at hearing that Jesus had died so soon; 2d, that when *he* was supposed to be dead, those, who were crucified with him, were still alive, (John 19—32 and 33); 3d, that in order to insure the death of those who were crucified, it was customary (and therefore probably considered necessary) to break their legs, and that his legs were not broken; 4th, that he was undoubtedly taken down very soon after the first signs of death; 5th, that he probably received no dangerous wounds: and 6th, that he was not dead at the time his side was pierced, (as is proved by the circulation of his blood), although the people had previously considered him dead; let all these facts be considered, I say, and it appears to me that the evidence is abundant to satisfy any intelligent and reasonable man of the probability that Jesus was not at this time dead; that he was in fact in such a condition, as he would have been likely to recover from, without any artificial aid at all.

But he was not left without artificial means of recovery. The blood-letting, caused by the wound in the side, would naturally tend to revive him. John says also (19—38 to 41) that the body was laid in an open tomb, (by Joseph of Arimathea and Nicodemus), confined by nothing but linen clothes, and that, with it, was wrapped, in the linen clothes, a large quantity of strongly scented gums, viz. myrrh and aloes. The odour of these gums would act as a restorative of considerable power. These circumstances sufficiently account for the restoration of this man from such a condition as I think he has satisfactorily been shewn to have been in.

How next did Jesus escape from the tomb? There are two ways, in which this may have been done. In the first place, he himself may have been able to force open the door, and make his escape alone. In the second place, Joseph and Nicodemus, who had taken so much pains in regard to this body, would not be very likely to let one day and two nights pass away without their going to the tomb to ascertain the condition of its inmate, and if they found him recovered, he had then nothing to do but to walk off; and if they found him still insensible, they had nothing to do but to carry him away, and take the necessary measures to restore him.

But here the Christian will say that neither of these things could have been done, because a watch was set there for the express purpose of preventing any thing of that kind. This matter of the watch must therefore be inquired into. And it so happens that there is abundant evidence to shew that, if there were any watch there, they were asleep.

In the first place, the stone was rolled away from the door, and the door was open. If these acts had been done physically by an angel, as Matthew (28—2) says they were, the watch, if awake, would have been as likely to observe them, when being done, as if they had been done by Jesus himself, or by Joseph and Nicodemus; and the single fact, that they did not see these acts done, alone proves that they were asleep.

But even if Jesus was restored to life supernaturally, he of course walked out at the door, for an angel is represented to have been sent from heaven to open the door and let him out. Now, if the watch had been awake, they would have been just as likely to have discovered Jesus when he came out *then*, as they would if he had recovered naturally, and had then come out alone, or as they would to have detected any one (Joseph and Nicodemus for instance), who should have come and taken the body; but the fact that they did not see him at all when he came out, is alone sufficient evidence that they were asleep.

Again. It was perfectly natural that the watch should sleep. If they saw a corpse safely deposited in a tomb, the door closed, and a stone placed against it, they would not be made very wakeful by any fear, either that the body itself would return to life and make its escape, or that it would be stolen by men, who should know that a watch was near—and it was probably their feeling of security, that made them sleep so soundly that neither the noise of the rolling of the stone, nor the opening of the door, by whomever caused, awaked them.

But Matthew says (28—4) that when Mary came to the sepulchre, an *angel* had rolled away the stone from the door, and sat upon it, and that "for fear of him the keepers did shake, and became as *dead* men."

Few probably will believe that an angel was there, simply because a simple, superstitious and timid woman imagined she saw one—at such a time and place too, where a woman, who believed in angels, would be more likely to see one than at any other. But there is no certainty, I think I may say probability, that she even imagined that she saw one sitting on the stone, for Mark says nothing about her seeing an angel *without* the sepulchre, but says (16—5) that the woman saw a young man clothed in a long white garment *within* the sepulchre; and Luke only says (21—3 & 4) that after they *had entered into* the sepulchre; "*two* men stood by them in shining garments," &c. John says nothing about Mary's seeing an angel at all the first time she went to the sepulchre.

But perhaps the Christian will ask, if there were no angel there, why did these keepers appear "like *dead* men?" Why, for the very good reason that they lay on the ground asleep, as I have supposed them to have done; and this undoubtedly is as far as they did resemble dead men. But Matthew says these "keepers did *shake*," and it may be argued that this could not be if they lay on the ground. To this it may be replied, that neither could they have "become like *dead* men," and yet continued *standing*. The unbeliever has a right to take his choice of these contradictory statements—I therefore take the last, that they "became like dead men," and then account for it by saying that they were asleep. The time when Mary saw these men in this situation was just at dawn of day, Matthew says; (John says (20—1) that the time of Mary's being there was "when it was yet dark"), and that is the time when they would naturally be asleep.

Matthew acknowledges that the watch told the Governor that they had been asleep; but he says that this story was a falsehood, and that the soldiers were bribed by the Chief Priests to tell it. But it is pretty certain that Matthew either manufactured this story, so far as it relates to the falsehood and bribery, or that he adopted it without knowing any thing of its truth—for how could he know that they had not slept? or how could this outcast fisherman, or any of his feather, know any thing about the Chief Priests making a bargain with these soldiers? was he, or such fellows as he, let into their counsels?

The simple declaration of these soldiers is sufficient evidence that they were asleep,—for it is not in human nature that men, in their situation, knowing that Jesus had pretended to he the Messiah, the Son of God, &c., should see an angel come and roll away the stone from the door of the sepulchre where he was buried, that they should feel such fear, on account of seeing this angel, as to "shake and become like dead men," and then that they should *all* go away and deny all this, and say that they had been asleep.

Still less, if possible, is it in human nature, that the Chief Priests, who knew what Jesus had claimed to be, when they learned that he had risen from the dead, and knew also, as they then of necessity must, that he was a being not to be controlled or baffled in his designs by them, should think of giving "large money" to these soldiers to hire them to say that the body had been stolen. Men never would have dared do such a thing. But supposing them to have dared to do it, what could they expect to gain by such a fraud? or how long could they expect to conceal it? If they knew that Jesus was alive, they could not but have been assured that the fact would be immediately known; and they must also have been aware that as soon as the fact should have become public, the falsehood of the soldiers would be exposed, and their own knavery in the greatest danger of detection. The absurdity of pretending that men would act thus, under such circumstances, is so gross as to be perfectly disgusting.

I here take it for granted that it has been established, by evidence, which Christians must abide by, that, if there were a watch at this tomb, they were asleep. There is still another subject of inquiry, viz. whether there were any watch at all there? The evidence is very strong tending to shew that there was none.

In the first place, nobody but Matthew says any thing about there being any, and his reputation for truth is decidedly too bad to have any thing improbable, which, if true, would make *for* his cause, believed on the strength of his assertion. He has told too many stories about soldiers being bribed to tell a falsehood, about Chief Priests' bribing them, about the earth quaking, rocks rending, graves opening, dead rising, about sermons on the mount, &c. &c. to be entitled to any mercy when his statements are to be examined, or any credit when those statements are improbable.

Matthew had a strong inducement to make up a story of this kind, if it were false. It appears (28—13 & 15) that, at the time he wrote, it was the current opinion among the Jews that the body was stolen from the tomb in the night. And he knew that this would be the natural inference of people in general, unless something were told by the friends of Jesus to prove that such could not have been the case. He therefore says that there was a guard there. But even when he has said

this, he seems to be aware that he has not relieved his case from all embarrassment, and that it is necessary for him to account, in some way, for the fact, that the circumstance of a guard's being there did not satisfy the *Jews,* as well as himself, that the body was not stolen. He could account for this in no way but by charging the soldiers with having told a falsehood, by which the Jews were deceived. He therefore declares that they did tell a falsehood, and in making this declaration, he shews that he himself was a man too dishonest to be trusted, because he certainly could not have known that they did not sleep. On his own showing, therefore, he, *without* any certain knowledge of the facts in the case, contradicts those who did know them perfectly, and asks us to believe, merely because he says so, that those others were all liars; although he acknowledges that the Jewish nation believed, and continued to believe, that they told the truth. A very modest man truly!

But even when he has accused the soldiers of lying, he has not done all that was necessary to be done. He must, in order to make this story against them believed, show that they had some motive for lying. He therefore makes another charge, which he could not have known to be true, even if it were true, against the Chief Priests, and says that they bribed the soldiers to do it. But even when he has done this, he has not cleared his case of all difficulty in which it is involved. It is necessary that he should also account for the fact that the soldiers were not *punished* for sleeping, when they had been set as a guard. One falsehood more, if it be but believed, will now make out his case—he therefore represents that the Chief Priests—those wicked Chief Priests, who were full of all manner of iniquity—interfered for these soldiers, according to agreement, and made such representations in their favor (false ones, of course, unless he means to charge the Governor also with corruption) as saved them.

Such is Matthew's story—a story, that might have been valuable to Christianity, were it not that, like many other stories of the same author, it failed to "keep probability in view."

The circumstance that neither Mark, Luke nor John make any mention of the guard, is very strong evidence that there was none; because they must almost necessarily have known that the way, in which the Jews accounted for the absence of the body from the tomb, was by supposing it to have been stolen; and, if they had common sense, they must have known that this supposition was a reasonable one, and that therefore, if there were any facts tending to contradict it, it was immensely important to their cause to state them. Yet they have said not one syllable on the subject. Besides, if there had been a guard there, that of itself was an incident so prominent, one would think, that these men would have been likely to have mentioned it, even if they had not seen its particular importance.

Another ground for believing that there was no watch there, is, that there seems to have been no good reason why there should have been one. The man was *dead,* as they all supposed, and the body had been taken down and given to its friends, and what more was necessary? But Matthew says (27—63 &c.) that the reason assigned by the Chief Priests and Pharisees, who wished to have a guard set, was, that "*they remembered* that Jesus had said that in three days he should rise again." Now this story is perfectly ridiculous, because it is evident that even the disciples, not only had never heard him say plainly that in three days he should rise again, but that they had not even

heard him say any thing, which they considered equivalent to such a declaration—how supremely absurd then is it to pretend that others had heard such a statement from him. If then the Chief Priests had never heard any thing about his rising again, the motive, which Matthew says induced them to get a watch set, did not exist; and if that part of the story, that relates to the motive be false, the whole is probably false.

There is still another circumstance, which, in my mind, stamps this story of the watch as a fabrication—and that is, that all the preparations for having the watch set, &c., are said to have been made on the sabbath day, (Mat. 27—62 &c.). There seems to have been an attempt to conceal the fact of this being done on that day, by calling it, instead of the sabbath, "the next day that followed the day of preparation." If the story, instead of running as it does, had run thus, "now, on the sabbath day, the Chief Priests and Pharisees came together unto Pilate" &c. the improbability would have been so glaring as to be dangerous; a man would notice it at the first glance; but "now, the next day that followed the day of preparation, the Chief Priests and Pharisees came together unto Pilate" &c. does not suggest the improbability so readily, and was therefore the better form of expression, in this particular instance, notwithstanding it is awkward and unnatural.

For my part I believe the whole of this story to have been the work of a knave, and probably of a more *modern* knave than Matthew. Some pious priest (before priests had become as honest as they are now) probably saw what was wanting, and attempted to supply it.

One consideration is here worthy of notice, viz. that if there were no watch, it is not improbable that Jesus went, or was carried, from the tomb even sooner than the second night. It is indeed probable even that when Joseph and Nicodemus (who appear to have been more intelligent men than the friends of Jesus generally) had him taken down from the cross, and asked of Pilate the privilege of taking the body into their care, they believed that he could be restored; that their object in seeking to get the body was to restore it; and that, on the very first night, as soon as the women and the other friends of Jesus, whom it would not do to trust with a secret, had gone, and it had become dark, they took measures to recover him. It is evident that the disciples did not go to the tomb on the sabbath day—so that if the body had been absent on that day, they would not have known it. All they knew about the time of the exit of Jesus from the tomb, was, that very early on the second morning he was gone—but of the length of time he had been gone they knew nothing.

If it be true that the individual, seen by the disciples, was really Jesus, his whole course, after his re-appearance, tends to confirm all I have supposed in relation to his natural restoration. Had he actually risen from the dead, he would undoubtedly have shown himself in the most open manner, so as to have made the fact of his resurrection notorious. But he kept himself timidly concealed from the public eye. He skulked about like a fugitive, who had luckily escaped the clutches of the executioner. He saw none but his friends. Peter says (Acts 10—41) he did not shew himself "to all people," but (only) to his disciples. His first interview even with them was had in the *evening* and within *closed doors,* (John 20—19). Eight days afterwards he met them again, and within *closed doors,* (John 20—26). Perhaps he saw *them* a few times more, but he carefully avoided

being seen openly. He lurked about among his former adherents for forty days, and at the end of that time he was among the missing.

It is now incumbent upon those, who maintain that he was supernaturally restored to life, to show, by reasonable evidence, what became of him at the end of these forty days. Those, who believe only that animation was *naturally* restored in him, can easily satisfy themselves as to his fate, by supposing that he was detected and privately slain; that he sought a residence where he might be safe from a second crucifixion; or that he went off with the intention of living concealed for a while, and then returning at a more favorable time to renew his attempt to make himself king of the Jews, and that he died before such an opportunity presented itself. But neither of these suppositions will answer the purposes of those, who maintain that he was *supernaturally* revived. *They* must dispose of him in a more dignified manner. Now, on what evidence can they do it? Matthew and John give no intimation that they ever knew what became of him. Nor do any of the eleven ever speak of having witnessed this miraculous "ascent." Yet Mark and Luke, who are our only authority for believing that he ascended at all, both say (Mark 16—19. Luke 24—50 to 51. Acts 1*) that he did it in presence of his disciples. Now is it to be believed for a moment, that if he had thus ascended into heaven in the presence of his disciples, no one of them would ever have given us his testimony to the fact? or that Matthew and John, who were of the twelve, when they undertook to write biographies of him, would have omitted all allusion to such an event as this, if it had ever happened? The thing is incredible. It would have been better for their case to have omitted the whole of their other accounts of the supposed miracles and wonderful works of Jesus, than to have omitted this single one, for without this, the rest, under the circumstances, are utterly incredible, and good for nothing. There is no excuse for attempting to support a story of this kind on the mere hearsay declarations of Mark and Luke, who could have known nothing of the fact, when the alleged eye-witnesses are silent. The imposition is too gross to deserve the toleration of society for a moment. And that class of men, who dare get their living by palming off this abominable deception upon the understandings of the simple and confiding, have little more excuse for their conduct than that other class of swindlers and cheats, against whom we have laws to protect the community.† The disciples perhaps (as some of their observations indicate) *supposed* that Jesus had gone to heaven, and well they might suppose so, and for these reasons, viz. that they thought that the proper place for him, and perhaps they remembered that he had once before told them that he was going to the Father, and they knew not now where else he could have gone to. (They did not dream that he could *run away*). But they never speak of having *seen* him ascend. Certainly the bare conjectures of these eleven are not to be taken as evidence of his ascension. The believer then is left with a risen Messiah on his hands, whom he has not disposed of, and whom he cannot dispose of, by any reasonable evidence, that can be found in the Bible.

But supposing any one should still say that he *will* nevertheless continue to believe that Jesus went to heaven, let me ask him whether he supposes that the *body* of Jesus went there? that human body, which is supposed to have been prepared solely for him to live in while on the earth? Surely he will not pretend that this flesh and blood, this lump of matter, this corporal system went to the land of souls. What then did become of it, unless it walked slily off one day out of the reach of danger?

Besides, what became of the dress he had on? Did he wear that into the world of spirits? But this is not all. There is, in this story, still another absurdity, gross as any preceding one. The testimony of the witnesses is, that he ascended "up" into heaven. Now, which way from the earth is *up?*

Where is men's reason, when they talk of the probability of such stuff as this?

The second solution of this alleged resurrection from the dead, supposes Jesus never to have been seen by his disciples after his crucifixion, but that they were duped by some one who pretended to be Jesus. There are some improbabilities attending this solution, yet none of them, I think, will be found to bear any comparison with that of a man's returning to life after he had once died.

The testimony tending to prove that he was seen alive, is but the statements of two men, (Mark and Luke) who do not pretend to have seen him, and of three other men, (Matthew, John and Paul), who say that they did see him.

As the return of the dead to life would be a supernatural event, it is so improbable that it appears little less than ridiculous to regard at all any stories told by men, who do not pretend to have seen the man, and who only relate what they *heard*, probably years afterwards. Few words only will therefore be devoted to the testimony of Mark and Luke. But since Matthew, John and Paul say that they saw him, their testimony will be more particularly examined—although, if the same fact had been related of any person but Jesus, or in any other book than the Bible, it would not be regarded as in the slightest degree probable, whether testified to by two, by ten, or even ten thousand men. If, in the case last supposed, we were not to doubt the *honesty* of the witnesses, we should still disbelieve their testimony, however, direct and positive it might be—for we should say, and say it too with the most entire confidence, that they must in some way or another have been mistaken, even though the circumstances had been such as that the witnesses should deem it impossible that they could have been, and such that we could not tell how they were. We should believe that they had seen an individual, who so nearly *resembled* the deceased, that they were in an error as to the identity of the person, or we should say that some delusion had seized on and deceived them.

No possible amount of human testimony could make us believe for a moment, that Mahomet rose from the dead, although the fact were universally believed by his followers. Even if it were said that Mahomet, after his death, was seen alive again and again, daily and hourly for years, by great multitudes who had known him intimately before his death, we could not be made to believe that the individual seen was he. Even if it were said that this individual assumed to be Mahomet; to fill the place, and take the station, which he had occupied; that he conversed about having been dead, and gave a reason for having suffered death; that he had marks about his person that resembled those about the person of Mahomet; still we should not believe; we should say that the man was an impostor; that he had disguised himself so as to resemble Mahomet as nearly as he could, and that he was by this art, deceiving all who credited his pretensions, however numerous and respectable those persons might be.

But this is supposing a much stronger case than that related by the biographers of Jesus. The individual, whom they supposed to be Jesus, did not show himself as such to the multitude, although, if he were really Jesus, and a belief in him as a Saviour were necessary to their future happiness, he would seem to have been bound by the strongest principles of moral obligation to have thus shown himself, that he might have inevitably convinced those who had before been incredulous—and the fact that he did not show himself to the world as the one who had been dead, is very strong evidence of itself that he was not the real Jesus.

This individual was seen by eleven, who had been followers of Jesus, and perhaps also the same individual was seen by three or four other persons, although it is very doubtful whether the person seen by the eleven was the one seen by Mary.

This individual was seen (as John says) by a part of the disciples of Jesus at *three* different times, and unless he were the one whom Mary and the two going to Emmaus saw, we have hardly a shadow of evidence that he was seen and recognised as Jesus, at any other times, or by any other *persons,* after the crucifixion. And yet Luke says (Acts 1—3) that Jesus was on the earth forty days after that event. If he himself were on the earth forty days, where was he, and what was he doing during all this time, that he should be seen not at all by the public, and but three times by his own disciples? If he were the genuine Jesus, a tenth part of this time was sufficient for him to have shown himself so publicly to the Jews, and proved his identity so unequivocally, as that the conversion of the whole Jewish nation would have been the probable result. Yet he did not thus exhibit himself, but left about sixty generations of a whole nation, as believers must say, eternally to perish, merely because they were not convinced that he was the Messiah. Even if he were really the Messiah, and did actually exhibit a disregard of men's happiness so inhuman as he is here represented to have done, a man must have an exceedingly degraded moral taste, or very obtuse moral perceptions, to be capable of feeling any respect for his character.

But let us look more minutely at the evidence.

We are told (Mat. 27—66) that the sepulchre was made sure, the stone placed against the door being sealed, or made fast, and a watch set. The inference, which the believer draws from these facts, is, that no one could have stolen the body without being detected. But the reader will here recollect the evidence, before offered, to prove that, if there were any watch, they were asleep, and also to prove that there was no watch. I shall here take it for granted that that evidence was satisfactory to prove one or the other of those positions. There was then *opportunity* enough to steal this body; and if it were *possible* to steal it, the single fact that it was absent, is conclusive proof that, if it were dead, it was carried away; because, as long as we can *imagine* a natural way in which this body could be removed, we are not to suppose it to have been supernaturally done.

Let us now look at the evidence of Jesus having been seen by Mary. Matthew says (28—9 & 10) that as Mary Magdalen and the other Mary were going from the sepulchre, Jesus *met* them, and commanded them, saying, "All hail," (precisely as a man, who, on seeing these women coming from the tomb, should infer that they had been followers of Jesus, and should feel disgusted at the thought of their believing that he would rise again,* would have done, if he had wished to

impose on them on account of their superstition); that they then came and held him by the feet and worshipped him, and that he then told them to not be afraid, but to go and tell his brethren to go into Galilee, and that they should see him there. Such is Matthew's account of the interview with Mary. Mark's story is somewhat different. He says that the angel, whom he says the women saw *in* the sepulchre, told them to go and tell the disciples that Jesus had gone into Galilee, and that they should see him there. And all that he says about Mary's seeing Jesus, is simply this (16—9) that early in the morning on the first day of the week, "he appeared to her"—but says nothing of the place where he appeared to her, or of what he said to her. Luke's account is still different from either. He says that Mary, *and other women,* went to the sepulchre, and saw *two* angels, but does not say a word about Mary's seeing Jesus at all after his death. John's account is still very materially different from that of either of the other three. He says (20—1 to 18) that Mary went first to the sepulchre, (making no mention of any other women going with her); that she saw the stone rolled away from the door; that she then returned and told this to Peter and John; that they (Peter and John) then went to the sepulchre, and saw the grave clothes &c. and then went away, (not having seen Jesus); but that *after* they (Peter and John) *had gone,* Mary remained behind at the sepulchre weeping; that she then looked into the sepulchre, and saw two angels, in a different position from that represented by Luke, viz. sitting one at the head and the other at the feet where the body had lain; that as she turned herself back from this sight, she saw a man whom she *did not know,* but whom she *supposed* to be the *gardener;* that this supposed gardener asked her why she wept, and whom she sought; that she answered him in a manner that indicated that she had been a believer in Jesus; that this supposed gardener then said to her "Mary;" that at the utterance of this single word she believed the man to be Jesus, (although she had seen him before, and had spoken to him, and he to her, *without her knowing him*); that she then addressed him in a manner that showed that she thought him to be Jesus; that he then, (probably to impose on her, and see how he could keep up and continue the delusion which he saw her superstition and her then excited imagination had led her into) said to her (assuming to be Jesus) "*touch me not!* for I am not yet ascended to my father! but go to my brethren, and say unto them I ascend unto my father and your father, to my God and your God." And here ended the interview.

If John's story stood alone, and uncontradicted, it contains enough to show that there was no Jesus there. If there were, why did he not show himself to Peter and John, instead of Mary alone? Why did not Mary know him at first? Why did he not suffer her to touch him? How did it happen that he had not as yet been to his father? He had told his disciples, (John 14—28), "I go away, and come again unto you. If ye loved me, ye would rejoice, because I said I go unto my father." And yet John represents him as telling Mary, *after* his supposed resurrection, that he had not yet been to his father. Where, then, if he were Jesus, had he been during that time which he had allotted to go to the Father?

Mary's mistake in supposing this man to be Jesus, is easily accounted for. She was an exceedingly simple and superstitious woman, as is proved by the facts that she supposed Jesus had cast out of her seven devils, (Mark 16—9) and that she imagined she saw angels at the sepulchre. She would naturally, at such a time and place, be in the greatest trepidation of mind, and her imagination would be filled with superstitious fancies. When therefore the man addressed her by her

own name, and doubtlessly in a tone a little more emphatic or authoritative than he had before used, it is not at all strange that she should at the moment imagine him to be Jesus, and address him as such. He then, seeing her simplicity and delusion, took advantage of her state of mind to dupe her farther, and told her not to touch him, &c. Here the interview closed before she had had time to recover her self-possession, and discover her mistake.

But the stories of all are so dissimilar, and in some of the most, if not the only, important particulars, so inconsistent with each other, that we cannot determine how much or how little of either may be true, or how much of all may be false: but we may safely infer from either alone, or from all together, that she really saw no Jesus there. We are laid under the stronger necessity of coming to this conclusion by the circumstance that the apostles themselves did not, at the time, believe her story, (Mark 16—10 & 11—Luke 24—10 & 11) but considered it an "idle tale."

The next time that he is said to have been seen, was when two, who had been his followers, were going to Emmaus. Luke says (24—13 to 31) that Jesus, on the *same* day that he rose from the dead, fell into the company of these two men, and conversed with them on the way, and yet that during all this time they did not know him. Luke accounts for the fact that they did not know him, by saying that "their eyes were (miraculously) holden that they should not know him." But to perform a miracle to *prevent* an individual from being recognised, would be a singular way of making it manifest that that individual had risen from the dead. Be that as it may, this man walked with them, and they told him that they had been believers in Jesus. And furthermore they told him that certain women had, that morning, been to the sepulchre, that the body was missing, and that the women said they had seen angels, who told them that Jesus was alive. The supposed Jesus must have by this time discovered what sort of persons he was talking with. He must have seen that they were strongly inclined to believe that Jesus really was alive, and thus he must have been satisfied that they could easily be imposed upon. He therefore attempts it, and in order to bring their minds into such a state as to be easily duped by any artifice he might choose to adopt, he tries to convince them *entirely* that Jesus was alive, by attempting to show from their scriptures that "Christ ought to have died," (and of course to rise again). Before they had reached the place where the two were to stop, he had undoubtedly brought them to believe that the story of the women was true, and that Jesus was really alive. They were then ready to be caught by his trick, which was this, viz. after they had set down to eat, he took bread, "and blessed it, (in the maner of Jesus) and brake, and gave to them." The result was such as might have been expected, viz. "their eyes were opened, and they knew him." *His* conduct was then such as might be expected, viz. "he vanished out of their sight."

Mark tells the story more briefly. He merely says (16—12 & 13) "and after that, he appeared, *in another form*, unto two of them, as they walked, and went into the country. And they went and told it unto the residue—neither believed they them." And well they might not believe them, and well may we not believe them, for if he appeared "in another form," how could the witnesses themselves know that it was he?

Mark and Luke, who were *not* of the twelve, tell these stories, but Matthew and John, who *were* of the twelve, say nothing about the matter—which circumstance is pretty good evidence that they always supposed there was some deception or mistake in it.

Another circumstance, which renders it probable that this individual was deceiving these simple men, is, that it is difficult, if not actually impossible, to conceive of any reason, that he could have had, if he were Jesus, for not wishing to be known by them at the first.

Still another circumstance, of the same strong character, is the *language,* which he employed to bring them to believe that Jesus was alive. He even went so far as to call them "fools," (language not very well becoming a Saviour), on account of their backwardness to believe the strange stories they had heard. If he had commended their good sense in not believing them, he would have shown himself a man of more judgment or more honesty. But such language as he used, when it comes from a superior, is often, with simple men, who doubt their own capacity to judge, the most persuasive of all arguments.

Although neither Matthew, Mark nor Luke (in his gospel*) speak of Jesus's being seen but once by his immediate disciples after his death, yet John says that he was seen by a *part* of them at *three* different times. Let us see whether it were so.

I have before said that no number of witnesses, however respectable themselves, and however direct and positive their testimony, would be sufficient to convince us that any man but Jesus ever rose from the dead. Although they were to testify to circumstances, which we should be unable to account for in any other way than by supposing the man to have risen from the dead, still we should believe, we should *know,* as absolutely as we can know any thing, that there was a mistake or a deception somewhere. In these three cases, related by John, of Jesus's being seen by his disciples, there is abundant room for mistakes and deception.

Of those numerous pretended Messiahs, who were about in the days of Jesus, it was perfectly natural that some one should seek to avail himself of the notoriety which Jesus had acquired, and of the additional notoriety that might be acquired by assuming his name, and pretending to have risen from the dead. Such an one, knowing the superstitious character of these disciples, would see, that if he could disguise himself so as to resemble in any degree the person of Jesus, he could pass himself off to his disciples as him. This too would be an easy matter for him to accomplish, for they were so superstitious, and so ready and eager to believe any thing marvellous in relation to Jesus, that if they were to see one whose looks or dress did but remind them of him, they could, by persuasion and the power of their imaginations, be brought to believe what they must have so earnestly desired to believe, viz: that the individual was really Jesus. If such were the motives, that governed the one, who, at three different interviews, assumed to be Jesus, he then probably found that it would be impossible longer to keep up the deception, and never attempted it again.

There is a different motive that might have induced some one to attempt this deception. The credulity and ignorance of these simple fishermen must have been well known among the more enlightened part of the community. If some one, after having witnessed the delusion which had

led them on before the death of Jesus, should, from a mere waggish curiosity to learn the extent to which they might be still further duped, disguise himself so as to resemble Jesus so far as to recal him to their minds when they should see him, and then, taking advantage of their flurried imaginations, should stoutly declare himself to be Jesus, the deception, with such men, would certainly succeed.

It appears that the individual, who had passed himself off as Jesus with the two going to Emmaus, was the same who afterwards appeared to the disciples, because Mark says (16—14) that he upbraided the eleven for not believing those, who had said that they had seen him. If then the one, who went to Emmaus, was an impostor, the one, whom the eleven saw, was also—and probably his success in duping the two induced him to try the same experiment with the eleven.

Very little disguise would be sufficient for his purpose—because the eleven were well prepared, by the stories of the women, and of the two, to believe that Jesus was alive. The success of the artifice, at the first interview, was aided also by other circumstances. The time chosen was the most favorable for the plot that could have been selected, viz: evening, (John 20—19). The *place* was favorable, for the *doors* were *shut.* The state of their minds, in other respects than the one above mentioned, was favorable, for they had assembled "*through fear of the Jews,*" and their thoughts were undoubtedly engrossed by the idea of his being alive—and they were undoubtedly querying with each other whether he *were* alive; and probably nearly all had come to the conclusion that he actually was. In the midst of this state of things the man enters, and says, solemnly, "Peace be unto you,"—the best language he could have chosen to impress their imaginations. Soon he *repeats.* "Peace be unto you—as my father hath sent me, even so send I you." Then he "*breathed on them!* and said receive ye the Holy Ghost." What means such disgusting mummery, unless it were a *studied imposition? Breathing* on them! He then closes the interview by one of the most arrant pieces of humbug that was ever attempted, viz: by pretending to confer on them power to *forgive sins!** a pretence which probably, at the present day, hardly deceives a single Protestant in all Christendom.

To proceed with the evidence. John says he showed unto them his hands and his side. John would have us believe, from this language, that the disciples plainly saw the scars or wounds; yet he does not say absolutely that they did; and if they only saw his hands and his side, without any scars or wounds, the prevarication would hardly be more palpable than the one which John was convicted of on a preceding page. But even the story, that he offered to show them his scars, is very improbable for several reasons,—such as, in the first place, that it is not likely that it was necessary, for they would generally believe him readily enough without seeing them. In the second place, if he were to show them his *hands,* he would not be likely to show them his side—the real Jesus would certainly be able to prove his identity, to men so ready to believe as they were, without submitting to so critical an examination. A third reason is, that it was probably so dark that they could not have seen the scars even if there were any—for John says it was in the evening, and that the doors were shut *through fear of the Jews.* If they were so fearful of being discov-

ered by the Jews, they would not be likely to have light enough in the room to enable them to detect a scar on a man's hand.

Eight days after this affair, John says (20—26) they were together, probably in the same place, for he says they were "within," and also that the doors were shut, as before. The individual comes again, and says to them—*as before*—"Peace be unto you." He then said to Thomas, "Reach hither thy finger, and behold my hands, and reach hither thy hand, and thrust it into my side, and be not faithless, but believing." Then, says John, "Thomas answered and said unto him, My Lord, and My God." Now here is room again for another of John's equivocations. He does not say that Thomas actually did examine either his hands or his side—he only says that the man proposed that he should do so. Thomas, having been half incredulous and half believing, would not be likely, after such a proposal had been made to him, to do any thing that would imply so much doubt, not only of the reality of the person, but also of the truth of the man's declaration, as, after the offer had been made to him in a tone of confidence, then to proceed to *make* the examination in earnest. Probably the man's apparent willingness to be examined confirmed Thomas in the belief that he was Jesus without any examination—if so, it would have appeared to him indecent irreverence to make the examination, and he would be satisfied without making it, as the others had been.

But supposing he actually did put his hand upon the side, and even suppose (what would not be very probable) that the side was naked, it is hardly possible that there should have been such a scar there as that a person, who expected as a matter of course (as Thomas by this time must have done) to *find* the scar there, would not be very liable to be deceived in just placing his finger for a moment on a substance so yielding as flesh. Besides, such a spear as those used for piercing the sides of those, who were executed, would undoubtedly be but a small instrument, and would leave but a trifling mark, and not such an one as John speaks of, into which a man might "thrust his hand."

Or supposing that Thomas did go so far as to look at, or feel of, the hand of the man, and supposing he actually did discover some appearance of a slight wound there; we must remember that it had been eight days since this man had been seen by the others, and if he were one of the spurious Messiahs, and designed at this time to attach this sect to him, he would naturally think that some new corroborating circumstance would at this time be necessary to keep up the deception which he had practised once, and might slightly wound his hand so as to give it just enough of the desired appearance to impose on the credulity of a man like Thomas, who was nine-tenths imposed on before.

The fact that the man had not been seen for eight days is very strong evidence that some cheat of this kind was practised on Thomas, if it were true that he examined the hand at all—a circumstance, which I entirely disbelieve. This whole story of Thomas's examination of Jesus is an exceedingly suspicious one. It is such an one as might be most easily manufactured, and one too very necessary to be manufactured, or otherwise supplied, in order to make out any thing of a plausible case in favor of a resurrection.

But even if Thomas did proceed to examine both the hand and the side, and even if he found marks there which satisfied *him*, still, the fact that he made so critical an examination, would argue most forcibly that the *personal appearance* of the individual did not well correspond with that of Jesus, and, of course, that the marks were counterfeit.

There is still another objection to the whole testimony of these alleged scars or wounds, and that is, that if a divine being were to be restored to life miraculously, it appears a little probable that he would be restored unblemished, and bearing no mark of man's violence, instead of thus bringing back his scars or wounds with him—otherwise the work of restoration would seem to have been but half performed. Supposing his legs had been broken on the cross, as the legs of the others were, would he have come back with broken legs?

John says again that this man was seen by a part of the disciples a third time. This appearance must have been thirty days or more after the last, if the individual was seen by the disciples but three times in all, (and we have none but hearsay evidence to show that he was seen more than three times); because Luke says (Acts 1—3) that Jesus was on the earth forty days, and the second time that he was seen was only eight days after he was supposed to have risen, and they could not have known that he was on the earth forty days, unless they saw him at the *end* of that time.

This individual, whoever he might be, appeared to them standing onthe shore in the morning, after they had been fishing through the night, (John 21—3 and 4). John acknowledges that when they first saw him on the shore, they did not know that the man was Jesus. It is evident also that, even after they had come to him on the shore, they were in doubt as to the identity of the man, for John says (21—12) that "none of his disciples durst ask him, who art thou? knowing that it was the Lord." Now if they knew that it was Jesus, how happened it that they *thought* of asking him who he was? yet the fact that they did not dare to ask him, proves that they desired to ask, or thought of asking, him; and the fact that they thought of asking, or desired to ask him, proves that they were in doubt. So that here is another case (only one of many as I believe) where John has attempted to make his story stronger than the truth. He probably, in years afterward, on recurring to this incident, and dwelling upon it, brought himself to believe that the man seen was Jesus.

There are some good reasons for believing, that John has colored his whole account of this supposed Jesus much beyond the reality. He was under strong temptation to exaggerate. His object, as was stated before, in writing his narrative, was to prove that Jesus was not a mere man.* It was important to the progress and dignity of the system that he should prove this—and it was important also to his own reputation and influence among the early converts, because he had undoubtedly always held that doctrine to them. But to establish this fact a strong story was necessary. Forty years experience, in the labour of convincing men of the truth of such improbable facts as his system rested on, had taught him that a very plausible and unhesitating story was absolutely necessary to gain credit, and the same experience had taught him how to tell such a story—and furthermore, many of those stories of his, which differ from any told by the others, are of such a kind as could be easily manufactured from very slight circumstances. He was also a

man of a low, contemptible and itching ambition, as is proved by the facts that he wished to have the promise of *sitting next* to Jesus in heaven, (or in his kingdom on earth), (Mark 10—35 to 37), and that he repeatedly pretends, by speaking of himself as "that disciple whom Jesus loved," to have been his favorite over the others—a fact, which I am not aware that any, but himself, ever discovered. A disposition so low, and so craving of notoriety, as this, is almost always associated with a propensity to practice duplicity and deception—and therefore, even if there were no circumstances, *out* of his narrative, to oppose his statements, his own character is a sufficient reason why we should not credit a word that he says, which looks improbable.

The testimony of Paul is (1 Cor. 15—5 to 8) that Jesus was once seen by five hundred at once, and that lastly he was seen by himself. I contend that it is not at all probable that even the individual, who pretended to be Jesus, ever made that pretension in the presence of five hundred, and for these reasons among others, viz: first, that we have only Paul's word for it, and as he has, as the reader will recollect, been already convicted of direct falsehood in one instance,* of probable falsehood in another, and in another of deliberate deception, which is equally falsehood, though accomplished by actions instead of words, his word is good for nothing as evidence of any thing improbable—and, second, that, of the four, who pretend to give the most minute accounts, which have ever been given, of the life, death, supposed resurrection, &c. of Jesus, not one says a word of his having ever been seen by the five hundred, or by any except his eleven disciples and four or five other individuals. John, in particular, has been *very* minute in his account of the several times when the man was seen by a few persons only, and of the circumstances attending each of those exhibitions, yet he has said not a word of his being seen by the five hundred, although he would most certainly have done so (supposing him to have had common sense) if he had known of any such occurrence—and he, from his situation, must have known of it, if it had happened. Perhaps Paul *heard* that he was seen by that number, and perhaps he did not—it would however be nothing improbable that he should hear so, even if there were not the slightest truth in the statement.

But supposing that the individual were seen by five hundred persons—we should not then know whether they believed him to be the real Jesus or not. Even Paul does not go so far as to say that they did—and, in the absence of further proof, the probability is altogether that they did not. John says (11—45, 46) that many Jews saw Lazarus raised from the dead, but also virtually says that a part of them believed that Jesus only attempted to practice a cheat upon them. So also some of the Pharisees saw the pretended miracle of restoring the withered hand, but, instead of believing it a miracle, evidently believed it a hoax. This case of the five hundred is very likely to have been another of those, where men saw, but did not believe, and therefore the fact that the individual was seen by five hundred, if such were the fact, would be worth nothing to prove that that individual was Jesus, unless it be shown also that the five hundred recognised him as such.

But Paul says also that he himself once saw him. Now since all the evidence heretofore offered of Paul's dishonesty, and of his readiness to assert positively any thing that was necessary for his cause, if it had the slightest foundation in hearsay, might go for nothing, in some men's minds, against the positive declaration of so great an apostle as he, I esteem it fortunate that he

has in this instance, *by contradicting his own testimony,* saved me the necessity of laboring to do it in any other way than by referring to his own acts. I say therefore, that he has proved, by his own conduct, that if (what is not very probable) he ever saw the individual who *pretended* to be Jesus, he did not at the time believe him to be him, because, if he had, he would of course, have been converted at once—whereas he was not converted until long afterwards, nor until he had been accessary to the murder of Stephen, on account of his preaching in the name of this same Jesus.

Perhaps Paul might have seen an individual, who pretended to be Jesus, and, though he did, not at the time, believe him to be the real one, he might nevertheless, after his conversion, on recurring to the circumstance, have brought himself to a different belief, and then in his reckless manner declare positively that, which he believed, but which was nevertheless untrue. This appears to me the most charitable supposition that the case will admit.

Another circumstance, in addition to those heretofore mentioned, against the fact that Jesus ever rose from the dead, is, that he is not said, in either of the four gospels, to have shown himself, even to his most intimate friends and followers but three times for forty days. Where was he during all this time? Where is it possible that the real Jesus could have kept himself so long concealed?

Another circumstance, and one of the strongest character, against the same fact, is, that he did not show himself to the world. Could any man be so destitute of common sense, as to suppose that reasonable men would believe that a *corpse came to life,* on the bare assertion of those ignorant fishermen, who had all along been viewed, by the most enlightened part of the community, as deluded fanatics?—and that too, when no good reason could be imagined why, if the man were really alive, he should not exhibit himself personally?

Every motive of duty, and every argument of expediency would seem to have conspired to induce this man to show himself to the world, if he were alive—yet he did not. Is it possible for the ingenuity of man to conceive of a reason why he should remain on the earth forty days, unless it were for the express purpose of exhibiting himself openly, and thus furnishing as much testimony as possible, for the benefit of succeeding generations, of the reality of his resurrection?

But the different accounts given by these narrators are sufficient to show that there were various and disagreeing stories afloat even among those who had been his most immediate and confidential followers, as well respecting his resurrection and ascension, as about his acts before his death. For example, Luke, in his chapter on the resurrection, (the 24th), says nothing of Jesus having but *one* interview with his disciples, and he says (24—50 & 51) that (manifestly at the close of *this first* interview) "he led them out as far as to Bethany, and he lifted up his hands, and blessed them. And it came to pass while he blessed them, he was parted from them, and carried up into heaven." This is a manifest contradiction of his declaration, in the first chapter of Acts, that Jesus was on the earth forty days. Mark also, immediately after detailing the particulars of the first and only interview, of which he speaks as having been had by Jesus with his disciples, says (16—19) "so then, after the Lord had spoken unto them, he was received up into heaven, and set on the right hand of God." These representations contradict the story of John, who says that he was seen once *eight* days after the first interview, and again after that time. Again—Matthew does not

speak of his being seen by his disciples but *once* after his death—John says he was seen three times. Further-more Mathew and John say not a word about his going up into heaven, although they most assuredly would have done so, if they had seen him, and Mark and Luke represent them to have seen him. Such differences of testimony show that there were unfounded reports in circulation about him, and believed among those who ought to have known the truth and the whole truth; that these reports differed materially from each other; that therefore no confidence is to be placed in any of them, and that we, of course, are without evidence that can be relied on.

There is another circumstance, which, of itself alone, ought to decide this question, in opposition to all the evidence together that can be found on the other side. It is this, that at the *only* interview, which Matthew (28—16 & 17) represents this supposed Jesus to have had with the eleven, who had been his immediate and confidential followers, *a part of those very eleven doubted whether the individual were he.* If any one of these eleven, after having once been an implicit believer in Jesus, after having been reminded of the intimations that Jesus had given that he should die and rise again, after knowing that the body was missing from the sepulchre, after having heard the stories of the women who had been to the sepulchre, and of the two going to Emmaus, after having gone "into a mountain where Jesus had appointed" with the *expectation* of meeting him, would then, on seeing the individual, doubt, while the rest believed, it is madness, it is the height of superstitious folly, for us to believe, on such testimony, that an individual rose from the dead.

I will mention another circumstance bearing upon this point—one very insignificant and unimportant standing alone, but which, considered in relation to the resurrection of Jesus, must, it appears to me, if men have a spark of reason in judging of this question, put an extinguisher upon the last pretence that he ever rose from the dead.

John says (20—1 to 7) that he himself ("the disciple whom Jesus loved" is the language used) was the first one of the disciples, and undoubtedly the first person, who arrived at the sepulchre after Mary had told them that the stone was rolled away from the door—and he says that "the napkin, which was about his head, was *not lying with the linen clothes,* but *was wrapped together in a place by itself.*" Did Jesus, when rising from the dead, leave a part of his grave clothes in one place, and a part in another. Did he stop to wrap up and lay aside this napkin? or was it done by some one, who carried, or assisted in carrying away the body? Which is the most probable? If a *chimney sweep* were to rise from the dead, he would no more think of *wrapping up and laying aside the napkin that had been about his head,* than he would of waiting in the tomb for his breakfast. But if the Son of God, or a Saviour of a world, or any such being, when rising from the dead to "bring life and immortality to light," should do an act of this kind, such an incident would present the most remarkable illustration, that the world ever furnished, of the truth of the adage, that "there is but a step between the sublime and the ridiculous."

Finally, the fact that no one of the eleven ever knew what became of this individual, whom they supposed to be Jesus, is invincible evidence that he did not rise from the dead. 'Tis not a question to be argued, whether a Son of God, or a man who had risen from the dead, would have served his friends and followers the trick, which this man did the disciples, of going off and leaving them forever, without letting them know where he had gone.

Endnotes

[*] This promise was probably understood, at the time it was made, as referring to temporal thrones; but after the departure of Jesus, was applied by the apostles to heavenly ones.

[*] See his ridiculous boast (2 Cor. 12—1 to 5) that he was the man who had been caught up into the *third* heaven, (query—how many heavens are there in all?) and had there heard certain sounds, which he declined repeating, on the pretence that it would be *unlawful* for him to do so. This journey to paradise, therefore, was labor lost, unless the story of it, united with his declarations (2 Cor. 11—5—2 Cor. 12—11) that "he was not a whit behind the very chiefest of the Apostles," and his other boastful pretences, of which the last named chapters are full, served some purpose in gaining him credit among those, whose backwardness to regard him, he virtually says, (2 Cor. 12—11) "*compelled* him" to brag a little; although, modest man! he would not for the world be thought "to glory of himself, but in his infirmities." (2 Cor. 12—5.)

[†] Perhaps some explanation may be given to this declaration of Paul; I here state only what appears on the face of the matter.

[‡] 2d. Cor. 11—8. "I *robbed* other churches, taking wages of them, to do you service." It may well be doubted, one would think, whether the last clause of this verse gives his real reason for an act, which he seems to admit, in the first clause, to be unjust.

[*] I trust the time is not far distant, when the moral courage of the more intelligent and independent portion of the community will be sufficiently aroused to expose, without reserve, the dishonest and cowardly practices of these men; when their attempts to dissuade weak and timid minds from the examination of evidence; to keep the reasons and arguments of their opponents out of sight; and to so fill the minds of their dupes with vulgar and superstitious fears and prejudices as to deprive them of all mental liberty on this subject, will receive their merited condemnation; and when the efforts, which, instead of meeting the arguments of men, they are now so zealously making, by Sabbath-schools and otherwise, to forestal the judgments and permanently rivet the faith of the *young*, by impressing and deluding their imaginations, before they are capable of reasoning, will be regarded as a nefarious artifice for perpetuating their own influence by depriving the human mind of its rights, and truth and reason of their power.

[*] Some may perhaps believe that this verse was not intended to convey such a meaning as I have attributed to it—but can such persons tell us what other definite idea can be gathered from it?

[†] We have evidence that there actually were in circulation after his death, and in credit among his followers,a great variety of stories about miraculous occurrences of the most ludicrous character imaginable, though hardly more ludicrous than some related in the four gospels. That evidence is furnished by those books, (now published under the title of the "Apocryphal New Testament") which were discarded as not being canonical, or at least as doubtful, by the Council of

Nice, about three centuries after Christ. As they are now admitted by Christians to be false, on that admission they prove all I wish to prove by them, viz. that after the death of Jesus, there were many stories in circulation respecting him, which rested on no authority but the tongue of rumor, and we are to judge whether these narratives, which are now esteemed by Christians, canonical—considering how many years after the death of Jesus they were written—are not as likely to have been gathered in part from simple rumor, as those others.

[*] For a more full account of these Messiahs, see Rev. Thomas Newton's Dissertations on the Prophecies, Chap. 19, also Josephus, Book 2d. Chap. 13. Several of them were finally put to death. Some of them succeeded in gaining a much larger number of followers than Jesus, *in his lifetime,* ever had.

[*] Some of the expressions, employed by the writers in relating this affair, appear to have been so unreasonably "glorified," that in order to put together a story which should appear natural and unstrained throughout, I have selected the most natural expressions from each of the accounts, instead of quoting the whole of any single one.

[*] Both Matthew and John are supposed to have written their narratives more than thirty years after the crucifixion. See Rees' Cyclopædia.

[*] I might here safely leave the question of Jesus's miracles, without any further argument, were I so disposed; because no thinking man would for a moment believe them to have been real ones, unless he could see, or should fancy he could see, that it was important that they should be wrought for the purpose of proving a Revelation—yet, as has been shown, the purpose, for which they are said to have been wrought, cannot logically be taken at all into the account, when judging of their reality.

[*] Such facts as the above would furnish a complete answer to all the arguments—founded on the importance of the alleged purpose of establishing in men's minds a belief in a revelation—(supposing such arguments to be admissible), that Christians have ever urged in favor of the *probability* and *propriety* of miracles; because the very testimony (the Bible), relied on to prove that miracles were employed for *that* purpose, declares also, explicitly and unequivocally, that, at the same time, and among the same people, other miracles, equally real, and equally wonderful as far as men's senses could discover, were performed, which are not pretended to have any connexion with a revelation, or any other important design. In order, therefore, to support the Bible history of these events, there is just as strong a necessity for arguing in support of the probability and propriety of God's giving miraculous power to some individuals for no discoverable purpose at all, as in favor of his giving it to others to enable them to convince men of the truth of a revolution, because, according to the Bible, he gave it in the former case as certainly as in the latter.

If the Bible be true, it is as certain also that God gave miraculous power to a *pool of water,* as it is that he gave it to Jesus or any of his disciples, (John 5—4.)

[*] See Lempriere's Biographical Dictionary.

[†] See Newton on the Prophecies Chap. 18.

[‡] See Lempriere's Biographical Dictionary, also Newton on the Prophecies, Chap. 18.

[*] The pretended discoverer of animal magnetism.

[*] In further support of the reasonableness of this explanation, I quote the authority of Dr. Combe, who says, in his work on Physiology, that "so powerful, indeed, is the nervous stimulus, that examples have occurred of strong mental emotions having instantaneously given life and vigor to paralytic limbs." This extract may be found in No. 71, Harpors' Family Library, page 112.

[*] In confirmation of the truth of this explanation, I quote from Carne, a recent Christian traveller in Palestine, who says, in describing this lake, that "the boats used on it are, in some seasons of the year, much exposed from the sudden squalls of wind, which issue from between the mountains."

I have taken some pains to procure "Carne's Travels in the East," (or Letters from the East,) so as to be able to refer the reader to the page where this fact is stated; but the book is a rare one, and I have not found it. I can therefore only refer to an extract published in the American Traveller (Boston) Oct. 29, 1833, Article, Lake Tiberias.

[†] Mark 11—21. Master, behold the fig-tree, which thou *cursedst* is withered away.

[*] What evidence is there of the deliberate villainy of Mahomet, Matthias or Joe Smith, that can compare with this evidence of similar conduct on the part of Jesus?

Or what stronger evidence of his knavery can be wanted than his pretence of calming the tempest?

[*] Luke says (2—52) that as Jesus grew up to manhood, he "increased in favor with God and *man.*" Now this affair took place in "Nazareth, where he had been brought up," (Luke 4—16). He seems therefore never to have got into very high "favor" with the people of his own village; for had he done so, they would not have been likely, on this occasion, to have treated him quite so shabbily.

[*] A rite grosser even than that of drinking from the skull bone of Odin, and more appropriate to be observed by cannibals than civilized men.

[*] If the reader wish any further confirmation that this view of the miracles of Jesus is correct, let him read the "Apocryphal New Testament," from which he will at least learn what kind of miracles it was common for the early Christians to believe in, and will thus be enabled to judge whether such works, as I have supposed the pretended miracles of Jesus to have been, would not have been likely, at that time, and among so superstitious a people, to have passed for true miracles.

[*] He pretended to them that the Almighty wrote the ten commandments "*with his own finger,*" on the two tables of stone, and gave them to him—although he acknowledges that he was absent in the mountain forty days—a time sufficient for him to have written them himself, and a little longer than would probably have been necessary for the Almighty, (Deut. 9—9 to 11).

He also, when there were thunder and lightning and a cloud (and nothing more, as any body may satisfy himself by reading the verses hereafter referred to) on Mount Horeb, told the Israelites that the Lord *was speaking to them, out of the fire.* He also stood between them and the mountain, and pretended to interpret the thunder, and to give to them the meaning of the Lord in their own language, (Deut. 4—11 and 12—also 5—4, 5, 22 to 28).

[*] See Newton on the Prophecies, Chap. 19.

[†] Same.

[*] Connected with this prediction about a Messiah is one circumstance, that shows that Daniel knew nothing of what he was talking about; and that is, that when predicting that Jerusalem should sometime be destroyed, he says "the end thereof shall be with a *flood*"—whereas (unluckily for inspiration) such happened not to be the fact.

[*] Such angels probably as he referred to when he said he could call upon his father, and he would give him more than twelve legions of angels to protect him, (Mat. 26—53).

[*] Luke is said by Christians to have written the Acts.

[†] Yet it is not that they thus get men's money, that I would oppose the Clergy; although that would be a sufficient reason for opposing them, if there were not other reasons stronger. The waste of money, immense though it be, I considered as among the slightest of the evils attending the existence and support of Christianity. It is because the Clergy, by means of their infamous doctrines, appal, delude and enslave the imaginations of the young; deprive men of their mental liberty, of their judgment, reason and candor; fill their minds with prejudice, and their imaginations with vulgar and disgusting superstitions; rob truth and reason of their power, and resist *totis viribus* their progress whenever they conflict with the vile delusion and imposture, which it is their interest to advocate; and because they thus make men dupes, fools, slaves, cowards, bigots and fanatics, that I would oppose and expose them and their system. It is, in short, because Christianity is nothing but a miserable and disgusting superstition; because its pretended evidences are false, many of them grossly and glaringly false; because the Clergy seem to understand all this, and yet have the audacity to impose upon men by pretending the contrary, and to degrade and govern them by thus imposing upon them, that I would awaken opposition to the Clergy and Christianity.

[*] I here admit, for the sake of the argument, that Jesus did predict that he should rise again, and that this fact was known abroad, as Matthew (27—63) represents it to have been.

[*] In the Acts (1st c.), (if he were the author of the Acts as he is generally supposed to have been) he represents that Jesus was seen many times—but he was not one of the twelve, and what he *heard* is good for nothing as testimony.

[*] John 20—23. "Whosoever sins ye remit, they are remitted unto them, and whosoever sins ye retain they are retained.

[*] See Lempriere's Bing. Dict.

[*] See Chapter 1st, on the Spread of Christianity.

4. SUPREME COURT OF UNITED STATES, JANUARY TERM, 1839. SPOONER VS. M'CONNELL, ET AL.

Source

Supreme Court of United States, January Term, 1839. Spooner vs. M'Connell, et al. (n.p., 1839).

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SUPREME COURT OF UNITED STATES, January Term, 1839. SPOONER *vs.* M'CONNELL, *et, al.*

COPY OF BILL AND INJUNCTION.

To the Honorable Judges of the Circuit Court of the United States, within and for the Seventh Circuit, and District of Ohio, sitting in Chancery:—

Your orator, Lysander Spooner, a citizen and resident of the State of Massachusetts, represents that he is the proprietor of the following described tracts or parcels of land, to wit:—A part of the northeast fractional quarter of section seven, township five, range nine east, upon the south side of the Maumee river, and bounding thereon, consisting of eighty acres more or less;—also of island numbered two in said river, opposite the tract above mentioned, containing two and four-fifths acres more or less; both of the said tracts being at the Head of the Rapids above the Maumee bay, and on what are usually called the Grand Rapids of said river, in the county of Wood and state of Ohio.

He further represents that from partial personal observation, and from the information of credible persons, he verily believes that said river is navigable, during a large part of the year, from the said Head of the Rapids above mentioned, upwards continuously and without interruption for a distance of about one hundred and twenty miles to Fort Wayne in the state of Indiana—that within the past year there has been a steamboat plying on said river throughout the whole distance referred to—that a number of keel boats carrying from fifteen to twenty-five tons burden have been in like manner employed—that said river was open and navigable as early as the 15th day of March in the spring of eighteen hundred and thirty-seven; and your orator is informed and believes that during the year 1837 the navigation of that part of the river referred to, was not prevented, or very materially obstructed by low water, for a period of more than eight or ten weeks—that the river between the Head of the Rapids and Fort Wayne is, and from the earliest settlement of the country has been navigated as the common and principal thoroughfare for the conveyance of produce, merchandize and other articles of transportation between the points mentioned.

Said Rapids extend down the river from the said Head of the Rapids towards the Maumee bay, a distance of about sixteen miles, in falls at short intervals;—around these Rapids is a portage. From the *foot* of said Rapids to the confluence of said stream with the Maumee bay (a distance of about twelve miles) the navigation is uninterrupted, and that part of the river is navigated by steam boats and other lake vessels of large size.

The said river is one of the streams of the region formerly designated as "The North Western territory." It leads into the St. Lawrence river through Lake Erie, and is embraced by the ordinance of the congress of the confederation, passed the 13th of July, seventeen hundred and eighty-seven, entitled "An ordinance for the government of the territory of the United States north-west of the river Ohio."

Your orator further represents that that ordinance provides, among other things, that certain articles therein specified should be considered "as articles of compact between the original states and the people and states in the said territory, and forever remain unalterable, unless by common consent." One of those articles contains the following provision, viz:—"The navigable waters leading into the Mississippi and St. Lawrence, and the carrying places between the same, shall be common highways and forever free, as well to the inhabitants of the said territory, as to the citizens of the United States, and those of any other states that may be admitted into the confederacy, without any tax, impost or duty therefor."

The right of unobstructed free navigation of the navigable streams of said territory, was again recognized and affirmed by an act of the congress of the United States, entitled "An act providing for the sales of the lands of the United States in the territory northwest of the river Ohio, and above the mouth of Kentucky river," passed May 18, 1796; and the bed of said river, within the distance before mentioned, between the said Head of the Rapids and Fort Wayne, it is believed has never been included in any survey or sale, by the United States, of the lands bounding upon the same.

Your orator further represents that the legislature of Ohio has passed an act entitled "An act to authorize the locating and establishing of so much of the line of the Wabash and Erie canal as lies within the state of Ohio, and to authorize the selection, location, sale and application of the proceeds of the sales of its lands," bearing date March 3d, 1834, whereby, and by other acts of legislation on her part, it is provided that a navigable canal, according to the title of said act, shall be constructed. A canal has accordingly been located from the state line separating the state of Ohio from Indiana, to the mouth of the Maumee river, and the work upon the same is now in active progress.

Your orator further represents, that Alexander M'Connell, Timothy G. Bates, Leander Ransom, William Wall, John Harris, and Rodolphus Dickinson, a body entitled, "The Board of Public Works," created by the legislature of Ohio, are charged with the management and execution of said work; and, under pretence of a right in the state of Ohio to control, and at her discretion obstruct the navigable rivers within her limits, claim to be authorized by her laws to erect any dam or dams upon said Maumee river, which they may deem necessary or expedient for the purposes of the canal aforesaid.

Your orator further represents, that the individuals above named, pretend that it is necessary or expedient to construct one or more dams upon said river, between the said Head of the Rapids and the said state line between Ohio and Indiana, for the purpose of supplying a section of said canal with water, and that they threaten and declare their intention to do so. And that, if not arrested by the action of this court, he doubts not they will speedily cause one or more such structures to be commenced, on the part of the stream referred to, and to be completed as early as conveniently practicable.

Your orator further represents, that he purchased the property above mentioned, situated at the head of the Rapids, at a very large price, with a view to the benefit of the navigation of that part of said river extending from the said Head of the Rapids to Fort Wayne, and especially because it is situated at the lower terminus thereof—which benefits he claims are secured to him by the ordinance and law of congress before mentioned, and the constitution of the United States.

There is an extensive and valuable water power upon your orator's said property, afforded by the Rapids of said river, which commence at that point. Two extensive saw mills, and one flouring mill have already been erected thereon—and it was the expectation of this complainant, that many others would speedily be erected—and he believes they still would be, but for the anticipated effects of said dam or dams, which are threatened to be located above.

Your orator further represents, that said dam or dams are intended to be erected some miles above his property; and that the effect thereof would be to greatly obstruct, if not entirely cut off and destroy, the navigation of the river, throughout the entire distance between the said Head of the Rapids and Fort Wayne. The value of your orator's property would be thereby greatly lessened, if not wholly destroyed; and his right, as a citizen of the United States, to navigate said river, without obstruction, hindrance, or the payment of toll, would be violated, and rendered of little or no practical value whatever.

In every aspect of the case, he avers and insists that said dam or dams across said navigable river would be a public nuisance; and that as such their erection should be arrested by the interposition of this honorable court.

He therefore prays that the said Alexander M'Connell, Leander Ransom, William Wall, Timothy G. Bates, John Harris, and Rodolphus Dickinson, both in their private capacity and official character, may be made parties defendant to this bill—and may be compelled, under their several and respective corporal oaths, to make full, true, and perfect answers to all the matters and things herein set forth as fully as if the same was here again repeated, and they in relation thereto particularly interrogated.

And your orator prays that a writ of injunction may be immediately issued, directed to said defendants, enjoining them and their successors in office, and all other persons to desist from placing any dam or dams, or other obstruction whatever to the navigation thereof, in said river, at any point between said Head of the Rapids and the state line between the states of Ohio and Indiana; and that upon the final hearing of this cause, said injunction may be made perpetual, and

that your orator may have such other and further relief in the premises as to your honors may seem meet, and equity and good conscience may require.

SWAYNE & BROWN,
Solicitors for Complainant.

(A Copy.)

Washington City.

I allow an injunction in this case, unless cause be shewn against it by the third day of the next circuit court at Columbus.

Let a copy of the above be served on defendants.

JOHN McLEAN,

Justice Sup. Court U. States, and of the 7th Circuit. February 5, 1838.

COMPLAINANT'S ARGUMENT.

The complainant supposes that the decision of the Supreme Court of the United States, in the case of Gibbons and Ogden, is of itself sufficient to sustain the injunction; but, as the ordinance of 1787—the laws re-enacting that ordinance—the law of 18th May, 1796, and the several laws in addition thereto, respecting the lands and navigable waters of the N. W. territory, furnish other and independent grounds, which he also considers sufficient, he will examine these latter first, and that decision afterward.

On the 13th July, 1787, fifteen years before Ohio became a state, and while the land in the whole Northwestern territory still belonged almost entirely to the United States, the congress of the confederation passed an ordinance, [See journal of old congress for 13th July, 1787—also Story's Laws, vol. 3, p. 2073,] entitled "An Ordinance for the government of the territory of the United States northwest of the river Ohio." The object of that ordinance was declared to be, among other things, "to provide for the establishment of states," (to be formed out of said territory) "and permanent government therein, and for the admission to a share in the federal councils, on an equal footing with the original states, at as early periods as may be consistent with the general interest." And in order to carry out these, and the other purposes intended by said ordinance, it was "ordained and declared by the authority aforesaid," (that is, the authority of the congress of the confederation,) that certain "articles" expressed in the ordinance, should "be considered as articles of compact between the original states, and the people and states in the said territory, and forever remain unalterable, unless by common consent." The fourth of these articles contains this provision, to wit:—

"The navigable waters leading into the Mississippi and St. Lawrence, and the carrying places between the same, shall be common highways, and forever free, as well to the inhabitants of the said territory, as to the citizens of the United States, and those of any other states that may be admitted into the confederacy, without any tax, impost or duty therefor."

Is this ordinance valid? The congress of the Confederation; at the time of passing this ordinance, were unquestionably both the proprietors of the territory, and the supreme legislative power over it—and as such had a right to exercise such government over it as to them seemed best, provided it were not inconsistent with the articles of confederation. We are not aware that any inconsistency with these articles is pretended to be found in the ordinance—and the fact that it was passed [See journal of old congress of 13th July, 1787] with but a single dissenting vote, is pretty good evidence that there is no such inconsistency. The ordinance, therefore, so far as it was in the character of a legislative enactment, was unquestionably valid so long as the confederation lasted. Did it continue its validity under the constitution of the United States? The congress of the United States, under the constitution, succeeded to all the rights of territory and of jurisdiction over it, which had been possessed and exercised by the congress of the Confederation—and the laws of the Confederation, so far as they were not inconsistent with the new constitution, would of course continue in force until repealed. The adoption of the constitution worked a change, of form merely, in the organization of the sovereign power over this territory—it did not annihilate any rights of property or jurisdiction that belonged to the United States, or abrogate any existing laws, unless in cases where such rights, jurisdiction, or laws were inconsistent with the principles or provisions of the new form of government. A change in the organization of the supreme power in a country, does not, of itself, change or repeal existing laws, any further than those laws are repugnant to the new form of government. The ordinance, therefore, would have continued valid under the new constitution, so far as it was consistent with that constitution, even without any re-enactment.

But, in point of fact, the ordinance was *re-enacted* at the first session of congress under the constitution. An act entitled "An act to provide for the government of the territory northwest of the river Ohio," was passed August 7, 1789, (Story's Laws, vol. 1, page 32)—the preamble of which runs thus—"Whereas, in order that the ordinance of the United States in congress assembled, for the government of the territory northwest of the river Ohio, *may continue to have full effect,* it is requisite that certain provisions should be made, so as to adapt the same to the present constitution of the United States: Be it enacted," &c. Then follow certain provisions for the appointment of the officers of said territory by the president and senate, instead of the congress, as had before been the law. In this preamble the object of the act is expressly declared to be, that "*the ordinance may continue to have full effect.*" This form of enactment we suppose to be as effectual in law, as though the act had contained a clause in this form, "Be it enacted that the ordinance *shall* continue to have full effect." The intention to continue it in force is clearly expressed, and that we suppose is sufficient for all legal purposes.

In addition to this re-enactment in 1789, congress has also, by subsequent recognitions, in at least three several instances, virtually re-asserted the validity of this ordinance, to wit:—In the act

passed April 30th, 1802, (Story's Laws, vol. 2, page 870, sec. 5,) authorizing the people of the territory, which is now Ohio, to form a constitution, preparatory to their admission into the Union; in the act passed April 19th, 1816, (Story's Laws, vol. 3, p. 1567,) authorizing the people of what is now Indiana to form a constitution; and in the act passed April 18th, 1818, (Story's Laws, vol. 3, p. 1675,) authorizing the people of what is now Illinois to do the same. In each of these three several acts, it is provided that the state constitutions, about to be formed, *shall not be* "*repugnant*" *to the ordinance.* Congress, therefore, on its part, has evidently entertained no doubt of the validity of the ordinance, and has repeatedly evinced the intention of maintaining it in force.

Let us now look at the conduct of the states themselves, that have been formed out of this territory, and see how far *they* have assented to the validity of this ordinance.

The representatives of the people of Ohio assembled in convention by virtue of the authority granted by the law of April 30th, 1802, before mentioned, which contained the provision that the state constitution to be formed should not be repugnant to the ordinance—(See Preamble to Ohio Constitution, Chase's Ohio Statutes, vol. 1, page 75.) By assembling *under authority* of that law, they virtually admitted the validity of that provision. Here then is one recognition. They then proceeded to adopt a constitution, the preamble of which they made to read thus:—"We, the people of the eastern division of the territory of the United States, northwest of the river Ohio, having the right of admission into the general government, as a member of the union, consistent with the constitution of the United States, *the ordinance of Congress of one thousand seven hundred and eighty-seven,* and of the law of congress," (of April 30, 1802, before mentioned,) &c. Here again they refer to the ordinance in a manner that virtually recognizes its validity. The people of Ohio, therefore, in their sovereign capacity, have twice virtually assented to the authority of this ordinance. The people of Indiana and Illinois also both did the same, in a manner substantially similar, at the time they adopted their constitutions.

In addition to all these legislative recognitions of the validity of this ordinance, we have a judicial one. The Supreme Court of Ohio, (in the case of Hogg et al. *vs.* Zanesville Canal and Manufacturing company, 5 Hammond 410,) after quoting from the ordinance the clause before cited in relation to "the navigable waters," say, (page 416,) "This portion of the ordinance of 1787 is as much obligatory upon the state of Ohio as our own constitution—in truth, it is more so—for the constitution may be altered by the people of the state, while this (the ordinance) cannot be altered without the assent both of the people of the state, and of the United States through their representatives."

Thus the state of Ohio, by her highest judicial tribunal, as well as in her highest legislative capacity, has recognized the validity of this ordinance. And it surely will not be pretended, in the face of this accumulation of legislative and judicial evidence, coming from both the general and state governments, that this ordinance is not operative, at least within the state of Ohio, unless it be on the ground of some inconsistency with the constitution of the United States.

The next question, then, that arises in this stage of the argument, is, whether the ordinance be inconsistent with the constitution of the United States? And here, for the sake of the argument, we might admit that some parts of it are inconsistent with the constitution. The ordinance

purports to establish fundamental rules on a variety of subjects, and a provision of the ordinance in relation to one particular subject may be unconstitutional and void, while the provisions pertaining to all the other subjects may be constitutional and valid. If, therefore, we were to allow that certain portions of the ordinance were void, we might still contend, as we do, that the clause in regard to "navigable waters" is consistent with the constitution, and therefore valid. Still, we do not admit, in reality, that any portion is unconstitutional; and although it may perhaps be necessary for our cause, only to shew the constitutionality of the single clause, in regard to "navigable waters," yet, in order to sustain the general character and authority of the ordinance, we will briefly advert to a few of its other provisions.

The objects of the ordinance, we have said, were various. The provisions contained in the first part, and comprising about one half of the instrument, are of a temporary character, their object being merely the establishment of a territorial government to continue until the territory should be formed into states. But the remainder of the ordinance was declared to be of permanent force and operation, even so far as "to fix and establish (certain) principles as the basis of all laws, constitutions and governments, which forever hereafter shall be formed in said territory." The paragraph containing this declaration of object, is inserted by way of preamble to the "articles," which are enacted by the next succeeding clause, and which constitute the whole of the remaining portion of the ordinance.

The first of these articles provides for religious liberty. The second, that "the inhabitants of the said territory shall always be entitled to the benefit of the writ of *habeas corpus*, of trial by jury, of an equal representation in the legislature," &c. The third, that the "lands and property of the Indians shall never be taken from them without their consent." The fourth, that "the said territory, and the states that may be formed therein, shall forever remain a part of this confederacy of the United States of America;" that "the legislatures of those new states shall never interfere with the primary disposal of the soil by the United States;" and that "no tax shall be imposed on lands, the property of the United States." This article also contains the provision quoted in complainant's bill, that the "navigable waters" in the territory should remain "common highways," for the free use of all citizens of the United States "*forever.*" The fifth article fixes the future boundaries of some of the states to be formed out of the territory. The sixth and last article prohibits slavery, and provides for the restoration of fugitives from service and labor. Some of these articles contain still other provisions than those here enumerated.

The only pretence set up against the constitutionality of any of these provisions is, that some of them trespass upon the constitutional sovereignty of the states. The articles that are considered most strongly inconsistent with that sovereignty, are those which assume to prescribe certain principles to be observed in the local or domestic legislation of the states. But the constitution of the United States provides, in the 4th sec. of 4th art., that "the United States shall guaranty to every state in this union a republican form of government"—and this clause, of course, gives to the general government the power of defining, at least, the essentials, if there be any essentials, of a republican government—and of coercing an observance of them, if it so please, however reluctant they may be supposed to be to exercise such a power against the will of the state. Congress

have assumed the power of determining what are the essentials of a republican government in the case, it is believed, of every new state that has been admitted into the union, as well of those not of the northwestern territory, as those that are. It is true, their definitions have not, in all cases, been uniform; but those states, whose constitutions are most restricted, have no more right to say that, in their case, the standard has been unconstitutionally curtailed, than they have to say that, in the case of the other states, the standard has been unconstitutionally enlarged; and until a general standard shall be made an article of the constitution of the United States—or shall be declared by a law intended for universal application, it is not seen how any one state can determine, or any tribunal determine for her, (unless in extraordinary cases,) whether her powers in regard to her domestic polity have been unconstitutionally curtailed, or whether the powers of other states have been unconstitutionally enlarged. It must therefore, for the present, at least, we think, be admitted, (if for no other reason, because the contrary cannot be shown,) that these provisions of the ordinance, which prescribe certain principles of republicanism to be observed in the legislation of the state, are constitutional.

These remarks, in support of the validity of the most doubtful parts of the ordinance, are made, not because they appear to the complainant to have any very important bearing upon the main question at issue in this cause, (because the ordinance may be void in one part, and valid in another.) but chiefly with a view of sustaining the general character of the ordinance for validity, constitutionality and authority.

We pass now to the consideration of the particular provision, quoted in the bill, pertaining to "navigable waters." Is this provision of any validity?

The ordinance purports to bear a twofold character:—1st, that of a simple law—and 2d, that of a compact.

We will first consider it in its character of a simple law, which is evidently its most important and appropriate character—for, although it is declared that the articles there enumerated shall be "considered as articles of compact," yet the terms of the compact were imperatively prescribed, and authoritatively dictated. It can hardly be said that any free choice was left to the other parties to ratify or not to ratify it; it was in its inception, entirely an *exparte* matter. Congress, by virtue of its own power alone, "*ordained and declared,*" that it should have legal force and effect. This, too, was done before the organization of any state governments in the territory, and of course before there was any other party in existence, *capable* of ratifying such a compact with the United States. It, therefore, had so much of the character of an absolute law, as, at least, *to reserve to the United States any rights of property, in the territory, which they had the right to reserve, and which, by the terms of the compact, were to be reserved by them.* On this point there can be no doubt.

By an ordinance of this character, then, congress, the then proprietors of the territory, declared a reservation of a right of "common highway" over all the "navigable waters" of the northwestern territory, for the use of the citizens of the then United States, and of all other states, that might thereafter be added to the confederacy, "forever," or until the right should be voluntarily surrendered. The only question that arises, as to the validity of this reservation, is,

whether it be consistent with the constitutional sovereignty of the states that have since been formed out of this territory, and in which these rivers lie.

Without attempting to define precisely how far the constitutional sovereignty of the States *does* extend, it will be sufficient for our case simply to show to what it does *not* extend.

On this point it is clear, that it does not extend to the exclusion of any *right of property* in the United States, which they succeeded to from the confederation, or which, for the purpose of executing their constitutional powers, congress may have since acquired by purchase or otherwise, within the limits of a state. If the government of the United States find it "necessary and proper," for executing their constitutional powers, to purchase property within the limits of any state, such as post offices, court houses, custom houses, dock yards, &c., they may constitutionally do so, and exercise a *special* jurisdiction over the property so acquired, sufficient to protect it from the operation of state legislation, and secure it to the uses of the general government, and the constitutional sovereignty of the state is not thereby infringed. It is true that *general* civil and criminal jurisdiction over the territory so acquired, cannot be exercised by the general government, without the consent of the state. But a *special jurisdiction,* sufficient to protect the property itself from the operation of state laws, and secure it to the uses for which the general government designs it, may be exercised in defiance of all state power. Such exemption of the property of the general government from state power, is essential to the very existence of the general government—and this doctrine was explicitly and fully maintained by the supreme court of the United States, in the case of McCulloch *vs.* Maryland, 4th Wheaton, 316, 317 & 432. The absolute and supreme power of the general government over their property, is also fully declared in the third section of the 4th article of the constitution, in these words: "The congress shall have power to make all needful rules and regulations respecting the territory or *other property* belonging to the United States."

Proceeding upon these principles, congress having the power to regulate commerce, may, in carrying out that power, buy sites for, and build dry docks for the use of *merchant* ships, and may enact that such docks shall be *free* for all merchant ships belonging to citizens of the United States. And the state, although it would retain its general civil and criminal jurisdiction over the spot occupied by the dock, could not legally touch the dock itself, or place the slightest impediment or obstruction in the way of the free use of it by those for whom it was intended. So, also, if a state owned any navigable rivers, which did not, by the necessary operation of the constitution, come under the control of congress, but which might nevertheless be made subservient to the purposes of that commerce which congress has power to regulate, congress would have the right to purchase that river of the state, declare it a "common highway" for all the citizens of the United States, and exercise such special jurisdiction as might be necessary to secure it to that use, and the constitutional sovereignty of the state would not be infringed thereby. And the same might be done in regard to any other property that congress might purchase, provided such purchase were "necessary and proper," for the purpose of executing any of their constitutional powers. They, of course, have no power to make purchases of property within the states for any other purposes.

The power of congress over the *territory* which they succeeded to from the Confederation, is equally absolute with that over the property which they may constitutionally acquire, by purchase or otherwise, within the limits of a State. The power is declared in the same clause of the constitution, (the 3d sec. of 4th art.) and in the same terms, to wit: "The Congress shall have power to dispose of, and make all needful rules and regulations respecting the *territory*, or other property of the United States."

In pursuance of this absolute power over the territory, Congress may reserve wild lands from sale within the limits of a State that has been erected out of territory once belonging to the United States, and protect such lands from taxation, and from all other interference on the part of the State. They may *lease* those lands, as in some cases they have authorized to be done, (Story's Laws, Vol. 1, page 789, sec. 15,) grant pre-emption rights, *reserve lots* for light houses, dock yards, custom houses, hospitals, court houses, post offices, and post roads, or appropriate them to any other uses whatever that they may deem "needful"—(that is, so long as they retain the *title* in themselves—they of course cannot control them after they have parted with their right of property in them)—and the State, although it may in all other respects, exercise a general civil and criminal jurisdiction within the territory so leased, reserved, or appropriated, can nevertheless do nothing that shall in any manner obstruct, or interfere with the use to which these lands have been thus dedicated by Congress.

It is by virtue of this power that Congress have reserved, (in the State of Ohio for thirty-six years, and in other states for many years,) and still own and control wild lands, salt springs, mines, and so forth, within the limits of all the new States—and by the same right that they have reserved them thus long, they may reserve them *forever*, if they please.

To apply these principles to "navigable waters." Such waters are as much "property" and "territory," as are lands, or any thing else. They are described as property by Vattel, (Book 1, Ch. 22)—(and if they were not so at common law, they would be made so by any statute reserving them)—and like lands, or other property, may be reserved from sale during the pleasure of their owners. Those in the N. W. Territory originally belonged to the United States—no rights in them, either of soil or use, inconsistent with a paramount right of "common highway," have ever been sold. So far from it, such a right of "common highway" over them has been expressly and repeatedly declared to be reserved. The constitutional sovereignty of the State is not infringed by such reservation. They are, therefore, still the property of the United States, so far as the right of "highway" over them is concerned—(we claim for the United States no other property in them)—and Congress has a right to exercise a special jurisdiction over them, sufficient to protect that right of "highway" from invasion.

But, it is said to be a common principle, that navigable rivers belong to the sovereign of the country in which they lie. This we grant is true, in the absence of any reservation by an antecedent sovereign—but such a reservation, we apprehend, would be binding even as between nations having nothing else in common. If England, for example, should cede one of her colonies to France, with a special reservation of a perpetual right of "highway" (in the technical sense of that term) for all English ships, over the navigable rivers in such colony, unless or until the right

should be voluntarily surrendered by her, any violation or *impediment* offered to that right by the French government, would be a just cause of war—and if such a reservation would be legal between two nations, otherwise independent of each other, how much more, if possible, is it so between governments having so many interests in common as our general and state governments have, and exercising their powers, and capable of holding property, within the same boundaries?

But, again. We say that even on the principle that navigable rivers do belong to the sovereign, the *right of way* over this river would belong exclusively to the general government—because, for all purposes of "commerce among the several states," Congress *is* the exclusive sovereign (Gibbons & Ogden 9th Wheaton 1)—and, as this river extends into two states, that circumstance would necessarily make it the property, and bring it under the control, of the power having the control of commerce between those states.

But, it is said that the old states have the control of their navigable rivers; and, therefore, unless the new states have the control of those within their boundaries, they are not on a political equality with the old states.

We are willing to admit that the old states, before the adoption of the constitution of the United States, had the control of their navigable rivers—especially of those which were entirely within their own limits. But, we doubt whether, even when they were independent states, they had a right to place any impediment to navigation in a river that extended into a neighboring state. Before the purchase of Louisiana, the American government contended for the free navigation of the Mississippi to its mouth—and if that doctrine was correct, it would have applied, before the adoption of the constitution, to a river that extended into two states. Still, we are willing to admit, for the sake of the argument, that the states respectively had the sole ownership and control of all navigable waters, of every kind, within their boundaries. How did they acquire that control? It was, in the first instance, say the Supreme Courts of Pennsylvania and Massachusetts, by *grants* from the crown—(Carson vs. Blazer, 2 Binney, page 476—and Commonwealth vs. Charlestown, 1 Pickering 182.) It was then only by virtue of a *proprietary* right,—by force of actual ownership of them as property—that those states, so long as they were colonies, controlled their navigable rivers. After the revolution they held them by an additional right—that acquired by forcibly expelling all other claimants from their limits. Ohio cannot claim to control the rivers within her limits, by virtue of either of these titles. The United States have never granted these rivers to her—nor has she ever ejected the United States from the possession of them. Furthermore, in the act of congress which admitted Ohio into the Union—or which (if the other side like the term better.) acknowledged the sovereignty of Ohio, the United States did so with the special limitation, and on the special condition of the United States retaining the right of "common highway forever" over these rivers, according to the terms of the ordinance, (Story's Laws, vol. 2, page 870, sec. 5)—and Ohio assented to this limitation and condition, as will be hereafter shown.

Further—The political equality of the States, in the view of the Constitution—to which (inasmuch as it has been assented to by all the States) all adverse provisions of the ordinance, if there are any such, must yield—does not depend at all upon the fact, whether the U. S. own the

same amounts, or the *same kinds* of property in each, to be exempted from the operation of the legislation of the State. Congress may own millions of acres of wild lands within the limits of one State, and that land be exempted from State legislation—and may *not* own a single acre in another State, and yet the two States are on a political equality in the view of the Constitution. So Congress may own a custom-house, court-house, or an hundred or five hundred post-offices in one State—in which case all these buildings would be exempt from the operation of State laws—& not own a single one of the same kind of buildings in another State, and yet the two States will be on a political equality in the view of the Constitution. Because the Constitution provides that the power of Congress over "the territory and other property" of the U. S. shall be absolute, in whatever State such territory or other property may lie. By virtue of the same principle, Congress—provided they succeeded to the possession of them from the Confederation, or purchased them for the Constitutional purpose of "regulating commerce"—may own the navigable rivers, or a right of "common highway" over the navigable rivers, in one State, and not own them in another, without affecting the political equality of those States in the view of the Constitution.

Inasmuch then, as the United States were once the undisputed owners of these rivers, and have never sold or granted to Ohio their property in them—but, on the contrary, have, by the ordinance of '87, the law of '89 re-enacting that ordinance, and the law of 1802 admitting Ohio into the Union, specially reserved a right of "common highway" over them—and inasmuch as there is no constitutional impediment to their continuing to hold that property in them forever if they please, or to their exercising such special jurisdiction over it as is necessary to protect it from infringement—this right, or property in these rivers must be regarded as still belonging to, and under the control of the government of the United States.

We have thus illustrated the effect of the ordinance, and the subsequent laws confirming it, regarding them in the light of ordinary statutes. We will now consider the ordinance in the other character, that of a "compact," which it also purports to possess.

It is declared that the articles enumerated in the ordinance "shall be considered as articles of compact with *the people,*" as well as "the States" of the N. W. Territory. We suppose that this compact with "the people" was, of course to continue only until the formation of States and State governments—for it is not to be supposed that Congress intended, even if they had had the power, to tie the hands both of the U. S. and of the State Governments in this territory, from ever altering any one of these articles, without first obtaining the consent of every individual citizen that might forever after reside in the States to be formed out of the territory. And even during the territorial government, it could certainly have no legal effect beyond the pleasure of Congress. The people, in their individual capacity, were incapable of *ratifying* such a compact—and for this reason the compact, as between the U. S. and the "people" of the N. W. Territory, was not binding even upon the faith of the U. S.—they might retract their pledge at any time they should see fit. The ordinance in this respect, was like the last tariff law, commonly called the compromise act, which it was declared should continue a certain number of years, and was *intended,* at the time it was passed, to operate as a sort of pledge—so far as that particular Congress, had power to make such a pledge—to all parties interested, of what the policy of the government should be

for the term of years therein mentioned—but which might nevertheless, be at any time *legally* repealed. So the ordinance, in its character of a "compact with *the people*," was merely a deliberate and solemn declaration, on the part of the U. S., and intended as a sort of pledge (so far as that Congress had power to make such a pledge,) to the people of the territory, as to the kind of Government that should be extended over them, until they were permitted to form State governments of their own. Such a pledge was repealable at the will of any subsequent Congress—and "the people" took no rights under it, which could not be retaken by Congress at will. It was also finally superseded by the "compact with the *States*," so soon as those states were formed. Of course we have now nothing to do with this "compact with the people."

But the ordinance purports also to be a "compact with the States."

Perhaps there may be sufficient grounds for saying that this compact has been ratified, or rather assented to, on the part of Ohio. The Convention that formed the constitution of the State, assembled, as we have before had occasion to remark, *under authority* of the law of Congress of Ap. 30, 1802, which provided that the Constitution to be formed by them, should "not be repugnant to the ordinance." By assembling under authority of that law, they acknowledge the validity of that provision. In the preamble also to their Constitution, they again recognize the validity of the ordinance. Her Supreme Court also has declared, at least one "portion" of the ordinance to be obligatory upon the State.—(Hogg & Zanesville Co. 5 Hammond, 416.)

If it should be said that until a State government was actually formed, no compact could be entered into that should bind the State *after* it was formed, and that therefore the assent of the Convention was of no validity—the answer would be, that, by the law of Congress (of April 30, 1802) authorizing them, on certain conditions to form a Constitution, the people of the territory were *invested,* prior to the formation of their State government, with the independence necessary to enable them to assent or dissent to the conditions of the ordinance and law. The people exercised this independence by electing members of the Convention under, and with reference to, the provisions of the law. The members of the Convention, therefore, constituted, in fact, *quoad hoc,* a government—for they had the authority of the people to act for them in the premises. Under these circumstances the Convention assented to the conditions of the ordinance—and although they at the same time established a new form of government, and assumed a corporate name, they could not thereby relieve their constituents from the obligations they had just assumed—especially as the people have ever since sanctioned the doings of the Convention by acquiescence.

Congress also, by the same law, that authorized the assembling of the Convention, (Story's Laws, Vol. 2, p. 870, sec. 7), submitted to that body, "for their free acceptance or rejection," certain "propositions" in relation to school lands and salt springs, by which the State, on certain conditions, was to acquire valuable benefits. These "propositions" were accepted by the Convention in behalf of the people of Ohio—(See "Ordinance and Resolution," to that effect, passed by the Convention, Nov. 29, 1802 Chase's Statutes of Ohio, Vol. I, page 74)—and Ohio has ever since enjoyed all the valuable privileges thus acquired. But if it should now be maintained that that Convention had no right to make a compact with the U. S., then those school lands must now be accounted for to the U. S. and the possession of the salt springs restored.

We think, therefore, it must be held that that Convention had power, in behalf of the people, to assent, and that their recognitions before mentioned of the validity of the ordinance, virtually constituted an assent, to the terms of the ordinance—or, in other words, they thus *ratified* the compact contained in it, and thus bound the State.

What, then, was the effect of this "compact"? Why, it threw open to the people of the whole U. S. the free use, "forever," as "common highways," of all the rivers in Ohio, that were *then* navigable—or, rather, the State thereby *assented to the reservation* of this right of highway, as expressed in the ordinance, and precluded herself from the right of ever afterward objecting to it. This was the effect of the compact, not merely in relation to such rivers as Ohio might suffer to *remain* navigable—but in relation to all that *were navigable at the time of the compact*—and this ratification of the compact would have had this effect, even if Ohio, instead of the U. S., had at that time been the real owner of the rivers.

The people of all the U. S. then, were thenceforth to have "common" rights with Ohio, in the use of these rivers, so far as the navigation of them was concerned. It was also a part of the compact that the rivers should remain "highways"—that is, open ways. No impediment, therefore, could be placed in them by either party without the consent of the other. And such, we apprehend, are now the respective rights of these parties to these rivers—(that is, if we consider the ordinance *merely* in the light of a compact between equals, and not of a law by the superior power—or, rather if we consider the rights of the U. S. to these rivers as *acquired,* instead of *reserved,* by compact—for in the case of reservation they would still continue to have *sole* authority over them. Such, we repeat, (subject to the proviso just stated), would, we apprehend, be the respective rights of these parties to these rivers, *unless the compact, on this particular point, have been annulled or modified.*

It was provided in the ordinance, that the articles of compact might be altered "by common consent." Has this been done? We maintain that by the adoption of the Constitution of the U. S.—to which Ohio, as well as the other States, has assented—this compact has been so far modified or superseded, as to give to the General Government the *same exclusive* power (instead of the modified one, which perhaps it would have held under the compact,) *over all such* "*navigable waters*" *as extend from Ohio into any neighboring State, as* by the Constitution, it possesses over all other navigable rivers, which extend into two States. We suppose the decision of this Court, in Gibbons and Ogden, that the power of Congress "to regulate commerce among the several States," was an *exclusive* power over "*navigation*" between two or more States, establishes the point that Congress has exclusive jurisdiction over the right of way of all navigable rivers extending into two or more States. If, however, the Court should decide that the compact expressed in the ordinance, has not been thus far superseded or modified by the Constitution, we then fall back upon the compact itself, and say that that covers all navigable rivers of every kind, whether they extend beyond the limits of the State or not—and maintain that, even under that compact, the U. S. have equal rights with Ohio in this river, and that therefore Ohio has no right to convert this "highway," or open way, into any thing different from an highway, or to obstruct or impede the navigation of it without first obtaining the consent of Congress.

We will however, offer one or two suggestions in support of the opinion, that this modification of the compact has been made by the constitution. And one suggestion is, that unless such a modification or alteration have been made, congress has not the power of making any such improvements in these livers as should make them any thing but "highways," or open ways—they cannot, for instance, erect dams in them for the purpose of improving the navigation, without first obtaining the consent of the states in which the rivers lie. If the provision of the ordinance, that these rivers should remain "common highways," that is, open ways, was *strictly* a compact, and not merely a reservation of certain highways by one party, and assented to by the other—and if that compact, so far as it relates to waters extending into two states, have not been superseded by the constitution—then, both parties having equal rights in the rivers under the compact, and having agreed that they should remain "highways," or open ways, neither party, the United States no more than a state, could place any structures in them that should alter them from highways—though with a view to the general improvement of the navigation, without having first obtained the consent of the other party to the compact. And, therefore, if this compact have not been altered, so far as it applies to rivers extending into two states, by the adoption of the constitution, but is still in force *against the United States,* it imposes such a restriction upon the constitutional power of congress in "regulating commerce among the several states" of the northwestern territory, as that power does not lie under in other portions of the union—for elsewhere, as we shall hereafter attempt to shew, congress may improve the navigation of rivers that extend into two states, by dams or otherwise, at pleasure.

The other suggestion is, that the ordinance was first enacted under the Confederation. The States being then independent of each other, compacts became necessary to secure freedom of navigation within each other's boundaries. Such a compact, to a certain extent, was expressed in the 4th of the articles of Confederation, as existing between the States that were parties to the Confederation. But the freedom of navigation into each other's territories being now secured by the constitution of the United States, subject only to such regulations as the general government may prescribe, compacts on that subject are no longer applicable to our condition. They would constitute exceptions to the operation of the national constitution—and would but disturb the uniformity and equal operation of the system intended to be established by it. Ohio, and the other States of the northwestern territory, have assented to this national constitution—and the only reasonable doctrine would, therefore, seem to be that such compacts, with these new States, have been superseded or annulled by that constitution, in all cases coming within its sphere.* In fact, we suppose it entirely clear that the ordinance, by virtue of its *original* enactment in '87, could not deprive succeeding Congresses under the constitution, of any power intended to be granted by the constitution. The only question is, whether Congress, by the re-enactment of the ordinance under the constitution in '89—or by the laws permitting the states of the territory to form constitutions "not repugnant to the ordinance," intended to surrender any portion of their exclusive and constitutional power of regulating commerce and navigation among these States? or, what is the same thing, of their exclusive control over navigable waters extending into two of the States? We do not think it necessary to make an argument on this point, for we cannot suppose that it will be pretended on the other side, that any intention to part with, or suspend the

operation of, one of their most important constitutional powers, so far as it might operate upon this particular portion of the union, can reasonably be inferred from the informal language of those acts. It would certainly require something more explicit to pledge the faith of Congress, that they would not exercise their constitutional powers in a particular portion of the union—more especially as they have repeatedly evinced the opposite of any intention to make such a pledge, by enacting various laws for disposing of and controlling these rivers.

Assuming then, that the compact contained in the ordinance, has been superseded or annulled, so far as it applied to "navigable waters" extending into two or more States—there is nothing else left for that compact or reservation to operate upon, except those "navigable waters," if any such there are, which lie entirely within the limits of one State, and connect with no waters of other States, but which may nevertheless be *useful* to the citizens of other States for purposes of navigation. The United States would have, under the compact, at least, an equal right with Ohio, to the control of these last named waters—and Ohio could not, without the consent of Congress, erect in them any structures that should alter them from "highways," or open ways, even though she were to do it for the purpose of improving the navigation.

The conclusion then, to which we have arrived in regard to the effect of this ordinance—reenacted as it has been under the constitution—is, that—if it have not been in part superseded or annulled by the constitution—it has, either in its character of a law, or a compact, or both, had at least this effect, viz:—To reserve to the United States *such a right* of "common highway" over all those rivers within the limits of Ohio, as well those lying entirely within the state, as those extending beyond it, that were navigable when Ohio was admitted into the union, and are still *useful* to the citizens of other states for purposes of navigation—*as that* Ohio can offer no obstruction or impediment to the navigation of them, without first obtaining the consent of congress. And this, the complainant supposes, is sufficient for his case.

There is however a different view, that may be taken of this matter of the "compact," so far as it relates to these rivers—a view, which, if correct, ejects Ohio from all right that she may set up, or that her Supreme Court may set up for her,* to an equal voice with Congress in the control of *any* of these navigable rivers—as well of such as lie entirely within her limits, as of those that extend into other states.

If Ohio have the right to an equal voice with Congress in the control of any of these rivers, that right is, in effect, an equal right of *property* in them, or in the right of way over them. The right of perpetual control is a right of property. Or, at any rate, a right of perpetual use of navigable rivers as highways, and of veto upon any alteration of them from highways to private ways, or to no ways at all, constitute a valuable property right. This right of property in them, if the State have it at all, must have been acquired, at some time, from the United States. Have the United States ever granted her that right? If they have ever made such a grant, it was made by, or in pursuance of, this "compact," that is expressed in the ordinance. Let us see whether this "compact," or the laws made in pursuance of it, have ever actually *passed* any such right to Ohio:—

At the time the ordinance was first enacted, there was no such State in existence as Ohio, that could ratify the compact, or, of consequence, that could take any rights under it. The ordinance,

therefore, at the time of its enactment, so far as it related to a grant of valuable rights of property to States afterward to be formed, was not a "compact;" for a compact supposes the actual existence of two parties. It was, then, in effect, merely the suggestion of a compact, or the mere promise of a compact, for the benefit of a party not then in existence. Such a suggestion or promise was entirely gratuitous, and not binding upon the party making it. It was not merely voidable—it was actually void—and could never be of consequence unless actually executed.

Was the re-enactment of the ordinance in 1789, an execution of this promise? or did it pass any rights of property to Ohio? No; for the State of Ohio had not even then come into existence to ratify the compact, or to take any rights under it. This re-enactment, then, so far as it promised any valuable rights in these rivers to Ohio, whenever she should come into existence, was, at most, like the original enactment, merely a gratuitous and void promise—it bound no one—it passed no rights of property in the rivers. The right of property, then, in these rivers, still continued to remain—at least until 1802, when Ohio became a State—perfectly, legally and solely in the United States. At any time previous to 1802, Congress had a perfect right to make, at pleasure, a final and absolute disposal of the property in these rivers—they had a right, for instance, to sell them to individuals, if they had so pleased—without the least regard to any gratuitous promises or one-sided compacts, that had previously been made or suggested for the benefit of a party not in existence at the time.

The question now remains: Did the United States, in 1802, when Ohio became a State, or have they since, executed this promise, by which they were to grant to Ohio equal rights with Congress in the property or control of these rivers? We say no. We say that Congress have chosen to disregard that void promise, and to dispose of these rivers in another way. On the 18th May, 1796, six years before Ohio became a State, and six years before any rights could have vested in Ohio, Congress evinced the intention of disregarding this promise, and proceeded to act upon that intention, by enacting, on the strength of their own rights of property and jurisdiction, and without reference to any will or any claims that Ohio might ever afterward set up, that a *portion* of these rivers should "be and remain public highways"—(Story's Laws, vol. 1, page 421.) This absolute and arbitrary legislation in regard to a portion of these rivers, evidences their intention to retain their right of exclusive control over the whole of them, without regard to any previous promise that had been made to the contrary. And they have followed up this policy, from that day to this, by the same kind of legislation (as will hereafter be shown) in regard to all the other navigable rivers in the territory, and without reference to, or consultation with, Ohio, or any other of the States in which the rivers lie. In doing this, they have only done what they had a perfect right to do. They have only done what the new form of government, and the new situation of the States under the Constitution, made it proper that they should do. Indeed this whole idea of a "compact" in regard to these rivers, had its origin solely in the nature of the Confederation, and in the want of any supreme power, that, legislating in its own sphere, could secure the rights of all parties to the use of them. When this requisite power was brought into existence by the adoption of the Constitution of the United States, all occasion for a compact vanished at once—and with the occasion doubtless vanished all intention of executing it. Its obligation also, if it ever had any, expired at the same time, for no rights had become vested in other parties under it, and the

promise or compact could have no force beyond the pleasure of the party making it, until some other party had actually availed itself of it, and acquired rights under it. In fact, the provision of the new Constitution, (art. 4, sec. 3,) which declares that Congress shall have sole and absolute power over the territory of the United States, to do with it whatever should to them seem "needful," was a virtual retraction of any promise, that had previously been made, to dispose of it in a particular way, or to give to any States that might afterwards be formed, an equal right with Congress to the property or control of the rivers that made a part of that territory.

But, it may be said that the law of Congress of April 30, 1802, allowing the people of Ohio to form any constitution "not repugnant to the ordinance," is equivalent to a permission to them to assume an equal power with Congress in the control of these rivers. But we think the object of this provision in the law of 1802, was merely to fix the republican character of the constitution to be formed, and not to invest the state gratuitously with any valuable *rights of property,* at the expense of the United States, and merely in the execution of a void promise, after all the circumstances that gave rise to that promise, and all occasion for the fulfilment of it, had passed away. We think that, even if Congress had never manifested any intention to the contrary, this merely negative provision in the law of 1802, which evidently referred to the political character of the constitution to be formed, and contained no express reference to any grant of property to the state, could not have had the effect of executing that void promise, or of passing any valuable property rights from the United States to the state. We are confident that a direct and explicit grant—such as has never been made—would have been necessary for such a purpose. But, however, that may be, the fact that Congress had previously manifested an intention of not executing that promise—as by the law of 18th May, '96, making an arbitrary and absolute disposal of a portion of these rivers, they had done—and the further fact that they have ever since continued to dispose of the rest of these rivers according to their own will and pleasure, and without reference to any claims or wishes on the part of the states in which they lie, *rebut* any presumption, that they intended, by the law of 1802, to grant any special rights of property in these rivers to Ohio.

To illustrate this point, let us suppose that the present Congress should pass a law, that whenever hereafter a state should be formed in the territory west of Missouri, such state should become joint proprietor with Congress of a certain tract of land within its limits. Such a promise would obviously be entirely gratuitous and void—and we say that it would require a new and explicit grant, after the state should have come into existence, to pass this right of property from the United States to the state. But, admitting that this express legislation would not be necessary, still, if Congress should at any time previous to the state's coming into existence, manifest an intention of not executing the promise, that circumstance would be sufficient to rebut every presumption founded on the original promise, and would make an express grant necessary. If, for instance, Congress, before this supposed state had come into existence, should *sell* a part of the tract referred to, that act would be sufficient evidence of their intentions in regard to the remainder of the tract. It would avoid the whole promise, and Congress might then go on, *after* the formation of the state, and sell the remainder of the land, without any reference to the claims of the state. So we say in regard to these rivers. Previous to any rights vesting in the states, Congress mani-

fested an intention of retaining, in their own hands, the exclusive control of these rivers during their pleasure, by making permanent laws in relation to a portion of them—and they have ever since, notwithstanding the formation of states, continued to act upon that intention, by making similar laws in relation to other portions of them. We say, therefore, that this promise of a grant to Ohio, of special rights of property in these rivers, has not only never been executed, but has been in fact repudiated.

If this view of the compact suggested in the ordinance, be correct, so far as it relates to rivers, then the compact (on this particular point) was never executed, nor ever took effect, so far as to pass any rights to any of these rivers, from the United States to the states in which the rivers lie—not even to those rivers that lie entirely within a single state; and, therefore, that particular portion of the ordinance, which relates to rivers, is now of no validity whatever, so far as its object was to grant valuable rights to Ohio. It is valid only in its character of a law, designed to reserve the rights of the United States, and we are to look at it solely in this latter character, and especially are we to look at any subsequent legislation on the part of Congress, to determine the present ownership of these streams.

There is still one other point, having relation to the ordinance, which is worthy of consideration. The constitution of Ohio, was professedly made in subordination to the ordinance, as its preamble shews. Now, whether the ordinance itself had power to bind the people of Ohio, against their will, in the formation of their constitution, or not, is a question of no consequence in determining the present power of their legislature, under that constitution. It is sufficient that, for some reason or another, the people of Ohio, by their constitution, gave their legislature no power to transcend the provisions of a certain instrument called "An Ordinance of Congress," &c. We submit, therefore, that—whether the people of Ohio have power to adopt, at pleasure, a new constitution, that shall be paramount to the ordinance, or not—yet, so long as they permit their present constitution to continue, their legislature is bound by it, and have no powers beyond it. If such be the case, the legislature of Ohio has no more power to obstruct these "highways" within her limits, than the legislatures of Maine and Massachusetts have to establish slavery in those states, in defiance of *their* constitutions.

Again—It is to be considered that the people of Ohio, at the time of adopting their constitution, were in a territorial state, and had no legislative powers, other than those *specially granted* to them by Congress. Congress, in the law of April 30, 1802, authorizing a convention, saw fit to limit the powers of that convention to the formation of a constitution, consistent with a certain instrument called "an ordinance," &c. Now, they might, if they had so pleased, have said that the powers of that convention should be limited to the formation of a constitution consistent with the declaration of independence, or with John Locke's constitution for Carolina, or with any other instrument whatever—and, although, such legislation on the part of Congress, would have been arbitrary, capricious, and perhaps unconstitutional, still that particular convention would have been bound by it—because all their powers were derivative, and could be exercised only in conformity to the authority granted. They must act thus, or not at all. If, therefore, the ordinance was not obligatory upon the state at large, either by force of its original enactment, or by force of

the re-enactment in 1789, still, the law of Congress of 1802, authorizing the convention, *made it obligatory* upon that particular convention, by refusing them power to go beyond it. The convention might have refused to act at all, under such restrictions, but they could not act in conflict with them. Under these circumstances, they saw fit to act in conformity with the powers granted to them; and, the people, by their subsequent acquiescence, have adopted and sanctioned that action; and even if the people have power to adopt a new constitution to-morrow, that shall be paramount to the ordinance, still their legislature is governed by the one in existence, until a new one shall be formed.

Upon this question of the powers of the legislature, we quote the opinion of the Supreme Court of Ohio, given in the case before referred to, of Hogg vs. Zanesville Company, which grew out of a dam, which the legislature had licensed that company to build across the Muskingum river. The court, after citing from the ordinance, the clause in regard to "navigable waters," say: "This portion of the ordinance of 1787, is as much obligatory upon the state of Ohio, as our own constitution. In truth, it is more so—for the constitution may be altered by the people of the state, while this cannot be altered without the assent both of the people of this state, and of the United States, through their representatives. It is an article of compact, and until we assume the principle, that the sovereign power of the state, is not bound by compact, this clause must be considered obligatory. Certain 'navigable rivers' in Ohio are '*common highways.*' Of this character is the Muskingum river. Every citizen of the United States has a perfect right to its free navigation—a right derived, not from the legislature of Ohio, but from a superior source. With this right the legislature cannot interfere. In other words, they cannot, by any law which they may pass, impede or obstruct the navigation of this river. That which they cannot do directly, they cannot do indirectly. If they have not themselves the power to obstruct or impede the navigation, they cannot confer this favor upon an individual or a corporation." (5 Hammond 416.)

This opinion, we suppose will be considered decisive as to the powers of the Legislature of Ohio—for although this Court may, in some cases, curtail the powers of a State Legislature, as expressed in their Constitution, in order to reconcile them to the Constitution of the U. S.—yet it is believed that it will never enlarge those powers beyond the limits established by their own tribunals.

The complainant is not disposed to rest his case upon any doubt that may exist as to whether the Commissioners have received the authority of the Legislature to erect this dam. The powers granted to the Canal Commissioners, by the law of 1825, "to take possession of, and use all and singular any waters, streams" &c. "and to make all such dykes, locks, dams and other works and devices as they may think proper," (General Laws of Ohio vol. 23-page 56—also Chase's Ohio Statutes Vol. 2, page 1475, Sec. 8.) were evidently intended to apply as well to navigable waters as to others. This intention is to be presumed from the unlimited terms of the grant, taken in connexion with the fact that the Legislature have ever assumed to control navigable rivers, and to license dams across them, as may be seen by the laws referred to under the head of "Dams," in the Index to Local Laws in Chase's Statutes, Vol. 3, page 2149. It is also well known that this power has been exercised by the Commissioners, and sustained by the Legislature, in very nu-

merous instances. The Legislature also, by "an act to improve the navigation of the Muskingum river by slack-water navigation," passed March 9, 1836, (Local Laws of Ohio, Vol. 34 page 346) authorized the Commissioners to erect dams and locks across that river. The Legislature also, at its last session, refused to grant the request of the Complainant, that the erection of this dam in the Maumee river might be forbidden. The only question therefore, which the Complainant raises, is as to the powers of the Legislature.*

One or two suggestions in reply to arguments urged in the Circuit Court, and we will have done with the ordinance. It was there argued, that because the "carrying places" between the rivers, which, equally with the rivers, were, by the ordinance, made "common highways," had been obliterated and lost, the right to the rivers was lost with them, notwithstanding the rivers have been in constant use as highways up to the present time. One answer to this argument is, that if these carrying places have been lost in consequence of their use having been *voluntarily abandoned* by the public, that constitutes an alteration, *so far,* of the compact, according to its provisions, viz. "by common consent." The right of "highway" is not a right of soil, but of use, and may be forfeited by *non-user.* But the right to any particular portion of a highway is not forfeited, so long as the common use of that portion is continued, although the use of the remaining portions be abandoned. Another answer to the argument is, that if these portages have been obliterated and destroyed, either by negligence or design, such a loss does not at all involve the loss of any other rights, which remain, and can be identified. Because a man's house is destroyed by accident or an enemy, that loss does not involve a forfeiture of his farm also. Yet such is the amount of the argument on the other side.

Another argument, urged in the Circuit Court, was, that Ohio and the U. S. were *joint owners* of these rivers, and that, as joint owners, each party might exercise control over them to the extent of the destruction of the object. But we doubt whether the Court will concur in the opinion, that Ohio, *in her capacity as a State,* is a joint owner with Congress, or has any control, or even a right to a voice in the control, of any of the navigable streams within her limits—and especially of any that extend into another State. But even if she have a right to an equal voice with Congress in the control of them, she obtained and still holds that right solely by virtue of a compact, one part of which stipulates that the rivers should remain "highways" or open ways, until the "common consent," that is, the consent of both parties, should be obtained to their alteration. This consent, on the part of Congress, has never been given. In addition to this, the laws of Congress, (which will be hereafter referred to,) enacting that these rivers "shall remain highways," would, until repealed, operate as an *express refusal,* on the part of Congress, to consent to the alteration.

We have now done with the ordinance, and will pass to the consideration of the question, as it would stand, *if the Ordinance were laid entirely out of the case.*

And here it becomes necessary to repeat several propositions, which have been stated before, viz. 1st, That the U. S. originally *owned* these rivers, *as property,* along with the rest of the territory. 2d, That there is no constitutional impediment to their continuing to hold and control them, *as property,* forever, if they so please. And 3d, That they have never sold or explicitly granted them to

Ohio. We ask, then, whether, under this state of facts, these rivers would not *necessarily* have remained the property of the U. S. even if no law had ever been passed making a reservation of them? Most certainly they must, unless there be some ground, on which an *inference* or *implication* could be based, that the U. S. *intended* to part with them. What *legal* ground is there to sustain such inference or implication? Is it, that these waters can no longer be useful to the U. S.? but may be useful to the State? Certainly not, for although they may be useful to the State, it is clear that some of them, at least, may be useful to other States also. Suppose a navigable lake or river, extending *nearly* across the State of Ohio from east to west—approaching nearly to Pennsylvania on the east, and Indiana on the west—yet lying entirely within the State of Ohio, and communicating with no other water that extended out of the State. Such a water, in one of the old States, might possibly be maintained to have not been granted to Congress, by the clause of the Constitution giving them power over "commerce among the several States." Yet it is evident that such an extent of free navigation in Ohio, might be highly *useful* to the people of other States than Ohio—and that it even might properly be considered of very great importance by Congress, as affording *facilities* for that "commerce among the several States," which Congress has the power of regulating. It even might properly be considered of such importance to that commerce, as to justify the purchase of it by Congress, if it were the property of the State. Under these circumstances, is it to be held, by force of some vague inference or implication merely, that Congress have seen fit to surrender their legal right to their property in this water *gratis* to Ohio? That they have given her the right to shut it up against the commerce of Indiana and Pennsylvania, or to exact contributions for its use from all the other States of the Union, that may wish to avail themselves of its navigation? Certainly such an inference or implication would be as unreasonable, as it is baseless. It might, with much more reason, be inferred or implied that Congress had gratuitiously surrendered to Ohio a tract of land of the same extent—because such a tract of land probably could never be made of one hundredth part the value, to the people of the U. S., of such a navigable water. On the other hand, inasmuch as such a water would afford great facilities for "commerce among the several States," there would be much more reason in implying a grant (under the Constitution) of such a water to the U. S., in case it lay in one of the old States, that own their streams, than in implying a gratuitous grant of it by Congress to a State, when Congress were the real owners, as they were of the streams in the N. W. Territory.

Even in the absence then, of any special reservation by Congress, Ohio could certainly lay no claim to the ownership or control of any navigable waters within her limits, unless it were such as, from their unfavorable location, or the smallness of their extent, were useless to the people of every other State: and none could be called useless or worthless to the people of other States, which, when free to be used, were in the habit of being used by them.

But Congress have not left their right to these rivers to stand upon this ground alone—although they might safely have done so. They have seen fit to guard and declare their rights by special enactments. So early as the 18th of May, 1796—six years before Ohio became a State—Congress passed an act, entitled "An act providing for the sale of the lands of the United States, in the territory northwest of the river Ohio, and above the mouth of Kentucky river"—(Story's Laws, Vol. 1, page 421.)

This act provided for the sale of all those lands, within the district which is now Ohio, to which the Indian title had, *at that time*, been extinguished. The 9th section of the act provides "That all navigable rivers, within the territory, to be disposed of by virtue of this act, shall be deemed to be and remain public highways."

The Indian title had not, at that time, been extinguished to but a small portion of the N. W. Territory; but this law continued the standard of the regulations and conditions upon which all lands subsequently acquired, were ordered to be sold; and so fast as the Indian title was extinguished, and the lands brought into market, laws were passed specially referring to this act of 18th May, 1796, and the acts in addition thereto, and enacting that the lands should be sold under the same regulations, and "upon the same terms and *conditions, in all respects*," as had been provided by those primary laws—except in certain cases where some special alterations were made by those subsequent acts. But no alteration of that portion of the original law, that related to navigable rivers, was ever made in any subsequent act—(Story's Laws, vol. 1, p. 783, sec. 1; vol. 2, p. 926, sec. 1; p. 929, sec. 5; p. 1011, sec. 1; p. 1066, sec. 2; p. 1186, sec. 2; vol. 3, p. 1586, sec. 3; p. 1596, sec. 3; p. 1744, sec. 3; p. 1786, sec. 2, &c. &c.)

The Indian title to the territory embracing so much of the Maumee river as lies in Ohio, was extinguished by a treaty, called the treaty of Detroit, made on the seventh of November, 1807—(See Lowrie & Clarke's edition of American State papers, 1st vol. of Indian affairs, page 747, sec. 1)—and by a treaty made 29th September, 1817, "at the Foot of the Rapids of the Miami of Lake Erie"—(Amer. State Papers, 2d. vol., Indian affairs, p. 131, secs. 1 and 2.) In these treaties, this river is called the "Miami of Lake Erie"—one of the several names by which it has formerly been known. These lands were subsequently brought into market, by a law passed March 3d, 1819—(Story's Laws, vol. 3, p. 1743)—and were included in what were then designated as the Piqua and Delaware districts. In this act it was provided, (sec. 3.) that the lands should be sold "on the same terms and *conditions*, in every respect, as are or may be provided by law, for the sale of lands of the United States in the States of Ohio and Indiana." These "conditions" of course embraced the one, contained in the original act of 18th of May, 1796, in regard to "navigable rivers," requiring that they should "be and remain public highways."

By a law also, passed March 26, 1804, (Story's Laws, vol. 2, p. 929,) it was provided, (sec. 6,) "that all the navigable rivers, creeks and waters, within the Indiana territory shall be deemed to be and remain public highways." The Maumee river extends twenty miles into what was then the Indiana territory, and what is now the State of Indiana. It also has two navigable branches, (the St. Mary's and St. Joseph's) lying partly in that territory. This reservation of that portion of the river lying in Indiana, would have been sufficient evidence, in the absence of all other, that the intention of Congress was to reserve the whole river; and any evidence of such intention, we suppose would have been sufficient for our case.

It is evident that it was the intention of Congress to give these provisions effect, not merely while the territorial governments continued—but forever. As Congress has fixed no limitation to the time, it must be considered unlimited. The intention of Congress on this point may also be gathered from the fact, that it has been their uniform policy to reserve all navigable rivers within

all the lands originally owned by the U. S.—and have subsequently, in no case, (so far as we are aware), granted or surrendered one of them to the State in which it lay. By a law passed March 3, 1803, (Story's Laws, vol. 2, p. 900) Congress enacted "that all navigable rivers within the territory of the United States south of Tennessee, shall be deemed to be and remain public highways." An act passed February 15, 1811, provided "That all the navigable rivers and waters in the territory of Orleans and Louisiana, shall be, and *forever* remain public highways." (Story's Laws, vol. 2, p. 1183, sec. 12.) An act of February 20, 1811, "for enabling the people of the territory of Orleans to form a Constitution," &c., provides "that the river Mississippi, and the navigable waters leading into the same, or into the Gulph of Mexico, shall be common highways and forever free" "to the inhabitants of the State and the citizens of the United States." (Story's Laws, vol. 2, p. 1184, sec. 3.) Another "Act for the admission of the State of Louisiana into the Union," &c., provided "that it shall be taken as a condition upon which the said State is incorporated in the Union, that the river Mississippi, and the navigable rivers and waters leading into the same, and into the Gulph of Mexico, shall be common highways, and forever free," &c. to the inhabitants of the whole U. S.—(Story's Laws, vol. 2, p. 1224 sec. 1.). This provision, being a part of the very act admitting the State into the Union, was necessarily intended to apply *after* the State government was formed, and is sufficient evidence that all other laws on the same subject, were intended to remain in force after State governments were established, as well as before.

It is believed that laws have been passed making the navigable rivers of all the territories and new States in the Union, "public highways." The various laws on this subject are referred to in the index in the fourth volume of Story's Laws, under the head of "Lands, public," in the respective States and Territories. They leave no doubt as to the intentions of the Government to make these "highways" *perpetual.*

On the ground then, of express statutory reservation, the right of the public to the use of the Maumee river, as a "common highway," is indisputable.

We have still one other ground, on which we claim that the control of this river belongs exclusively to Congress, viz:—the decision in the case of Gibbons and Ogden (9th Wheaton 1.) That decision was, that the Constitutional power of Congress to "regulate commerce among the several States," was a power over *navigation.* The language of the Court in that case, is (page 193) that "the word" (commerce) "used in the Constitution, then, comprehends, and has been always understood to comprehend, navigation within its meaning: and a power to regulate navigation, is as expressly granted, as if that term had been added to the word "commerce". (We may then, in the further discussion of this cause, consider commerce and navigation as synonymous terms.)

This power of Congress over "navigation among the several states," is declared to be an *exclusive* power, (page 198,) and to comprehend the *whole subject* of such navigation. It therefore comprehends the navigation of all navigable fresh water *rivers,* that extend into two states, as well as to all lakes and tide waters. We find that Congress have understood their powers as embracing navigable fresh water rivers that extend into two states. They have annually made appropriations for rivers of this kind. At the last session, appropriations were made for improving the Hudson river above Albany, the Cumberland river in Kentucky and Tennessee, below Nashville, and many

other fresh water rivers—(Statutes of 1837-8, Ch. 171, pages 115, 118.) It is believed that at every session of Congress, there have been more or less appropriations of this kind—all proceeding upon the assumption that Congress had the right to take possession of these rivers, and do with them what they pleased, without asking the consent of the states in which the rivers lie—and this has been the case in regard to rivers in the old states, as well as in the new. At the last session of Congress, (March 23, 1838,) a report (House of Reps. Doc. 343,) which had been called for, was made to Congress, of a survey of Alleghany river from Olean, in New York, to Pittsburg, in Pennsylvania, with a view to its improvement. What was done with this report, we have not yet had an opportunity of ascertaining. But this is a strong case to shew that Congress consider their power as embracing all navigable rivers, even within the old states, if they but extend beyond the boundaries of one state.

If it should be said that these appropriations are made on the supposition, *not* that the states, in which these rivers lie, *must*, but that they voluntarily *will*, *tolerate* these improvements, and let all the citizens of the United States have the free benefit of them—the answer is, that such a supposition is by no means so probable a one as to justify Congress in the expenditure of money upon them, without first obtaining the consent of the states. If the states have the *power* to control these rivers, it may oftentimes be for their interests to do it. They may, for instance, wish to charge toll for the use of them, as they have a right to do—as much as for their canals—if they are the private property of the state. Ohio is now about expending a large amount of money upon the *Muskingum* river, and intends hereafter to demand toll for the use of it. After she shall have expended this money, she cannot be presumed willing to surrender the possession of the river to Congress, and be deprived of the privilege of taking tolls.

Again—if a State have the right to put in dams and locks, and charge toll for the use of them, in rivers that extend into another State, then Congress have no conflicting right, and cannot prevent the State from taking such toll as she pleases. Congress would have no right to interfere with the improvements or obstructions which the State is making—nor with the rate of toll which the State may exact for the use of the river, any more than with the toll the State might charge for the use of its turnpikes, railroads or canals. The consequence would be, that the State, under the name of toll for the use of the State's property, could indirectly, but as effectually, exercise the power of "regulating navigation or commerce among the several States," as it could if it had power to levy a direct tonnage or impost duty, on imports and exports—a power that is expressly prohibited to the States by the constitution. If, therefore, Congress have not the control of all waters, naturally navigable, that extend into two States, they have no power "to regulate commerce among the several States," that cannot, at any time, be defeated by the States themselves. These naturally navigable waters are the only avenues, except roads and canals, for carrying on commerce. The roads and canals may all be the private property of the State—and if navigable rivers are also the property of the States, then the States have control of *all the avenues* of commerce, and, of course, by means of tolls for the use of those avenues, can, in defiance of Congress, regulate commerce as they please.

Again—if these rivers belong to the States, and Congress make improvements in them, the States have a right to say, we do not like the plan of these improvements, and we will, therefore, prostrate them. But, will it be pretended that, if Congress should improve the navigation of the Allegany, as proposed in the report before mentioned, New York and Pennsylvania may prostrate the dams, buoys, and locks at pleasure?

Or, again—if these rivers belong to the States, then the States, after Congress shall have made improvements in them, may say, we are very thankful to Congress for having expended so much money in benefiting our property—we shall now be able to charge a higher rate of toll than formerly, for the use of our rivers, and shall derive greater profit from the expenditure which Congress has gratuitously, (though rather inconsiderately,) made upon our waters. Can this doctrine be true? It must be true, if these rivers are the private property of the States in which they lie, because the States certainly have a right to do what they will with their own property. On the other hand, if they are not the property of the States, then they belong to Congress—that is, so far as the right of way over them is concerned; and Congress have the exclusive control over that right of way.

If it should be said that the rivers belong to the States, but that Congress may assume the control of them, on the principle of taking private property for public use, the answer would be—that Congress, in that case, must pay the State the value of the river—and that value would probably be estimated by the amount of tolls that the State might derive from the use of the river. But never, we presume, have Congress thought of such a thing as making compensation to a State, when they have improved a river and declared it free to all citizens of the United States.

Again—if the improvements made by Congress in rivers, are merely *tolerated* by the States, and the general government have not within itself the legal right, the constitutional power, to control the navigation of them, then the agents of Congress are, legally, trespassers, whenever, in making the improvements ordered by Congress, they touch *private* property on the banks of the rivers. They also commit a nuisance, whenever they erect a dam in the bed of a river—for these agents are, in these cases, mere volunteers, acting without license from the only competent authority. Supposing Congress should send men to repair the banks of the Erie canal, or to put locks in it, without the permission of the State of New York, and those men should go upon the adjoining lands for stone and earth—would they not be trespassers? And would it not be the same in the case of the Allegany river, if that river belongs to the States of Pennsylvania and New York?

Again—if these rivers belong to the States, the States have the same right to shut them up *entirely,* that they have to shut up their canals and roads. They may shut them up by dams, and if by dams, by embargo laws, or otherwise, at pleasure. Virginia, for example, may, by law, forbid boats that come down the Muskingum, and other rivers within the State of Ohio, from entering the Ohio river. (It was decided in Handley's case, [5 Wheaton 374,] that Virginia still owned to the northwest bank of the Ohio river.) Indiana, Michigan, and Pennsylvania may also forbid Ohio boats the use of their waters—and thus they may shut Ohio up within her own boundaries; or, Ohio may, if she pleases, shut herself up, by forbidding the boats of other States from coming

within her borders—and thus make herself at once an independent nation, so far as commerce is concerned. All the other States of the union might do the same. We should, in short, present the paradox of a general government, with power "to regulate navigation among the several States," while the several States had, at the same time, power to *prohibit* such navigation entirely. And the consequence probably would be, that we should very soon become twenty-six independent nations for all purposes of commerce—and when we shall have become so for purposes of commerce, we shall not be long in becoming so for all other purposes. The prohibitory and retaliatory legislation of the States of New York, New Jersey, and Connecticut, which was quashed by the decision in Gibbons & Ogden, gave us a foretaste of the manner in which the several States would "regulate navigation" among themselves, if they had the power.

It was further decided, in Gibbons & Ogden, (page 210) that the power of the States "to regulate their domestic trade and police," did not extend to any act that might conflict with the perfect freedom of navigation among the States. No matter how important to the wealth and prosperity of the State, such "domestic trade and police" might be, it must not be suffered to come at all in conflict with the freedom of navigation among the States. This was decided to be the law, even in cases where Congress had made no specific regulations—it being considered that where Congress had not specially regulated navigation, they intended it should be entirely unrestrained.

The Court even said (pages 205 & 6,) that the States could not execute their quarantine laws, against any special provisions of Congress—and Congress seem to have had the idea that the State laws could not be executed without express authority from Congress—for by enacting that the State quarantine laws should be observed, they proceed on the supposition that State power was of itself incompetent to give those laws any vitality.

This decision then, in Gibbons & Ogden, is, of itself, all-sufficient for our cause. It covers *all* "navigation among the several States," whether on rivers, lakes or tide waters, and gives *exclusive* control of such waters to Congress—that is, so far as the use of them for navigation is concerned.

On the supposition, then, that the Maumee is a "navigable" river, and extends into two States, the complainant has at least *five*, and perhaps six, distinct grounds, on either one of which he apprehends he might securely rest his case. These grounds are:—

First—The ordinance of 1787, in its character of an absolute law—re-enacted as it has been under the Constitution by the law of 1789, and the law of April 30, 1802.

Second—The ordinance, in its character of a compact—ratified as it has been by Ohio—that is, if it now have any validity as a compact in relation to these rivers.

Third—The incapacity—imposed upon the Legislature of Ohio, by the State Constitution—of transcending the ordinance.

Fourth—The original right of property, in these rivers, *necessarily* remaining in the United States, because never specially or impliedly relinquished to Ohio.

Fifth—The express reservation of this original right of property, as made, on the part of the United States, by the various statutes that have been referred to. And

Sixth—The exclusive power of Congress over all "navigation among the States," according to the decision in Gibbons & Ogden.

The question that next arises is, what constitutes a "navigable river," within the meaning of the ordinance, the several laws of Congress, and the Constitution?

And, first, what constitutes a navigable river within the meaning of the ordinance, and the several laws that Congress have passed in relation to these western rivers?

There are but two classes of navigable rivers known to the common law of this country—one, in which the tide ebbs and flows—the other, in which there is no tide, but which are nevertheless navigable in fact.

It is evident that the makers of the ordinance and laws did not intend the former class, when they legislated in regard to the "navigable waters" of the N. W. Territory—because they knew that the tide ebbed and flowed in none of them. They must therefore have meant the latter class, to wit: those that were navigable in fact.

The question then arises—what degree of navigability is necessary, in a fresh water stream, to make it, or rather the right of way over it, public property? Probably no better rule can be adopted in this case, than that which has been adopted by the old States in regard to their streams of this kind. Indeed this rule *must* be adopted, or an entire new one be established, for this and similar cases, without regard to precedent. And what new rule can be created, if this be discarded.

In Shaw *vs.* Crawford, (10 Johnson's N. Y. R., p. 236,) it was proved only that the river had been used for *rafting*—and yet it was held to be a navigable one in the eye of the law. In that case, the Court (Kent being Chief Justice, and probably delivering the opinion) said, "When a river is so far navigable as to be of *public use in the transportation of property,* the public claim to such navigation ought to be liberally supported. The free use of water, which can be made subservient to commerce, has by the general sense of mankind, been considered a thing of *common right.*"

Kent, in his Commentaries, also (vol. 3, p. 344) says: "The public, in cases where the river is navigable for boats and rafts, have an easement therein, or a right of passage as a public highway."

Spencer, Ch. J. (17 Johnson 209 and 10) quotes the following passages, for the reason, as he says, that the treatise from which they are taken, "is universally considered of high authority, of itself, and because it defines, with more precision than any other work, what constitutes a public river." "Lord Hale, in his treatise *de jure maris et brachionum ejusdem,* edited by Mr. Hargrave, (pages 8 and 9) says: 'There be some streams or rivers, that are private, not only in propriety and ownership, but also in use, as little streams or rivers, *that are not a common passage for the king's people:* Again, there be other rivers, as well fresh as salt, that are of common or public use for carriage of boats and lighters; and these, whether they are fresh or salt, whether they flow and reflow, or not, are

prima facie, publici juris, common highways, for a man or goods, or both, from one inland town to another.' 'Thus, (he observes) the rivers of *Wey,* of *Severn,* of *Thames,* and divers others, as well above the bridges and ports as below, and as well above the flowing of the sea, as below, and as well where they are become private property, as in what parts they are of the king's property, are public rivers, *juris publici;* and therefore, all nuisances and impediments of passage of boats and vessels, though in the private soil of any person, may be punished by indictment, and removed.' "

In the same case, (page 211) Ch. J. Spencer adds, that "The distinguishing test between those rivers which are entirely private property, and those which are private property subject to the public use and enjoyment, consists in the fact whether they are susceptible, or not, of use as a common passage for the public." And he adds that "this distinction was adopted by Chief Justice Kent, in Palmer *vs.* Mulligan, (3 Caines' Rep. 319.)"

The same doctrine is laid down in numerous other cases, (20 Johnson, p. 100; N. Y. Digest, vol. 2, p. 299; Johnson's N. Y. Digest, vol. 2, p. 8; also Arundel *vs.* McCulloch, 10 Mass. R., p. 71; and in Wheeler's Practical Abridgment of Am. Com. Law Cases, vol. 8, p. 369 to 375, where most of the American cases are cited.)

We see not upon what ground any abatement from, or modification of these principles, can be made in determining what rivers were intended, by the ordinance and laws of Congress, to be made "public or common highways," for the people of all the States—unless, perhaps, in one single particular, to wit: The case of a river, or other water, if any such there be, lying entirely within the limits of one State, and navigable for so short a distance, or lying in so disadvantageous a position, as to be *useless* to the people of any other State than that in which it lies.

It is true, that the doctrine of these cases may perhaps at first view, appear rather rigid to be applied against a State where her sovereignty over the streams within her limits is in question. But no other rule can be applied, unless a new one can be created—and, as was before suggested, what are the principles on which a new rule can be founded, if this old one be given up? It is, moreover, far more proper that, under the ordinance and laws of Congress, the rule of interpretation, as to what constitutes a navigable river, should be applied strictly against the State, than strictly against the General Government, because, on the one side depend the rights of the people of the whole United States, *in common* with the people of Ohio—on the other, depend only those of Ohio to the *exclusive* possession. Furthermore, the General Government undoubtedly *meant* to reserve a right of free navigation over all rivers that *could* be useful to the people of the United States, for purposes of trade. Besides, if it should be found that the rule adopted by the Court was more strict against the right of the State than Congress intended, Congress can give a dispensation from the rule, to such an extent as they see proper. But if, on the other hand, it were decided too strictly against the right of the United States, the people of the United States would have no remedy, because Ohio would of course refuse to give back any sovereignty of this kind, which had once been adjudged to her. If it should be said that the U. States would be no more disposed to relinquish their sovereignty over any particular river to Ohio, than Ohio would to the General Government, that argument would go to shew that the river was one which the United States had always intended to include in their reservation—because it is not to be presumed that

Congress are any more grasping of power now, than they were at the time of passing and re-enacting the ordinance of 1787, or the laws that have been referred to. In short, Congress have no interest to retain, and therefore cannot be supposed to wish to retain, the control of any rivers except such as it is for the welfare of the whole country that they should retain: and all such they must be presumed to have intended to reserve by the ordinance and laws. On the other hand, it is evidently for the interest of Ohio, for obvious reasons, to get the control of all the rivers that she possibly can, both great and small, and to keep the control of all she can get. Congress, by reserving "all" navigable rivers within the territories that once belonged to the United States, have shewn that they intended, as they had an undoubted right to do, to retain in their own hands the *power of judging* what waters it will be for the interests of all to have remain "public highways." The States therefore can claim authority over none of these "navigable waters," except by virtue of express grants from Congress.

The intention of Congress, as to the extent of their reservations, may be gathered from the law of March 26, 1804, (Story's Laws, vol. 2, p. 929, sec. 6,) in regard to the waters in the Indiana territory. In that law, they include every water, great and small, that can be called "navigable." Their language is "*all* the navigable rivers, *creeks* and waters." The Courts can make no exception where the law thus enumerates every thing. Congress have since made no special grants to the States of any of these waters. Every navigable one, then, still remains as the laws of Congress left it—that is, subject to the sole control and disposal of Congress.

But it is not necessary for our case, that we should insist upon this strict rule against Ohio, however correct the rule may be in itself. The Maumee, in its *natural* state, is navigable, not merely for rafts, but for keel boats of large size, and for small steam boats. It is also capable of being cheaply improved so as to be navigable by craft of an hundred or two hundred tons burden. Neither is the navigation confined to a downward passage. The boats used on it, pass and repass, upwards as well as downwards, a distance of more than an hundred miles.

Again—The Supreme Court of Ohio decided (5 Hammond 416) that the *Muskingum* was a navigable river, within the meaning of the ordinance—and that river is not materially, if any, larger than the Maumee.

So much for what constitutes a navigable river within the meaning of the reservations expressed in the ordinance and laws of Congress. There is another question, viz: as to what is a navigable river within the meaning of the Constitution, or within the decision in Gibbons & Ogden?

On this point there seems to be no limitation. The decision is that the power of Congress embraces the *whole subject*, "*the entire result*," of "navigation among the several States."—(page 209.) It of course embraces all rivers, however small, that extend into two States, and that are *used* and *useful* for "navigation." The Court say, (9th Wheaton 197,) "The power of Congress, then, comprehends navigation within the limits of every State in the Union—so far as that navigation may be, *in any manner*, connected with commerce among the several States."

In the legislation, which Congress has had in pursuance of their power to regulate "navigation among the several States," we may also find a definition, sufficient for our purpose, of what constitutes a navigable river. In a law that was passed at the first session of Congress under the Constitution, (Story's Laws, vol. 1, p. 40, sec. 22,) we find a provision for licensing vessels of only *five* tons burden. Whatever therefore may be said of still smaller streams, all that are capable of being navigated by craft of five tons burden, must be considered as rivers of the United States. The Maumee, in its *natural* state, is navigable for craft of five or ten times the necessary tonnage—and can easily be made navigable for boats of twenty or forty times that size.

In another law passed May 1st, 1802, (Story's Laws, vol. 2, p. 873, sec. 4,) Congress authorized a Collector's office at Marietta on the Ohio, and, in the words of the law, "established a district, to be called the district of Marietta, which shall include all the waters, shores and inlets of the river Ohio, on the northern side, and the rivers, waters and shores *connected therewith,* above or to the eastward of, and including the river Scioto, from the mouth thereof upwards as far as the same may be navigable." Now the Maumee is a larger river than the Scioto—and the extent of navigation on the Maumce, and its several branches—the St. Mary's, St. Joseph's, Auglaize and Tiffin river or Bean creek—is probably twice as great as that on the Scioto. Now, although there may no longer be customs collected on rivers of the size of the Scioto, and some of the others embraced in this law, it by no means follows that Congress have surrendered their *power* over the navigation of them—because, according to the decision in Gibbons & Ogden, it is a part of the system adopted by Congress, to leave all navigation entirely free, which is not specially regulated. The system extends as much to what is left free, as to what is regulated—(9th Wheaton 209.) By the 8th section of this same law of 1802, that established the district of Marietta, (Story's Laws, vol. 2, p. 875,) Congress enacted that "no duty on the tonnage of any boat, flat, raft or other vessel of less than fifty tons burden shall be demanded or collected," &c., "on the Mississippi or any of its branches." Now it cannot be inferred from this enactment that Congress intended to abandon, or surrender to the States, the control of all navigation carried on by craft of less than fifty tons burden, merely because they liberated such craft from tonnage duty. On the contrary, they intended to give a special *protection to such craft* against regulations, that would be more vexatious to commerce, than profitable to the nation. And when, by the 4th section of this law, (page 873,) they included the *Scioto* river within the Marietta district, it is not likely that they supposed that that river was navigated by craft of fifty tons burden, or that they expected to derive one dollar of duty from the navigation of that river—but that they only intended to secure to that navigation the protection of the laws, by putting it under the care and supervision of an officer of the general government.

This incidental mention of the *Scioto* river, in this law of Congress, is a test, sufficient for our purpose, of what constitutes a navigable river, and one from which, it seems to the complainant, there can be no appeal.

Again—If the regulation of the smallest craft that sails from one state into another, do not belong to Congress, it *must* belong to the states—and then Congress would not have "*exclusive*" power over "navigation among the several states."

Again—The court say (9th Wheaton 194) that "commerce," (or navigation, for commerce includes navigation,) "as the word is used in the constitution, is a unit, *every part* of which is indicated by the term." And still again (page 215) the court say, "The *subject* of navigation is transferred to Congress, and no *exception* to the grant can be admitted, which is not *proved* by the words, or the nature of the thing."

Further, still—It was decided, in Gibbons & Ogden, that commerce means not merely traffic, but intercourse also (page 189)—and that the power of Congress extends to vessels employed merely in the transportation of passengers, (page 215.) All rivers, therefore, that are of sufficient depth only for passenger boats, must be embraced by the power of Congress.

Again—The court say specially that "the deep streams, which penetrate our country in every direction, and pass through the interior of almost every state in the Union," are embraced by the power of Congress, (page 195.) By "the deep streams" here mentioned, must have been meant simply *navigable* streams. Perhaps, however, it may be argued that no streams are here intended other than those that "penetrate the country" directly from tide waters. But this would be a very narrow view of the subject, and founded upon any thing but practical reason. Such a construction would take from Congress the control of navigation on all our great lakes. It would also take from Congress the control of navigation on the Mississippi and its branches, if there were but such an interruption of the navigation, by falls at the mouth of that river, as to make a transhipment of goods necessary, within the body of a state, from the tide water vessels to the river craft.

But the court have superseded all necessity for further argument on this point, and settled every question of power pertaining to the subject, by declaring, in the broadest terms, (page 195,) *this doctrine*, that the power of Congress extends to *all* navigation, except that which is "*completely* internal," "*within a particular State.*" This doctrine covers the *whole* ground that the complainant contends for. It leaves nothing to be argued or questioned, except the simple *fact*, whether a particular navigation extends into two states?

In the laws of Congress, establishing Collector's Districts, we have an evidence of *their* opinions in regard to the extent of their powers, for they include in those districts all navigable waters, down to those of the smallest capacity. As, for example, in establishing the district of Yorktown, (Story's Laws, Vol. 2, p. 873, sec. 1,) they enact that that district "shall comprehend the waters, shores, harbors and *inlets* of north and east river," "and *all* other navigable waters, shores, harbors and *inlets* within the county of Mathews." In the law passed in 1789, at the first session of Congress under the constitution, (Story's Laws, Vol. 1, page 6,) establishing Collector's Districts along the whole Atlantic coast, we find that the smallest class of waters are considered as being under the control of Congress. As, for example, (on pages 12 & 13,) in establishing the several districts in Virginia, the enumeration, in one case, is, of "all waters, shores, bays, rivers, creeks, harbors and inlets." In other cases, the enumeration is substantially the same. This minuteness of enumeration is significant. It shows the understanding of the first Congress to be, that their powers included every water, of whatever size, that could be called navigable. We see no good reason why the constitutional power of Congress over the *interior* "navigation among the several states," should not be as comprehensive as over the exterior.

The navigability of the Maumee, to the extent set forth in the bill, is not attempted to be denied by the other side. On the contrary, one of the counsel for the state, admitted before the Circuit Judge, that he had himself seen a steamboat or steamboats on the river, within the distance described in the bill. Nor is it denied that this river has been constantly used, from the first settlement of the country, up to the present time, as the common and principal thoroughfare for the transportation of the produce and merchandize of the country, as set forth in the bill.

Further evidence of the navigability of this river may be found in a report, made in 1822, to the Ohio legislature, by the Hon. James Geddes, of New York, then an engineer of perhaps the very highest reputation of any in the country. He was employed by the State to examine and ascertain the best route for a canal to connect Lake Erie with the Ohio river. In his report, he said that a canal on one of the routes that had been contemplated by the State of Ohio, would find a "formidable rival," in "the Wabash and Maumee navigation"—and also, that this navigation, aided by a canal connecting the two rivers, and by a canal around the rapids, near the mouth of the Maumee, *would be the cheapest in proportion to its value,* (that is, *the best in proportion to its cost,*) that could be had between Lake Erie and the Ohio river. [See history of Ohio canals, p. 44.]

In the first grant of land by Congress, for the purpose of this Wabash and Erie canal, a part of which Ohio is now constructing, we find evidence of the same fact. This grant was made to Indiana in 1824, [Story's Laws, vol. 3, p. 1955]—and the grant was for a canal, not extending from the Wabash to Lake Erie, but only for one "to connect the navigation of the *rivers* Wabash and Miami of Lake Erie." (The latter river, now called Maumee, was then usually called the Miami of the Lake.) This shews that both Congress and the State of Indiana considered the Maumee a navigable river—and that they supposed the navigation afforded by it would be sufficient for the wants of the country. But it would seem to have been afterwards found that if the river were used, a canal would have to be constructed around the rapids, near the mouth of the river—that is, from the Head of the Rapids, mentioned in the bill, to that portion of the river that opens into the Maumee bay. The consequence would be, that the navigation *from* each end of the navigable portion of the river—that is, from Fort Wayne westward to the Wabash, and from the Head of the Rapids eastward towards Lake Erie, would have to be by canal. If, therefore, the river, between the Head of the Rapids and Fort Wayne, were used under these circumstances, a transhipment of goods from canal boats to steamboats, and from steamboats to canal boats, would be necessary at each end of the hundred and twenty miles, for which the river is here navigable.* In order also to make the navigation of the river constant through the season, for boats of the necessary burden, some expenditures in improving the river would be necessary. The distance by the river would also be thirty or forty miles greater than by a direct route. It was undoubtedly for these reasons that it was deemed best to make a canal for the whole route from "the navigable waters of the Wabash to those of Lake Erie," and avoid the necessity of transhipments altogether. And by a law of March 2, 1827, [Story's Laws, vol. 3, p. 2064,] Congress made a further grant of land, and authorized such a continuation of the canal.† Now, in all this Congress have manifested no intention of surrendering their right to the navigation of the river—nor have they made any admission that the river was not navigable for this hundred and twenty miles. They have, at most, only expressed the opinion that in making a continuous and

constant navigation from Lake Erie to the Wabash, it was not *expedient* to avail of this extent of river navigation, which was circuitous, and which, being situate between two sections of canal navigation, would require transhipments at each end. The first grant being merely for a canal to connect the Wabash and Maumee *rivers,* is conclusive evidence that both Congress and the State of Indiana considered the Maumee not only a navigable, but an important river.

But in fact, Ohio herself has admitted the navigability of this river, by forbiding its obstruction. The Legislature, on the 20th March, 1837, passed an act entitled "An act to incorporate the Defiance Bridge Company, on the Maumee river." By this act they licensed the building of a bridge across the river, about three or four miles *above* the place where the commissioners now propose to erect their dam. And, in the 7th section of the act, they inserted this proviso, to wit: "Provided always, that the navigation of said river by steamboats or other craft, be not impeded or obstructed by the erection of said bridge." [Local laws of Ohio, vol. 35, p. 279.]

We have now, we think, certainly produced evidence enough to make out this river a "navigable" one, within the meaning both of the ordinance and laws of Congress, and of the constitution. We will answer one or two objections, and then leave this part of the subject.

It has been argued, that because there is an interruption in the navigation by rapids near the mouth of this river, it is not to be held navigable above, although it is navigable in fact. But such a doctrine would shut up the Mississippi and its branches, if there were but falls at the mouth of that river. It would also shut up all the navigable lakes and waters above the falls of Niagara. The test of a navigable river is its *usefulness* for navigation. Falls at the mouth of a river may more materially diminish its usefulness then falls near its head—but unless they entirely destroy its usefulness, the river remains a navigable one for such distance as it is useful. Wherever the navigation of a river is interrupted by falls, the navigable portion above the falls, is, to all practical purposes, *another river,* and, as another river, its navigability is to be tested by the same rule that the navigability of other rivers is tested—that is, by its usefulness. The only reasonable doctrine then, and the only one consistent with the principles on which the law of navigable rivers is founded, is this, that where a river, in any portion of its course, is navigable for such a distance, and to such a degree, as to be *useful* for navigation, it should, for such distance, be held navigable in law. The Maumee, above the rapids, is, in its *natural* state, navigable continuously, and without interruption, for more than one hundred miles. This distance, we suppose to be amply sufficient for all legal purposes. But it also—as ought to have been set out in the bill—has four navigable branches, which fall into it between the Head of the Rapids and Fort Wayne: These branches are the Auglaize, Tiffin river or Bean creek, the St. Mary's, and St. Joseph's rivers. These branches are navigable, several months in the year, for boats of considerable size, about fifty or sixty miles each—thus making, with the main river, between three and four hundred miles of continuous navigation. The complainant, however, does not rely upon the navigability of these branches, (if the other party object to it,) because it was not set forth in the bill—still, he is ready to produce what will probably be satisfactory evidence of the fact to the court, if the court desire it.

It may perhaps also be argued, that because the navigation of the river is impeded by low water during a period in the summer, it is not to be considered navigable. But it is believed that the

navigation by *small* boats is at no time suspended. Still, if it were, it is not seen how that could affect the question. The test of *usefulness*, before referred to, is applicable to this case, as well as to all others. If, then, the river is navigable for such a *length of time*, as to be *useful* for navigation, that is sufficient. That such is the case here, there is no doubt. The River is navigable so as to be highly useful at least six or seven months in the year. Its usefulness is proved by the fact that it is used—a kind of proof from which there is no appeal. The Ohio river, for a considerable period in almost every season, is so low as to be very nearly, if not entirely useless for navigation—but will it be said, that therefore the Ohio is not a navigable river in law?

In addition to all the evidence that has been presented, of the navigability of this river, we have found two acts of Congress, specially embracing this river. These acts were not discovered until all the preceding evidence had been prepared. Although we suppose these laws would alone have been sufficient for our purpose, we have thought best, even at the risk of being tedious, to present the evidence already given, in order to place the matter more entirely beyond the reach of any possible objection.

By a law of Congress, passed March 3, 1805, (Story's Laws, vol. 2, page 973) establishing certain ports of entry, it is provided (Sec. 3) "That from and after the thirty-first day of March next, all the shores, rivers and waters of Lake Erie, within the jurisdiction of the United States, which lie between the west bank of Vermillion river, and the north cape or extremity of Miami Bay, into which the river Miami of Lake Erie empties itself, and including all the waters of the said river Miami, shall be a district to be called the district of Miami," &c. (The Maumee, it will be recollected, was formerly called the Miami of the Lake.) No objection can be taken to this law, on the ground that the whole river was not then within the "jurisdiction" of the United States, for, although the United States had not, at that time, extinguished the Indian title to all the lands in Ohio, yet they had previously extended their "jurisdiction" over the territory. The State of Ohio had previously been admitted into the Union, with the same limits that she has now, which include a large portion of this river.—(See 2d sec. of Law of Ap. 30, 1802—Story's Laws, Vol. 2, p. 869.) Congress had also, two years before, by a law passed Feb'y. 19, 1803, (Story's Laws, Vol. 2, p. 882,) "to provide for the due execution of the laws of the United States within the State of Ohio," enacted "that the (whole of) said state shall be one district, and be called the Ohio district," &c. "All the waters of the said river Miami," it will be observed, are also included in the law of 1805, establishing the "district of Miami." The portion above the rapids is therefore included as well as that below.

As early also as March 2d, 1799, (three years before Ohio had any state rights,) Congress passed an act, establishing various districts and ports of entry, (Story's Laws, Vol. 1, page 573,) and among others (page 585; sec. 17) they established one to be called the district of Erie, which it was enacted should include, among other waters, "the river Miami of Lake Erie." (It appears also, that by this (pages 585 & 586,) and a subsequent act, (Vol. 2, page 873, sec. 4,) all the rivers of Ohio, many of which are much smaller than the Maumee, have been, and, so far as we know, still remain, included in the districts that have been established.) It was also provided by this act of 1799, (sec. 105, page 661,) that navigation might be carried on in the above districts, "*in vessels or*

boats of any burden, and in rafts or carriages of any kind or nature whatsoever." This shows that Congress consider their power as extending to the humblest kind of navigation.

The Complainant supposes that these acts settle all questions, both in regard to this river's being a navigable one, and also in regard to Congress having extended their power over it. They also constitute a *seventh* distinct ground, on which the complainant supposes he might safely rest his case.

We will now pass to another question.

It was argued before the Circuit Judge, that Congress, by licensing the construction of this Wabash and Erie canal "through the public lands," had *impliedly* given Ohio *permission* to obstruct this river with a dam, if it should be found convenient or necessary in the construction of the canal. But Indiana (nor Ohio, who has since taken the place of Indiana, in regard to such portions of the canal as lies within the limits of Ohio,) cannot, of course, claim by virtue of that act, to use or convert any more of the property of the U. S. to the purposes of the canal, than she was *specially* authorized to do by Congress. Now all the authority over the property of the U.S.—(in additiou to that of constructing the Canal "through the public lands of the U. S.") that was granted to Indiana by the acts of Congress relating to this canal, was simply this. She was "authorized, *without waste,* to use any *materials* on the public *lands* adjacent to said canal, that may be necessary for its construction." (Act, of 26th May 1824, Story's Laws vol. 3, page 1955, and act of March 2, 1827, Story's Laws vol. 3, page 2064.) It will be observed, on reference to these acts, that this grant of permission to go upon the lands of the U. S. and "take materials," was given only by the *first* of them. And the second, if construed strictly by its terms, would seem to have been an entirely new grant, and on new terms; instead of an additional grant on the old terms. In this latter view of the case, the State would not be entitled even to go upon the lands of the U.S. adjacent to the canal and take "materials," for no such permission is given in the last act. And it is very likely to have been the intention of Congress that this should not be done—for, as by the last act, every alternate section of land, along the whole line of the canal, was granted to the State, it was not likely there would be any great necessity for the State's going off her own sections for materials. But, however this may be, the State cannot, at any rate, enlarge the license beyond the terms of the first grant. These were simply to go upon the public lands adjacent, and take "materials." If a State, under such a license as this, can take a *legal right* to obstruct, or, what is the same thing, *appropriate,* any portion of a navigable river, it may, on the same principle, appropriate the *whole* river to the purposes of the canal. This conclusion follows inevitably. And thus, according to this doctrine, whenever Congress—partially with a view of raising the price of the public lands—passes a law licensing and aiding a State to construct a Canal through *them,* the State, instead of constructing the canal "through the public lands," according to the intentions and law of Congress, may make at once for the nearest or most valuable navigable rivers of the U. S.—seize upon them—dam them up at intervals, and thus convert them into State property, and levy contributions upon the navigation of the whole U. S. for the privilege of passing over them.

Again. The grant was of a privilege to construct a canal "through the public *lands.*" Navigable rivers are *not* "lands," in legal contemplation—they are not included in surveys, or sold as lands by the acre. It is otherwise with rivers *not* navigable.

Again. No real or supposed necessity, if there were any, (as in this case, none is pretended, or at any rate proved—the location of the canal in the present position being evidence only of convenience not of necessity,) could avail to enlarge the terms of the grant. The grant was *conditional*—and like other grants by statute, was in the nature of a *written* contract—not to be enlarged by implication. The U. S. would give so many "lands," on condition that Ohio (or Indiana) would construct such a canal, and in a *particular place*—that is "*through the public lands.*" If those lands, with her other resources, are insufficient to enable the State to comply with the proposal of the general government, or if the location proposed by the general government be found impracticable, then the State must decline the offer, or solicit a further grant. She can no more claim, as a matter of legal right, that the U. S. give her a navigable river, or any portion of one, in addition to the original grant, in order to enable her to complete the canal, than she can that they give her an hundred thousand dollars in money, or an additional quantity of "lands."

Again. It is unreasonable to suppose that Congress anticipated that the navigation of this river was to be obstructed—and for this reason, if for no other, that in constructing a canal from the navigable waters of the Wabash to Lake Erie, *it is necessary to go out of a direct course,* in order to cross this river.

But even if a grant had been made for a canal "through the public lands," from a point on one side of a navigable river, to a point on the other side, so as that Congress *must have known* that the canal *boats* would have to cross the river, still no grant could be implied of an authority to obstruct the river—and for two reasons—first, because the grant was literally to construct the canal "through *lands*" only, and could not be enlarged by implication—and, secondly, because it would be unreasonable to suppose that any necessity could exist for constructing a canal *in the river,* inasmuch as a boat would ordinarily be presumed capable of crossing a *navigable* river, without the aid of any artificial structures sufficient to impede the navigation.

Again—When a river has been specially declared a "public and common highway," (as all navigable rivers in the N. W. Territory have been,) canal boats, if they have occasion to cross them, have, by the already existing law, a right to use or cross them, *as highways,* and *in common* with other boats—but they can by no means claim that this "common and public highway for all citizens of the United States," specially established by law, has been abolished for their sole benefit, unless they show an express law to that effect.

But it was argued that Congress must have known that *water* would be wanted for this canal, and that therefore they must be presumed to have intended that navigable rivers should be obstructed, if necessary to obtain it. One answer to this is, that this question, like all others, must be settled by the terms of the grant—which were for the canal to go "through lands" only. Rivers and streams *not* navigable, *are* "lands," and it is reasonable to suppose that Congress believed there were enough of these to feed the canal. Besides, if the Commissioners wish to take water from a navigable river, they have a right to do so, by means of a wing dam, that shall not extend

so far into the stream, as to be any impediment to navigation. Or they may take it out by deep cutting through the bank, provided always they do not take out so much as to impair the navigation of the river. A riparian owner, on a fresh water stream, has a right to do thus much for his own use.

It was argued in the Circuit Court, that because Congress had made a grant of lands (May 24, 1828, Story's Laws, vol. 4, page 2141) to aid in constructing another canal (called the Miami canal) from Cincinnati and Dayton to Lake Erie, in *partial* compliance with a memorial presented to Congress three years before by the Ohio Legislature, (See Memorial in History of Ohio Canals, page 170,) which canal forms a junction with the Wabash & Erie canal above the place where it is proposed to cross the river—therefore Congress have impliedly granted liberty to obstruct this river. But it will be remarked that in this memorial the Legislature gave Congress no intimation that the river was to be crossed, or even touched by this Miami canal. They only describe the route as "commencing at the city of Cincinnati, and terminating at the foot of the Rapids of the Miami of the Lake"—that is, on the Lake level, for the foot of the Rapids is on the Lake level. They also mention certain counties through which it will pass. But all these counties lie, in whole or in part, on the south side of the river—that is, on the same side with Cincinnati and the main body of the canal. In order therefore to construct the canal through these counties, and terminate it at the foot of the Rapids, as indicated in the memorial, it was not necessary to touch the river except *at its termination*—and of course it was not necessary to *cross* it *there*—for they would there form a junction with the Lake navigation without crossing the river. Congress therefore derived no intimation from this memorial, that the river was to be crossed. The object of the Legislature too, in presenting this memorial to Congress, was, not to obtain permission to cross the river, but simply to obtain a grant of "lands," and liberty to go through those of Congress. Besides, as an inducement to Congress to make these grants, they say (page 171) that the lands of Congress, through which the canal will pass, will be "much increased in value, and command an enhanced price when they shall be brought into market." Now this enhanced value, which is urged on Congress, by the Legislature, as an inducement to the grant, could not apply to navigable rivers—because a navigable river would not be "much increased in value," by having its navigation destroyed or impaired. Neither the grant, nor the memorial, therefore, can be understood as applying or referring to any thing but "lands."

Congress finally made a grant of lands in aid of this Miami canal, and of liberty to go "through the public lands"—(May 24, 1828, Story's Laws, vol. 4, page 2141)—but the grant extended, at most, only *to* the Maumee river, "at the mouth of the Auglaize," which is on the south side of the river. And it is evident that Congress considered it doubtful whether the canal would extend even so far as *to* the Maumee river—for the grant is of a certain quantity of land "on each side of said canal, between Dayton and the Maumee river, at the mouth of the Auglaize, *so far* as the same shall be located through the public lands." So that, at any rate, here is no permission given, either expressly or impliedly, to obstruct the river.

It may perhaps be argued that the canal, which Ohio is building, will be a better channel of communication than the river, and that therefore there is no harm in shutting up the river. But it

may be very well doubted, one would think, whether a canal, on which boats must pay toll, and also travel at a slow rate, is a better channel than a river that is free, and on which, when it is in a navigable condition, boats may move at any speed they please. But even if the canal were the better channel, that would not alter the legal complexion of the case at all. A man has no right to shut up a public highway, merely because he has opened a better way through his own land, on which he offers to let people travel on paying him toll.

We will now take it for granted that we have established the point that Ohio has no right to erect any structure that shall actually and entirely shut up or destroy the navigation of this river.

But another question here presents itself, viz: whether the State of Ohio, without the consent of Congress, can, under any pretence, or for any purpose whatever, legally assume the power of placing in this river a dam, *provided they put a lock in it, and tend and open the lock*, for the accommodation of the passenger? The discussion of this question has been rendered necessary by *one part* of the decision of the Supreme Court of Ohio, in the case before referred to, of Hogg vs. Zanesville Co., (5 Hammond 417.) The court there decided that, although the right of way over that river was the common property of the people of the whole United States, yet the State of Ohio had a right to license the erection of a dam across it, provided a lock were put in the dam, and promptly tended and opened for the passenger. We suppose this part of the decision is clearly erroneous—for the reason that if Ohio have not the *sovereign* power over this right of way, she has no power whatever to license any interference with, or obstruction in it. But although we suppose there is really no necessity for argument on this point, we will cite the opinion of the Supreme Court of Massachusetts, as given in Commonwealth vs. Charlestown, (1st Pickering, page 184.) The court there say "none but the *sovereign* (legislative) power can authorize an interruption of such passages, because this power alone has the *right to judge* whether the public convenience may be better served by suffering bridges to be thrown over the water, than by suffering the natural passages to remain free." And again, in the same case, (page 185,) "There must be some act of *sovereign* power, direct or derivative, to authorize any interruption of them."—The principle which, in this case, was held to apply to bridges, would apply equally to dams, because the public would be incommoded by dams, unless the locks were opened, in the same manner that they would by bridges if the draws were not raised.

It was held in this case in Massachusetts, that the State Legislature was the "sovereign power" over the navigable river then in question. This part of the decision may or may not be correct. The decision was given before that in Gibbons & Ogden, and no question was raised, either by the counsel or the court, as to whether the control of their waters had not been surrendered to congress by the constitution; nor do we know whether the waters over which this bridge was built, were accessible from the waters of any other State. We therefore can neither admit nor deny the correctness of that part of the decision, which assumes that the State Legislature was the "sovereign power" over them. We cite the opinion only in support of the principle, that the consent of the "*sovereign* power"—in whatever hands it may in any particular case reside—must be obtained in order to justify bridges with draws, or dams with locks, across navigable rivers.

It has been shown, we trust, in the former part of this argument, that whether the old States still have, or have not, the sovereign power over their streams, those States that have been formed out of territory that once belonged to the United States, have *not* the sovereign power over the navigable streams in their limits; but that the United States are still the sovereigns over, and have the *exclusive* control of, all navigable waters in these last mentioned States—that is, so far as navigation over them is concerned. The State of Ohio, then, having no sovereignty of her own over the navigable streams within her limits, and having never had any discretionary power over them delegated to her, to authorize her to license dams or other obstructions on such conditions as she may see fit, she has no right to authorize them in any way, or on any conditions whatever. By thus licensing them, as in some instances she has done, she has been constituting herself the attorney of the United States—has been assuming to act for the United States, and has in reality been usurping an unauthorized discretion and control over the property of the United States. She has no more right to assume this discretion, than the same number of any other individuals have. She has no more rightful authority over the navigable rivers of the United States, than she has over the post offices of the United States within her limits. All her legislative acts, therefore, authorizing individuals to construct dams across the navigable rivers of the United States, are utterly and palpably void—and it is of no consequence what securities she took from those individuals, that the locks should be opened, or what penalties she imposed for neglect to open them. Her whole legislation on the subject has been a work of supererogation. She might, with as much propriety, have assumed the power of licensing an individual to lock up the post offices or court houses of the United States within her limits, on taking from the individual so licensed a promise that he would open them again at all proper times, or on affixing such penalties to his neglect to open them, as she might think would prove sufficient to induce him to open them. And her statute penalties for neglect to open locks in a dam that she has licensed, are as void as would be her statute penalties for neglect against the individual before supposed, whom she should license to lock up the post offices and court houses of the United States, or as would be her statute penalties against trespasses upon the public lands within her limits. She is in no way the agent or attorney of the United States, either for affixing the penalties to trespasses upon the property of the United States, or for granting licenses to individuals to occupy, enjoy or control the property of the United States;—whether that property consist of navigable rivers, post offices, court houses, wild lands, or any thing else.

The inconsistency of the State Court is most obvious. They admit, in the case referred to, (5 Hammond, 416) that the "navigable rivers" of Ohio are "common highways"—that "every citizen of the United States has a perfect right to the free navigation of them"—and that "with this right the Legislature cannot interfere." They admit also, (pages 421 and 423) that a dam, with a lock, is, *of itself,* a nuisance; And still they say that the Legislature of Ohio, who, they assert, have no power to "interfere with this right of way," can yet cure a nuisance in it, or, what is the same thing, *maintain* a nuisance in it. The error of the Court consists in assuming for the Legislature of Ohio, a discretion over a highway belonging to the United States. On this principle, the State Legislature would have a discretionary power over all property of the United States, that should happen at any time to be within the limits of Ohio.

The State of Ohio, then, has no right to *license* the erection of a dam by individuals, on any conditions whatever, across a navi gable river within her limits, over which the United States, or the citizens of the United States, own the right of free navigation. Not having the right to *license* the erection of such dams by individuals, has the right to erect them herself, on any conditions whatever, without the consent of Congress? It is difficult to imagine how she can have the power to build them herself, when she has not the power of licensing them to be built by individuals. A dam that should obstruct the navigation, unless it were authorized by the sovereign power, (which in this case is Congress) would be as clearly a nuisance when erected by a State, as when erected by an individual. It would be as clearly a trespass for a State, or persons acting under State authority, to injure a post office or court house, belonging to the United States, as for a mob or an individual to do it. It is, therefore, difficult to conceive how the State of Ohio can interfere with, or exercise any more control over this right of way belonging to the U. States, than an individual, or than the same number of other individuals, citizens of the United States, as those composing the State of Ohio, might do. This right of way is the common property of all the citizens of the United States: as much so as are the mails and post offices in the State of Ohio; and as such, it is under the exclusive control of Congress. Neither the citizens nor State of Ohio have any peculiar property in it, or control over it. Ohio, in short, stands on the same level in relation to this public right of way, that an individual does. She is in no way known in relation to it, in her capacity as a State. Her citizens are but so many citizens of the United States, having privileges *in common* with the other citizens of the United States, in the use of this river; but having no peculiar property in, or control over it. Congress have the sovereign power over this right of way, and there is no secondary or subordinate power over it, resting in the State of Ohio. There are, in fact, no intermediate rights, either of property or use, to this river, between those of the United States on the one hand, and those of the riparian owners on the other. The United States own the right of way over these streams, and the riparian proprietors own (subject to the right of way) every thing else that pertains to them as streams. They own the bed of the streams, the right to fish, and the right to use the water, as it flows over their lands. And there are no intermediate rights between those of these two owners. None such are any where expressed, or necessarily implied. They therefore do not exist. Now Ohio may take, for the public use of the State, any property of her own citizens; but she can take no more than the property of her own citizens. She cannot take the property of the United States. In regard to these streams, therefore, she can assume only those rights of property and use, which belong to the riparian owners. She cannot enlarge those rights, without encroaching on the rights of the United States, because the riparian proprietors have all the rights of property pertaining to these streams, except what belong to the United States. There are no intermediate rights in existence. Now a riparian owner confessedly has no right to put a dam across a navigable river. The State Court expressly declares such to be the fact, in the case before cited, (5 Hammond 421 and 423.) The State of Ohio then, of course, can have none, because she can have no larger or other rights of property or use in the stream, than those she took from the riparian owner. Dams, then, that should be erected by the State of Ohio, would be as much nuisances, as those that should be erected by the preceding owner.

In order to support the views of the other side, upon this point, it would be necessary to show, that, between the right of way, (belonging to the United States) on the one hand, and the rights of the riparian proprietor on the other, there existed an *intermediate* right—*that of damming up the river:* And that this right of damming belonged, or might belong, to a third party—(which party, in this case, is the State of Ohio.) But who ever heard of the right of damming, as existing separate from all the other rights pertaining to navigable streams? Surely no one. The right of damming, or of keeping open a river, is a *necessary* incident to the right of way—otherwise the owner would have no security for the enjoyment of that right. The way might be dammed up and obstructed, and he would be without remedy. The right of Congress, too, "to regulate navigation among the several States," includes necessarily a right to keep open navigable waters—otherwise "navigation among the States" might be defeated by the States, in defiance of Congress. This Court virtually asserted the same doctrine, at its last term, in case of U. S. *vs.* Combs, (12 Peters 78) where it said, that "any offence, which *interferes with,* obstructs, or prevents commerce and navigation (among the States) may be punished by Congress, under its general authority to make all laws necessary and proper to execute their delegated constitutional powers."

But it is said that if there be a lock in the dam, and the lock be really tended and opened promptly for the passenger, there is no nuisance. But would such a dam be a nuisance, if it were erected by an individual, without his being specially licensed by the sovereign power—the owner of the right of way? Most certainly it would. The State of Ohio has repeatedly said so, because she has repeatedly assumed to be the sovereign power, and to give or withhold licenses to individuals to build such dams, thus virtually declaring that the dams of individuals would be nuisances, unless specially authorized by the sovereign power. The State Court also says the same (5 Hammond 421 & 423)—the Massachusetts Court says the same of bridges, (1st Pickering 184; 2 do. 39; 4 do. 460; 9 do. 142;) all Courts say the same. Yet, in no respect, as has before been shewn, does a dam erected by Ohio, or licensed by her to be erected, across a navigable river of the United States, without authority from the sovereign power, (that is, Congress,) differ from one erected by an authorized individual.

But, admitting for the sake of the argument, that if the lock were tended and opened, there would be no nuisance—still, the question, even then, whether there be or be not a nuisance, is made to depend entirely upon the *contingency* of the lock's being opened. Now the lock will not open itself—and we cannot know beforehand that any individual will open it—and yet, unless it be opened, it is admitted to be a nuisance. So that the public enjoyment of the right of free passage, in this case, is made to depend entirely upon the mere will or ability of some person, *who is unknown to the law,* to open the lock, or, what is the same thing, his mere will or ability to *make* a passage.

What then is the amount of this doctrine, that if the lock be opened, there is no nuisance? Why, it is this, that any unauthorized person, or at least any riparian owner, may, of his own mere motion, erect a structure, which is, *of itself,* an obstruction, in a navigable river belonging to the United States, and compel all the citizens of the United States to depend, for their passage over their own "highway," upon his mere will or ability to remove that obstruction, (that is, open the

lock, or *make* a passage,) whenever they may wish to pass. The law cannot remove the obstruction, until the intentions of this individual, in regard to opening it, have been judicially inquired into—and if it should be found that his intentions *probably*, (for they could not be ascertained certainly,) are to remove the obstruction, (that is, open the lock,) whenever it may become necessary, then the obstruction itself must remain. The public, in the meantime, that is, until they actually arrive at the lock with their freight, must be content to derive such consolation as they can from what has been judicially decided, or, more properly, judicially conjectured, to be the man's intentions in regard to opening it. When they arrive there, if he open the lock, well—but if they find that his intentions have been mistaken, that he intends *not* to open it, why then they must either make their way through by force, or let their freight remain where it is, until the obstruction shall be removed in due process of law. And then, if they have suffered any damages by the detention, they must recover them of the man, who erected the dam—provided always he remain where he can be reached, and have the means of paying damages—for otherwise, the sufferers must pocket their loss. All this they must submit to, merely because the law chose rather to occupy itself with what it was pleased to conjecture might be the man's intentions, than to take notice of such material things as dams, locks and obstructions in a "common highway."

Such is the whole amount of the doctrine that any person or State, unauthorized by Congress, can possess themselves of the right to shut up the "common highways," the "navigable rivers" of the United States, by merely expressing *intentions* to open or make a passage, whenever the citizens of the United States may wish to pass. Such a doctrine would take the rights of the whole citizens of the United States out of the keeping of the laws of the United States, and expose them to become the sport of contingencies, resting in the mere will or ability, in the *undiscoverable intentions*, in fact, of individuals unknown to the law. Is it possible that, after having had our rights guarantied to us by the paramount law of the country, they can be lawfully seized upon in this manner, by any subordinate power, that may please to do so, and we be thrown back, for our enjoyment of those rights, upon the mere will and pleasure of unlicensed and unknown persons? The idea is preposterous. If such a doctrine were to prevail, any unlicensed individuals might put *chevaux de frize* across the Bay of New York, and compel every vessel that should come in, to depend upon them to open and make a passage. They would have as much right to put such an obstruction across the Bay of New York, or across the Mississippi river, as across the Maumee river—and any indifferent or unknown persons would have as much right to do it, without the consent of Congress, as would the state of New York, or the states lying on both sides of the Mississippi.

But it may be said, (it is in fact so said by the State Court,) that if the lock should actually be opened, no one is injured. For the sake of the argument, be it so—but if it be not opened, then some one *is* injured. Now, since the opening of the lock for the passenger, is an affair to take place at some time subsequent to the erection of the dam, and as we cannot know whether the lock will be opened, until it actually is done, there is all the time from the erection of the dam to the opening of the lock in every individual case, during which all the rights of the public to a free passage, are in a state of uncertainty—they are not in the condition in which the law left them, but are in the keeping and at the mercy of the mere intentions and non-intentions of an irresponsible

usurper. The community hold their rights *on sufferance* from this usurper—and if the doctrine we are arguing against be true, these rights cannot be taken out of his keeping, until he has further violated them by actually delaying men on their passage. This whole doctrine is pre-eminently absurd. It is as illegal for any man, or any individual state, thus to usurp *the keeping*, *the custody*, of the rights, which belong to men by virtue of the laws of Congress, as it is to actually trample upon those rights. It is a violation of those rights, to take them out of the keeping of the laws of the United States, and assume the custody of them to themselves. A man, who should without license, take his neighbor's money, might, with the same propriety, say: "Why, surely there is nothing illegal or wrong in my simply *taking* this man's money, for he may rest assured it is my honest intention to return it to him whenever he needs it. I will not delay a moment to do so, whenever he says he wants to use it. But, until he does want to use it, he certainly ought not to object to my keeping it, and deriving what benefit I can from it to myself—especially as there will not be the least harm done to him, if I do but return it to him, as I intend, when he calls for it." An individual, who should take such liberties with his neighbor's money, would be treated by the laws as a thief, (unless, perchance, his reasoning should be considered sufficient evidence of his insanity.) The laws would restore the money to the custody of the rightful owner, whether he wanted it for actual use or not, and without compelling him to wait and see whether the thief would restore it voluntarily, when it should be wanted. Still, the reasoning of this thief would be but a fair parallel to the doctrine, that would make it legal for an individual or for a single state to assume the keeping of the rights of the citizens of the United States, to a free and unobstructed passage over the navigable rivers of the United States, (by putting dams across them,) on merely expressing intentions to restore the navigation, or open and make a passage, whenever those citizens should wish to pass.

According to this doctrine too, any individual State might seize any *treasure* of the U. S. within its limits, and be supported by the laws in keeping the possession of it, until the General Government should want it for actual use, on the State's merely expressing intentions to restore it whenever it should be thus wanted. A State might seize upon a sub-treasury of the U. S. within its limits, if we should ever have any, lock it up, appoint agents to keep the keys, and compel the subtreasurer to depend upon these State agents for the means of going into his own office. A subtreasury of the U. S. would not, by law, be more under the exclusive control, or in the exclusive keeping of the laws and agents of the U. S. than are the navigable rivers of the U. S. in the keeping of the laws of Congress, and of those citizens who wish to use them for purposes of navigation.

On the doctrine too, that we are contending against, any individual, or any agent of any one of the States, might go on to Washington, and nail up or lock up the doors of the Capitol, or of the Supreme Court room, twenty times in a day during the whole sessions, (if there were sufficient cessations of passing to give him time to do it so often,) and the laws would protect him in thus nailing them up, and in keeping them thus nailed up, until the members of Congress, Judges or others, who had business there, should actually arrive at the doors and demand admission. And even then the individual would be entitled to a reasonable time in which to open them, because, if he have the right to shut them in that manner, he of course has a right to the necessary

time for opening them again—and during all such time as should be necessary for opening them, the Judges, members of Congress, or other persons at the door, must wait for admission. And if he should choose to not open them at all, then they themselves must force them open, or send for some one to do it, or wait until they can be opened by legal process.

Such is the legitimate issue of this doctrine, that individuals, or individual States, have a right to assume the custody of the property of the United States, without being first licensed by the Government of the United States. The judges of the Supreme Court have no clearer right, under the laws of the United States, to an entrance into the court room, free from all let, hindrance, impediment, or interference, from all irresponsible and unlicensed persons and powers whatever, than have boats engaged in commerce to pass thus freely upon a navigable river belonging to the United States, which Congress has declared shall be a "public highway" for all citizens of the U. S.

But it will perhaps be said that if the persons, who should build a dam across a river, should but for once neglect to open the lock, or should but for once delay the passenger, the lock or dam might then be removed as a nuisance. But why then, any more than before? If the persons were but to renew their intentions of opening it in future, would they not have just the same right to keep it up that they had in the first instance? Most certainly they would, if, as is contended, their rights to keep up the lock can, in any case, depend upon their entertaining an intention to open it. And if their rights to keep up the lock do *not* depend upon their intentions to open it, they certainly have no right to keep it up at all—for they, of course, have no right to keep it up with the intention that it shall remain unopened, and obstruct the passenger.

But again—as to the legal effect of men's intentions. Has a man a right, without my consent, to come upon my premises and erect a gate before my door, on merely expressing intentions to open it whenever I may wish to pass through? Or would he have a right to maintain his gate there, if he should actually stand by it at all times, and invariably open it for me, so as never to cause me a moment's delay? Most certainly not. The law will not compel me to depend, for my free ingress and egress, upon any assurances, which either the man's words or actions, though never so strong or never so often repeated, may give. The law will forbid him to erect any thing, which, *of itself, if let alone,* will obstruct or incommode my free passage. Yet the contrary is the amount of the doctrine of the other side.

Or again. Has an individual a right, without the consent of the State, to erect a gate across a highway, or across a railroad belonging to the State, on merely expressing intentions to open it whenever the citizens of the State, or cars belonging to the State, may wish to pass? Has the man's *intentions* any thing to do with his right to thus place a thing, which is, *of itself,* an obstruction, across a way that does not belong to him? Certainly not. No more right has Ohio to put such an obstruction across a way belonging to the United States, without first obtaining the consent of Congress.

The only way, then, of determining what is, and what is not a nuisance, in a navigable river, is to look at the nature of the obstruction itself, *without any regard whatever* to the intentions which those who erected it, may have concerning it. If the passage itself be shut up or obstructed

thereby, then, unless the structure have either been authorized by the sovereign power, or have, within *itself,* the mind, will and ability to remove itself, to make way for passengers, it is a nuisance. Tried by this test, a dam with a lock is as clearly a nuisance as a dam without a lock. The stream is, for the time, as much shut up in the one case as in the other—for a lock will no more open itself for the passenger, than a dam will fall down of itself to make way for him. The natural navigation too—*the* "highway," established by Congress, is as completely and utterly destroyed by a dam with a lock, as by a dam without a lock. All that can be said in favor of the dam with a lock, is, that it contains certain artificial *facilities,* that may be used as a *substitute* for the legal "highway." That is, it contains certain facilities for opening a *private* way (for a lock being private property, is a private way) for the accommodation of those passengers, against whom the legal "highway" has been closed. But an unlicensed person has no right to obstruct a "public highway," on merely putting gates in his own fences, so as to afford facilities for men's passing through his private grounds. Yet such is the amount of the doctrine we oppose.

Again: The doctrine that a dam and lock may be put in a river, without license, if the lock be *afterward* opened for the passenger, is equivalent to saying that unlawful acts may be done on conditions *subsequent* to the acts, On such a principle, the law could not take notice of an unlawful act so soon as it was committed; but must wait to see what the offender will do next; and whether he will not voluntarily repair his wrong.

Again: It appeared, in the case before referred to, (5 Hammond 421) that the proprietors of the dam *could not* open the lock, (until the freshet had subsided,) by reason of the sand and drift wood, with which the freshet had clogged it. All dams are liable to the same objection. To say, therefore, that a dam and lock may be built in a highway of this kind, without license, is to say, that an obstruction may be placed in it, that may, in some cases, be *incapable* of removal.

Again: The doctrine that a State may put dams across the navigable rivers, or "common highways" of the United States, on condition that locks are put in them, is equivalent to saying that the State, on certain conditions, but without the consent of Congress, may *seize* such rivers or highways, and take them out of the *possession* of Congress: For the erection of dams across them, by which passengers are made to depend for their passage upon the will of the State, or of the agents of the State, instead of the will and laws of Congress, is to all intents and purposes, a *seizure* of the river. If I lock up the doors of a man's house, and put the key in my pocket, does not that act constitute a seizure of the house? And suppose that, in order to accommodate the occupant, I open the door for him whenever he wishes to pass through, and shut it after him when he has passed through, does that alter the case at all? Is not my possession as illegal as though I refused him a passage altogether? Most certainly it is. I have taken such possession of his house, that I *can,* at will, prevent his ingress and egress, and he holds the enjoyment of his own property, merely on sufferance from me. Such possession on my part is illegal. So in the case of a dam built by Ohio, across a river of the United States—even if she could let boats through without any delay at all, (instead of one of five or ten minutes, as will really be the case at best,) still she would have no right whatever to thus take possession of what belongs to the United States, and compel

the citizens of the United States to depend upon her will for the enjoyment of the privileges which they hold under the laws of Congress, and the Constitution of the United States.

The reason, and in fact the only reason, that the State Court gave for its strange opinion, was, (page 415,) that "the Legislature *supposed* they possessed this power." The reason is almost as strange as the opinion, which it is designed to support. Are the State legislatures invested with judicial powers, to decide legal questions arising under the Constitution and laws of the U. S?—Are their acts or opinions of any more consequence, in a legal point of view, than are the acts or opinions of any body else? It is true that some of the State Legislatures, before the decision in Gibbons and Ogden, and perhaps since, have in some instances authorized bridges and dams across rivers—and these bridges and dams may have been tolerated—but it must have been because the people did not understand their rights, or because no one individual was sufficiently damaged to induce him to assume the expense and vexations of a suit. The fact, that such bridges and dams have been tolerated, furnishes no argument in favor of their legality.

Again. If the law had been that any riparian owner, or any corporation or individual subordinate to the sovereign power over navigable rivers, could without obtaining the consent of that sovereign power, put dams across them, on merely putting in locks and expressing intentions to open them, we should doubtless have had innumerable cases of the kind, (because there must have been strong inducements to build such dams for the purposes of water power,) and we should also have had numerous judicial decisions in support of these dams—but no such decision, where this point has been directly put in issue, has been produced, (or rather was produced before the Circuit Judge,) except this solitary one in the Ohio reports—(5 Hammond 410.) and even this decision is self contradictory—for one part of it is, that "the Legislature cannot interfere with this right of way"—while another part is that they can maintain a nuisance in it.

But further. It is admitted, on all hands, that no *individual,* not even a riparian owner, would have any right, without the consent of Congress, to put a dam across a navigable river of the U. S. however many locks he might put in it, and however well he might tend and open them. The State of Ohio stands on the the same, level, in this respect, with an individual. She has no rights, except those she takes for the public use, from individuals. Besides, all powers subordinate to a sovereign power, are on a level with each other, in the view of the laws of that sovereign power. But the case here is even a stronger one, if possible, against the right of a State, to put a dam across a navigable river of the U. S., than against the right of an individual, because in the case of an individual, if he did not open the lock, he would be liable to an action for damages, and probably exemplary damages would be given. But no redress could be obtained against a State, that should neglect or refuse to open the locks, because a State cannot be sued, and a sufferer would therefore be entirely without remedy for any loss he might sustain by the obstruction. Neither could damages be obtained against agents of the State, because the State might, if it pleased, refuse to appoint agents to the duty of opening the lock. The State also, in this case, would have a strong motive to refuse to open the locks, because by so doing they would compel passengers to go in their canal, instead of the river, and pay them toll.

This consideration, that an individual, who should suffer damage from the neglect or refusal of the State to cause the lock to be opened, would be without any means of redress for that damage, appears to the Complainant an unanswerable and all-sufficient reason, why the most rigid rules of law should be inflexibly enforced against the proceedings of the State.

We have thus argued the question as if no delay at all would *necessarily* be occasioned to the passenger, by a dam with a lock in it—and trust that even on that supposition, we have shown that a dam would be a nuisance.

But there is another reason why such a dam would be a nuisance, even though the lock were tended and opened in the best possible manner—and that reason is, that *some* delay would necessarily be occasioned in going through it. This delay, it is true, might be but for five or ten minutes for each boat—but a delay of five or ten minutes, if unauthorized by the sovereign power, (which in this case is Congress) is as illegal as one for five or ten years. The State of Ohio has no more right to stop every passenger on the highways of the U. S. five or ten minutes each, than an individual has to stop passengers the same length of time, on the highways of the State. Nor has the State any more right to stop boats engaged in "navigation among the several States," five minutes each, than she has to stop the mails coaches of the U. S. for that length of time. Such boats are as much under the "exclusive" regulation of Congress, as are the mail coaches of the U. S.

Again—a right, in one particular State to stop navigation on the navigable rivers of the United States, for five or ten minutes, would involve a right to stop it for five or ten years, and forever. It would, therefore, involve a right to *prohibit* "navigation among the several States" altogether; it would involve a right to pass embargo laws, and to shut up their navigable rivers entirely by dams—all of which rights would be in direct conflict with the "*exclusive* power of Congress to regulate commerce and navigation among the several States."

Again—the States may as well put in a dam, and demand *toll* of all the citizens of the United States for the privilege of going through it, as to demand any portion of their time—the latter is as much a tax upon them as the former would be.

But it has been suggested, that the right reserved by the United States to these fresh water navigable rivers, is a mere right of way, or easement of navigation—and that a riparian owner, and of course the State, may use the bed, banks, and waters of the rivers in any manner for their own benefit, provided they do not "*materially*" interfere with, or interrupt the navigation—and that a dam with a lock in it, if the lock be properly tended and opened, is not a "material" interruption—that, in short, the delay of five or ten minutes caused by the dam, is not "material." The leading *principles* of this suggestion may, for ought we see, be correct—not so with the application. Is not any interruption in a "highway" that compels the passenger to depend for the enjoyment of his right of passage, upon an irresponsible and unknown person, "material?" If not, then it is not a material matter whether any of a man's rights or property are suffered to remain in his own possession, or whether they be seized upon by an usurper.

Again—is not a delay of five or ten minutes "material?" If not, then a tax of five or ten cents would not be material. To say that the State has a right to tax boats to the amount of five or ten

minutes time, but has not the right to tax them to the amount of five or ten cents in money, is sacrificing sense to sound.

Again—is it not absurd to speak of *any* interruption or delay as *immaterial?* Is it not as much a paradox to speak of an immaterial delay, or an immaterial loss of time, as it would be to speak of an immaterial loss of money? Besides, when we consider that this dam may cause a delay of five or ten minutes to ten, twenty, or an hundred boats in every day, and that these boats may each have on board ten, twenty, or an hundred passengers, the materiality of five or ten minutes delay becomes very materially increased.

There is another way of testing the materiality of such a dam: If one dam is not material, then any number of dams would not be. If any number be material, one is material in its proper proportion—and if one dam cannot be enjoined, then an hundred, if but built one at a time, could not be. Now, we know that a large number of dams would make the navigation of a river utterly worthless; not so with a large number of wharves, none of which should extend so far into the channel as to interfere with the navigation. Riparian owners, or the State, may, therefore, build such wharves along the whole course of a river, if they please—although they may not put in one dam *across* the river, Such wharves are the kind of structures that are not "material," because they do not interfere with the navigation.

There is still another test of the materiality of a dam. There can be no doubt that if a dam, with a lock, or with any number of locks in it, were built across the river Thames, just below the city of London, it would at once give rise to a rival city, and gradually remove a large portion of London commerce below the dam, and greatly reduce the value of real property in London; all solely by reason of the inconvenience of passing a lock. Can a cause capable of producing such effects, be called immaterial? If it would be material on the river Thames or the Mississippi, it would be material on the smallest river that the law had declared navigable.

Again—the erection of the dam by authority of the State, is equivalent to the passage of a law by the State, that every boat navigating from one State to another, or engaged in "commerce among the States," shall stop at that particular point five or ten minutes. If, therefore, the State may, by a dam, stop boats five or ten minutes at one point on the river, they may pass a law that all boats shall make a halt of five minutes once in every *ten rods,* if the State so please, through the whole length of the river—and such a law would be as valid as the law authorizing a single dam at one point. It is no answer to this view of the case, to the say that the State *will not* conduct so maliciously or illiberally as to pass such a law. The question is whether she have the power? If she have the power, she may exercise it at will, and without regard to right or reason—(Congress undoubtedly has power to pass such a law.) In the case of Brown *vs.* Maryland, [12 Wheaton, 439 and 440,] the Supreme Court of the United States say: "Questions of power do not depend upon the degree to which it may be exercised. If it may be exercised at all, it may be exercised at the will of those in whose hands it is placed," &c. &c. And again, [p. 447]—"The question is, where does the power reside? not how far will it probably be abused? The power claimed by the State, is, *in its nature,* in conflict with that given to Congress—and the greater or less extent, in which it may be exercised, does not enter into the inquiry concerning its existence." In McCulloch *vs.*

Maryland. [4 Wheaton, 430,] the court say: "We are not driven to the perplexing inquiry so unfit for the judicial department, what degree of taxation," (or, they might have added, of any other burdening or interference.) "is the legitimate use, and what degree may amount to the abuse of the power. *The attempt to use it* on the means employed by the government of the union, in pursuance of the constitution, *is itself an abuse,* because it is the usurpation of a power, which the people of a single State cannot give:" And again, [p. 436]—"The States have no power, by taxation, or otherwise, to *retard, impede, burden, or in any manner* control the operation of the constitutional laws enacted by Congress to carry into execution the powers vested in the general government." Now Congress, in pursuance of their constitutional powers "to regulate navigation among the several States," and "to dispose of and make all needful rules and regulations respecting the territory belonging to the United States," have enacted that this river shall "be, and remain a public highway." Ohio puts a dam across it, which shuts it up entirely, and says to the passenger, "You shall hereafter depend upon my will, and the will and ability of my agents to open for you a private way in the place of the highway established by Congress." Is not here collision? Does this leave the river a "public highway?" Is not here an assumption to "*control*" the constitutional legislation of Congress? Ohio says also to all passengers, "you shall be delayed in you passage at least five minutes at this point," (and, of course, as many minutes at as many other points as the State may please.) Is not this "retarding, burdening, and impeding the operation of the law of Congress," which enacted that this river should be a "public highway?" Is not such a law as clearly in "conflict" with the constitutional laws of Congress, as would be a State law that should enact that the United States mail coaches should make stops of five minutes each, at particular points designated by the State?

Again. By the laws of Congress, this river has been established as a "common and public highway," in the technical meaning of that term. The laws, therefore, that apply to highways *on land,* apply to this river. To suppose a parallel case then—if *two* fences were placed, by an unauthorized person, across a highway on land, with gates in them, so as to require five minutes for passing them, would they not constitute a nuisance? Jacob says, "Erecting a gate across a highway, though not locked, but opening and shutting at pleasure, is esteemed a nuisance, for it is not so free and easy a passage, as if there had been no gate." (Jacob's Dict, tit. highway, sec. 5.) Also, "It is clearly agreed to be a nuisance in a highway to do any act which will render it less commodious." (Jacob's Dict, tit. highway, sec. 4.) The Supreme Court of Massachusetts also says that bridges with draws, across navigable waters, are nuisances, unless authorized by the sovereign power. (1 Pick. 184—2d do. 39—4th do. 460—9th do. 142.) In one of these cases (2d Pick. 39) the Court mentions that the Legislature of that State have been in the habit of requiring the owners of bridges, as a condition annexed to the privilege of erecting them, that they make compensation to the owners of vessels for the delay that is *necessarily* caused by passing bridges with draws.

But it is said—and such a *dictum* was given out by the Supreme Court of Ohio, in the case before cited in 5th Hammond—that a State may put in dams and locks, if by so doing they *improve* the navigation of the river. Now, there is in this word "*improvement,*" a sort of charm for covering up what is illegal, and that is the reason why it is brought forward to cover up and excuse so

palpable a trespass upon a public right of way, as that of erecting dams and locks in a navigable river, over which the State has no control, and compelling men to submit to the delay of going through them, or to the risk of not being able to get through them at all. Where a stream is *not* navigable, the State has undoubtedly power to make it so by means of dams and locks, because the stream then belongs to her own citizens, and she may do what she pleases with it. But wherever (in the States that have been formed out of territory that once belonged to the U. S.) a stream *is* navigable, it belongs to the U. S., and without the consent of the U. S. the State has no right, under pretence of improving it, to put in dams and locks, or make other alterations which, of *themselves*, are sufficient to obstruct or delay the passenger. The State would have a right to deepen the channel, and so would the riparian owner, because that *could not* obstruct the navigation. But the principle before quoted from the 1st Pickering, would apply to the case of a dam, a bridge, or any other structure, which involved an impediment or obstruction in the natural passage, and a temporary delay to passengers, viz: that "none but the *sovereign* (*legislative*) *power* have the right to *judge*" whether such an alteration would be an improvement. Nor is the question whether the dam be an improvement, one simply of fact, to be ascertained and determined *judicially*. When the legislative power have enacted that a particular river, *in its natural state*, shall "*remain* a common highway," that is, an *open* way, the judicial department have no power to inquire into, and determine the expediency of erecting in that river certain structures, which involve a shutting up, or a destruction of the natural passage, a temporary delay to the passenger, and a dependence on the part of the passenger upon the will of unknown persons for his passage. The judiciary, in such a case, (say the S. C. of Mass. 1st Pick. 187) would be legislating instead of declaring the law as it is.

Again—Has the State of Ohio, under pretence of "*improving*" the post offices of the United States, within her limits, a right to assume the power of putting doors, windows and boxes in them, without the consent of the United States, or their agents? And especially has she, under pretence of providing for the greater security of the public mails, a right to put locks on the doors of the post offices within her limits, appoint agents to keep the keys, and open the doors when necessary, and thus compel the citizens of the United States to depend for their mail facilities upon the mere will or ability of these State agents to open the doors? Certainly not. Yet, she might as well assume such an authority, without the consent of Congress, as the authority of putting dams and locks in the rivers of the United States (under pretence of improving them,) and thus of compelling the citizens of the United States to go through them, and to depend upon the agents of the state for liberty to go through them.

If the State of Ohio wishes to improve the navigation of the Maumee river by any means that involve a shutting up or destruction of the "highway," or open way, established by Congress, let her lay her plans for such improvement before Congress, and if Congress should be satisfied with her plans, and if Ohio should give satisfactory assurances that the locks should be always kept in repair, be always properly tended, and that all other things proper to be provided for in such cases should be conscientiously performed by the State of Ohio, Congress would, no doubt, consent to the alteration—otherwise they ought not to consent to it. There may be thousands of cases where it would be proper for Congress to grant to Ohio the privilege of obstructing a navi-

gable river, which they have declared shall "remain a highway"—but the question now is, whether Ohio can, in any case, claim this privilege as a *legal* right?

Another way of testing this question of a right in the State of Ohio, to put dams and locks in the rivers of the United States, under pretence of improving them, is, by asking whether the riparian owner have that right? If he have not, the State of Ohio cannot have it, because she has no right to use the river otherwise than as he might have used it before her.

Another way of determining this question, is, by simply deciding to which of the two governments, Ohio or the United States, this right of way belongs. If it belongs to the United States, Ohio certainly has no right, without the consent of Congress, to interfere with it in any way that can possibly injure or obstruct it. On the other hand, if it belongs to Ohio, then the *United States* have no right to interfere with it, without the consent of Ohio. There is no concurrent jurisdiction in the two governments over this right of way. It belongs to one or the other of them—and the one to whom it does *not* belong, must be content to let it remain in just such condition as the one to whom it *does* belong, *chooses* to let it remain. The general government is the owner—and has seen fit, as yet, not only to leave the navigation unobstructed by any artificial structures, that may be called improvements, but also to enact specially that it "*shall remain*" so—and Ohio has no right to say that it shall not remain so forever, if Congress should so please. Ohio has as much right to go on and improve the wild lands of the United States within her limits, as to improve the navigable waters of the United States in any way that *can* injure or obstruct the navigation of them.

Again—If a river were to remain a "highway," or open way, the distance usually occupied by a lock, could be passed in one minute, or perhaps in one-twentieth of a minute—but to pass through a lock requires five or ten minutes. At least, then, the particular portion of the highway that is occupied by the lock, is injured. Now is the benefit, if any, that may result to other portions of the highway, any legal justification for an injury done to that particular portion occupied by the lock? Can the State claim, as a matter of right, to offset the benefit against the injury?

Again—The improvement made in navigable rivers by dams and locks, consists in this—that by means of a lock, a boat is enabled to overcome, at a single lift, several feet of ascent, which otherwise would have to be overcome gradually. And this is the kind of improvement, which the Ohio Court says may be lawfully made by the State in a "highway" belonging to the United States. Let us apply this doctrine to a highway *on land.* Suppose an inclination of ten feet to the mile in a highway on land—would any individual or power, subordinate to the power that established the highway, have a right, without license, to reduce the inclination, and bring the road to a level, by making a perpendicular descent of the whole ten feet at a single point? Would he have the right to do this, even if he were to provide artificial facilities at that point, by means of which the embankment could be ascended and descended with a delay of less time than would be gained on the remainder of the mile? The idea is too ridiculous for argument—and yet the case is a perfect parallel to that of a dam and lock in a navigable river.

Again—The State Court claims for the State, the power of improving the "highways" belonging to the United States, by means of structures that interrupt the highway, and delay the

passenger five or ten minutes at particular points, if they but facilitate his passage, for the remainder of his course, sufficiently to counterbalance or overbalance the delays. Such a doctrine is equivalent to this—that the State Legislature has power to exercise a general supervision and control over the constitutional legislation of Congress. For example, Congress enacts that this river, *such as it is,* shall be a "common highway"—that is, an *open* way. A highway is also a way that can be lawfully interrupted by no power subordinate to the power establishing it. But Ohio says it shall not be an *open* way—but shall be interrupted by dams and locks, because *she* thinks the way will be the better for it. Is not this assuming a power to alter and improve upon the legislation of Congress? Congress also, by enacting that this river shall be a "common highway," have virtually enacted that passengers upon it shall, at no point, or on any pretence, be delayed or hindered in their passage, by any person or power not licensed by Congress. But Ohio, by authorizing a dam, enacts that passengers shall be delayed five minutes whenever they arrive at a particular point. This is palpable collision. But Ohio, in order to avert the consequences of this collision, and to prevent her legislation being set aside, appeals to this Court with an apology for the collision—enters into a justification of the delay that she causes—offers an argument as to its expediency—and says that in consequence of it, passengers will find the remainder of their route more easy of accomplishment. This all may, or may not be true. Still, what is the amount of the justification, unless it be that Ohio have a right to overrule the legislation of Congress, whenever she can accomplish good by it—this Court being the judge whether the good be accomplished? It certainly means this, or it means nothing. It means that the State Legislature and this court combined, have the right, whenever they think it expedient, to take the legislative powers of Congress out of its hands, and administer them themselves. Such an apology as this, then, for the exercise of the power, on the part of the State, is good for nothing. Nor would this or any other apology be offered, or be necessary, if the power itself belonged to the State—for a State may exercise at will, and without rendering reasons, any power that belongs to her. If Ohio have the right to delay passengers five minutes on the "highways" of the United States, or to delay boats five minutes that are engaged in "navigation among the several States," on pretence of doing a benefit to the boats, it follows that she has a right to delay the operation of all other laws of Congress, whenever by so doing she can improve their influence upon those that are to be affected by them. And if this Court will listen to arguments from Ohio, tending to prove that she has altered the regulations of Congress *for the better,* and will sustain the State in making whatever alterations this Court may think beneficial, in the laws of the United States, then Ohio may suspend, alter or delay the operation of every law of Congress within her limits, provided she can satisfy this Court that her legislation is better than the legislation of Congress. She may, for example, stop the mail coaches of the United States five minutes in the middle of their routes, provided she cause the horses to be refreshed so as to be able to get through the remainder of the routes sooner than they otherwise would. She may also delay the time of holding the Circuit Court for the district of Ohio, by preventing the Judges from entering the Court House at the time appointed by Congress, provided she can satisfy this Court that suitors will thereby be better accommodated. If Congress order the post offices in Ohio to be opened at eight o'clock, Ohio may forbid their being opened until five minutes or five hours after eight, provided she can satisfy this Court that such an arrangement is an improvement upon that established by Congress. Ohio has as much right to stop

the mail coaches of the United States in the middle of their routes—to delay the Judges when entering the Court Houses of the United States—and to prevent post-offices from being opened and entered at the time designated by the laws of Congress, as she has to shut up the navigable rivers or "common highways" of the United States, and thus delay passengers and boats that are navigating "among the several States," or that are passing on the highways belonging to the United States. Such boats are as exclusively under the control of Congress, as are mail coaches, the district Courts, or the post offices of the United States. Congress is the sovereign power over these highways and navigable rivers, and also over boats engaged in "navigation among the several States"—and therefore Congress has the sole *right to judge* of what the public convenience requires—and the State has no particle or color of right to exercise any control in the matter, or to stop boats for one moment of time, or at any point of their progress, on any good or bad pretence whatever, or by any means whatever, whether by dams, laws or otherwise. She has no more right to stop them, than she has to stop the mails at particular points, or to delay the opening of the Courts and post offices of the United States on pretence of benefitting the public.

Again: The question, whether a dam and lock, erected without the license of Congress, *be* an improvement, is one that can never be settled in the affirmative by this or any other Court: And for this reason, that the question of improvement or injury depends, at best, upon a *contingency*, viz: that of the lock's being opened for the passenger. Now, it can never be *proved* beforehand, that the lock will be opened. A court therefore can never determine affirmatively that the navigation has been improved: For if the lock be not opened, the navigation, instead of being improved, is ruined. Indeed, the *natural* navigation—*the* "highway" established by Congress, is destroyed, in any event, by a dam and lock—and the only real question, therefore, that the case then admits of, is, whether the *artificial* navigation, which the intruder has provided as a substitute for that established by Congress, be better than the latter? Such a question, the complainant supposes this Court will not entertain.

But, perhaps all argument, on this point of improvement, might have been spared—for no evidence has been offered, nor any pretence set up by the defendants themselves, that the effect of this dam will be to improve the navigation of the river; or that any dam is needed at this point, for the improvement of the river. That is all a gratuitous assumption of the counsel. The truth is, as is set forth in the bill, and as is not denied by the defendants, that the whole object of the dam is, to make the waters of the river, subservient to the purposes of the canal.

But there is another consideration, which the complainant thinks is sufficient, of itself, to set at rest every possible question in regard to the legality of a dam with a lock in it—whether it be considered that such dam and lock *might* be made to operate as an improvement or not. This consideration is, that it cannot be presumed that Ohio will *ever* open the lock at all. We cannot presume that she will open it, for the reason that we have no evidence that she will—and it cannot be presumed without evidence. She has never pledged her faith that it shall be done—she has appointed no agents that are authorized to make any such pledge—it is clearly against her interest to open it, (because it will be attended with some expense, and she also will thereby lose the monopoly of the transportation for her canal.) No law can compel her to open it, (because a

State cannot be sued)—and it is notorious that in innumerable similar cases, she has invariably refused to open locks, unless she were paid toll for so doing, (which is equivalent to not opening them at all.) We must therefore presume that she will not open the lock in the Maumee river—or, at any rate, we cannot presume that she *will.* We can no more presume it in the case of a State, than we could in the case of an individual. The dam therefore can only be looked upon in its naked character of an obstruction, which will have to be removed by the General Government, or the navigation of the river abandoned.

Again: Congress have enacted that this river shall "remain a highway." A highway is an *open* way; but a way through a lock, is one that requires to *be opened,* whenever one wishes to pass.

One suggestion more on this point of a dam with a lock, and we will cease arguing the question. This dam is to be some sixty, seventy, or eighty rods in length—nine or ten feet high, and built in a very heavy and substantial manner. Suppose that after it shall be built, it should not answer the purpose, or that the present location of the canal should be changed—or that for some other reason, this dam should be abandoned. Who then is to open the lock, or remove the dam? Ohio certainly cannot be *compelled* to do either: there is no law that could in that case reach a State. She may abandon her dam at any time, and the only way left to restore the navigation of the river, will be for the United States to remove the dam at their own expense. Now is it possible that an individual State, without the consent of Congress, can lawfully place heavy and formidable structures across the navigable rivers and highways of the United States, and then turn round and leave the United States to the task of removing them? This certainly is an unavoidable conclusion from this doctrine. So also, if we suppose what is *very likely* to happen, that Congress should hereafter see fit to improve the navigation of this river, as they are doing that of hundreds of others of like character, in different parts of the Union—and that the plan of their improvement should be such that dams would not be wanted at all, or that this canal dam would be in a wrong place, or even its lock of a wrong size, the objection before stated again presents itself, viz: The removal of them must be made at the expense of the United States. Has the State a right thus to fill up, at pleasure, the navigable rivers of the United States with these obstructions, and subject the United States to the cost of removing them? It is no answer to the argument, to say that Ohio will not be likely to *abuse* this power, (that depends upon the motives she may have to do it.) But the question is, whether she *have* the power, and can be allowed to use it, if she will?

It may be argued that as the erection of this dam is not *for the purpose* of "regulating navigation among the States," it may be done by the State. It was admitted by the Court, in Gibbons and Ogden (page 197 to 210,) that the States, for the purpose of regulating their domestic trade and police, might exercise certain powers—as taxation for instance—*similar* to those exercised by Congress. It was admitted, also, that the State might adopt certain police regulations of the same kind as some of those, which it might be proper for Congress to adopt for the purpose of regulating commerce. But the Court expressly limited the power of the States, on these points, to the passage of laws, that did not interfere either with the freedom of navigation, or with any regulations that Congress had established. The Court said (pages 209 and 10) that if any "collision "exist" between the State laws and the laws or regulations of Congress, it was immaterial whether

the State laws were enacted for the purpose of regulating "their domestic trade and police," or for that of regulating commerce among the States. "In one case and the other (say the Court) the acts of the State must yield to the laws of Congress." The law of New York, giving a monopoly of steam navigation on the North river to Livingston and Fulton *was not for the purpose* of "regulating navigation among the States," but for the encouragement of the arts—an object as important to the wealth and civilization of a State, as is the construction of canals. Yet the law of New York was pronounced void for "collision" with the regulations of Congress—void, not for *prohibiting* commerce, but for simply imposing a burden and impediment, where the commercial system of Congress had left it free. The law of Ohio authorizing a dam, comes in "collision" with the law of Congress, which declares that the Maumee river shall "remain a highway," or open way. It also comes in "collision" with the regulations which Congress have established in regard to "navigation among the several States," because it interposes an impediment, where the commercial system of Congress had left the navigation free. It also assumes a "control" over the property of the U. S. (for the right of way over these rivers is the "property" of the U. S.) It also acts upon "the means employed by the government of the Union, in pursuance of the Constitution." In both these respects, it is an usurpation, and comes in "collision" with the rights and legislation of Congress. (M'Culloch and Maryland 4th Wheaton 430.)

It is said that unless Ohio can obstruct the navigable rivers of the U. S. she cannot construct her canals. But whether the State can or cannot construct all necessary canals, without obstructing the navigable rivers of the U. S. is a question of fact to be determined by evidence, and is not now before this Court. But admitting the fact to be as stated, that is no better argument in favor of the *legal right* of the State to obstruct them, than the argument of individuals, that unless they were permitted to obstruct such rivers, they could not operate their saw mills, would be in favor of the right of such individuals to obstruct them. If Ohio cannot construct her canals without obstructing the navigable rivers of the U. S., the object is undoubtedly of sufficient importance to be entitled to the consideration of Congress, and Congress will undoubtedly be liberal in judging of the expediency of complying with the wishes of the State. But this is a very different matter from that of the State's claiming the legal right to obstruct them in defiance of the laws of Congress. Congress must, of course, retain in their own hands the power of judging whether it be expedient that their highways and navigable rivers should be shut up, and their laws in regard to them superseded and overruled by State laws. And the State has no more reason to complain on account of being required to obtain the permission of Congress to obstruct navigable rivers within her limits, than she has on account of being required to obtain the consent of Congress to go through those lands, within her limits, which belong to Congress. In the case of the Miami canal, she requested and obtained permission to go through the lands of Congress, and made no complaint that it was an infringement of her constitutional sovereignty to require her to obtain that permission. And yet the power of controlling *all* lands within their limits, and of taking them for the public use, is as much an attribute of sovereignty, in ordinary governments, as the power of controlling the navigable rivers within their limits. But the peculiar character of our system takes from the State governments this attribute of sovereignty, so far as it relates either to the

lands or rivers, or other property, of the general government—and the restriction is no more a subject of complaint, when it applies to rivers, than when it applies to lands.

But it is said, that if the State may not control the navigable waters within her limits, or do any thing else that interferes with the commercial regulations of Congress, she is in a very "*helpless condition.*" And this is, after all, the grand argument, for it appeals to State pride. But the answer is, that whatever this helplessness may be, it is endured by Ohio in common with all the other States of the Union. The Constitution of the U. S. condemned the State governments to utter helplessness as to all power of controlling the general government in relation to "navigation among the several States." It was foreseen that if the States were suffered to retain a particle of such power, they would inevitably clash with each other, and thus render futile all attempts of Congress to establish an uniform system for the whole country. The Constitution also condemned the State governments to utter helplessness as to all power of controlling Congress, in "disposing of, and making all needful rules and regulations respecting the territory and other property belonging to the United States"—of which territory and property these rivers are a part.

The Jurisdiction.

The case arises under the constitution and laws of the United States—the parties are also citizens of different States.

The liability of the Defts.

In Osborn vs. Bank of U. S. it was decided that: "In general, an injunction will not be allowed, nor a decree rendered, against an agent, where the principal is not made a party to the suit—But if the principal be not himself subject to the jurisdiction of the Court, (as in the case of a sovereign State,) the rule may be dispensed with." (9th Wheaton 739.)

The Remedy.

This is a case of public nuisance, attended with special injury to the Complainant.

The land of the complainant is situated at the lower terminus of the large extent of free navigation afforded by the Maumee river, and its branches. On account of being so situated, it enjoys great advantages as a place from which merchandize may be forwarded up the river, and at which produce coming down the river may be received for storage and market—and also as the natural trading point for the country bordering on the rivers above—and its value depends greatly upon the continued enjoyment of these advantages. In addition to this, the large water power attached to the land of the complainant, and afforded by the rapids, which commence at this point, make the situation the most natural one for the manufacture of the lumber and grain furnished by the country above. It is also the most natural seat for the establishment of most of the mechanical and manufacturing operations, requiring water power, and demanded by the wants of the country above. This water power, therefore, which is intrinsically of very great value, and already partially in use, will undoubtedly be called into speedy and extensive requisition, unless some impediment should be placed in the navigation, which now conducts to it—while any such impediment would tend most materially to divert this business to other places, and thus deprive the complainant both of the opportunity of selling, and of the profit of improving,

this water power. The value of the complainant's land, adjoining this water power, would also be greatly reduced by any circumstances, that should tend to keep this water power out of use.

The aggregate of these various injuries, to the value of the complainant's property, would be very great, and of a nature utterly incapable of estimation—and, not unlikely, incapable, from its amount, even if it could be estimated, of being compensated by those who may hereafter be defendants—for he has no security that the Commissioners, or other agents of the State, who are annually changing, will always be men of pecuniary responsibility. On both these accounts, there is the most imminent danger that the injury would be irreparable.

That these reasons are sufficient for the injunction, we cite the following authorities:

In Crowder vs. Tinkler, (19 Vesey's, Ch. R. 621) the Lord Chancellor said: "Where the subject of complaint is matter (merely) of public nuisance, the Attorney General alone can sue—but it is going too far to say, particularly without more materials than can be had on motion, that if a plain nuisance is attended with particular and special injury to an individual, producing irreparable damage, that individual shall not be at liberty to come here, unless the Attorney General chooses to accompany him." And he adds, on the next page (622) "Upon the question of jurisdiction, if the subject were represented as a *mere* public nuisance, I could not interfere in this case, as the Attorney General is not a party." "The complaint, therefore, is to be considered as of not a public nuisance, simply, but what, being so in its nature, is attended with extreme probability of irreparable injury to the property of the Plffs. including also danger to their existence—and on such a case, clearly established, I do not hesitate to say an injunction would be granted."

The case of Coming vs. Lowerre, (6 Johnson's, Ch. R. 439.) was this:

"Bill for an injunction to restrain Deft. from obstructing Vestry Street, in the city of New York, and averring that he was building a house upon that street, to the great injury of the Plffs. as owners of lots on and adjoining that street, and that Vestry street has been laid out, regulated and paved-for about twenty years.

"The Chancellor distinguished this case from that of the Atty. Gen. vs. The Utica Ins. Co. (2 Johnson's, Ch. Rep. 371) inasmuch as here was a special grievance to the Plffs. affecting the enjoyment of their property and the value of it. The obstruction was not only a common or publie nuisance, but worked a special injury to the Plffs. Injunction granted."

Story says also that "Where privileges of a public nature, and yet beneficial to private estates, are secured to the contiguous proprietors on public squares, or other places dedicated to public uses: the due enjoyment of them will be protected against encroachment by injunction." (2 Story's Equity, sec. 927, page 206.)

The principle of these authorities was specially sanctioned by this Court, at its last session, in the opinion given in the case of city of Georgetown vs. Alexandria Canal Co. (12 Peters 91.)

Much reasoning, that is applicable to this case, is also contained in the opinion of this Court, delivered by Ch. J. Marshall, in Osborn vs. Bank of the U. S. (9th Wheaton 838 to 846.)

We are aware that there has been a hesitation on the part of Courts in granting injuctions. But it is believed that this hesitation has been confined chiefly to granting them on *exparte* testimony, or on the preliminary proceedings, before the rights of the parties had been fully ascertained. And in such cases, the hesitation is evidently discreet and proper—for otherwise there would be great danger of arresting men in the prosecution of their legal business, and in the enjoyment of their legal rights.—Still, Courts will grant injunctions, even on exparte testimony, where a plain case is made out, and where there is manifest danger of irreparable injury from delay. And even "if the right be doubtful, the Court will direct it to be tried at law, *and will in the mean time restrain all injurious proceedings.* And when the right is fully established, a perpetual injunction will be decreed." (2 Story's Equity Sec. 927, page 207.) There seems, therefore, to be no occasion for delicacy or hesitation in granting injunctions, *after the right has been established.* In New York Printing Establishment vs. Fitch (1st Paige's Ch. R. page 97—also Barbour and Harrington's Equity Digest Vol. 3, page 448,) the Chancellor said, "There are many cases in which the complainant may be entitled to a perpetual injunction on the hearing, where it would be manifestly improper to grant an injunction in limine. The final injunction is, in many cases, matter of strict right, and granted as a necessary consequence of the decree made in the cause. On the contrary, the preliminary injunction, before answer, is a matter resting altogether in the discretion of the Court."

Such also seemed to be the opinion of this Court in Osborn vs. Bank of the U. S. (9th Wheaton,) where the injunction was affirmed, *on the hearing.* The reasoning of the Court generally in that case, (from page 838 to 846) was strong in favor of a very liberal use of their preventive power, after the rights of the parties are once established. For example, the Ch. J. said (page 843,) "Why may it (the Court,) not restrain him from the commission of a (any) wrong, which it would punish him for committing?"—He also said (page 845) that "it is the province of a Court of Equity to arrest injury, and prevent wrong," because *such* "remedy is more beneficial and complete than the law can give." And the injunction was affirmed in that case, although the Ch. J. said that an action at law might have been sustained, and (page 841,) that "a reasonable calculation might have been made of the amount of injury, so as to satisfy the Court and Jury."

The 16th Section of the Judiciary Act of 1789, (Story's Laws Vol. 1, page 59) is in these words, "That suits in equity shall not be sustained in either of the Courts of the United States, in any case where plain, adequate and complete remedy may be had at law." The necessary inference from the language of this section, is, that suits in equity *may* be sustained *in all cases* when the remedy at law is *not* "adequate and complete." We trust that in this case, the reasons already given, to wit, the impossibility of estimating an injury of that nature, and the doubtful responsibility of those who may hereafter be Defts.—to which may be added the fact, that the principal is not liable to a suit—are sufficient to show that there is no reasonable probability that any "adequate or complete remedy" could ever be had at law. In addition to these reasons, there is another, to wit, that this dam would be a *continuing* injury, and the remedy at law could only be obtained by a multiplicity of suits. These suits would be attended with such an amount of trouble and expense over and above the legal costs, that they would afford no "adequate or complete remedy."

It may perhaps be argued that this injury may be repaired by *abating* the dam, after it shall be erected. But if the dam cannot be enjoined at the suit of the Complainant, it certainly could not be abated at his suit. And if it could not be abated at his suit, he has no security that it would be abated at all, because the District Atty. may not see fit to procure its abatement.

But suppose it should be abated—it could be done only after a delay of two, three or four years from the present time—because it will require a year or two to complete the erection of it, and then it would doubtless require another year or two to abate it, and during all this time, the effect of the dam is to sink the marketable or available value of the complainant's property greatly below its true value, by reason of the uncertainty that must pervade the minds of the public, as to when and whether the dam will be finally abated. To keep the legal and available value of a man's property in abeyance in this manner, and for this length of time would be a heavy and irreparable injury. Besides, there is danger, in this as in all other similar cases, that the Complainant may, within the time mentioned, become pecuniarily embarrassed, and his property be sacrificed at its reduced value, to pay his debts—in which case, it is evident that no "adequate or complete remedy" could ever be even hoped for at law. In addition to this, the place, by having its natural advantages cut off for three or four years, would lose the benefits of all those improvements, which during that time, its peculiarly favorable situation and great natural advantages would otherwise undoubtedly give rise to. This loss would also be of a nature incapable of estimation, and of course incapable of reparation.

It was argued in the Circuit Court, that if this property were to be injured in value by the erection of this dam, it was in the situation of private property taken for public use, and that the complainant must look to the State for his compensation. The answer to this argument is, that no *property* of the complainant is actually taken, unless it be a small quantity of water, which he would have the use of as it flowed over his land, but which is not worth contending about. The property, so far as any is taken—that is, the highway, or right of way—is the property of the United States. The taking, therefore, is not of a citizen's property for public use, but of national property for State use. The injury to the complainant is consequential merely—resulting from the illegal act done to the highway established by Congress. For such an injury, an individual could obtain no redress from the State, because neither the constitution nor laws of the State make any provision for such cases. They were not framed on the supposition that the State would ever invade the property, or violate the constitutional laws of the United States—or, of course, ever have occasion to make reparation to individuals for injuries resulting from such acts. Nor would a State have any power to violate the laws, or invade the property of the United States, even if it were to compensate individuals tenfold for all the injuries they might suffer from such violation or invasion. The State of Ohio, for instance, would have no right to shut up or abolish the post offices of the United States, or to prevent the holding of the United States courts within her limits, or to prevent navigation between herself and her sister States, though she were to compensate every individual that might suffer from such acts. The rights and benefits, which the citizens of the United States enjoy under the constitution and laws of the United States, are not so feebly secured to them, that they may be taken from them, at pleasure, by the States, and the citizen be compelled to look for compensation only to the justice of the State governments.

The court, we apprehend, cannot grant a *conditional* injunction—one, for instance, that should not forbid the erection of a dam, provided a lock were put in it, and tended and opened for passengers. That would be equivalent to offering to make a contract with the State—which the judiciary are not authorized to do. Neither would such an injunction secure to the complainant "the due enjoyment," [Story's Equity, p. 206,] of the advantages of this highway. "The due enjoyment" must be the *legal* enjoyment—and not one depending upon the will of an usurping power, that cannot be held responsible to him for its acts or omissions.

The complainant, therefore, asks for a peremptory injunction against a dam of any kind, that shall extend *across* the river, or so far into the channel as to obstruct, impede, or impair the navigation.

Endnotes

[*] We suppose the compact, expressed in the ordinance, that the new States of the northwestern territory should not tax the lands of the United States, or Interfere with the disposal of them, is now vold from having been superseded by the constitution, which gives the general government the *power* of preventing any thing of that kind. But under the Confederation such a compact was necessary.

[*] In Hogg vs. Zanesville Co., 5 Hammond 416, the Court say that that portion of the ordinance which prescribes that these rivers should forever remain "highways," could "not be altered without the assent, both of the people of the State, and of the United States through their representatives." This is claiming for the State, an equal right of control, with the United States, over these rivers.

[*] The same powers, that were granted to the original Board of Canal Commissioners, by the act of 1825, before referred to, were transferred to the Board of Public Works, (the same mentioned in Complainant's bill) by "an act to organize a Board of Public Works," passed March 4, 1836, (General Laws of Ohio, Vol. 34, page 14, Sec. 2.)—and again devolved upon the present "Canal Commissioners," by "an act to abolish the Board of Public Works, and to revive the Board of Canal Commissioners," passed March 16, 1838. (General Laws of Ohio, vol. 36, page 64, Sec. 4.)

[*] This explanation of the reason why the river was not used, instead of a canal, was given to the complainant by one of the principal engineers employed by Ohio in locating this canal.

[†] It will be observed, that both these grants were originally made to Indiana—she subsequently, with the consent of Congress, [Story's Laws, vol. 4, p. 2141, sec. 4] transferred to Ohio her privilege, for that portion of the canal which lies within the limits of Ohio.

5. CONSTITUTIONAL LAW, RELATIVE TO CREDIT, CURRENCY, AND BANKING (1843)

Source

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CONSTITUTIONAL LAW, relative to CREDIT, CURRENCY, and BANKING.

BY LYSANDER SPOONER.

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1843.

CHAP. I. THE UNCONSTITUTIONALITY OF ALL STATE LAWS RESTRAINING PRIVATE BANKING AND THE RATES OF INTEREST.

The Constitution of the United States, (Art. 1, Sec. 10,) declares that "No State shall pass any law impairing the obligation of contracts."

This clause does not designate what contracts have, and what have not, an "obligation." It leaves that question to be decided by the proper tribunals. But it plainly recognizes two things, as fixed, constitutional principles—first, that there *are* contracts that have an "obligation;" and, secondly, that the people have a right to enter into, and have the benefit of, all such contracts.

The force of these implications will, perhaps, be more clearly seen, when applied to a particular contract, than when applied to contracts generally. Suppose, then, the constitution had merely said that no State should pass any law impairing the obligation of the marriage contract. This provision would have plainly implied, first, that marriage contracts were in their nature obligatory,—and, secondly, that men had a right to enter into that species of contract. But the implica-

tions, which would, in this case, have applied to marriage contracts, now apply, under the constitution as it is, to all contracts whatsoever, that are in their nature obligatory.

That this constitutional prohibition, against "impairing the obligation of contracts," implies that there *are* contracts having an obligation, no one will deny. But that it also implies that men have a constitutional right *to enter into all such contracts,* seems also to be perfectly clear.

Suppose the constitution had declared that no State should "pass any law impairing a man's right to recover the wages of his labor"—This prohibition would have certainly implied that men had a right to labor for wages—and any law that should have forbidden them to labor for wages, would have been as much unconstitutional, as one that should have deprived them of the wages they had earned.

Or suppose again that the constitution had forbidden the States to "pass any law impairing the meaning and intent of *wills*." Such a provision would have manifestly implied, and therefore established it as a constitutional principle, that all men had a right to make wills. And any law that should have forbidden men to make wills, would have been as much unconstitutional, as one that should have altered or invalidated their meaning and intent when made. So also the prohibition against "impairing the obligation of contracts," implies that men have a right to enter into all contracts that have an obligation. And any laws that forbid men to enter into such contracts, are as much unconstitutional, as those that would impair the obligation of the contracts when made.

The assumption, also, in the constitution, that men's contracts *have* an "obligation," implies that the parties have a right to enter into them; for if they have no right to enter into them, no obligation could arise out of them.

This constitutional right of men to enter into all obligatory contracts, is a natural, inherent, inalienable right. It exists antecedently to, and independently of, any positive or municipal law. It may be recognized, acknowledged, guarantied, and *secured,* by the municipal law, but it is not derived from it—nor can the municipal law rightfully take it away. It is an original right of human nature, like the right of speech—the right to enjoy life, liberty and religion—the right to keep and bear arms—and the right of self-protection. And it is *as an original right,* existing prior to the constitution, that the clause quoted from the constitution, recognizes and guaranties it.

The right to enter into obligatory contracts, is also involved in the right to "*acquire property*"—for one man can acquire property of another only by means of an obligatory contract. Every purchase and sale of property that takes place between man and man, involves a contract—that is, an agreement—an assent of their minds to an exchange of values. And every purchase and sale, that takes place between man and man, depends, for its validity, upon the "*obligation*" of the contract or agreement, that the parties have entered into—an obligation, that is protected by the Constitution of the United States.

If the State Legislatures had power to declare, even *prospectively,* what contracts should, and what should not be obligatory, they might arbitrarily prohibit all trade between man and man—they might invalidate, not merely credit contracts, but even those contracts that are executed at

the time they are entered into—for there is no difference in the intrinsic obligation of a contract that *is to be* executed, and one that *is* executed. The *equitable* right of property is transferred as absolutely by an executory, as by an executed contract; and government has as much right to declare, *prospectively*, that contracts that may afterward be *actually executed*, shall, notwithstanding, be void; and that men who may sell and *deliver* property, may nevertheless recover it back, as it has to declare that those who have sold property and *promised* to deliver it, shall still be entitled to retain it—or, what is the same thing, be released from their obligation to deliver it. A promise to pay money, for value that has been received, is a mere promise to *deliver* money, that has been sold and paid for—and government has as much right to declare that if a banker shall actually sell and deliver money, he may nevertheless recover it back, as it has to declare that if he *promise* to deliver money that he has sold, he shall be relieved from his obligation to deliver it. The law, that should enable a man to recover property, that he had actually sold and delivered, would no more interfere with men's natural rights to acquire property, by contract, or purchase, than the law which should relieve a man from his obligation to deliver property, which he had sold and promised to deliver. But will any one pretend that government has a right, even by a prospective law, to invalidate contracts that may afterwards be actually executed? If not, he cannot consistently claim that it has a right to invalidate executory contracts—for the equitable right of property passes as absolutely by the latter contract, as the former.

The right to *acquire property*, is enumerated, in many, if not all, of the *State* Constitutions, as one of the natural, inherent, inalienable rights of men—one that is not surrendered to government—one which government has no power to infringe—one which government is bound to respect and secure. And this right to acquire property, as was before said, involves the right to enter into obligatory contracts—for men can acquire property of each other, only by such contracts.

The right of men, then, to enter into obligatory contracts, and to have the benefit of them, is guarantied, not only by the national constitution, but also by many, if not all, of the state constitutions. It is, in short, a fundamental principle in our systems of government—as much so, as the right of speech, or the right to life and liberty, or the free exercise of religion, or the right to keep and bear arms, or the right to acquire property.

But notwithstanding the general and State constitutions have thus guarantied to the citizens of this government their natural right to enter into all obligatory contracts with each other, and to have the obligation of their contracts respected, and enforced, it is nevertheless probable that the statute books of every State in the union, contain laws, or the forms of laws, whose avowed and only object is to abridge this right, and impair the obligation of these contracts; and which declare that certain contracts, that may be entered into by bankers and others, to pay money—contracts that are in their nature as obligatory as any others that men ever enter into—shall be entirely void, or essentially impaired, or that the individuals entering into them shall be fined or imprisoned.

To an unsophisticated mind, nothing could be more selfevident than the unconstitutionality of these laws. Yet they are enforced by the courts, and submitted to by the people, without their constitutionality being seriously questioned.

The Courts admit that the contracts, which are thus nullified or impaired, *would be* obligatory, were it not that the law has deprived them of their obligation. But this is no answer to the objection, because to impair their obligation is the very thing, which the law is forbidden to do. To say, therefore, that the law has deprived these contracts of their obligation, is equivalent to saying that a "law impairing the obligation of contracts" is constitutional. The very test of the constitutionality of the law, on this point, is, whether, if suffered to have its effect upon contracts, it would impair their obligation. If it would, it is unconstitutional, and, of course, void.

But let us now enquire, more particularly, what contracts are obligatory? or, rather, in what consists the obligation of contracts?

There have been differences of opinion on this point—but they have all arisen from a desire to uphold the arbitrary power that is assumed by legislatures over the subject. But for this, a doubt could never have arisen as to what constituted the obligation of a contract. The very phrase "obligation of contracts," implies that the obligation is something intrinsic in the contracts themselves. It assumes that the obligation is something that pertains to the contract *naturally,* and as a matter of course—and not that it is a quality contingent upon the will of those who had no hand in forming the contract. The facts, also, that the right of acquiring property by contract, is a natural right, and not one derived from municipal authority, and that the contracts entered into by men in a state of nature, without reference to any municipal law, are obligatory, prove that the obligation of contracts must be something intrinsic in the contracts themselves, depending upon the acts of the parties, and not upon any extraneous will.

What, then, is this intrinsic "obligation of contracts?" It is, and it can be, nothing else than the *requirements* of *natural justice,* arising out of the acts of the parties. All judicial tribunals hold it to consist in this, and this alone—as is proved by the fact, that wherever this requirement is shown to exist, they hold the contract to be obligatory as matter of course, unless the legislature have specially ordered otherwise. And they will even imply a contract, in many cases, in order to enforce this requirement. On the other hand, where this requirement is shown not to have arisen out of the acts of the parties, the contract is held to be destitute of obligation. For instance, judicial tribunals hold that contracts entered into by persons that are mentally incompetent to make reasonable contracts, are not obligatory—that contracts entered into gratuitously, or without a valuable consideration, are not obligatory—that contracts obtained either by coercion or fraud, are not obligatory upon the party against whom the coercion or fraud has been practised—that contracts to commit any vice, crime or immorality, or to pay for the commission of any vice, crime, or immorality, or the object of which is to aid or encourage any vice, crime, or immorality, are of no obligation. All these contracts are destitute of obligation, and are held to be so by judicial tribunals, not because any legislative enactments have declared them void—(for, in general, there are no such enactments)—but, simply because natural justice does not require them to be fulfilled—or, what is the same thing, because the contracts had no *intrinsic* obligation—no foundation in natural justice. On the other hand, judicial tribunals, except where the legislature has ordered otherwise, hold *all* contracts to be obligatory, which justice and morality require to be fulfilled. Courts do not require statute authority for enforcing each particular contract. The princi-

ples of natural justice are a sufficient authority, and in most cases their only authority. And this practice of course proceeds on the ground that the requirements of natural justice are what constitute the obligation of contracts. And this practice shows also that the question of what contracts are obligatory, and what not, is a judicial, and not a legislative question. The legislature, as a *general* rule, pass no laws declaring either what contracts shall, or what shall not, be obligatory. The judicial tribunals are established as much to decide what contracts are obligatory, as to enforce the fulfilment of them. Their authority to do this, is derived directly from the constitution, and not from the legislature. *In general,* the legislature do not seek to encroach upon this prerogative of the judiciary—but leave it entirely to them to determine what contracts are, and what are not, obligatory. In fact, the judiciary do determine, and must determine, in the last resort, upon the obligation of every contract that is brought before them—for they must, of necessity, decide upon the obligation of all contracts, in regard to which the legislature have *not* spoken, and they must equally decide upon the obligation of those, in regard to which the legislature have spoken, because they must determine the validity of every legislative enactment, that assumes to interfere with, or control, the obligation of contracts.

The *general* principles, then, that obtain in regard to the obligation of contracts, are, 1st, that the obligation is intrinsic, arising solely from the acts of the parties, and that the requirements of *natural justice* constitute that obligation—and, second, that it is the province of the judiciary to determine in what cases that obligation exists.

But although such are the *general* principles that obtain in all our judicial tribunals, in regard to this particular point of the obligation and validity of contracts, the legislative department does nevertheless sometimes assume the authority of innovating upon these general principles, and of dictating to the judiciary, how they shall decide in regard to the obligation of particular contracts. In the case of the contracts of unlicensed bankers, for instance, they enact that the judiciary, whenever these contracts come before them, shall decide that they have no obligation. This is the whole purport of the law that declares that these contracts shall be void. It is nothing more, nor less, than a requirement upon the judiciary to deny their obligation—because the contracts are naturally obligatory, and the courts would of course hold them obligatory, if they were not required to do otherwise. And the legislature make this requirement, not at all on the ground that these contracts really have no obligation—but they do it arbitrarily, and simply because it is their *will* that the judiciary should deny the existence of this obligation. They thus, in effect, require that the judiciary shall assert a falsehood—that they shall declare that a contract has no obligation, when it really has an obligation. By thus requiring the judiciary to decide that a banker's contract to pay money, has no obligation, they, in effect, require them to deny that he has received value for it—because, if he have received value for it, his obligation to pay has *necessarily* arisen, and that obligation has become an existing, unalterable fact—and however much the legislature may wish to have this fact denied, the fact itself still remains. The power of the legislature is as powerless to annul that fact, as it is to annul any other fact that has ever occurred. It is as powerless to annul that obligation, as it is to annul the parental, filial, or social obligations of mankind.

The question now is, whether any requirements, that may be made by the Legislature, upon the judiciary, to deny this fact, to deny this obligation, and to assert that no such fact or obligation exists, are binding upon the judiciary?

This question may probably be answered without going to the Constitution of the United States. The constitutions of most, if not all the states, contain, in some form or other, this provision, viz: that Courts shall be open, and that right and justice shall there be administered to every man without denial or delay. Now if the Legislature enact, that in adjudications upon bankers' contracts, right and justice shall be violated, withholden or denied, are not such enactments in palpable violation of this provision of the constitution? And if the Legislature enact that the obligation of bankers' contracts shall be denied, disregarded, or not enforced, by the courts, is not that equivalent to a requirement upon the courts that they shall withhold right and justice from the holders of those contracts? Clearly it is—and the requirement is consequently void even by the state constitutions.

But perhaps it will be said, that the Legislature does not assume to declare that right and justice shall be withholden, but only to declare what right and justice, under bankers' contracts, shall be. The answer to this objection is, that right and justice, as accruing by contract, are judicial, and not legislative questions—and, therefore, if the legislature declare that right and justice, under certain contracts, shall be any thing different from what the judiciary would have decided them to be, they thereby virtually require the judiciary to violate or withhold right and justice. It is also an usurpation, on the part of the legislature, to prescribe what right and justice shall be, or to declare what rights accrue, under any contracts whatever. It is the business of the legislature to provide and prescribe the means, the instrumentalities, to be used, for enforcing the right and the justice, that may accrue to individuals, by virtue of their contracts—but it is the sole prerogative of the judiciary to determine what that right and that justice are. The legislature can prescribe, to the judicial tribunals, nothing that is of the essence of justice itself. If the legislature may prescribe to the judiciary what right and justice shall be, under one class of contracts, they may, by the same rule, prescribe what they shall be under all contracts whatsoever, and thus wholly usurp this prerogative of the judiciary. They may, in fact, make the judiciary a mere supple instrument in their hands.

But, perhaps it will be said, that the legislature do not merely require that bankers' contracts shall be held void, but that they also forbid men to enter into those contracts—and that, inasmuch as the contracts themselves are forbidden, no obligation or rights can arise out of them. The answer to this, is, that the legislature has no authority to pass laws forbidding men to enter into obligatory contracts—and that all laws of that kind are unconstitutional, as conflicting with the constitutional right to acquire property. The natural right of men to acquire property of each other, being guarantied to them by the constitution, against the action of the legislature, the right to enter into obligatory contracts is necessarily guarantied also—because it is the only means by which they can acquire it.

It follows, then, that the people are secured, by the state constitutions generally, in the possession of these two rights, viz: to enter into all contracts with each other, that are in their nature

obligatory—and, secondly, to have right and justice administered upon those contracts by the judiciary.

If these views are correct, we need go no farther than the State constitutions, to determine the validity of all those laws, or pretended laws by which the business of private banking is attempted to be prevented. These laws are palpably unconstitutional—and no mist of words, no professional quibbles, no arguments of expediency, no authority of long continued custom or acquiescence, can conceal or resist the fact.

But let us now inquire whether these laws are not also in violation of the constitution of the United States.

This constitution declares that "No State shall pass *any* law impairing the obligation of contracts."

What is "*the* obligation," which is here assumed to pertain to contracts, and is forbidden to be impaired?

We have already seen that the *intrinsic* obligation of contracts—the obligation that is recognized by all judicial tribunals—is the requirement of natural justice, arising out of certain acts of individuals. For instance, A sells to B a bushel of grain, and B promises that he will pay a reasonable compensation for it. Natural justice requires that he should make this payment—and this requirement of justice constitutes the obligation of *this* contract. And this requirement of natural justice is the *kind* of obligation, and the only kind, that is recognized and enforced by judicial tribunals. And it is recognized and enforced by them in all cases where it is shown to exist, except where legislatures specially interfere to set it aside. Is not this "*the* obligation," which the constitution of the United States declares shall not be impaired? If any say that it is not, it is incumbent upon them to show what other kind of obligation is meant. No other obligation pertains intrinsically to contracts. No other is known to judicial tribunals—no other is known to the consciences of men. *This* obligation, it is true, is not always enforced in full—sometimes not even at all—but that is owing, as we say, to the authority allowed to unconstitutional laws. But *no other* obligation is ever enforced. No other obligation is even known. This, then, is "*the* obligation," which the constitution declares shall not be impaired.*

A prospective law may impair *this* obligation, as well as a retrospective one. There is, in this respect, no difference between them. The prohibition of the constitution is against "*any* law"—whether prospective or retrospective—that should impair the obligation of contracts.

The laws which declare that the contracts of unlicensed bankers, to pay money, shall be void, are palpable violations of this clause of the constitution. And this position is so self-evidently correct, that I need spend no words in making it more clear. I will merely reply to the fictions and quibbles that are usually urged against it.

1st. It is said that if contracts are forbidden by law, they can have no obligation.

This ground is untenable for the following reasons. *First*—It assumes that the law is constitutional, and that the Legislature has authority to forbid men to enter into contracts that are in

their nature obligatory—whereas this authority, as we have seen, is withholden from the legislature, even by the State constitutions—inasmuch as it would be in conflict with the constitutional right of the people to acquire property. If the legislature may forbid men to enter into one kind of obligatory contracts, they may, by the same rule, forbid them to enter into any—and the natural rights of men to buy, sell, contract, and exchange property, with each other, instead of being secured by the constitution, would become mere privileges to be withheld or permitted at the caprice or discretion of the Legislature. And if a banker's contracts, for the purchase, sale, or delivery of money, are forbidden today, a farmer's, merchant's, and mechanic's, for the purchase, sale, and delivery of their respective commodities, or appropriate articles of traffic, may be forbidden tomorrow.

2d. The State laws forbidding contracts that are in their nature obligatory, conflict also with the constitution of the United States—because the provision against impairing the obligation of contracts, implies that men have a constitutional right to enter into all contracts that have an obligation. And all laws that forbid men to exercise their constitutional rights, are of course void.

3d. To forbid men to enter into contracts that have an obligation, and then to infer that the contracts, simply because forbidden, have no obligation, is only a circuitous way of coming to the same end. It is only doing by indirection, what the constitution forbids being done by "any law" whatever. For it is still the *law*, and the law only, that impairs the obligation of the contract—and "any law" that would produce that effect, is void.

4th. The establishment of a constitution precedes, or is presumed to precede, *in point of time*, any laws that are to be governed or tested by it. Of course any principles, which the constitution establishes, as a guide to legislation, are principles that are presumed to exist independently of, and anterior to, any legislation under the constitution. The provision then, in the constitution, against impairing the obligation of contracts, assumes that the obligation of contracts is a principle existing at the time the constitution is established, and of course existing independently of any legislation under the constitution—and that it does not depend upon any mere arbitrary rule, that may subsequently be established. It assumes that the obligation of contracts is a principle existing in the nature of things, or at least independently of any legislative will—because it requires that the validity of legislation shall be *tested by it*. It sets up the obligation of contracts as a *standard*, by an appeal to which the constitutionality of subsequent legislation may be determined. But if a law were to be passed by the legislature, and the obligation of contracts should then be tested by *it*, the constitutional order of things would be reversed. The obligation of contracts would then be tried by the assumed authority of the *law*, instead of the constitutionality of the law being tested by its consistency with the obligation of the contract. The obligation of the contract is the constitutional standard, by which the validity of legislation is to be tried: and laws must conform to this standard, and not the standard be brought down to the measure of the laws.

5th. The constitution is, in its nature, a fundamental law, expressly intended to govern all laws that are, in their nature, temporary, or not fundamental. This fundamental law, like other laws, takes effect from the time of its adoption, and controls all other laws passed subsequently *to it*.

The only question *of time,* therefore, (if any,) that can arise in the case, is, not whether the impairing law were passed prior or subsequently to the contract, on which it would operate, but whether it were passed subsequently to the adoption of the constitution.

6th. To say that the state legislatures have power to declare what the obligation of contracts shall be, or what contracts shall, and what shall not, have an obligation, is equivalent to saying that they have power to declare *what the Constitution of the United States shall* mean. And as this meaning would of course be arbitrary, the legislature of *each* state separately might declare that it should be something different from what it was in any of the other states—and we might consequently have, in every state in the union, a different constitution of the United States on this point. Not only this, but every state legislature might alter, at pleasure, the meaning, which it had itself given to the constitution of the United States. The constitution of the United States, therefore, might not only be different in every different state, but it might be altered in each state at every session of the legislature. Such is the necessary consequence of the doctrine, that the state legislatures have power to prescribe or determine what the obligation of contracts shall be, or what contracts shall be obligatory.

Another ground urged against the views here taken, is the commonly received doctrine, that the law makes a part of the contract. And it is said that a law, operating only upon future contracts, cannot impair their obligation, because it makes a part of them.

In the case of Ogden vs. Saunders (12 Wheaton), where this doctrine was examined more fully, probably, than it has ever been in this country, and combatted and maintained by the ablest counsel in the country, the judges were very much divided, holding no less than four different opinions, as to the relation which a law bore to a contract. A majority were of the opinion that the law did *not* make a part of the contract. Nevertheless a majority (consisting of four, out of seven, of the judges), was made up, that united in saying that a law passed prior to a contract, did not impair its obligation. This majority was made up in this way. Justice Washington (page 259) and Justice Thompson (page 298) held that the law made a part of the contract. Justice Johnson held that it did *not* make a part of the contract, but that parties were bound to submit to all "fair and candid" laws on the subject of contracts, whether made before or subsequently to the contract. Justice Trimble (page 317) held that the law did not make a part of the contract, but constituted its obligation. Thus a bare majority was obtained for the decision. But such a decision, by a bare majority, and that majority disagreeing as to the grounds on which it should rest, is of course good for nothing. Besides, one of them (Washington) expressed great doubts whether his opinion were correct, and said that he adopted it only because "he saw, or thought he saw, his way more clear on that side than on the other"—(page 256). The minority of the court, consisting of Chief Justice Marshall, Justices Duvall and Story, held that the law made no part of the contract—that men had a natural right to contract—that that right had never been surrendered to government—that the contract was solely the act of the parties—that its obligation was intrinsic—that the law was merely the remedy provided by government for the breach of contracts, and produced no effect upon a contract unless the contract were first broken—that parties, in making their contracts, could not legally be supposed to look at the law otherwise than as the

remedy that would be enforced in case the contract were broken—and, finally, that a law passed prior to a contract, might impair its obligation, and therefore be unconstitutional, as well as one passed subsequently.*

So much for authority. Let us now look at the principle itself.

In the first place, then, the doctrine that any law is a part of a contract, of necessity assumes that the law is constitutional—because, if it be not constitutional, it clearly can make no part of a contract.

Now the legal definition of a contract, is simply an agreement, to do, or not to do, a particular thing. If the law strictly *conforms* to the intrinsic obligation of this agreement, it obviously has made no part of the agreement itself, because the agreement remains the same that it was before. The law has contributed nothing to it, and of course makes no part of it. On the other hand, if the law is different from the contract, varying its intrinsic obligation in any manner, or in any degree, it is unconstitutional, as impairing its obligation. And it consequently can make no part of the contract, for the reason that an unconstitutional law is void, and has no legal effect upon any thing.

Whether, therefore, a law agrees with a contract, or differs from it, it is no part of the contract itself. If it differs from the intrinsic obligation of the contract, it is unconstitutional, and has no effect whatever upon the contract. If it agree with the contract, it is still no part of it—it is only something subsidiary and remedial.

But it will be said that parties, who expect to have their contracts enforced, must be presumed to have *intended* to make them according to law. This is true. They must be presumed to have intended to make them according to all constitutional laws—but clearly they cannot be presumed to have intended to make them according to any unconstitutional law. Now, in order that a contract may be according to law, it is only necessary that it should have an *intrinsic* obligation. So far as *any* contract has this obligation, it *is* according to law, for it is according to the fundamental law—the constitution. And this fundamental law has also provided that the people shall not be required to make their contracts according to any other law.

Again. No one will pretend that the law can make entire contracts for parties, without their consent, and then presume their consent, and enforce the contracts as if the parties had actually agreed to them. No one, for instance, will pretend, if the legislature were to pass a law that A should pay B an hundred dollars for his horse, and that B should sell his horse to A for an hundred dollars, that courts would be bound to presume the assent of A or B to this contract, which the law had attempted to make for them. All admit, then, that the law cannot make an *entire* contract for parties, and then presume their consent. How, then, can it make any part of a contract, and presume their consent? If the law has a right to make the least part of a contract, it has the same right to make a whole one.

The idea that the law makes a part of the contract, cannot be sustained at all, except upon these suppositions, viz, that the natural right of individuals to make contracts, has either been entirely surrendered to government, or entirely usurped by the government—that government

exercises the rights thus granted or usurped, so far as it chooses, and then gives back to individuals the privilege of exercising so much of the remainder of their original rights as government thinks it judicious to allow them to exercise. These, let it be particularly remarked, are the *only* grounds on which it can be pretended that government has power to make any part of a contract. Now, it is evident that, if these suppositions are correct, government has the same right to make entire contracts, that it has to make parts of contracts—and it may accordingly proceed to make bargains to any extent, between individuals—binding, obligatory contracts—to which the individuals themselves may never render any thing but a constructive assent. The government, for example, may compel A to sell his farm to B, at a price fixed by the government, and compel B to buy it, and pay for it, at that price, when neither A nor B consent to the contract. Is this the country, in which a principle, morally and politically so monstrous, is to exist and be recognized as law?

This whole doctrine, that the law is a part of the contract, is a mere fiction, invented or adopted by English courts to uphold the supremacy of their government over the natural rights of the people to make their own contracts. And it has been acted upon in this country only in obedience to arbitrary precedent, and in defiance of our fundamental law, which provides that the natural right of the people to make their own contracts, shall *set limits* to the power of their governments.

But suppose, for the sake of the argument, that the law were a part of the contract, the result would still be the same—for then the *constitution* would be a part of the contract—for that is the fundamental law. And the intrinsic obligation of the contract would still have to prevail over any law that was inconsistent with it.

Another ground assumed by those who oppose the view here attempted to be maintained, is, that the word "contract," in the constitution, is used in a technical sense, borrowed from English precedents, and that therefore the phrase "obligation of contracts," means only the *legal* obligation of contracts, or only such obligation as legislatures may please to allow contracts to possess.

But the supreme court of the United States have decided that the language of the constitution is not to be taken in any technical or limited sense, unless it be some parts of it that are plainly intended to be so understood—but that it is to be taken in its popular sense—in that sense, in which the people, for whom it was made, and who adopted it, and gave it all its vitality, may be supposed to have understood it.

If it be said that the word "contract," in the phrase "obligation of contracts," is to be understood in a technical sense, and to mean nothing more than legislatures may please to allow it to mean, it may just as well be said that the terms freedom of speech, free exercise of religion, right to keep and bear arms, right to acquire property, and right to enjoy life and liberty, are all to be taken in a technical and limited sense, and to mean nothing more than such a *legal* freedom of speech, such a *legal* free exercise of religion, such a legal right to keep and bear arms, such a legal right to acquire property, and such a legal right to enjoy life and liberty, as legislatures may see fit to establish. Such constructions would abolish every bill of rights in the union. It would take from the people all the security afforded by their constitutions for the enjoyment of their natural rights.

It would abolish all restraints upon the legislative power, and place every right of the individual at its disposal.

Again. If there could be any doubt about the meaning of language so plain as that which declares that "No State shall pass any law impairing the obligation of contracts," that doubt would have to be decided in favor of the natural rights of men to make their own contracts—because our institutions, state and national, profess to be founded on the acknowledgement of men's natural rights, and to be designed to secure them. And the general principles of an instrument must always decide any doubts that may arise as to the meaning of particular parts.

Finally. It is obvious that all these arguments in favor of laws controlling the obligation of contracts, are mere quibbles, pretexts and fictions, resorted to, to evade, or circumvent a plain unambiguous provision of the constitution—a provision too, that seeks only to place men on their natural level with each other—to protect the natural rights of all against the despotic action of legislatures—and to establish the principles of natural justice as the basis of law—a provision, which all men, who do not wish to have their most important rights made the football of legislative faction, folly, ignorance, caprice and tyranny, ought to unite to uphold.

It is also obvious that these arguments are urged almost entirely by men who have been in the habit of regarding the legislative authority as being nearly absolute—and who cannot realize the idea that "the people" of this nation, acting in their primary capacity, should ordain it as a part of their fundamental law—the law that was to govern their government—that their natural right to contract with each other, and "the obligation of their contracts" when made, should not be subjects of legislative caprice or discretion.

If the principles thus attempted to be maintained, be correct, men may exercise at discretion their natural rights to enter into all contracts whatsoever that are in their nature obligatory; and it is the duty and the prerogative of the judiciary alone, to decide upon the obligation of all contracts that come before them for adjudication—and legislatures have no authority to interfere in the matter, further than to prescribe the means to be used for enforcing the obligation of contracts, and the extent to which these means shall be exerted.

Furthermore. If these principles be correct, they not only prohibit all laws restraining private banking, but also all laws restraining the rate of interest for money—all laws forbidding men to make contracts by auction without license, and all other laws in restraint of men's natural right to contract. They also prohibit the legislature from impairing the obligation of marriage contracts. It is a judicial question whether a marriage contract have been broken by either party—and if it have not been broken, the legislature has no power to discharge the other party from its obligation.

Here let me say, that in order to maintain the unconstitutionality of these laws against banking, usury, &c, it is not necessary to suppose that the people, who adopted the constitution, actually foresaw that the principle they were establishing in regard to contracts, would, when carried out, produce this particular effect. This result, for aught that concerns the argument, may be admitted to be one of the details of its operation, which they never dreamed of. They did not know,

and could not pretend to know, all the forms which the future contracts of an enterprising and commercial people might assume—and even if they had known them, no special note would have been taken of them separately, in the instrument they were adopting. The object of a constitution is to establish principles—not to follow out the operation of those principles in all their ramifications. That is the business of the legislative and judicial tribunals under the constitution. All, then, that it is necessary for us to suppose in the case, is, that "the people," who established the constitution, recognized the inherent right of men to contract with each other—and the intrinsic rectitude of the principle that should maintain the inviolability of all their obligatory contracts. That they also saw that these principles were vital to the free commercial intercourse of the citizens of the different States with each other—and that they saw the danger to which these principles would be exposed, if left to the caprice of numerous rival, and, in many cases, illiberal, unwise and tyrannical local legislatures. That they, therefore, ordained that these principles should be recognized throughout the country, and govern the dealings and contracts of the people with each other—and that no local or subordinate government should "pass *any* law impairing the obligation" of any of their contracts.

The supreme court of the United States, in the case of Sturges and Crowningshield, *(*4 Wheaton 209*),* have expressed the comprehensive purpose of the constitution, on this point, as follows. The court say, "The *principle,* which the framers of the constitution intended to establish, *was the inviolability of contracts.* This *principle* was to be protected, in whatever form it might be assailed. To what purpose enumerate the particular modes of violation, when it was intended to forbid all. Had an enumeration of all the laws, which might violate contracts, been attempted, the provision must have been less complete, and involved in more perplexity than it now is."

Viewing the purpose of the prohibition in this light, is there another clause in the whole instrument, that does more credit to those who framed, or to the people that adopted, the constitution, than this? Is there another clause, which more strongly discloses their love of personal liberty, their sense of justice, and their respect for the equal and natural rights of men? It in fact establishes a great principle of civil liberty. It embodies also the most wise, benevolent, and far-reaching principle of political economy—a principle, the natural and necessary operation of which is, to produce the greatest aggregate increase, and the most equal distribution of wealth, that can be accomplished, consistently with men's personal rights—for it gives to each individual, what no other principle can, the full command, and the entire profit, of all his legitimate resources.*****

CHAP. II. WHAT BANK CHARTERS ARE UNCONSTITUTIONAL.

If the principles of the foregoing chapter are correct, then all bank-charters, and other acts of incorporation, which would relieve the stockholders from the full liability incurred by *the terms of their contracts,* are unconstitutional, as impairing the obligation of contracts. Such are most of the bank charters, and other acts of incorporation, in this country.

But it will, perhaps, be said that such charters are themselves contracts—and that *their* obligation, therefore, cannot be impaired.

For the sake of the argument it may be admitted that a charter is a contract—but it does not follow that it is one having an "obligation." To decide whether any contract have an obligation, we must determine whether the contract be, in itself, just or unjust, moral or immoral.

Some charters are merely an authority to the corporators to use a corporate name in their dealings and contracts, and in suing and being sued—the corporators still remaining liable, as partners, to the extent of their means, for the debts of the company. To the constitutionality of such charters, there is probably no ground of objection.

But the other kind of charters profess to guaranty to individuals the immunities, (to a certain extent,) of a joint, incorporeal, intangible being. They declare that these individuals shall, in certain contingencies, be *deemed to be* such a being. And the object is to protect them severally in the non-performance of their joint contracts. Now it is obviously impossible for legislation to create such a being, or entity, as it here professes to do. For, after all, who are "The President, Directors and Company" of a bank, but real bona fide men, who, in making contracts, consult their own interests like other men—who are as competent as other men to make contracts, and who, so far as the obligations of justice are concerned, are as much responsible for their acts, as if they had never passed through such an operation as that of being fictitiously transformed into an unreal being. Now, it is to be observed, as has been already suggested, that the whole object and effect (if any) of this legislative legerdemain, is to give to these individuals an immunity against all personal liability for the contracts they may make. The question now is, whether this "contract," or pledge, on the part of the state, that these individuals shall be regarded, in law, as an imaginary, incorporeal being, or rather as so many imaginary, incorporeal beings, and that they shall be held irresponsible, as men, for the contracts they may enter into, is an *obligatory* contract?

Perhaps this question cannot be better answered, than by asking another. Suppose, then, a legislature, for the purpose of enabling them to perpetrate their crimes with impunity, should assume to incorporate a gang of burglars, and to guaranty to them all the immunities, such as intangibility, irresponsibility &c, that would pertain to a joint incorporeal being. Would such a charter be an "*obligatory contract?*" Clearly not. But would it not be *as* obligatory as one that should pledge to men the privilege of contracting debts, without the liability of being held to pay them?

A bank charter, then, of the kind now under discussion, *so far as it is in the nature* of a "contract," is a mere agreement, on the part of the state, to screen men against their just liability for their debts. In their character of "contracts," then, these charters are void—void for the same reason that all immoral contracts are void, viz, that] justice does not require their fulfilment.

Suppose a legislature should say to a single individual, who was worth fifty thousand dollars, "Sir, If you will invest ten thousand dollars of your money in mercantile, manufacturing, or agricultural business, you shall be allowed to issue unconditional promises to pay to the amount of three times the sum you invest, and if your enterprize prove successful, you shall have all the profits—but if it prove unsuccessful, you shall lose only the ten thousand dollars which you intended

to risk, and we will then protect you in refusing to pay your creditors the other twenty thousand, which you shall have promised them—and you may then retire to indulge your dignity on the forty thousand dollars that will still remain to you." Is there a man in the whole country, that would not declare such a contract to be a nefarious and swindling agreement, destitute of "obligation?" Void for immorality? Yet such are most of our bank charters. All the difference is, that in a bank charter, the agreement is with twenty, or an hundred men, instead of one.

Bank charters, of this kind, then, are void in their character of "*contracts.*" They are also void in their character of *laws.* They are unconstitutional as impairing the obligations of the contracts made by the company. They declare that the absolute promises, that may be entered into by the individuals, composing the company, to pay money, shall not, in law, be held to be absolute promises, but only promises to pay in a certain contingency—that is, in the contingency that they can be fulfilled without requiring more money than the individuals *were willing to risk* when they made the contract. The charters, then, impair the obligation of contracts, by making those promises contingent, which in their terms are absolute.

If a state law can declare that certain obligatory promises to pay money, shall be void in the contingency of their payment requiring more money than the promissors intended to put at risk, (a contingency not mentioned in the contracts the themselves,) it may equally declare that contracts shall be void in any other contingency whatever—in the contingency, for instance, of a hail-storm, or a thunder-shower.

But it will, of course, be said that the promises of a banking company are made, by the company, in their joint, incorporeal, intangible *capacity.* The answer to this argument is, that this idea of a joint, incorporeal being, made up of several real persons, is nothing but a fiction. It has no reality in it. It is a fiction adopted merely to get rid of the consequences of facts. An act of legislation *cannot* transform twenty living, real persons, into one joint, incorporeal being. After all the legislative juggling that can be devised, "*the company*" will still be nothing more, less or other, *than the individuals composing the company.* The idea of an incorporeal being, capable of carrying on banking operations, is ridiculous. The theory of one incorporeal being is not, and cannot be, consistently sustained throughout the various doings of the company. For instance, when the agents of the company, the President and Cashier, enter into contracts on behalf of the company, to pay money, they act under the dictation of the stockholders, voting severally and individually, as so many distinct and real persons, though a committee of their number, called directors. *The making of the contract, then, is the act of real persons*—and necessarily must be, for no others can make contracts. But no sooner does their *liability* for their contracts come in question, than these real persons claim that they have been resolved, by law, into an imaginary, intangible, and purely legal being. So also when the *profits* of their contracts are to be received and enjoyed, these same stockholders, who authorised the contracts to be made in their name, appear in their real, bona fide, corporeal nature, to receive those profits, and put them in their pockets. But in that moment when the fulfilment of their contracts comes to be demanded, *presto!* they have all vanished into an incorporeality. There is nothing left of them, but a "*legal idea!*"

Now does not a law, which allows men to make contracts in their proper persons, and would then screen them from all personal liability on those contracts, by giving them the liberty to shroud themselves, at pleasure, in a fictitious, incorporeal, intangible nature—does not such a law "impair the obligation of their contracts?" Or is this fictitious nature a sufficient plea in bar of the promises they have personally made?

Suppose the Constitution of the United States had declared that "no State should pass any law impairing a man's right to be protected against burglars." And suppose a state should then incorporate a company of burglars, by a charter that should guaranty to them full liberty to commit burglary, *in concert,* in their own proper persons, and then authorize them severally to plead a joint, incorporeal, fictitious, intangible nature, in bar of an indictment by the grand jury. Would not such a charter be void, as being a law prohibited by the constitution? Or would it really be a good plea for these burglars to say, "we committed our crimes, it is true, in our own proper persons; but it was, nevertheless, in our joint, incorporeal, irresponsible *capacity,* and of course we cannot be held liable to such corporal responsibility and punishment, as are justly incurred by those vulgar burglars, who are not thus privileged in the commission of their offences?" The case is a fair parallel to that of a bank charter.

If such bank charters are valid, their effect is to give to individuals the advantage of two legal natures—one favorable for making contracts, the other favorable for avoiding the responsibility of them, when made. Another effect is, to convert an unconditional promise, of individuals, to pay money, into a mere promise to pay, *provided they should not choose to refuse to pay*—or provided they should not choose to transform themselves into a joint, fictitious, incorporeal, and *non-debt paying,* being.

Perhaps it will be said that these bank charters are public acts, and that the public must be presumed to have known of them, and to have trusted the company only to the extent of their chartered liability. The answer is, that the public must also be presumed to have known that any state law, which assumes to screen men from the responsibility incurred by the *terms of their contracts,* is unconstitutional—and that they must therefore be presumed to have trusted the company *on the strength of their promise,* without any regard to any unconstitutional law, that would convert an unconditional promise into a contingent one. No man can legally be presumed to have trusted another with reference to a void law, not named in the contract.

If companies or individuals wish to limit their liability on their promises, *the limitation must be expressed in the contracts themselves*—and not in a law, which, if it lessen the liability expressed in the contract, impairs the obligation of the contract.

Perhaps it will be said that the terms of a bank promise—which are that "the President, Directors and Company of a Bank, promise to pay," &c—necessarily imply that the promise is a conditional one, limited by the amount of funds already deposited in the joint treasury. But such is not a true or natural construction of the contract. An act of incorporation does not, *necessarily,* attempt to limit the personal liability of the members of the company. It may, and often does, only grant them the privilege of making contracts, and being known in law, under a corporate name and style, to save them the inconvenience of repeating the several names of the whole

company—they being all the while liable, as partners, to the extent of their private property. The promise, therefore, of a "Company," to pay money, if unconditional in its terms, carries with it no necessary implication of any limited responsibility on the part of the individuals composing the company. They all join in an absolute promise; and the presumption of law must be, that both they and the public knew that the liability, incurred by such a promise, was unconditional also.

If these views be correct, the owners of bank stock, and the members of all other incorporations, are liable, in their private property, as partners, on the promises of their respective companies—and even a transfer of their stock does not relieve them from any liabilities incurred while they were stockholders—and the rich stockholders of every insolvent corporation may be sued, and made to pay.

If the foregoing principles are correct, I suggest whether they are not a sufficient objection to the constitutionality of a bank of the United States—or at least to that feature of its charter, which would limit the liability of the stockholders for the debts they may contract among the people, in their capacity of bankers. Congress has no direct authority to pass any law impairing or limiting the obligation of men's contracts, or screening their property from the operation of state laws, unless it be a "uniform law on the subject of bankruptcies throughout the United States." A bank charter does not come within the definition of such a law, and therefore it is unconstitutional, unless some other authority for it can be shown.

In the case of M'Culloch and Maryland, (4 Wheaton), the supreme court of the United States affirmed the constitutionality of a bank—but the grounds on which they affirmed it, by no means support the conclusion. The grounds, on which the question was decided, were, that Congress had authority to "pass all laws that were necessary and proper for carrying into execution" the substantive powers of the government—and that, therefore, if a corporation were a convenient and proper agent to be employed in collecting and disbursing the revenues of the government, Congress had a right to create such an agent by an act of incorporation. This doctrine all looks reasonable enough, and it is probably correct law that congress may incorporate a company, and authorize them to do, in their corporate capacity, *any thing which they are to do for the government.* And congress may undoubtedly limit, at discretion, the liability which the stockholders shall incur *to the government.* And the company may probably, in their corporate capacity, buy and sell bills of exchange, so far as it may be convenient to do so, in making the *necessary* transmissions of the public funds from one point of the country to another—because bills of exchange are the most usual safe, cheap and expeditious mode of transmitting money.

But all this is a wholly different thing from a charter authorizing the company, not only to perform these services for the government, but also to carry on the trade of bankers, in all its branches, and contract debts at pleasure *among the people,* without being liable to have payment of their debts enforced, either according to the natural obligation of contracts, or the laws of the states in which they live. The *principles* of the decision itself do not justify the grant of any such authority to the company. Those principles go only to the extent of authorizing the company to use their corporate rights in doing the business of the government alone—for the court say, that if

an agent be needed to perform certain services for the government, the government may create an agent for that purpose. The court admit also, that the necessity of such agent for carrying into execution the powers of the government, is the only foundation of the right to create the agent. This principle evidently excludes the idea of creating the corporation for any other purpose—and of course it excludes the right of giving it any other corporate powers than that of performing the services required by the government. Now in order that the company may collect, keep and disburse the revenues, *(*which are the only services the government requires, or which the decision of the court contemplates that the bank will perform*),* it plainly is not at all necessary that they should also have the privilege of contracting debts *among the people,* as bankers, in their corporate capacity, or under a limited liability, or with an exemption from the operation of those state laws, to which all other citizens are liable. If congress may, by a charter, thus protect the private property of a company of bankers, from liability for their banking debts, according to the laws of the States, merely because, in addition to their banking business, they perform for the government the service of collecting and disbursing its revenues, then, by the same rule, congress may by law forbid the state governments to touch the private property of any collector of the customs, or of any clerk in the custom house, for the purpose of satisfying his debts. And the result of this doctrine would be, that every person, who should perform the slightest service of any kind for the government, might be authorized by congress to contract private debts at pleasure among the people, and then claim the protection of Congress, not merely for his person, but also for his property, against the state laws which would enforce the obligation of his contracts. Every postmaster, for instance, and every mail-contractor might have this privilege granted to them, as part consideration for their services—for Congress have the same right to grant this privilege to postmasters and mail-carriers, in consideration of the particular services *they* perform for the government, as they have to grant it to a company of bankers, as a consideration for their collecting and disbursing the general revenues of the government. There is no difference, in principle, between an act incorporating a company of mail-carriers, *with banking powers,* and an immunity against their debts, and one incorporating, with like powers and immunities, those who collect and disburse the revenue.

Suppose that Congress, in consideration of the engagement of a certain number of men to carry the mail between such and such points, should assume to incorporate them for that purpose—and, under cover of that pretence, should licence them also to carry on the additional business of common carriers of passengers and merchandize, and, in that capacity, to extend their business throughout the several states at pleasure, and contract debts among the people, with an immunity against both the natural obligation of their contracts, and the laws of the States for the collection of debts—is there a man who would not say that such a charter was unconstitutional? No. Nor is there a man who can point out the difference, in principle, between such a charter, and the charters of the banks of the United States.

CHAP. III. WHAT BANK CHARTERS ARE CONSTITUTIONAL.

A Charter, that merely authorizes individuals to assume, and be known in law by, a corporate name, without pledging to them any protection against the ordinary liability of other individuals on their contracts, cannot be considered unconstitutional on the ground of "impairing the obligation of contracts."

The usual objections made to the constitutionality of bank charters, is, that they are an evasion of that clause, which declares that "no State shall emit bills of credit." The argument is, that what the State does by another, it does by itself—and that the creation of corporations, for the purpose of issuing bills of credit, is therefore as much a violation of the constitution as if the states were themselves to issue them. The principle is of course correct, that what one does by another, is done by himself—but the application of the principle to the case of banks chartered by a state, assumes two propositions, which are false, viz, 1st. That these corporations derive their authority to issue bills, from the grant of the state—and 2d. That in issuing them, they act as the *agents* of the state. Neither of these positions is correct. To issue bills of credit, that is, promissory notes, is a *natural right.* It is also a right, the exercise of which is specially protected by the constitution of the United States, as has been shown in a former chapter. It is one that the state governments cannot take from their citizens, and all those laws, which have attempted to deprive them of this right, are unconstitutional. The act of incorporation, then, gives no new right in this respect. It only authorizes the corporators to use a corporate name, in making such contracts, and doing such business, as they had a previous right to make and do in their own names. It also allows them to be known in law by that corporate name. The right of banking, or of contracting debts by giving promissory notes for the payment of money, is as much a natural right, as that of manufacturing cotton—and an act of legislation, incorporating a banking company, no more confers the right of banking, than an act incorporating a cotton manufacturing company, confers the right of manufacturing cotton.

Banking corporations, then, are not, in any essential particular, the "*creatures*" of the state governments. Those governments create neither the individual corporators—nor furnish the capital with which they carry on their business. Nor do they confer the right of carrying on any business, which, but for the grant, they could not lawfully have carried on as individuals. A banking corporation is not necessarily any thing more than a certain number of individuals, *exercising their natural and constitutional rights,* and permitted to be known in law, under a different name and style from their ordinary ones. Neither are they, in any sense whatever, the *agents* of the State. They do not issue their bills of credit, f*or, or on behalf of,* the state. The state does not "emit bills of credit" *through them,* any more than it manufactures cotton through the agency of the manufacturing companies, which it incorporates. Neither does the state furnish any of their capital, or participate in their profits. In short, these corporations are merely associations of men, doing a lawful business for themselves alone, under a name and style which the state permits them to assume.

If the granting of corporate names to banking companies, be a violation of the constitutional prohibition against the "state's emitting bills of credit," the granting of a corporate name to a

manufacturing company, that should, in the course of its business, issue *its* promissory notes, would be equally such a violation. But will any one say that the promissory notes of all incorporated manufacturing companies are unconstitutional and void, as being within the prohibition to the States to "emit bills of credit?"

It must be evident, I think, that the prohibition upon the "states" to "emit bills of credit," is a prohibition only upon the emission of bills *upon the credit of the states themselves.*

CHAP. IV. THE POWER OF CONGRESS OVER THE CURRENCY.

It is a general rule of construction, that where the constitution has clearly and particularly defined a power given to congress, that definition *limits* the power. And I know of no reason that has ever been given why this rule does not apply in this case, as well as in any other. What then are the powers of Congress over the currency?

All the powers that are expressly given to Congress, over the currency, are the powers "to coin money, and regulate the value thereof, and of foreign coins"—and "to provide for the punishment of counterfeiting the securities and current coin of the United States."

These powers are certainly very few, very simple, very definite, and perfectly intelligible. *First,* "To coin money"—we all know what that means. *Second,* "To regulate the value thereof, and of foreign coins"—that is, to fix their legal value relatively with each other. This also is a very definite and intelligible power. *Third,* "To provide for the punishment of *counterfeiting* the securities and current *coin* of the United States." This power is also so clearly expressed, that its limits are distinctly seen. It authorizes the punishment of "*counterfeits*"—that is, fraudulent *imitations,* of the securities and current coin of the United States—*and it does nothing more.* These are all the powers expressed in the constitution, on this subject—and strange as it may appear, not one of them embraces any power "to regulate exchanges," or to regulate any other currency than coin, or to prohibit or punish the use of any thing, as a currency, except it be "counterfeits," or fraudulent imitations, of the securities or current coin of the United States.

But collateral with these powers of Congress, is a prohibition upon the States, "to coin money, emit bills of credit, or make any thing but gold and silver coin a *tender* in payment of debts."

These are the only provisions relied upon by the advocates of a compulsory metallic currency, to prove that it was the intention of the constitution that the people should not be *allowed* voluntarily to use any currency except such as might be provided for them by the government, in conformity with these provisions.

The confusion that has arisen on this point, seems all to have resulted from confounding the terms "money" and "currency." It seems to have been taken for granted that all currency is necessarily money. But this is by no means the fact. It is true that "money" is pretty likely to be used as currency, to some extent—though it is not necessarily so to any considerable extent—and there

can be no legal compulsion upon the people to use it as currency at all. But there may be many kinds of currency besides money. Currency may be any thing having value, or presumed to have value, which, on account of its greater convenience, or for lack of money, or for any other reason, is by mutual consent of the parties to bargains, given and received in lieu of, or in preference to, money.

Coined money, which is the only kind of money recognized by our constitution, consists of pieces of metals stamped by authority of government. The metals, previous to being stamped, are mere merchandize like any other commodity. The pieces of metal stamped, are of a particular weight and fineness prescribed by law—and the object and effect of the stamp are merely to fix upon them the government certificate to their amount and quality.

It was undoubtedly supposed that these coins, on account of their portableness, and on account of their amount and quality being accurately known, would be bought and sold, to a considerable extent, from hand to hand, as a currency, that is, in exchange for other commodities. But there is no evidence of any intention, on the part of the constitution, to preclude the people from the enjoyment of their natural right freely to buy and sell, from hand to hand, any other articles of property, which the parties might agree upon—whether those articles should be notes of hand, certificates of stock, bills of exchange, drafts, orders, checks, or whatever else might happen to be convenient for such purposes.

The more important object of the coins probably was to provide an article or subject of "tender in payment of debts," that should be uniform throughout the country, and of nearly equal value in every part of it. It was of very great importance to the promotion of free commercial intercourse between the citizens of the different states, (which was one of the greatest objects the constitution was intended to secure,) that the subject of "tender" should be uniform throughout the country—otherwise contracts, made in one state, might not be strictly, or even tolerably, enforced, in the other states. And hence it is provided that "no state shall make any thing but gold and silver coin a *tender* in payment of debts."*

"Currency" may consist of any thing that is a legitimate subject of bargain and sale, provided it be so portable, and its value capable of being so nearly and readily judged of, as that parties to bargains are willing *frequently* to buy and sell it, in exchange for other commodities.—The *use* of any article as *currency,* (whether the article be coined money or any thing else,) consists merely in buying and selling it *frequently*—or *more* frequently than property in general. Now the constitution of the United States lays no restraint upon the *frequent* purchase and sale of any article of marketable property whatever.

Experience proves, that the value of promissory notes, checks, bills of exchange, certificates of stock &c., can, in many cases, be so nearly and readily judged of, that men as readily agree upon their value, and as willingly buy and sell them in the course of their dealings with each other, as they do coined money, and that in many cases they even prefer them to money. In so far as they are *voluntarily* bought and sold in this manner, they constitute as legitimate and legal a *currency,* as money itself. The principal practical difference between this kind of currency and money, is this. The latter is a legal subject of "*tender,*" that is, a debtor can *require* his creditor to receive *it,* or

nothing, in payment of his dues—whereas he *cannot require* him to receive any other "*currency.*" If the creditor *voluntarily* receive the other currency, the debt is cancelled as legally and effectually as if the payment had been made in money. But if the creditor, either because he doubt the solvency of the paper currency, or for any other reason, *elect* to refuse it, the debtor must then procure and tender the money, before he can *demand* that his debt be cancelled.

The principles contended for by some advocates of metallic currency, that coined money is the only article that can constitutionally be used as a *currency*—that is, that it is the only article of property that can be legally bought and sold *frequently*—would lay very great restraints upon trade, and be a manifest violation of men's natural and constitutional right to contract, make bargains, and exchange and acquire property.

Again. The constitution expressly provides for an exclusive "*tender*"—but it has no provision whatever in prohibition of any merely voluntary currency that might obtain among the people. Nor could there consistently have been any such prohibition, unless on the supposition that the people were incompetent to make their own bargains. This express provision for an exclusive "tender," and the entire omission of any provision in regard to an exclusive *currency,* could not have been matters of accident. It was well known, at the adoption of the constitution, that paper currency was in use both in this country and elsewhere, and if the constitution had intended to lay any restraint upon its use, so far as it might be voluntary between individuals, it certainly would have contained some explicit provision on the subject.

But it is said that coined money is established as a "standard of value," and that it was the intention of the constitution, that all other commodities should be "*measured*" by it—that is, *bought and sold with and for it*—(for that is the only way of measuring the value of commodities by money)—and that the use of any other currency, varies the value of this standard. This is a very common, but certainly a very groundless and preposterous argument. Strange as the fact must be presumed to appear to these "standard" advocates, it is nevertheless true, that the constitution no where authorizes or suggests the establishment of any "standard" for measuring the "*value*" of commodities in general. It *expressly* authorizes a "standard of weights and measures"—but it nowhere alludes to a "standard of value." And the reason of this omission probably was, that the framers of the constitution understood two things, viz, that the value of any "standard" must of necessity be as uncertain and conjectural as the value of the commodities to be measured by it—and, secondly, that as the value of any standard must depend principally upon the value of the commodity of which it should be composed, the standard itself must necessarily and constantly vary and fluctuate in value like other commodities—that is, according to the wants, necessities and caprices of mankind in regard to the use of that commodity.

Money or coin, properly speaking, instead of being a "standard of value," is a mere commodity, whose quantity and quality are ascertained—but whose "*value*" is a matter of conjecture, caprice and fluctuation, like the value of all other commodities. Instead of measuring the value of other commodities, it is merely *sold for* other commodities, just as other commodities are sold for *it.* It no more measures the value of other commodities, than other commodities measure its value.

It was undoubtedly supposed by the framers of the constitution, that the "money," which was to be "coined," and which was to constitute the only legal "*tender* in payment of debts," would be the commodity, in which debts would generally be promised to be paid. And the government itself coins this money, and places its stamp upon it, and prohibits and punishes any counterfeiting or imitation of it, in order that parties, and especially courts of justice, may always know with certainty, (without having the article weighed and assayed again,) whether the thing tendered by the debtor, be the identical thing, in quantity and quality, that he had promised to pay. But the government does not at all assume to fix the value of this money that is promised. It only adopts the means necessary for having *the thing itself indentified—its quantity and quality proved.* It leaves the "*value*" of the thing to be conjectured, as the value of all things must be. The value of the thing too, may be greater, or it may be less, at the time when it is paid or delivered, than it was at the time the promise was made. This will depend, in a measure, upon the greater or less consumption or use there is, by the community, of the material of which the money is composed. But the government takes no note of this variation. It leaves the parties, debtor and creditor, to take each their respective risks as to whether the value of the money promised, will be greater or less, at the time of payment, than at the time of making the contracts. The government provides only that the *identical thing* promised, shall be paid—it at no time attempts to dictate the *value* that either party, or the public, shall put upon that article. The government, in short, prescribes only the *quantity and quality* of their coins—leaving their value to be regulated by the wants of society, and to be conjectured by each individual who may at any time buy or sell them. It does nothing, and has a right to do nothing, to prevent a depreciation in their value, in consequence of the people's buying and selling other articles of property in preference to them.

But it will be said that Congress are authorized "to coin money, *and regulate the value thereof,* and of foreign coins." This is true—but its obvious meaning is, that Congress shall fix the value of each kind or piece of coin, *relatively with the other kinds or pieces,*—that they shall, for instance, decide what weight and fineness in a silver coin, shall constitute it equal in value to a gold coin of a certain weight and fineness. It means that they shall have power to declare that a dollar of silver shall be equal in value to a dollar of gold, and that they shall decide what weight and fineness of each of these metals shall constitute the dollar, or unit of reference. Congress, then, have power to fix the value of the different coins, *relatively with each other*—or to make them, respectively, *standards of each other's value.* But they have no power to make them "standards of the value" of anything else, *than each other*—or to fix their value relatively with any thing, *but each other.* Nobody will pretend that Congress have power to fix the value of coin relatively with wheat, oats or hay—that they have power to say that a dollar shall be equal in value to a bushel, a peck, or even a pint, of wheat or oats. And it is only in the single case of a "*tender* in payment of debts," that the legal value of the coins, *relatively with each other,* can be set up. In all other cases individuals are at perfect liberty to give more or less for any one of the coins than they would for any others of the same legal value.

But it will perhaps be argued that the *custom* of mankind is to measure the value of commodities generally by the value of coin—and that it was the intention of the constitution that coin should be, in *practice,* a "standard of value." But this custom is by no means universally observed,

for different kinds of property are continually exchanged, or bought and sold with and for each other, without the value of either being estimated in coin—and nobody doubts the legality of such purchases and sales. And even when the value is estimated in coin, it is the result of habit and convenience, and not of any requirement of law. But, in point of fact, when any article of property is sold for coin, such article as much measures the value of the coin, as the coin measures the value of such article. If a dollar in coin and a bushel of wheat are exchanged for each other, the wheat as much measures the value of the dollar, as the dollar measures the value of the wheat.

We hear much of an analogy between a "standard of weights and measures," and a "standard of value"—as if the constitution recognized such an analogy. But no such analogy is recognized by the constitution, nor does it, nor can it exist in fact. It exists mainly in sound. They differ in the essential quality of a standard, viz, that of being *fixed.* Standards of quantity can be fixed, and when fixed, they remain unalterable—because they consist of certain amounts of matter, and matter is indestructible. They also bear a fixed, ascertainable and unalterable proportion to other quantities of matter. But the *values* of different commodities, as compared with each other, can only be *conjectured* at any time, and the values of all articles, (as well those that may be selected as standards, as any others,) necessarily fluctuate with the ever varying wants and caprices of mankind—for it is only the wants and caprices of mankind that give value to any thing.*

But admitting, for the sake of the argument, that coins are "standards, of value"—and that there is presumed to be, by the constitution, and that there actually is, an analogy between a "standard of weights and measures," and a "standard of value"—still nothing can be inferred from that analogy, to justify any restraint upon the free use of such other currency than coin, as parties may voluntarily agree to give and receive in their bargains with each other. Congress fixes the length of the yard-stick, in order that there may be some standard, known in law, with reference to which contracts may conveniently be made, (if the parties *choose* to refer to them,) and accurately enforced by courts of justice when made. But there is no compulsion upon the people to use this standard in their ordinary dealings. If, for instance, two parties are dealing in cloth, they may, *if they both assent to it,* measure it by a cane or a broom-handle, and the admeasurement is as legal as if made with a yard-stick. Or parties may measure grain in a basket, or wine in a bucket, or weigh sugar with a stone. Or they may buy and sell all these articles in bulk, without any admeasurement at all. All that is necessary to make such bargains legal, is, that *both* parties should understandingly and voluntarily assent to them—and that there should be no fraud on the part of either party. The use of a paper currency is somewhat analogous to the use of some other measure of quantity than those standards specially instituted by law. Whenever other currency than coin is given and received, it is necessarily done with the knowledge and consent of both parties—because the difference between the form and material of a promissory note, and those of a metallic dollar, is so great as to render the substitution of one for the other, without the knowledge of both parties, impossible.

One argument more is perhaps worthy of notice. It is said that the "regulation of the currency, is a prerogative of sovereignty"—and it is hence taken for granted to be a prerogative of

our own governments. It may be, and probably is, an assumed prerogative of all *despotic* governments—for such governments assume to control every thing they please. *But our governments have no prerogatives except what the people have given to them** —and among those, is no one to dictate what articles of property may, and what may not, be bought and sold so *frequently* as to become practically a currency. The power to coin money, and regulate the value thereof, and of foreign coins, and to make those coins an exclusive "*tender* in payment of debts," and to provide for the punishment of counterfeiting the securities and current coin of the United States, are the only prerogatives conferred by the people upon our governments, with any direct or evident view to a "control of the currency." The object of conferring these prerogatives on the government, obviously is, to prevent litigation, and facilitate the enforcement of contracts by courts of justice, by providing a legal medium for paying debts, *where the parties cannot otherwise agree between themselves.* And it was doubtless also another object, *incidentally,* to furnish a convenient currency, which the people should *be at liberty to use,* (that is, buy and sell,) if they should choose to do so. But such prerogatives as these are as different from that of restraining the people from the frequent purchase and sale of any thing else that they may prefer to these coins, as liberty is from tyranny.

But—granting all that the advocates of a compulsory metallic currency claim—that it is a prerogative of government to regulate the currency—that our coins are standards of value—and that the value of these standards will be varied, unless the use of all other currency be prohibited—grant all this, and it makes nothing in favor of any power in the *state governments* to regulate the value of this standard, either by usury laws, or by restraining the use of any other currency that the people may choose. *Congress* have all the power that exists in either government, for "regulating the value of coined money," and if *they,* either from choice, or because they have no power to do otherwise, have left the value of this money to be regulated by the best of all regulators—the laws of trade, and the wants of the people—any attempt, on the part of the *state* governments, to interfere with such regulation, is as impertinent as it is unconstitutional.

ERRATA.

"*Chap.* 5" &c., in the table of contents—"*become*" *for became,* on the 13th page, one line from the bottom of the note.

Endnotes

[*] If contracts had had no obligation of their own, there might have been some reason for supposing that the words of the constitution referred to some obligation, which the government might assume to create, and annex to contracts. But when contracts really have the obligation, which is so precisely and naturally described by the words of the constitution, and when this is the only obligation that is acknowledged or enforced among men, it is absurd to pretend, because this obligation has not always been enforced to the letter, that the constitution intended to pass it

by in silence, and apply its language to some other obligation, thereafter to be created, and the nature of which could not be anticipated.

[*] This minority, however, made one admission, that was inconsistent with their general doctrines. It was, that "acts against usury," which "declared the contract (wholly) void from the beginning," and "denied it all original obligation," were valid. They thus held that the constitutional prohibition against "any law impairing the obligation of contracts," might be forestalled by a law declaring that contracts should have no obligation to be impaired. But they might as well have held that a constitutional prohibition against impairing a man's right to life and liberty, might be forestalled by a law declaring that no person, thereafter to be born, should be deemed to have any right to life and liberty; or that the constitutional prohibition against "any law abridging the freedom of speech," might be forestalled by a law declaring that, from and after a certain time, there should be no freedom of speech to be abridged. Mr. Webster, in his argument of the cause, made the same inconsiderate admission. No reasons were given for it, by any of them, except the naked unsustained assertion, *that the States had power to prohibit such contracts.* This inconsistent and groundless admission was turned against them, at the time, and made to destroy the force of their otherwise able arguments.

Throughout the whole case, the court and counsel, on all sides, seemed to take it for granted that statute law was a guide in constitutional interpretation, and that it was more important to sustain certain statute laws of the states, than to support the constitution of the United States. How both could be sustained was an inexplicable matter. Some thought it could be done only in one way, and some only in another—and hence the irreconcilable difficulties and disagreements, in which they become involved. None of them had courage to come up to the mark of sustaining the constitution, and quashing outright every thing inconsistent with it.

[*] The dissenting opinion of Marshall, Duvall and Story, in the case of Ogden and Saunders, (12 Wheaton,) although, as before mentioned, not a consistent one throughout, is yet a very admirable and conclusive argument in support of the intrinsic obligation of contracts, and of the right of individuals, under our constitution, to make their own contracts. The opinions of the *majority* of the court are also instructive, as showing how the minds of those composing our highest tribunal, bow to the authority of fictions and precedents designed merely to sustain monarchical and arbitrary power, and how incapable they are of appreciating the free principles of our own constitutions.

[*] The decision, of some of our state courts, that bank bills are a legal tender, *unless objected to by the creditor,* are palpably unconstitutional. The courts have as much right to say that the promissory notes of any other individuals, who are supposed to be solvent, are a legal tender, unless objected to, as to say that the promissory notes of a company of bankers are such a tender.

[*] The value of gold and silver, as currency, depends mainly upon the value they have for other purposes, such as gilding, dentistry, watches, ornaments &c. And their value for these latter purposes, depends upon their beauty and utility, compared with those of other articles, that are continually manufactured, invented and discovered, and made to compete with them in gratifying the wants and vanity of men. This value is affected again, by prevailing fashions, and the

greater or less fondness of society for trinkets, ornaments &c. This value is modified still further, by the scarcity or abundance of the metals themselves—by the discovery of new mines, the barrenness and fertility of old ones, and the price of labor in mining countries. Their value is also controlled and changed, in one country, by the legislation of other countries. And their general value, throughout the world, is continually varied by the ever changing conditions of society—by war, by peace, by the progress of the arts, and the increase of wealth, population and commerce. If it were, (as it is not,) in the nature of things, that a "standard of value" could be established at all, a more unstable and tensile standard than gold and silver, could hardly be found. And every touch of legislation, instead of fixing, serves but to contract or extend it. When the various elements of value, viz, fancy, fashion, caprice, utility, necessity, supply, demand, production, consumption, labor, legislation, war, peace, the progress of the arts, wealth, population, commerce, and, above all, the judgments of men in estimating value, shall all be brought under the jurisdiction of the legislature, and made to obey the statutes in such cases made and provided, it will then be in time to talk about establishing "standards of value."

[*] I am aware that it is the judicial doctrine, in this country, that our *state* governments possess all powers, *except what are expressly prohibited to them.* But this doctrine had the same origin with the one that the law makes a part of the contract. It is a purely despotic doctrine, and is borrowed from governments founded originally in force and usurpation, and which have retained all powers, except what have been wrested from them by the people. It is a consistent principle, that such governments have all powers, except what are prohibited to them. And our judges, in blind obedience to monarchical precedents, or in base subserviency to legislative usurpation, have introduced the principle into this country. But our governments, neither state nor national, were founded in force or usurpation; nor do they exist either by natural or divine right. They are mere institutions, voluntarily created by the people. Their very existence and all their powers are derived solely and wholly from the grants of the people. Of necessity, therefore, they can have no powers, *except what are granted.* This principle is universally admitted to be true of the national government, and it is equally true, (and for the same reason,) of the state governments. The contrary doctrine is the authority, and the only authority, for a large mass of state legislation, destructive of men's natural rights. Of this legislation, the laws restraining private banking and the rates of interest, are specimens. These two doctrines, that the law makes a part of the contract, and that the state legislatures have all powers, except what are specially prohibited to them are illustrations of the insidious manner, in which the judiciary lend their sanction to the most sweeping encroachments upon individual liberty, and the vital principles of our governments.

6. THE UNCONSTITUTIONALITY OF THE LAWS OF CONGRESS, PROHIBITING PRIVATE MAILS (1844)

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UNCONSTITUTIONALITY OF THE LAWS OF CONGRESS, PROHIBITING PRIVATE MAILS.

TO THE PUBLIC.

The American Letter Mail Company present the following exposition of the grounds on which they assert their right to establish mails and post offices, in competition with those of Congress.

If the public are satisfied of the correctness of the principle, the Company ask their patronage to enable them to sustain it.

ARGUMENT.

Of the following propositions, almost any one of them is sufficient, I apprehend, to prove the unconstitutionality of all laws prohibiting private mails.

1. The Constitution of the United States (Art. 1. Sec. 8.) declares that "the Congress shall have power to establish post-offices and post roads."

These words contain the whole grant, and therefore express the *extent* of the authority granted to Congress. *They define the power,* and the power is limited by the definition. The power of Congress, then, is simply "to establish post-offices and post roads," of *their own*—not to interfere with those established by others.

2. The constitution expresses, neither in terms, nor by necessary implication, any prohibition upon the establishment of mails, post-offices and post roads, by the states or individuals.

3. The constitution expresses, neither in terms, nor by necessary implication, any surrender, on the part of the people, of their own natural rights to establish mails, post offices, or post-roads, at pleasure.

4. The simple grant of an authority, whether to an individual or a government, to do a particular act, gives the grantee no authority to forbid others to do acts of the same kind. It gives him no authority at all, relative to the acts of others, unless the acts of others would be incompatible, or in conflict, or collision, with the act he is authorized to do. It does not authorize him to consider mere competition and rivalry, as conflict, collision, or incompatibility.

This doctrine fully admits that Congress "have power to make all laws which shall be necessary and proper *for carrying into execution*" their own power of establishing post-offices and post-roads." But, then, it asserts that every law they pass, must, in order to be constitutional, be a direct, positive, affirmative step in *actual* "execution" of their own power. It must, in some way, *contribute,* affirmatively, to the establishment of *their own mails.* But the suppression of private mails is not an act at all in "execution" of the power "to establish" others. If Congress were to suppress all private mails, they would not thereby have done the first act in "execution" of the power given them by the constitution, to *establish* mails. The entire work executing their power of *establishing* mails, would still remain to be done.

This doctrine also fully admits the absolute authority of Congress *over whatever mails they do establish.* It admits their right to forbid any resistance being offered to their progress, and to prohibit and punish depredations upon them. But it, at the same time, asserts that the power of Congress is confined exclusively to the establishment, management, transportation and protection of their own mails.

5. It cannot be said to be necessary to prohibit competition, in order to obtain funds for establishing the government mail—because Congress, in order to carry out this power, as well as others, are authorized, if necessary, "to lay and collect taxes, duties, imposts and excises"—and this is the only *compulsory* mode, mentioned in the constitution, for providing for the support of any department of the government. They are under no more constitutional constraint to make the post-office support itself, than to make the army, the navy, the Judiciary, or the Executive support itself.*

6. The power given to Congress, is simply "to establish post-offices and post roads" of their own, not to forbid similar establishments by the States or people.

The power "to establish post-offices and post roads" of their own, and the power to forbid competition, are, in their nature, distinct powers—the former not at all implying the latter—any more than the power, on the part of Congress, to borrow money, implies a power to forbid the people and States to come into market and bid for money in competition with Congress. Congress could probably borrow money much more advantageously, if they could prohibit the people from coming into the market and bidding for it in competition with them. But the advantage to

be derived by Congress from such a prohibition upon the people, would not authorize them to resort to it, even though the people were to offer so high a rate of interest, that Congress could not borrow a dollar in competition with them. Congress must abide the competition of the people in borrowing money, be the result what it may. And they must abide the same competition in the business of carrying letters; and for the same reason, viz:—because no power has been granted them to prohibit the competition.

7. The power granted to Congress, on the subject of mails, is, both in its *terms*, and in its *nature*, *additional to*, not destructive of, the pre-existing rights of the States, and the natural rights of the people.

The object of the grant to Congress undoubtedly was to enable the government, in the first place, to provide for its own wants, and then to contribute, *incidentally*, as far as it might, to the convenience of the people. But the grant contains no evidence of any intention to prohibit the States or people from using such means as they had, so far as those means might be adequate to their wants. Any other doctrine than this would imply that the people were made for the benefit of the department, and not the department for the benefit of the people.

8. In matters of government, the people are principals, and the government mere agents. And it is only as the servants and agents of the people, that Congress can "establish post-offices and post roads". Now it is perfectly clear that a principal, by simply authorizing an agent to carry on a particular business in his name, gives the agent no promise that he, (the principal,) will not also himself personally carry on business of the same kind. He plainly surrenders no *right* to carry on the same kind of business at pleasure. And the agent has no claim even to be *consulted*, as to whether his principal shall set up a rival establishment to the one that is entrusted to the agent. The whole authority of the agent is limited simply to the management of the establishment confided *to him*.

9. It is a *natural right* of men to labor for each other for hire. This right is involved in the right to acquire property; a right which is guarantied by most of the State constitutions, and not forbidden by the national constitution. No law which forbids the exercise of this right in a particular case, can be constitutional, unless a clear authority be shown for it in the constitution. No authority is shown for prohibiting the labor of carrying letters.

10. If there were any doubt as to the legal construction of the authority given to Congress, that doubt would have to be decided in favor of the largest liberty, and the natural rights of individuals, because our governments, state and national, profess to be founded on the acknowledgment of men's natural rights, and to be designed to secure them; and any thing ambiguous must be decided in conformity with this principle.

11. The idea, that the business of carrying letters is, *in its nature*, a unit, or monopoly, is derived from the practice of arbitrary governments, who have either *made* the business a monopoly in the hands of the government, or granted it as a monopoly to individuals. There is nothing in the nature of the business itself, any more than in the business of transporting passengers and merchandise, that should make it a monopoly, either in the hands of the government or of indi-

viduals. Probably one great, if not the principal motive of despotic governments, for maintaining this monopoly in their own hands, is, that in case of necessity, they may use it as an engine of police, and in times of civil commotion, it is used in this manner. The adoption of the same system in this country shows how blindly and thoughtlessly we follow the precedents of other countries, without reference to the despotic purposes in which they had their origin.

12. An individual who carries letters, cannot be said to usurp, *or even to exercise*, an authority that is granted to Congress—for Congress have authority to carry only such letters as individuals *choose* to offer them for carriage. Whereas a private mail carries only those letters which individuals choose *not* to offer to the government mail. The authority of Congress over letters, does not commence until the letters are actually deposited with them for conveyance; and therefore the carrying of letters that have never been deposited with them for conveyance, does not conflict at all with the power of Congress to carry all the letters that they have any authority to carry.

13. It cannot be said that an individual who carries letters, is doing the *same thing* that Congress are authorized to do. He is not doing the *same thing*, but only a thing of the *same kind*. This distinction is material and decisive. There is no objection to his doing things of the same kind as Congress, (so far as he has the *natural* power and right to do them), unless the Constitution plainly prohibits it.

14. If Congress could forbid individuals doing a thing simply because it was *similar* to what the government had power to do, they might forbid his borrowing money, because "to borrow money," is one of the powers granted to Congress. They might also, on the same grounds, forbid parties to settle their controversies by referring them to men chosen by themselves, because government has established courts, and given them authority to settle controversies, and references to other tribunals, chosen by the parties, is depriving this department of the government of a part of its business, and the marshals, clerks, and jurors of the opportunity of earning fees. There is just as much ground, in the constitution, for prohibitions upon the settlement of controversies, without the aid of the government courts, as there is for the prohibitions upon the transmission of letters without the aid of the government mail.

15. Suppose the Constitution had declared that Congress should have power "to establish roads and vehicles for the transportation of *passengers and merchandise*" (instead of letters). Would such a grant have authorized Congress to forbid either the States or individuals to establish roads and vehicles in competition with those of Congress? Clearly not. Yet that case would be a perfect parallel to the case of the post office.

16. If Congress can restrain individuals from carrying letters, on the ground that the *revenues* of the post office are diminished thereby, they may, by the same rule, prohibit any other labor, that tends to diminish the revenues derived from any other particular source. They may, for instance, forbid the manufacture, at home, of articles that come in competition with articles imported, on the ground that such home manufactures diminish the revenues from imports.

17. The extent of the power "to establish post offices and post roads," certainly cannot go beyond the meaning of the word "establish." This meaning is to be determined by regarding,

first, the persons using the word, and, secondly, the object to which it is applied. The persons using it, are "*We the people*"—for the preamble to the constitution declares that "We the people do ordain and establish this constitution." The word then is used in its *popular* sense; in that sense in which it is ordinarily used *by the mass of the people.** That such is the true meaning of all the language of the constitution, is obvious from the consideration that otherwise we should be obliged to suppose that the people entered into a compact or agreement with each other, without knowing what they themselves meant by the language they used. Besides, the word "establish" has no technical meaning whatever, nor had any, so far as we know, at the time the constitution was adopted. But, secondly, the meaning of the word is to be inferred also from the nature of the object to which it is applied. Thus, we "establish" a principle, by making it clear, proving it true, and thus fixing it in the mind. We "establish" a law, by giving it force and authority. A man "establishes" his character, by making it thoroughly known to the world. We "establish" a fact, by the evidence necessary to sustain it. In these, and other cases, the word "establish" has no exclusive meaning whatever, other than this. It excludes what is *necessarily* inconsistent with, contradictory to, or incompatible with, the establishment of the thing declared to be established. It does not exclude the establishment of any number of other things of the same kind, unless they would be *necessarily* inconsistent with the thing first established. Thus the establishment of one truth does not imply the subversion or suppression of any other truth; because all truths are consistent with each other. The establishment of one man's character, does not imply the destruction of any other man's character. When applied to matters of business, as for instance, to the establishment of facilities for the transmission of letters, (and the transmission of letters is a mere matter of business), the word "establish" has no meaning that implies an exclusion of competition. Thus we speak of the establishment of a bank, a store, a hotel, a line of stages, or steamboats, or packets. But this expression does not imply at all that there are not other banks, stores, hotels, stages, steamboats, and packets "established" in competition with them. Neither does the establishment of certain roads as "*post roads,*" imply the exclusion of all other posts, than those of Congress, from those roads. Congress establishes a road as a "post road," by simply designating it as one over which their posts shall travel. This designation clearly does not exclude the passage of any number of private posts over the same road, (provided the government posts are not thereby actually obstructed or impeded in their progress,) because the establishment of any one thing implies the exclusion of nothing whatever, except what is absolutely inconsistent, or incompatible, with the thing established. The designation, therefore, or the establishment of a particular road as a post road, excludes nothing except obstacles to the progress of the posts over that road. The prohibition, therefore, of Congress upon the passage of other posts over the same roads travelled by their own, is going beyond the simple power of establishing those roads as post roads, and beyond the simple power of establishing their own posts upon those roads.*

If Congress *owned* the roads over which their posts travel, they would have a right to exclude all other posts from them; not, however, by virtue of their power to establish those roads as post roads, but by virtue of their power to control the use of their own property.

18. The word "establish," when applied to any particular thing, does not imply that the thing established contributes, either in whole, or even in part, to the necessary expenses of its own

maintenance. For instance, Congress have power to establish forts, arsenals and lighthouses—but it does not follow that the forts, arsenals and lighthouses are expected to support themselves. Congress have power to establish courts, but it does not follow that the courts are to derive their support, either directly or indirectly, from the business done in them. The same is the case with the army, the navy, and all the departments of the Government.—None of these establishments are expected to derive their support from their business. Yet no *compulsory* process, except that of "laying and collecting taxes, duties, imposts and excises," is authorized for the support of any of them. If individuals *voluntarily* send letters enough by the government mail, to pay the expenses of the establishment—well—if not, the establishment must go down, or be sustained like all the other departments of the government, by general taxation—and not by restraints upon competition.

19. By the old articles of *Confederation,* it was declared that "the United States, in Congress assembled, shall have the *sole* and *exclusive* right and power of establishing and regulating post-offices from one State to another throughout all the United States."

When the constitution came to be adopted, this phraseology was altered, and the words "*sole* and *exclusive*" *were omitted.* This alteration of the power, from a "sole and exclusive" one, to a simple "power," must certainly have been intentional—and it clearly indicates that the framers of the constitution did not intend to give to Congress, under the constitution, the same "*exclusive*" power, that had been possessed by the Congress of the Confederation.

20. The 10th Sec., of the 1st Art., of the constitution contains an enumeration of various prohibitions upon the State governments. They are prohibited from entering into any treaty, alliance or confederation—granting letters of marque and reprisal—coining money—emitting bills of credit—making any thing but gold and silver coin a tender in payment of debts—passing any bill of attainder, *ex post facto* law, or law impairing the obligation of contracts—laying any imposts or duties on imports or exports, without the consent of Congress, except what may be necessary for executing their inspection laws—or, without the consent of Congress, laying any duty on tonnage, keeping troops or ships of war in time of peace, entering into any agreement or compact with other States, or with foreign powers, or engaging in war, unless actually invaded, or in such imminent danger as will not admit of delay.

Among all these prohibitions, why is there none against establishing mails? The answer is obvious. The constitution did not intend to prohibit them.

21. If the right granted to Congress, to carry letters, be an exclusive right, it is, of necessity, an exclusive right *for the whole country,* and not merely for such roads and offices as Congress may see fit to establish. And it would, therefore, be as much unconstitutional for individuals to establish mails on routes where Congress had *not* established any, as where they *had.* And the consequence would be, that the people would have no constitutional right to have any mails at all, except such as Congress might please to establish for them.

22. If the constitution had intended to give to Congress the *exclusive* right of establishing mails, it would have *required,* and not merely *permitted,* Congress to establish them—so that the

people might be sure of having mails. But now Congress are no more *obliged* to establish mails, than they are to declare war. And in case they should neglect or refuse to establish them, the people could have no mails, unless individuals or the states have now the right of establishing them.

23. It would have been as unconstitutional for individuals to establish mails, if Congress had neglected to do it altogether, as it is to establish them *in competition* with those established by Congress—for the unconstitutionality of private mails, (if they are unconstitutional,) consists, *not in the competition,* but in the exercise of a right that belongs exclusively to Congress.

24. If the power granted to Congress, be an exclusive right of establishing mails, then Congress have no authority even to *permit* individuals to establish mails on their own account, either on routes where Congress have, or on those where they have not established them. Such permission would be, *so far,* abdicating government in favor of such individuals. Congress have no more right to abdicate any power of this kind, than to abdicate, to an individual, the power of making laws.

25. If the exclusive right of carrying letters, has been granted to Congress, then it is unconstitutional for a person even to carry a single letter for a friend. And Congress are bound to punish such an act as an offence against the constitution.

26. No one, I presume, has ever doubted that individuals would have a right to establish mails, *but for the law of Congress forbidding them.* Yet if the constitution had given Congress the *exclusive* right, private mails would have been unconstitutional, *without the law.* On the other hand, if the constitution have *not* given Congress the exclusive right, then the law prohibiting private mails, is without any constitutional authority. It is certain, therefore, that Congress, the courts, and the country have always been in an error, either as to the grant in the constitution, or the constitutionality of the law—if not as to both.

27. It may, perhaps, be pretended that an exclusive authority to establish mails, is a *prerogative of sovereignty,* and, therefore, of the government. But this is a notion borrowed wholly from arbitrary governments. *Our governments have no prerogatives* of *sovereignty,* except such as are granted to them by our constitutions. And these prerogatives are limited by the terms of the grants, without any regard to the extent of similar prerogatives under monarchical or despotic governments.

28. The only rules of interpretation, so far as I know, that have ever been laid down for determining whether a power granted to Congress, is to be held by them exclusively, or only concurrently with the states or people, are those laid down by Hamilton and Madison, who, above all other men, were the fathers of the constitution. Those rules are given by them, in the Federalist, and are there treated by them, as being infallible *criteria* by which all questions of this nature may be settled. The essays of the Federalist have ever, from the adoption of the constitution, been considered the very highest authority, on questions of constitutional law, next to the decisions of the Supreme Court of the United States. And these particular rules of interpretation are constantly cited, in discussions before that tribunal, and have never, so far as I am aware, been overruled by them. Judge Story emphatically affirmed them in the case of *Houston vs Moore,* and said

he did "not know that they had ever been seriously doubted." (5 Wheaton 48 to 50.) The rules are these.

That *none* of the powers granted to Congress, are held by them exclusively, except in these three cases, 1*st.* "*Where an exclusive authority is, in express terms, granted to the union:*" (The grant of "exclusive legislation" over the seat of government, is an instance of this kind,) *or,* 2*d.* "*where a particular authority is granted to the union, and the exercise of a like authority is prohibited to the states.*" (An instance of this kind is furnished in the grant to Congress of a power "to coin money," and the collateral prohibition "no state shall coin money,")—*or* 3*d. where an authority is granted to the union, with which a similar authority in the states would be utterly incompatible.*" (The power to pass "*uniform* laws on the subject of bankruptcies throughout the United States," is an instance of this kind. Bankrupt laws by the states would necessarily destroy the *uniformity* of the laws on this subject, and hence would be incompatible with the power given to Congress to establish uniformity.

Tried by these rules, the power "to establish post offices and post roads," has not a shadow of claim to be considered an exclusive one. The terms of the grant are not exclusive—the states or people are not prohibited by any other clause, from exercising a similar power—there is no incompatibility in the simultaneous exercise of such a power by each of the governments and by individuals.

The rules of interpretation here stated, are treated at length in the Federalist, in connexion with the power of taxation, and the judicial power, and it is mainly, if not solely, by the application of them, in construing the constitution, that the authority of Congress to prohibit all state taxes, is controverted.

The power of taxation, (except upon exports,) is granted to Congress, not only in as ample terms, but in precisely the same terms, as the power "to establish post offices and post roads." The taxation of the states may often interfere with the taxes of Congress, by rendering them less fertile, or more difficult of collection; and hence it was argued, by the opponents of the constitution, that congress might assume to forbid the states to collect their taxes—But the authors of the Federalist replied, that although "inconveniences" and "interferences of policy" might possibly arise from this rival taxation, yet, inasmuch as the power of taxation had not been granted to Congress in exclusive terms, and the exercise of a similar power had not been prohibited to the states, and there was no incompatibility, or necessary conflict in the co-existence of such a power in each of the governments, therefore it could not be considered an exclusive one in Congress—and that Congress could therefore no more prohibit the state taxes, than the states could prohibit the taxes of Congress. That each government must submit to the competition of the other, as best it might. Such were the opinions of these fathers of the constitution—and unless these principles are correct, every tax, that has been levied for the support of the state governments, since the adoption of the constitution, has been unconstitutional, as infringing the exclusive authority of Congress.*

If, then, the power of taxation is not an exclusive one, the power of establishing post offices and post roads, clearly is not—for both powers are granted in precisely the same terms. The words of the grant are simply, "The Congress shall have power to lay taxes, to establish post of-

fices" &c. Neither power is granted to Congress in exclusive terms—neither is prohibited to the states—nor is there any incompatibility in the existence of such powers in different governments at the same time. The operations of rival mails do not necessarily *conflict*, but only *compete*, with each other.

If there be any powers whatever, granted to the general government, and yet held by it concurrently either with the states or individuals, the power of establishing mails is one of them, according to every principle of interpretation that has ever been laid down by any respectable authority. And those who hold that this power is *not* held concurrently, either with the states or individuals, or both, must hold that Congress holds *no* power concurrently, either with the states or individuals.

Again—The 42d number of the Federalist specially notices the post-office power; and notices it in such language as to show conclusively that the authors considered it a concurrent, and not an exclusive power.

They say, "The power of establishing post-roads, *must*, in *every view*, *be* a *harmless* power—and *may*, *perhaps*, by *judicious management*, *become productive* of *great public conveniency*. Nothing, which tends to *facilitate* the intercourse between the States, can be deemed unworthy of the public care". And this is all they say on the subject.

Now mark his language—"Nothing that tends to *facilitate* the intercourse between the States can be deemed unworthy of the public care." "It *may*, *perhaps*, by *judicious management*, become productive of great public conveniency." "It *must*, in *every view*, *be a harmless power*." All this language evidently refers to a power, that might, if judiciously managed, add to existing facilities, but which, at any rate, could not do harm, by taking those facilities away. It applies, therefore, to a concurrent, and not to an exclusive power.

But mark again the strength of this expression—"It *must*, *in every view*, (that is in a political, as well as practical one,) *be a harmless power*." Did not Mr. Madison and Mr. Hamilton know the despotic purposes, to which an *exclusive* power over the transmission of all commercial social and political intelligence might be applied? That it was capable of being made one of the most powerful engines of police? As efficient for purposes of despotism as a standing army? Certainly they did. Are they, then, chargeable with the effrontery of telling the people of this country, that an *exclusive* power, of this sort, "*must*, in *every view*, *be a harmless power?*" No. Their characters forbid such an idea, and they had no motive for such a deception. The conclusion, then, is inevitable, that *they* did not consider it an exclusive one.

Moreover if any of the *opponents* of the constitution, by whom the lurking dangers to liberty were hunted through every line and word of the instrument, had considered this power an exclusive one, they would have exposed it; and the authors of the Federalist would not then have treated it in this manner—but would have obviated the objection by showing that the power was only a concurrent one. And they would have shown this, by the same rules of interpretation by which the power of taxation and certain judicial powers are shown to be concurrent. But that it

was merely a concurrent power, seems to have been taken for granted, both by the advocates and opponents of the constitution.

But if all the preceding considerations have failed of establishing the unconstitutionality of the laws against private mails, there is still another which alone would be decisive.

The first article of amendment to the constitution, declares that "Congress shall make *no* law abridging the freedom of speech, or of the press."

"The freedom of speech," which is here forbidden to be abridged, is the *natural* freedom, or that freedom to which a man is entitled of *natural right.* And the word "speech" does not mean simply utterance with voice, *but the communication* of *ideas.* And the right of speech includes a right to communicate ideas in any of the various modes, in which ideas may be conveyed. A man has the same natural right to speak to another on paper, as *viva voce.* And to speak to a person a thousand miles distant, as to one who is present. Any law, which compels a man to pay a certain sum of money to the government, for the privilege of speaking to a distant individual, or which debars him of the right of employing such a messenger as he prefers to entrust with his communications, "abridges" his "his freedom of speech."

"The freedom of the *press,*" too, which is forbidden to be "abridged," is not the freedom of barely *printing* books and papers, (for that kind of freedom alone would be of no value, either to the printer or the public,) but it includes the freedom of selling and circulating. And the freedom of selling and circulating, involves the right of conveying them to purchasers by such messengers as one pleases to employ.

If any one is disposed to deny that manuscript correspondence comes under the denomination of "speech," as that term is used in the constitution, he must adopt the alternative of including it in the term "the press"—for it certainly must be embraced by one or the other.

Finally. If the constitution had intended to give to Congress, the exclusive right of establishing mails, it would have prescribed some rules for the government of them, so as to have secured their privacy, safety, cheapness, and the right of the people to send what information they should please through them. But the constitution has done nothing of this kind. On the contrary, the grant is entirely unqualified—and it has made the power of Congress *over such mails as they do establish,* entirely absolute. They may say what shall go in them, and what shall not—whether they will carry sealed papers, or only open ones—and even whether sealed papers, deposited in their offices, shall be sacred from the espionage of the government. Their power over their own mails is unqualified in every respect. And if the people have no power to establish mails of their own, their whole rights, both of private correspondence, and of transmitting printed intelligence, are at the feet of the government.

If this power, so absolute over its own mails, were also an exclusive one over all mails, it would be incomparably the most tyrannical, if not the only purely tyrannical feature of the government. The other despotic powers, such as those of unlimited taxation, and unlimited military establishments, may be *perverted* to purposes of oppression. Yet it was necessary that these powers should be entrusted to the government, for the defence of the nation. But an exclusive and un-

qualified power over the transmission of intelligence, has no such apology. It has no adaptation to facilitate any thing but the operations of tyranny. It has no aspect whatever, that is favourable either to the liberty or the interests of the people. It is a power that is impossible to be exercised at all, without being exerted unjustifiably. The very maintenance of the exclusive principle involves a tyranny, and a destruction of individual rights, that are now, and ever must be, felt through every ramification of society. The power is already exerted to the great obstruction of commercial intelligence, and nearly to the destruction of all social correspondence, except among the wealthy. But that we are accustomed to such fetters, we would not submit to them for a moment.

To what further extent of tyranny and mischief, this power, in the future growth of the country, may be exerted, we cannot foresee. But the only absolute *constitutional* guaranty, that the people have against all these evils and dangers, is to be found in the principle, that they have the right, at pleasure, to establish mails of their own. And if the people should now surrender this principle, they would thereby prove that their minds are most happily adapted to the degradation of slavery.

THE POSTMASTER GENERAL'S ARGUMENT.

The argument of the Postmaster General is as follows:—

"This grant of power" (that is, "to establish post offices and post roads,") "is found in the same clause, (should be "section,") and is expressed in the same words and language of the grants of power to coin money, to regulate commerce, declare war, &c."

No argument, in favour of the exclusiveness of the power, can be drawn from the fact here stated. Nearly all the powers granted to Congress, are included in the same section—but who before ever argued that all the powers mentioned in that section, were therefore exclusive?

The power "to lay and collect taxes," and the power "to borrow money," are "found in the same clause," (section), and "expressed (substantially) in the same words and language of the grants to coin money, to declare war, &c." But the powers to borrow money, and to lay and collect taxes, are not therefore exclusive.

The Postmaster General is certainly very unfortunate in his analogies. The exclusiveness of the powers "to coin money," and "to declare war," does not result from the terms of the grants, as his argument supposes, but from the special prohibitions in another section, to wit,—"no State shall coin money," and "no state shall declare war." *But for these express prohibitions upon the States,* the powers to coin money, and declare war, would have been concurrent powers—else why were these prohibitions inserted? There being no such prohibition in regard to establishing post offices and post roads, that power *is* concurrent, as those would have been, but for the prohibitions.

Besides, there is no analogy, *in principle,* between an exclusive power "to declare war," or "to coin money," and an exclusive power to establish post offices and post roads; because an individual has a *natural* power and right to establish post offices and post roads; but he has no natural

power or right "to declare (*public*) war." He has power only to speak and act for himself. Neither has he any natural power or right "to *coin* money," because "to *coin*" signifies, (according to lexicographers), an act of government, as distinguished from the acts of individuals.

But the powers of Congress "to declare war," and "to coin money," are in reality exclusive, *only as against the State governments.* They are not exclusive of any *natural* rights on the parts of individuals. The constitutional prohibition upon individuals, to coin money, extends no farther than to prohibitions upon "*counterfeiting* the securities and current coin of the United States." Provided individuals do not "*counterfeit*" or *imitate* "the securities or current coin of the United States," they have a perfect right, and Congress have no power to prohibit them, to weigh and assay pieces of gold and silver, mark upon them their weight and fineness, and sell them for whatever they will bring, in competition with the coin of the United States.

It was stated in Congress a few years since, by Mr. Rayner, I think, of North Carolina, that in some parts of the gold region of that State, a considerable portion of their local currency consisted of pieces of gold, weighed, assayed, and marked by an individual, in whom the public had confidence. And this practice was as unquestionably legal, as the sale of gold in any other way. It was no infringement of the rights of Congress.

The same is true in regard to war. Individuals have no *natural power* to declare *public* war. But the natural *right* of individuals to make *private* war is secured to them by that clause of the constitution, that secures to them the right to keep and bear arms. It is true, the natural *right* of individuals to make war, extends no farther than is necessary for purposes of defence. Their natural *power,* however, goes beyond this limit—and if an individual were to exercise his natural power of making war for other purposes than defence, he would be punished only as a murderer or pirate, and solely on the ground of his having transcended his natural right—certainly not on the ground of his having infringed the exclusive power of Congress.

The power of Congress "to regulate commerce," (which is quoted by the Postmaster General as a parallel case to the post office power), is held to be exclusive solely on the ground of the *unity* of the subject. In the case of Gibbons vs. Ogden, (9 Wheaton,) Mr. Webster's argument in favor of the exclusive power of Congress over commerce, was this—that "commerce was a unit," and that regulations by the States, operating upon the identical thing that was under the regulation of Congress, would *necessarily conflict* with the regulations of Congress—because, he said, the regulations of Congress may consist as much in leaving some parts free, as in regulating others. And the court concurred in this opinion.

That "commerce" is a unit, is obvious. There is but *one* "*commerce* with foreign nations," into however many parts and varieties it may be subdivided. "Commerce" is a word that has no plural. It embraces every variety, part and parcel of all the different kinds of commerce that are carried on by individuals.

But there is no *unity* in the term "post offices" or "post roads"—any more than there is in the term stage coaches or steamboats. Suppose the constitution had said that "Congress shall have

power to establish stage coaches and steamboats"—would any one have imagined that Congress had thereby acquired the *exclusive* right of establishing stage coaches and steamboats?

But there is a lack of analogy, in another particular, between the power "to *regulate* commerce" and the power "to *establish* post offices and post roads." The power to "*regulate*" and the power to "*establish,*" are, *in their nature,* very different powers. No power is granted to Congress, *to carry on or* "*establish*" *commerce* on their own account—but only to "*regulate*" that which is carried on by others. Their post office power is directly the reverse of this. It is a power "to *establish* post offices" of their own—but *not* to "*regulate*" the offices or business of others.

But the Postmaster General says further, that the grant of power "to establish post offices and post roads" "is *ample, full, and consequently exclusive.*"

According to this reasoning, the power of Congress "to borrow money" is exclusive—for it is both "ample" and "full"—precisely as ample and full as the power to establish post offices and post roads. The power of taxation (except upon exports) is also "ample, full, and (according to the argument of the Postmaster General) consequently exclusive."

Such are the absurdities into which men are obliged to run, in order to find apologies for claiming that a simple "power to establish post offices and post roads" is an exclusive one.

But the Post Master General says further: "If a doubt could exist as to the exclusiveness of this grant, that doubt must vanish upon a reference to the 10th article of the amendments to the constitution, which declares '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 power to establish post offices and post roads, is plainly and distinctly delegated to the United States. It is, therefore, not a power reserved to the states respectively, or to the people."

This implication is as unfounded, as it is far-fetched and unnatural. The language quoted by the Post Master General is not contained in the original constitution, but constitutes an amendment, that was subsequently adopted. It is one of the ten amendments, that were adopted soon after the original constitution had gone into operation. These amendments were all adopted for the avowed purpose of quieting the fears of those who thought that too great powers had already been given to the government. Not one of the whole ten purports to grant any new power to Congress, or to enlarge any of the powers that had been previously granted. On the contrary, *every one of them,* without an exception, purports either to prohibit Congress from stretching their powers beyond the terms of the original grants, or to secure some principle of civil liberty against all pretences of power on the part of Congress. And the very amendment, quoted by the Postmaster General, was obviously designed, and designed solely, as a prohibition upon the usurpation of any power not previously granted. Yet now the Postmaster General, by a back-handed and unnatural implication, would draw, from a simple amendatory prohibition of this kind, a warrant for enlarging all the original powers, and making those exclusive and despotic, which were before harmless and concurrent.

But again. The language of this amendment is simply that: "The powers, not delegated to the United States, *by the constitution,*" (as distinct from the amendments,) "nor prohibited by it to the

states, are reserved to the states respectively, or to the people." Now the inference of the Postmaster General from this language, might, safely to the argument, be admitted to be correct, if it were also considered *what kind of a power,* (on the subject of post offices and post roads,) had really been "delegated to the United States *by the constitution.*" What was that power? It was, as has been shown, merely a power concurrent with that of the states and people, "to establish post offices and post roads." Only a concurrent power, then, having been delegated, and a like power not having been prohibited to the states or people, it necessarily follows, from the terms of the amendment itself, that a concurrent power to establish them is "reserved" to the states respectively, or to the people—or to both.

But the Postmaster General reasons as if none but *exclusive* powers had been either delegated or reserved. His whole argument hangs upon this idea. He cannot conceive of concurrent powers. It is probably a mystery to him how even two individuals can have concurrent rights to establish business of any kind in competition with each other.

If the implication of the Postmaster General were correct, the powers of Congress "to lay and collect taxes," and "to borrow money," are now exclusive powers—for they are "plainly and distinctly delegated to the United States," and "therefore" (according to his argument) are "not reserved to the states respectively, or to the people."

Nearly all the plausibility of the Postmaster General's argument, (if it have any plausibility,) is derived from the unauthorized use of the article "*The.*" He says that "*The* power," (as if there were, or could be, but *one* power of the kind, in the country,) "is plainly and distinctly delegated to the United States"—and then infers that it cannot of course be reserved to the states or people—because that would involve an impossibility. Now it happens that the power delegated to the United States, on this subject, is not described, in the constitution, as "*the* power," (meaning thereby a *sole* power)—but it is described simply as "power." The constitution does not say that Congress shall have "*the* power"—but only that they shall have "*power*"—that is, *a* power—or (more properly still) *sufficient* power—"to establish post offices and post roads." He might, with the same propriety, have said that "*The* power," (instead of *a* power,) "to borrow money," had been delegated to the United States, and that therefore no similar power could be reserved to the states or people—as if there were, or could be, but one power, in the whole country, constitutionally capable of borrowing money. Or he might, with the same propriety, have said that "*The* power" of taxation—instead of *a* power of taxation—had been delegated to Congress—and that therefore no similar power had been reserved to the states or people.

When, in common parlance, we use the article "*The,*" in connexion with a power granted to Congress—as, for instance, in the expression, "The power of congress to borrow money," or "The power of congress to lay and collect taxes," or "The power of Congress to establish post offices, and post roads"—we do not use it to designate certain *sole* powers, or units, but to designate the powers existing in congress, as distinguished from similar or other powers existing in the states or individuals. But the Postmaster General has not only substituted the language of common parlance for the language of the constitution, but has also given to it a different meaning from what, even in common parlance, is attached to it.

The whole argument of the Postmaster General, as has already been said, rests upon the assumption that there is, or can be, but one power of any one kind, in the whole country—and that if this one power be granted to Congress, it cannot, of course, remain with the states or people. If this doctrine were correct, *all* the powers granted to Congress, would necessarily have been exclusive, without any express prohibitions either upon the states or individuals—and consequently all the express prohibitions, in the constitution, would have been mere surplussage.

But there is still another oversight in the argument of the Postmaster General.

A simple power "to *establish* post offices and post roads," and the power of prohibiting similar establishments by others, *are, in their nature, distinct powers.* The former alone having been delegated to Congress, the latter necessarily remains, and is declared, by the amendment cited, to remain with the states, or the people. Neither the states, nor the people, have seen fit to exercise this prohibitory power, that is thus reserved to them—and they probably never will. They *cannot* exercise it, without abridging the freedom of speech and the press, and infringing a fundamental principle of civil liberty.

Still further. No implication, natural or unnatural, logical or illogical, necessary or unnecessary, can prevail against an express provision. The provision is express, that "Congress shall make *no* law" (post office law, or any other,) "abridging the freedom of speech, or of the press." The power of Congress, then, on this subject, is just what it would have been, and only what it would have been, if the two clauses had stood in connexion, in this wise. "Congress shall have power to establish post offices and post roads," but "shall make no law abridging the freedom of speech, or of the press."

EXPEDIENCY.

The whole argument of expediency in favor of maintaining an exclusive power in the government over mails, may be summed up in this. It enables the government to throw upon those who live in the populous portions of the country, and who have been at the expense of constructing extraordinary facilities for transportation, the burden of all the government postage, and a portion of the expense of carrying mails to those who have voluntarily gone beyond the reach of those facilities, and who have no more claim that their letters shall be carried to them at the expense of other people, than that their food or clothing shall be.

Palpably unjust and tyrannical as are these objects of the law, they are in reality the only arguments that can be invented in support of it.

The policy of the law is on a par with its morality. A law for defraying expenses of government, by a tax upon, and consequently by obstructing the dissemination of, commercial, social and political information, probably combines as many of the elements of barbarism as any law that parverted ingenuity or political depravity has ever devised.

The extortion also of money from individuals in the populous portions of the country, in order to support the present expensive mode of carrying mails to the less populous portions, is, in one respect, like "filching from one his good name"—it is robbing one without enriching another. If the business were open to free competition, there probably is not a man, who lives fairly within the limits of civilization, that would not receive his letters at less cost than he now pays. And if any man has chosen to go beyond those limits, he certainly has no right to claim that we, who remain behind, shall be taxed to carry civilization to him. If, however, the government chooses to pursue such men with its generosity, it should at least have the decency to be generous with means honestly obtained, instead of obtaining them by so unequal and mischievous a tax as that upon the diffusion of knowledge. The progress of the whole civilized portion of the country, certainly ought not to be retarded, in order that the government may show that its partiality for those few individuals, who, by going beyond the limits of civilization, give strong evidence that they do not appreciate its benefits.

But, in reality, the inmates of the farthest cabins on our frontier, are interested in free competition, as a constitutional principle—for even if they should not at once, under that system, (although they probably would soon,) have as good facilities as they now enjoy, it will yet be but a few years before these same cabins will be in the midst of a numerous population, all of whom will be benefitted by the free principle. The inhabitants of the frontier are also, (for their posterity, if not for themselves,) equally interested with other portions of the country, in maintaining the freedom of speech and the press, and the free principles generally of our constitution.

The present expensive, dilatory and exclusive system of mails, is a great national nuisance—commercially, morally and socially. Its immense patronage and power, used, as they always will be, corruptly, make it also a very great *political* evil.

The moral, social and political evils of the system are of a nature not to be estimated in money. The commercial ones, although incapable of any accurate estimate, are yet of a nature more susceptible of calculation. Let us look at them for a moment.

The importance of despatch in commercial correspondence, may be, in some measure, conceived of, when it is considered that every day's and hour's delay, in the sale and transmission of merchandize, (whose sale and transmission wait on correspondence,) involves a loss, during the time of such delay, of the interest, insurance and storage of such merchandize, and also a lapse, in part, of the season when particular kinds of merchandize are most valuable to consumers, and of course command the best prices in the hands of the merchant. Delays in business correspondence of all other kinds, as well as that strictly commercial, are also attended with losses more or less important.

Suppose now that, on an average throughout the whole country, one *fifth* of the time that is now occupied in the transmission of commercial and other letters, should be saved by opening the business to competition, what would be the aggregate saving, *in dollars and cents,* to the whole country? Is not *twelve thousand dollars a day* a moderate estimate? Undoubtedly (I think) the real saving would be very much, probably several times, greater than this sum. But I have mentioned this amount, because it is (in round numbers) the actual expenses of the present establishment. If,

then, this sum only could be saved by opening the business to competition, the country, as a whole, could actually afford, as a matter of mere dollars and cents, to let the present establishment retire upon an annual pension, equal in amount to the whole of its present receipt, as a compensation for its simply getting out of the way of private enterprize. In other words, the country could afford to support the establishment in idleness, for the sake of getting rid of its services.

We should also gain, in the bargain, the social benefits of cheap postage, and the political benefits of a very material purification of the government.

The question, then, is, would one fifth of the time now occupied in the transmission of letters, be saved by a system of free competition? There can be but one answer to this question. That amount of saving might not be accomplished at the outset—but it speedily would be. Universal experience attests that government establishments cannot keep pace with private enterprize in matters of business—(and the transmission of letters is a mere matter of business.) Private enterprise has always the most active physical powers, and the most ingenious mental ones. It is constantly increasing its speed, and simplifying and cheapening its operations. But government functionaries, secure in the enjoyment of warm nests, large salaries, official honors and power, and presidential smiles—all of which they are sure of so long as they are the partisans of the President—feel few quickening impulses to labor, and are altogether too independent and dignified personages to move at the speed that commercial interests require. They take office to enjoy its honors and emoluments, not to get their living by the sweat of their brows. They are too well satisfied with their own conditions, to trouble their heads with plans for improving the accustomed modes of doing the business of their departments—too wise in their own estimation, or too jealous of their assumed superiority, to adopt the suggestions of others—too cowardly to innovate—and too selfish to part with any of their power, or reform the abuses on which they thrive. The consequence is, as we now see, that when a cumbrous, clumsy, expensive and dilatory government system is once established, it is nearly impossible to modify or materially improve it. Opening the business to rivalry and free competition, is the only way to get rid of the nuisance.

But even if the government establishment were to continue its operations, competition is still an important principle to its utility; for it is the only principle that can always compel it to adapt its speed and prices to the convenience of the public.

Endnotes

[*] There is not even a *propriety* in making the post-office support itself, any more than in making any other department of the government support itself. An important portion of the expenses of the department are incurred for public objects—such as the transmission of official correspondence, the private correspondence of official men, and of tons, and hundreds of tons, of political documents. If the government are bound to provide for all these things, it should be done at the general charge, and not by the partial and unequal mode of levying double or triple

charges upon the private correspondence of individuals. If Congress cannot carry the letters of individuals as cheaply as individuals would do it, there is no propriety in their carrying them at all. The correspondence of private individuals, which is now sent through the public mails, could probably, on an average, be sent through private mails, for one third of the present expense. The overplus, demanded by the government, is an extortion for which there is no justification.

[*] In the case of Ogden vs. Saunders (12 Wheaton 332) Chief Justice Marshall said, that in construing the Constitution, "the intention of the instrument must prevail; that this intention must be collected from its words; that its words are to be understood in that sense in which they are generally used by those for whom the instrument was intended."

Mr. Webster, also, in a speech made in the Senate, in 1840, on the Bankrupt Bill, declared the same principle of interpretation to be the true one. He said:

"What, then, is 'the subject of bankruptcies?' or, in other words, what are 'bankruptcies?' It is to be remembered that the Constitution grants the powers to Congress, by particular or specific enumeration; and, in making this enumeration it mentions bankruptcies as a head of legislation, or as one of the subjects over which Congress is to possess authority. Bankruptcies are the subject, and the word is most certainly to be taken in its common and popular sense; in that sense in which the people may be supposed to have understood it, when they ratified the Constitution. This is the true rule of interpretation. And I may remark, that it is always a little dangerous, in construing the Constitution, to search for the opinions or understanding of members of the Convention in any other sources than the Constitution itself, because the Constitution owes its whole force and authority to its ratification by the People, and the People judged of it by the meaning most apparent on its face. How particular members may have understood its provisions, if it could be ascertained, would not be conclusive. The question would still be, how did the People understand it? And this can be decided only by giving their usual acceptation to all words not evidently used in a technical sense, and by inquiring, in any case, what was the interpretation or exposition presented to the People, when the subject was under consideration."

[*] Congress themselves have uniformly adopted the above construction, as being the true meaning of the word "establish," when applied to post roads; for, in addition to their laws "establishing" certain roads as post roads, they have passed other laws specially to exclude other posts than their own. If the simple "establishment" of a road by Congress as a post road, excluded, *ipso facto*, all other posts, all their special laws of exclusion would be unnecessary.

[*] See the Federalist Nos. 31. 32. 33. 34. 35. 36. and 72.

7. POVERTY: ITS ILLEGAL CAUSES AND LEGAL CURE (1846)

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POVERTY: its ILLEGAL CAUSESand LEGAL CURE. PART FIRST.

BY LYSANDER SPOONER

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CHAPTER I. ILLEGAL CAUSES OF POVERTY.

The existing poverty would be rapidly removed, and future poverty almost entirely prevented, a more equal distribution of property than now exists accomplished, and the aggregate wealth of society greatly increased, if the principles of natural law, and of our national and state constitutions generally, were adhered to by the judiciary in their decisions in regard to contracts.

These principles are violated by the judiciary in various ways, to wit:

1. In a manner to uphold arbitrary and unconstitutional statutes against freedom in banking, and freedom in the rate of interest; thus denying the natural and constitutional right of the people to make two classes of contracts, which will hereafter be shown to be of vital importance, both to the general increase and to the more equal distribution of wealth.

2. In a manner to extend the obligation of certain contracts beyond their natural and legal limit, and hold men liable to pay debts no longer due; thereby condemning large numbers of men to perpetual poverty and destitution, by making their expired debts a burden upon their fu-

ture acquisitions, and an obstruction to their obtaining credit for the capital necessary to the successful employment of their industry.

3. In a manner to reduce the obligation of the contracts of corporate bodies below their natural and legal limit, and thus enable the privileged debtors, who have the means of payment, to withhold payment of debts actually due, and make themselves rich by making others poor.

4. In a manner to deny the legal rights of creditors, relatively to each other, in the property of their debtors; enabling, and, in cases of insolvency, compelling debtors to swindle one portion of their creditors for the benefit of another; making it impossible for capitalists to determine, with any reasonable accuracy, the value of personal security for loans; rendering it unsafe for them to loan capital at all to mere laborers; and thus preventing the natural and more equal diffusion of credit among all those poor men, who are in want of capital upon which to bestow their labor, and who, for the want of such capital, are compelled to sell their labor to others for a price much below the amount of its actual products.

These erroneous decisions of the judiciary are made, in some of the cases, in obedience to arbitrary and unconstitutional legislation; in others, through ignorance of the natural law applicable to contracts, where no special legislation has been had.

It will be the object of the following essays to establish the illegality of these various decisions, and to explain their effects in obstructing the increase and more equal distribution of wealth.

But before proceeding to any legal discussions, let us state certain economical propositions, that are obviously conducive, if not indispensably necessary, to the greatest aggregate increase, and most equal distribution of wealth, that can be accomplished consistently with the natural right of each man to the control of his own property. Having stated these propositions, we will then see whether those principles of natural and constitutional law, which our judiciary are bound to adhere to, would secure the establishment or realization of the propositions themselves.

CHAPTER II. ECONOMICAL PROPOSITIONS.

Proposition 1. Every man—so far as, consistently with the principles of natural law, he can accomplish it—should be allowed to have the fruits, and all the fruits of his own labor.

That the principle of allowing each man to have, (so far as it is consistent with the principles of natural law that he can have,) all the fruits of his own labor, would conduce to a more just and equal distribution of wealth than now exists, is a proposition too self-evident almost to need illustration. It is an obvious principle of natural justice, that each man should have the fruits of his own labor; and all arbitrary enactments by governments, interfering with this result, are nothing better than robbery. It is also an obvious fact, that the property produced by society, is now distributed in very unequal proportions among those whose labor produced it, and with very little regard to the actual value of each one's labor in producing it. And this fact is not the result—except in a partial degree—of the superior mental capacities, which enable some men, consistently

with honesty and fair competition, to compass more of the means of acquiring wealth than others; but it is the result, in a very important measure, of arbitrary and unjust legislative enactments, and false judicial decisions, which actually deprive a large portion of mankind of their right to the fair and honest exercise of their natural powers, in competition with their fellow-men. That such is the truth will be seen hereafter.

That the principle of allowing each man to have the fruits of his own labor, would also conduce to the aggregate increase of wealth, is obvious, for the reason that each man being, as he then would be, dependent upon his own labor, instead of the labor of others, for his subsistence and wealth, would be under the necessity to labor, and consequently would labor. The aggregate wealth of society would therefore be increased by just so much as the labor of all the members of society should be more productive than the labor of a part. It would also be increased by the operation of another principle, to wit: When a man knows that he is to have *all* the fruits of his labor, he labors with more zeal, skill, and physical energy, than when he knows—as in the case of one laboring for wages—that a portion of the fruits of his labor are going to another. Under the influence, then, of this principle, that each man should have all the fruits of his own labor, the aggregate wealth of society would be increased in two ways, to wit, first, *all* men would labor, instead of a part only; and, secondly, each man would labor with more skill, energy, and effect, than hired laborers do now.

Proposition 2. In order that each man may have the fruits of his own labor, it is important, as a general rule, that each man should be his own employer, or work directly for himself, and not for another for wages; because, in the latter case, a part of the fruits of his labor go to his employer, instead of coming to himself.

Proposition 3. That each man may be his own employer, it is necessary that he have materials, or capital, upon which to bestow his labor.

Proposition 4. If a man have not capital of his own, upon which to bestow his labor, it is necessary that he be allowed to obtain it on credit. And in order that he may be able to obtain it on credit, it is necessary that he be allowed to contract for such a rate of interest as will induce a man, having surplus capital, to loan it to him; for the capitalist cannot, consistently with natural law, be compelled to loan his capital against his will. All legislative restraints upon the rate of interest, are, therefore, nothing less than arbitrary and tyrannical restraints upon a man's natural capacity and natural right to hire capital, upon which to bestow his labor. And, of consequence, they are nothing less than arbitrary and tyrannical restrictions upon the exercise of his right to obtain all the fruits, that he honestly can obtain, from his labor.

The rate of interest, which the capitalist will demand, will depend upon a variety of circumstances, and especially upon the risk of loss attendant upon the loan—in other words, upon the character of the security offered by the borrower for the payment of the loan. This security and consequent risk will differ in the cases of different individuals. The legislation, therefore, that prescribes a fixed rate of interest, beyond which no contracts may go—especially if that limit be, as it usually is, the lowest at which capitalists will loan money on the most approved security—in

effect deprives all those, who cannot offer the most approved security, of their right of hiring capital at all.

The great mass of those, who, by reason of not having the most approved security to offer, cannot borrow capital at all at six per cent., could yet, without difficulty, borrow enough to employ their own hands upon, (say from two to ten hundred dollars,) on the credit of their skill, industry, integrity, and ability, and of the value which their labor would add to the capital borrowed, if they were allowed to contract for seven, eight, nine, or ten per cent. interest—enough to pay for the risk of life, health, losses by fire, theft, robbery, &c.; which risks it is perfectly right that the capitalist should be guarded against by an additional rate of interest.

The effect of usury laws, then, is to give a monopoly of the right of borrowing money, to those few, who can offer the most approved security. A man offering the most approved security, can obtain money at six per cent.; while another, whose security is not so acceptable, but who, nevertheless, could obtain money as readily at seven, eight, or nine per cent., as the other does at six, cannot now obtain it at all, simply because he is forbidden to contract for such a rate of interest as would, in the average of loans, compensate capitalists for the additional risk or inconvenience attendant upon the only kind of security he has to offer.

The consequence is that the loanable capital of society is monopolized almost entirely by those *few,* those very few, who wish to borrow, and can offer the most approved security; while the mass of those, who have not capital of their own, but who, if left free to make their own contracts, would be able to obtain a portion sufficient to employ their own hands upon, are now, for the want of capital on which to bestow their labor, compelled to sell their labor to those who have, by means of the usury laws, monopolized the capital. And they are compelled to sell their labor at such a price as will enable the employer to make a large profit upon their labor; or, in other words, enable him to put into his own pocket an important portion of the fruits of *their* labor. All this is the effect of the usury laws. The same laws that enable him to monopolize the loanable capital, enable him also to monopolize the labor of those who cannot borrow capital on which to bestow their labor.

To illustrate the operation of this principle, let us suppose that a capital of five hundred dollars is necessary to employ the labor of one man; that, under the usury laws, A, owing to the approved character of the security he has to offer, can borrow, and does borrow, at *six* per cent. interest, five hundred dollars capital more than he wants to employ his own hands upon; that B is a poor man, who cannot borrow capital at six per cent., and, therefore, owing to the prohibition of the usury laws, cannot borrow it at all; that he is consequently compelled to sell his labor to A, who has borrowed the necessary capital to employ his labor; that A buys B's labor for a year, and, after paying his wages, and the interest on the five hundred dollars on which he has employed B to labor, he (A) realizes one hundred dollars profit.

This probably is not an extravagant supposition; for it is probable that employers, who borrow their capital at six per cent., and manage their business judiciously, do generally realize at least an hundred dollars profit from the labor of each adult male laborer they employ.

Now it is plain that if B had been allowed to borrow, and had borrowed, (as he probably could have done,) this same five hundred dollars capital at *nine* per cent., and had then employed his own hands upon it, he could have put into his own pocket eighty-five dollars more of the fruits of his labor than he did when laboring for A for wages—for he could have had *all* the fruits of his labor, (that is, the amount both of his wages and the profits made by A,) with but this abatement, viz., that he must have paid three per cent. more interest for his capital than was paid by A. This three per cent. interest, on five hundred dollars, would be fifteen dollars—which, deducted from the hundred dollars that went into A's pocket as profit, leaves eighty-five dollars to go into B's own pocket, over and above the amount he received as wages when laboring for A.

This supposition illustrates fairly the operation of usury laws, in depriving the mass of men of the fruits of their labor. These laws give a monopoly of the loanable capital to a few individuals. These individuals, having a monopoly of capital, are able to take advantage of the necessities of all those who have not capital of their own, and are forbidden to borrow any, on which to labor. They thus compel them to sell their labor at a price that will give their employer a large slice out of the products of their labor. The laws themselves are the contrivances, not of the retired rich men, who have capital to loan—for they, of course, wish to carry their money to the largest and freest market—but of those few "enterprising" "business men," as they are called, who, in and out of legislatures, are more influential than either the rich or the poor; who control the legislation of the country, and who, by means of usury laws, can sponge money from those who are richer, and labor from those who are poorer than themselves—and thus make fortunes. And they are almost the only men who do make fortunes—for almost all fortunes are made out of the capital and labor of other men than those who realize them. Indeed, large fortunes could rarely be made at all by one individual, except by his sponging capital and labor from others. And the usury laws are the means by which he does it.

The reason given for usury laws is, that they protect the poor from the extortions of the rich. But this reason is a false one—for there is no more extortion in loaning capital to the best bidder, than in selling a horse, or renting a house to the best bidder. The true and fair price of capital, as of everything else, is that price which it will bring in fair and open market. And those who falsely pretend to be interested to prevent the rich extorting money from the poor, in the shape of interest on capital, are the very men who want nothing but an opportunity for themselves both to extort capital from the rich, and labor from the poor, that they may thus fill their own pockets at the expense of other men's rights. The protection they offer to the poor, is the protection of forbidding them to borrow capital on which to employ their labor, and thus compelling them to sell their labor at a price that enables the purchaser to make a large profit upon it; it is the protection, which, as in the case already supposed, would really extort from them eighty-five dollars of their labor, to save them from the pretended extortion of fifteen dollars in the shape of interest. Leave the rich and the poor to make their own bargains in regard to the interest of capital, and it is as certain as the laws of nature, that capital will find its way into the hands of those who are to perform the labor upon it. In fact, the usury laws impliedly admit that such would be the result—else why do they prescribe such rates of interest as must necessarily confine all loans to a few individuals?

Of all the frauds, by which labor is cheated out of its earnings by legislation, and of all the monopolies established by legislation, probably no one is more purely tyrannical in its character, or more destructive at once of the natural right of individuals to make their own contracts, and of the just distribution of wealth, than that monopoly of the right of borrowing money, which forbids the mass of men to obtain capital, on which to bestow their labor, and thus compels them to sell their labor at a price far below the amount of its actual products.

The law, that allows all men, without distinction, to borrow capital, provided they can borrow it at six per cent. interest, is, in the equality of its operation, like a law that should allow every man perfect freedom to profess and enjoy his own peculiar religion, provided his peculiar religion was the particular and only one that was allowed by the State to be professed and enjoyed by any one.

A statute, that should forbid one man to borrow, at any rate of interest whatever, more capital than he could manage by his own labor alone, would not be tolerated, for the reason that it would be an infringement of men's natural rights to borrow all they could; yet it would not be half so unequal or pernicious, nor so unjust an infringement of individual rights, nor probably so destructive of the equal distribution of wealth, as are the usury laws, which allow one man to borrow enough to employ a hundred laborers upon, while they forbid the hundred laborers to borrow each enough to employ his own hands upon.

What a change would be wrought upon the face of society, if each adult male laborer, who is now obliged to sell his labor, were to receive, during the prime of his life, eighty-five dollars annually of the fruits of his labor more than he does now; and if all older and younger persons, and females, who are now obliged to sell their labor, were also to receive a similar greater proportion of the fruits of their labor. Yet if the supposition before made be correct, what prevents such a result? If the abolition of the usury laws alone would not accomplish it, the abolition of these and the other tyrannical and unconstitutional restraints upon the freedom of industry, and men's rights of contract, hereafter to be pointed out, would, I think, certainly accomplish it, at least in the case of all honest, industrious, and ordinarily skillful laborers.

Proposition 5. The laborer not only wants capital, on which to bestow his labor, but he wants to obtain this capital at the lowest rate of interest, at which, in the nature of things, he can obtain it. That he may obtain it at the lowest possible rate of interest, it is necessary that free banking be allowed.

The correctness of this proposition will be seen, when it is considered what banking really is. Banking is loaning one's credit, (for circulation as currency,) instead of loaning money.

If a man can afford to loan money for six per cent. interest, he can certainly afford to loan his credit for three. And why? Because whatever profit a man makes by loaning his credit, is clear gain. It costs him nothing; for he still enjoys the use of the houses, lands, or other property, on which his credit is based, in the same manner as if he had not loaned the credit based upon them. But the income, which a man derives from the loan of money itself, is obtained only by the sacrifice, or at the expense of the crops, rents, or other incomes, which he might derive from the

lands, houses, or other property, which his money would purchase. If, therefore, a man can afford, for six per cent. interest on his money, to give up all the crops, rents, and other incomes, which he might obtain from the lands, houses, or other property, which his money would purchase, it is plain that for three per cent. he could afford to loan his credit, which costs him nothing but the risk and trouble attendant upon the loan, (which risk and trouble, by the way, are not materially, and, in general, perhaps no greater, than in the loan of money.)

It can hardly be said that there is any *profit* in loaning money itself; for the interest obtained is generally no more than a fair price or equivalent for the crops, rents, or other incomes, which the property that might be purchased with the money, would yield. But in the loan of *credit*, there is an actual profit of the whole amount that is received as interest, after paying the trouble and risk of banking.

It is clear, therefore, that if money can be loaned, as it now is, for six per cent. interest, credit could be loaned at two, three, or four per cent.

Since, then, all banking profit is a net profit without cost, and not, like the interest on money, an equivalent for the crops, rents, and other incomes of property, that the lender might have retained and enjoyed; and as the materials for banking credit are abundant, and almost superabundant, it is obvious that if free competition in banking were allowed, the rate of interest on banking credit would be brought very low, and bank loans would be within the reach of everybody whose business and character should make him a reasonably safe person to loan to. Probably every such person could borrow, at six per cent., capital enough to employ his own hands upon; and many would doubtless be able to borrow it for five, four, or even three per cent.

Suppose such were the result, and suppose five hundred dollars capital to be enough to employ each man's labor, the only difference between the annual income of a man, who should own his capital, and of one who should borrow his, would be barely the interest paid by the latter—that is, fifteen, twenty, twenty-five, or thirty dollars, according as he should pay three, four, five, or six per cent. interest. What a change would be rapidly wrought in the condition of mankind by a system that should supply all the destitute with the use of capital on such terms as these.

If free banking were allowed, the loanable credit could not be monopolized by a few borrowers, as the loanable money now is. The materials for banking credit are so immense, so nearly illimitable indeed, and exist in such a variety of shapes, and are distributed among so many proprietors, that it would be impossible to concentrate them, as money is now concentrated, in the hands, or bring them under the control of a few corporations, or confine the loans based upon them to a few favorite individuals.*

Banking credit is the best kind of credit for the borrower—and for these reasons.

1. It is obtained at the lowest possible rate of interest.

2. It then enables the borrower to buy, *at cash prices,* whatever he wishes to buy.

3. Circulating like money itself, and divisible like money itself into small amounts, it enables the borrower to buy his commodities, or materials, in such quantities, of such qualities, and of such persons as it will be most for his interest to buy them—instead of his being compelled, as he is when he buys his commodities on credit, to buy them in such quantities, of such qualities, and of such persons, as it may chance that he can buy them on credit.

So great are the necessities of the poor for materials upon which to bestow their labor, and for the necessaries of life, such as food, clothing and fuel; and so great are the difficulties in the way of getting cash to make their purchases with, that they are compelled to make most of their purchases on credit; to make them of persons who do not wish to give them credit, and who will not give them credit, except at extravagant prices; and also often to buy commodities not the best adapted to their wants. In making their purchases under these circumstances, they not only suffer serious losses in the kinds and qualities of the commodities purchased, but they are also obliged to pay five, ten, fifteen, or twenty per cent. more for them, than they would have to pay if they had cash to buy with. Probably also the retailer (of whom many of their purchases are made) has himself bought his goods on credit of the wholesale dealer, and paid five, ten, or fifteen per cent. more than if he had bought with cash. And this increased price, paid by the retailer, finally falls upon the consumer, in addition to the increased price which the consumer also pays on account of his own want of cash to buy with. Free banking would obviate almost entirely these enhanced prices of commodities, and these losses from the want of adaptation in the commodities to the wants of the purchasers; because, if free banking were allowed, almost everybody, who was worthy of credit at all, both retailer and consumer, could obtain it at the banks, and then make his purchases for cash; and, having cash to purchase with, he would be under no necessity to buy only such commodities as were best adapted to his wants.

It would probably be a moderate estimate to suppose that the poor suffer an average loss—including the losses on price, quality, and adaptation to their wants—of fifteen or twenty per cent. on all their purchases, over what they would pay under a system of free credit currency. Supposing their purchases to be from two to four hundred dollars a year, their losses, at the rate mentioned, would be from thirty to eighty dollars annually—an amount sufficient, if lost, to keep them poor; or, if saved, to give them a competency.

Proposition 6. All credit should be based upon what a man has, and not upon what he has not. A debt should be a lien only upon the property that a man has before and when the debt becomes due; and not upon his earnings after the debt is due. If, therefore, a man be able to pay a debt when it becomes due, he should pay it in full; if unable to pay it in full, he should pay to the extent of his ability; and that payment should be the end of that transaction. The debt should be no lien upon his future acquisitions.

The only exceptions to this rule should be, 1, where the debtor, previous to the debts becoming due, has dishonestly squandered or misapplied the means, which he should have retained for the payment of his debt; and, 2, where he has omitted to do something, which he was plainly bound to do, towards putting himself in a condition to pay. But if he have been honest and faithful in the performance of everything, that, on his part, he was bound to do, the debt should be

binding only to the extent of his ability at the time the debt should become due. And this, it will be seen hereafter, in the chapters on the legal nature of debt, is the whole *legal* obligation of a debt in any case; and, in the case of most debts, it is also the whole moral obligation.

Under the operation of this principle, nearly all debts would be settled at once on their becoming due; and be then settled finally and forever. The creditor would then know what he had got, and would have no occasion to spend any further time, thought, or money, in harassing the debtor by attempts to get more. And the debtor, on his part, would know that he was a free man; and would at once engage in the best employment he could find, without being liable to be disturbed or obstructed by his former creditor, in the prosecution of it. Thus creditor and debtor would be likely thenceforth to be more useful, both to themselves and society, under this arrangement, than under the opposite one, which makes the creditor the enemy of the debtor, and incites him to an expensive, cruel, perpetual, destructive and generally profitless war upon him, his family, and his and their industry.

It may be supposed by some, that credit would not be given, if the legal obligation of debts were limited in this manner. But men would as lief give credit on this principle, as on any other, if they were to understand, when the contract was made, that such was its legal effect; and if they were also to be at liberty to make their own bargains in regard to the rate of interest—for they would then charge an additional interest sufficient to cover the additional risk, if any, that they might suppose to result from this principle. And it would be far better for debtors to pay a slight additional interest, and have the benefit of this principle, than to make their contracts under all the liabilities of the opposite one. The payment of a slight additional interest would be equivalent to paying a slight premium for being insured against the calamity of an arrearage of debt and perpetual poverty, in case of any miscalculation or misfortune on their part.

But the probability is, that the risk to creditors would be no greater, not even so great, under the operation of this principle, as it is without it—and for these reasons.

1. This principle would bring about a general practice of short credits, and prompt settlements; which, for a variety of reasons, too obvious to need enumeration, are altogether safer and better for both debtors and creditors.

2. The debtor, under this principle, has a much stronger motive than he has under the opposite one, to the practice of honesty, industry, and frugality, and—if unable to pay the whole of his debt—to the payment of the most that it is in his power to pay, when the debt becomes due. For he knows that he can thus not only cancel his debt, at its maturity, and be free from it forever, but save his character and credit also. But under the principle of perpetual liability, whenever a man finds that he has made an error in his calculations, and that it will be impossible for him to pay his debt in full, that no exertion on his part can save him from an arrearage of debt, he is apt to think and feel that he is ruined, not only in his present fortune, but in his future credit and prospects. He therefore becomes disheartened, and perhaps idle, prodigal, and dishonest—saying to himself, "I may as well die for a large sum as a small one." So far as this feeling operates upon the debtor—and that it will operate to a greater or less extent upon all debtors is inevitable—the

creditor suffers a corresponding per centage of loss on his debt—a loss that, under the opposite principle, would have been saved.

But when a debtor contracts a debt with the knowledge that, at its maturity, all that can be required of him by his creditor, will be, that he shall have practised integrity, industry, and frugality, and that he shall make such payment as the practice of these virtues may have enabled him to make, and that, under these circumstances, not only his debt will be cancelled, but his character and credit saved, he has the stimulus of all these motives operating upon him during the whole period from the time the debt is contracted, until it becomes due. And when a man is governed by these motives, during the whole period mentioned, he will almost uniformly be able to pay, at their maturity, all such debts as were *prudently* contracted; unless he meet with some unusually hard fortune. And even in the case of hard fortune, he would still be able generally to pay the greater part of his debt; for it is not often, if ever, that a man, in the short interval between the time of contracting a debt, and the time the same debt becomes due, meets with such heavy misfortunes as to swallow up everything in his hands.

3. If this principle of law were acted upon, we should have no insolvent or bankrupt laws, as now, discharging men from their contracts arbitrarily, without regarding whether they have been honest or dishonest, prudent or profligate, frugal or extravagant, fortunate or unfortunate. Under the present system, insolvent and bankrupt laws are indispensable to save *honest* debtors from hopeless and perpetual poverty and want. Yet as these laws apply to large numbers of debts, instead of a single one, it is impossible that they should make such discriminations between the honest and dishonest, the frugal and the extravagant, the fortunate and the unfortunate debtor, as would be made in the case of a single debt, debtor, and creditor. The consequence is, that under the present system, creditors have, and can have, little other security for the honesty of their debtors, than what the principles and interests of the latter may afford. But under the other system, the debtor would be held liable, on each debt, to the scrutiny of his creditor; and would fail of a release from his liability, if dishonesty, profligacy, or extravagance were proved against him.

Which of these two systems affords the best securities to creditors, it hardly needs further argument to demonstrate.

4. Under the present system, debtors, under certain circumstances, are almost *compelled*, by the necessities of their condition, to wrong their creditors. For instance—a debtor, before his debt becomes due, finds that it will be out of his power to pay the whole of his debt at the time it becomes due. He knows that this arrearage will be a burden upon his future acquisitions, and that, if he suffer it to become known, it will also be an obstacle to his obtaining such further credit as may be necessary for the successful prosecution of his industry. But his debt not being yet due, and his insolvency not having yet come to light, he has still a credit in the community. He avails himself of this credit in the desperate hope to retrieve his fortune, and save his credit; or, if this cannot be, with the intention of putting as far off as possible the evil day of open insolvency and ruin. He adopts the principle that he will never stop payment so long as his credit is available. (And public opinion justifies him in adopting this principle. The public generally regard a man as a fool, or a coward, who submits to open insolvency so long as he can get credit.) He, therefore,

makes new debts to pay old ones; borrows money at ruinous rates of interest; makes desperate moves in his business; every struggle to extricate himself only sinks him deeper in the mire; finally he gets to the end of his credit; his race is run; the insolvent laws come in to settle the matter; and his whole arrearages of debt, and the consequent losses of his creditors, are perhaps ten, twenty, or fifty times greater than they would have been, if he had settled with his first creditor, by paying all he had to pay, when he first found that he was in arrears. Which of the two systems, then, is the best for creditors, as a class?

5. Creditors, as a class—men who have money and capital to loan—have an interest that their customers, the borrowing class, should cancel their debts, by paying what they can, as soon as they find themselves in serious arrears, not only for the reason that their arrears will then usually be many times less than when settlements are postponed, as now, to the latest possible period, but because the debtors will then become good and safe customers to the money lenders again.

6. The principle, that a debt is obligatory only to the extent of the debtor's means when the debt becomes due, would nearly, if not wholly, put an end to a class of contracts, that are immoral and fraudulent, in intent, if not in law, on the part of the *creditors,* and which ought never to be enforced against debtors. These contracts are of this kind. An old and experienced man takes advantage of the inexperience and the sanguine anticipations of a young man, to sell him property at enormous prices, giving him credit for the whole, or a part, but well knowing, from his own superior judgment and experience, that the young man will not at all realize his anticipations, or even realize enough from the property to cancel his liability. But he sells the property to him on the calculation that the latter will be able to pay at least the real value of the property; and that, as for the balance, *he is a young man, he will be able to work it out;* or his friends will pay it for him; or the possession of this property will enable him to get credit of others, and thus he will be enabled to pay this debt by throwing an equivalent amount of loss upon somebody else. Such contracts are plainly immoral and fraudulent, on the part of the creditor, both towards the debtor, and towards others* —although their immorality and fraud are of a character not susceptible of being legally proved and defeated in particular cases. The only way of defeating them seems to be, to adopt the principle that no contract is binding beyond the limits of the debtor's means.

But it is unnecessary, in this place, to go into a detail of all the benefits, that would result to both debtors and creditors from the adoption of the principle, that a debt is a lien only upon the debtor's means at the time the debt becomes due. These benefits are obviously of the most important character. And we shall hereafter see that the principle is one of natural law, which all courts, without the aid of legislation, and in defiance of all legislation, are bound to maintain and carry into effect.

Proposition 7. Creditors should have liens upon the property of their debtors, in the order in which their debts are contracted; (with some exceptions hereafter to be named;) and the creditor having the first lien, should be paid in full, before the second receives any portion of his debt. And this principle should apply to all the creditors respectively—each prior creditor having a right to full payment, before a succeeding creditor can receive anything. And it should be held

legally fraudulent in a debtor, (except in cases hereafter mentioned,) to pay a subsequent creditor to the prejudice of a prior one.

These principles are just in themselves—they are the principles of natural law—and the effect of them would be much better, for both debtors and creditors, than those that now prevail.

That they are just in themselves, as between creditors, is obvious from the fact, that a personal debt, as, for instance, a promissory note, or a book account, is, *in equity,* a lien upon *all* a debtor's general property, in very nearly the same manner, except in form, that a mortgage is a lien upon a specific parcel of real estate. The second creditor, therefore, in a personal debt, stands in the same relation to a prior creditor, with reference to the general property of the debtor, that a second mortgagee does to a prior one, with reference to a specific parcel of real property, on which they both hold mortgages. He, in effect, takes a second lien upon the debtor's general property; and he, of course, takes it, subject to the incumbrance of the prior lien, which is entitled to be first satisfied.

One great obstacle in the way of capitalists loaning capital to poor men, under our present system, is, that the creditor holds no claim upon the capital he himself has loaned, or its proceeds, for the security of his debt, in preference to subsequent creditors. If he could hold the first lien upon the capital loaned, and upon the value that should be added to it by the labor of the borrower, it would then generally be safe to lend capital to men who were destitute of any other property.

It is a great defect in the doctrine of liens, as now administered, that it in general recognizes the principle of lien only in relation to specific articles of property; which articles can be used by the debtor, but cannot be exchanged by him for any other property better adapted to his use. This principle does not enable a borrower to give his creditor security upon *money,* which his creditor loans to him to be employed in business, and which must be exchanged, and perhaps pass through half a dozen different forms before it is repaid to the creditor. What is wanted in order to secure a creditor for *money,* which he has loaned to be employed by the debtor in business, or for property of any kind which he sells on credit, and which the debtor is to be permitted to convert into property of another kind, is, that he (the creditor) should have a prior right, over any subsequent creditor, to the proceeds of that money, or other property, into whatever shape it may afterwards be converted by the debtor. And this object can be accomplished only by adopting the general principle, that a prior creditor has a prior lien upon the general property of his debtor, for the full satisfaction of his debt.

If A loan capital to Z, when Z is free of debt, it is certainly right that A should be paid out of the proceeds of the capital he himself has loaned, in preference to anybody else. It is therefore right that his debt should be a lien upon that capital, or its proceeds, in the hands of Z; and that Z should have no right, without the consent of A, to dispose of it, or its proceeds, to the prejudice of A, for the benefit of any third person. And he should have no more right to dispose of it, to the prejudice of A, for the benefit of a subsequent creditor, than for the benefit of any other person.

If, therefore, B subsequently give credit, or loan capital to Z, before the debt of A is paid, (or has expired for want of payment,) he gives him credit subject to all the disadvantages of the prior lien that A has upon the property of Z. And this prior lien, which A has upon the property of Z for the capital first loaned to him, will be a lien also upon the capital loaned him by the subsequent creditor, (B,) unless B, at the maturity of A's debt, shall be able to prove that particular portions of the debtor's property, *still remaining distinguishable from the rest,* are parts, or proceeds of the specific capital loaned to him by himself, (B.) That is, the first creditor, when his debt becomes due, will have a *prima facie* lien upon *all* the property in the hands of the debtor; and the burden of proof will be upon the subsequent creditors to show that specific portions of the property, which can still be distinguished from the debtor's general property, were loaned to the debtor by themselves, and were therefore not included in the first creditor's lien. All those portions of the subsequent loans, or their proceeds, which shall have become indistinguishably mixed with the first loan, or its proceeds, or which the subsequent creditors shall have no legal proof to distinguish from the first loan, or its proceeds, will be held absolutely liable for the satisfaction of the first creditor's debt.

This principle, of the priority of rights on the part of creditors, will be more fully illustrated hereafter, in the chapters on the legal nature of debt; and the principle will then be shown to be a legal one, which courts are bound to carry into effect. In this place, I shall only point out some of the economical results, that would flow from its adoption.

1. One of these results would be that it would be *safe* for a capitalist to loan capital to a poor man, if the latter were but free of debt, were a man of integrity and frugality, of ordinary capacity for business, and were engaged in a business that was ordinarily profitable; because the capitalist would have a lien for his debt, not only upon the capital itself, that he had loaned, (or its proceeds,) but also upon all the value that should be added to it by the labor of the debtor. If, for instance, a capitalist should sell to a shoemaker, on credit, two hundred dollars' worth of leather, or should loan to him two hundred dollars of money with which to buy leather, to be wrought by the latter into shoes he would hold a lien, in preference to any subsequent creditor, not only upon the leather itself, but upon the shoes manufactured from that leather. All the additional value, that should be given to the leather by its being wrought into shoes, would add so much to the creditor's security for his debt.

The principal drawback upon this security is this, viz., that the laborer and his family must have their subsistence out of the proceeds of their labor—in other words, from the sale of the shoes manufactured. The amount of this drawback will depend upon the number, health, economy, and industry of the debtor's family. In the case of a young man, just setting out in life, with a wife, and without children, the necessary cost of a frugal subsistence, such as a prudent and reasonable person would be satisfied with, (at least until he had accumulated capital enough of his own to employ his own hands upon,) would probably not consume even one half the value that would be added to the capital by his labor. In the case of larger families, a large proportion of this value would be consumed. But in few or none, unless it were in case of sickness, would it be so nearly consumed as to impair the creditor's security. This is evident from the fact that la-

borers now support their families simply upon the wages they receive for their labor, although their wages do not amount to more than one half, two thirds, or three fourths of the value, which their labor adds to the capital on which they are employed, (the rest going into the pockets of their employers.) If, then, they were to have—as, when they were their own employers, they would have—the whole of the value that should be added to the capital by their labor, they could not only subsist as well as they do now, but have considerably more than enough beside to repay the capital borrowed, with interest—because the capital borrowed will itself be sufficient to repay the loan and interest, if but six, seven, eight, nine, or ten per cent., (according as the rate of interest may be,) shall be added to its value by the laborer. Any laborer, having ordinary capacities, could add this amount of value to two, three, or five hundred dollars capital, and still have nine tenths of the whole value or proceeds of his labor left, with which to subsist himself and family. And these nine tenths of the whole value or proceeds of his labor, (when he had two, three, or five hundred dollars capital to work with,) would unquestionably amount to much more than he would receive as wages, when he sold his labor to an employer.

The other drawbacks on the security mentioned, (in addition to the subsistence of the laborer and his family,) are the risks of the health and life of the borrower, and the risk of accidents by fire, &c. These risks, on the aggregate of loans, would be small, and would be guarded against by creditors, by small additional rates of interest, (if usury laws were abolished,) by life insurance, and by insurance on the capital against fire. The costs of guarding against all these risks would amount to no more than a small addition to the rate of interest on the capital, and, being thus provided for, would interpose no serious impediment to the loan of capital to poor men.

One principal, if not insuperable obstacle, in the way of loaning capital to poor men, in the present state of things, is that the creditor has no legal security that the debtor will not contract other debts afterwards, and that the capital, which he has loaned to him, will not be applied, either by the debtor himself, or by the insolvent laws, to the payment of these debts to other men. This obstacle would be entirely removed by the adoption of the principle of the prior right of the prior creditor.

2. Another result of this principle would be the general distribution of credit. A capitalist, about to loan money, would be very cautious of loaning to a person already in debt for capital borrowed of others—lest the capital loaned by himself should become indistinguishably mixed with that borrowed of the prior creditors, and be devoted, in whole or in part, to the payment of such prior creditor's claims. He would, therefore, seek for borrowers who were free of debt, that he might at least hold a secure lieu upon the capital, which he himself should loan to them. The principle would thus obviously prevent the accumulation of large credits in the hands of single individuals. And by preventing large accumulations of credit in the hands of single individuals, it would promote the distribution of the same aggregate amount of credit, in smaller parcels, among a larger number of individuals. And the same aggregate amount of credits, that now exist in the community, if properly distributed, would probably put into the hands of nearly or quite every laborer in the country an amount of capital sufficient for him to employ his own hands upon.

This principle of the prior right of the prior creditor would be no obstacle to banking, nor to a banker's paying a second note while a prior one was still in circulation—because a banker's notes are payable on demand, and are due immediately on their being issued. If, therefore, the holder do not present them when due, (that is, if he do not present them immediately on their being issued,) such omission is a voluntary waiver, on his part, of his right to priority of payment, and allows the banker to pay his notes in the order in which they are presented for payment. The same principle would apply to all other debts that were not demanded when due.

Again; although this principle, of the prior right of the prior creditor, would be an obstacle in the way of a debtor's getting a second credit, (unless of the same creditor,) *before* a prior one had become due, it would be no such obstacle *after* the former one had become due, even though he should have been unable to pay the first credit in full—because, at the maturity of the first credit, he would—if the principle of "Proposition 6" be correct—cancel it by paying to the extent of his means, which would leave him thenceforth a free man.

The result of the two principles stated in propositions 6 and 7, viz., 1, that a debt is binding upon a debtor only to the extent of his means; and, 2, that a prior creditor has a prior lien on his debtor's property, would be to induce capitalists individually to seek out separate laborers, of capacity, industry, and integrity, who were free of debt, and furnish them respectively with what capital their business should require; and thus save borrowers from the necessity of getting credit, as they do now, in petty parcels, of several different persons. That such would be the result is obvious—because, 1, a capitalist would prefer, as a general rule, not to become the second creditor of a debtor; and, 2, as capitalists would not wish to become the second creditor of a debtor, it would be indispensable, as a general rule, that the first creditor should advance capital enough to enable the debtor to prosecute his business advantageously, else he might lose a part of what he should loan him. The debtor, having a right to cancel his debt, by paying to the extent of his means, would do so whenever the creditor should refuse to furnish sufficient capital to enable him to prosecute his business profitably. And the creditor, when he should see that his debtor was using capital advantageously, would *choose* to advance to him whatever might be necessary, because such advance would be a profitable investment of his capital. On the other hand, whenever he should find that his debtor was not using capital advantageously, he would withhold any further advances, and, at the maturity of the credit given, close the connexion with as little loss, if any, as possible, by accepting payment to the extent of the debtor's means, in full discharge of the debt.

The operation of these principles, therefore, would be the establishment of a sort of partnership relation between the capitalist and laborer, or lender and borrower—the former furnishing capital, the latter labor. Out of the joint proceeds of this capital and labor, the laborer would first take enough for an economical subsistence while performing the labor—as it would be necessary that he should, in order that he might perform it. On all the remaining proceeds the capitalist would hold a lien for the amount of capital loaned, and also for such an amount of the increased value given to it by the labor, (say six, seven, eight, nine, or ten per cent.,) as should have been agreed on between them, under the name of interest.

This *quasi* partnership between the capitalist and laborer, by which the latter is made sure of his subsistence while laboring, and by which the capitalist is made to risk his capital on the final success of the enterprise, without any claim upon the debtor in case of failure, is the true relation between capital and labor, (or, what is the same thing, between the lender and borrower.) And why? 1. Because capital produces nothing without labor; and it is impossible that the laborer should perform the labor, without having his subsistence meanwhile. For these reasons, it is right that the subsistence of the laborer, while bestowing his labor upon the capital, should be the first charge upon the joint proceeds of the capital and labor."*

2. It is right that the capitalist should be made to risk his capital on the final success of the enterprise, without having any claim upon the debtor in case of failure, (that is, when the debtor performs his part in the enterprise honestly and faithfully;) because, beyond this point, the capital must be risked by somebody, (the capitalist or laborer,) in every enterprise. And inasmuch as profit (in the shape of interest) is as much the object of the capitalist, in furnishing the capital, as (in another shape) it is of the laborer in furnishing labor, it is as much right that he should take the risk of losing his capital, as it is that the laborer should take the risk of losing his labor, (that is, all over and above his subsistence.) The risk is then fairly divided between them; whereas it would not be, if the laborer were to risk both his labor and the capital. If the profit is to be divided in case of profit, the loss ought to be divided in case of loss. It is sufficient to make the enterprise a joint one, if the profit is to be divided in case of profit. And if it be a joint enterprise, it is as much right that the risk of loss should be jointly borne, as that the chance of profit should be jointly enjoyed.

But this joint risk, between the capitalist and laborer, or lender and borrower, as to the final result of an enterprise, in which the labor of the one and the capital of the other are to be jointly employed, for their joint profit, is not only right as between the immediate parties, but it is also right and expedient on general principles of economy—and for this reason, viz., that when both capitalist and laborer are interested in the risks and results of an enterprise, the enterprise will then have the benefit of two heads, instead of one, in judging of its feasibility and probable results, and also in deciding upon the best plan of execution. Injudicious enterprises will then be more likely to be avoided; and less labor and capital will, therefore, be wasted on such enterprises than now are. When a capitalist loans money to a laborer, and knows that he will have a claim on the subsequent earnings of the laborer for any capital that may be sunk in the enterprise, he (the capitalist) does not look, for himself, into the merits of the enterprise as he would if he knew that his ultimate security for his capital depended solely upon the success of the enterprise, instead of depending also upon the subsequent earnings of the laborer.

CHAPTER III. ECONOMICAL RESULTS FROM THE PRECEDING PROPOSITIONS

The last four of the preceding propositions assert the following principles, to wit:

1. The right of the parties to contracts to make their own bargains in regard to the rate of interest.

2. The right of free competition in the business of banking.

3. That the legal obligation of a debt, with specific exceptions, is extinguished by the debtor's making payment to the extent of his means, when the debt becomes due.

4. That the several creditors of the same debtor hold successive liens upon his property, for the full amount of their debts, in the order in which their debts respectively were contracted.

It will hereafter be shown that these several principles are legal ones, founded in natural and constitutional law, that is binding upon all our judicial tribunals, and incapable of being invalidated, or set aside, by any legislative enactments that are within the constitutional power of any of our governments.

It has already been shown, in part, how these principles are adapted to the accomplishment of the following objects, to wit:

1. That of enabling each poor man to obtain, on credit, capital sufficient to employ his own hands upon.

2. That of enabling him to obtain this capital on the most advantageous terms as to interest, and in the most advantageous form for his use.

3. That of enabling him to obtain this capital on credit, without the risk of incurring an arrearage of debt in case of misfortune, or of miscalculation, on his part, as to his ability to pay in full.

4. That of enabling capitalists to loan capital to poor men, and hold the first lien upon it, in the hands of the debtor, for their payment; and without the risk of having the capital so loaned taken and applied, either by the law, or by the debtor, to the payment of debts to other men.

If such be the operation of these principles, it seems to follow, that, if they would not fully, they would yet very nearly accomplish the object of securing to every poor man, who was honest, industrious, and ordinarily skilful, the enjoyment of his right to labor to the best possible advantage, (by enabling him to obtain capital upon which to labor,) and also of his right to the possession of all the fruits of his labor, except what, in the nature of things, must be paid for the use of the capital upon which he labors.

If there can be any doubt as to such being the result of these principles, it can arise only from a doubt whether capitalists would loan their capital to laborers, or poor men, if the principles of law applicable to the loan, were such as have been described. This question, therefore, becomes important, viz., whether capitalists would loan capital to poor men under such circumstances?

The true answer to this question is, that, although they might not do it immediately, they yet would do it speedily—and for the following reasons:

1. It is obvious that, *other things being equal,* it would be much more *safe* for capitalists, especially when they loan on personal security, to loan their capital in small sums to a large number of individuals, who were each their own employers, than in large sums to a small number, who employed the labor of others. It would, for instance, be much more safe to loan fifty thousand dollars, in sums of five hundred dollars each, to one hundred men, who should each bestow their own labor upon it, than to loan the whole fifty thousand to one man, who should employ an hundred other laborers in the management of it. Each of the one hundred men would be more likely to repay the whole of his five hundred dollars, than the one man to repay the whole of his fifty thousand dollars. And why? Because a man can manage, with far less risk and waste, and with much more comparative profit, a capital of five hundred dollars, on which he expends his own, and only his own labor, skill, and calculation, than he can a capital of fifty thousand dollars, on which he is obliged to employ the labor of an hundred others, whose skill, industry, and economy he cannot stimulate to the same degree, to which they would be stimulated, when laboring for themselves. Small borrowers are also less likely to squander their loans in extravagant living, and in extravagant, fanciful, and hazardous enterprises, than large borrowers. The command of large borrowed capitals often intoxicates men with the conceit of their superior judgment in the management of property, or with a vain ambition for display, or with dreams of sudden wealth, or with a passion for magnificent schemes—the consequences of all which are told in deep, perhaps ruinous losses to their creditors. On the other hand, a man who borrows merely capital enough to employ his own hands upon, avoids this intoxication entirely. He thinks only of results, and of skill, industry, and frugality, as the means. The small borrower is therefore much more likely, than the large borrower, to be *able* to repay his loan. He is also much more likely to be *willing* to repay it. The temptation to fraud in his case is trivial, compared with that in the case of the other.

2. In the case of small loans to a large number of individuals, each individual is not only more likely, for the reasons already given, to repay the loan, than the single individual is in the case of a large loan, but there is this further security, which is of great consideration with capitalists, who loan money, viz., that in cases of misfortune or fraud on the part of a debtor, the loss is small, not ruinous. If the hundredth debtor fail to pay, the ninety-nine are still solvent. The capitalist is not ruined. He loses but one per cent. of his whole capital. But in the case of the large loan, if the debtor fail, the creditor is ruined, or seriously injured—simply because he has embarked a large freight in one ship.

Capitalists understand these principles, as we see in the case of insurance companies, which act uniformly on the policy of taking a large number of small risks, in preference to a few large ones.

3. There is still another consideration in favor of small loans to a large number of individuals, who are their own employers, over large loans to a small number, who employ the labor of others. It is this. The labor of individuals, who labor for themselves alone, being, for the reasons al-

ready given, much more productive, economical, and profitable, than the labor of hirelings, individuals could afford to pay a higher rate of interest—much higher if it were necessary—for the little capital that each man needs to employ his own hands upon, than they can for capital on which to employ the labor of hirelings.

The higher self-respect also, which a man feels, and the higher social position he enjoys, when he is master of his own industry, than when he labors for another, would induce him, *if it were necessary,* to pay even such a rate of interest for capital as would cut down the not profits of his labor to the same amount that he would receive as a laborer for wages.

The inevitable result of these principles would be that the class of employers, who now stand between the capitalist and laborer, and, by means of usury laws, sponge money from the former, and labor from the latter, and put the plunder into their own pockets, would be forced aside; and the capitalist and laborer would come together, face to face, and make such bargains with each other, as that the whole proceeds of their joint capital and labor would be divided between themselves, instead of being bestowed, in part, as now, as a gratuity, upon an intermediate intruder. The capitalist would not only get all he now gets as interest, and the laborer all he now gets as wages, but they would also divide between themselves that sum which now goes into the pockets of the employer. What portion of this latter sum would go to the laborer, and what to the capitalist, would depend upon the circumstances and bargains in each particular case. The probability is that for the first few years after these principles went into operation, capitalists would ask and obtain a pretty high rate of interest. The competition among laborers, in their bids for capital, would produce this effect. But as the general safety of the system should be tested, and as laborers should gradually make accumulations, which would serve as some security for loans, and as the business of banking should be increased, the rate of interest would gradually decline, until—probably within ten or twenty years—capital would go begging for borrowers, and the current rate of interest would probably not exceed three or four per cent. And all the proceeds of labor and capital, over and above this interest, would go into the pockets of the laborer.

There obviously would be little or no risk in loaning capital to the generality of laborers, if the lender could hold the first lien upon the capital loaned; for industry, guided by ordinary skill and judgment in the application of labor, is almost certain to add more value to the capital employed than is necessary for the comfortable subsistence of the laborer. The cases, where it would fail of doing this, are few, and even in those few cases the deficiency would be very small. The principal risk, then, in loaning to a poor man, would be the risk of his death, and of loss in winding up his affairs. But this risk could be guarded against by the debtor's keeping his life insured. The cost of keeping his life insured for an amount equal to the capital he hired, would not ordinarily be more than one, or at most two per cent. upon that capital. And he would thus accomplish the double purpose of giving his creditors a guaranty for their loans in case of his death, and of securing something for the support of his family.

The risk of loss to the creditor, from the death of his debtor, is now made altogether greater than it otherwise would be, by those laws that give to a deceased debtor's family, (at the discretion of a Probate Judge,) the whole, or a part, of the effects in his hands, in preference to applying

them to the payment of his debts. Such laws are as injurious towards debtors, *as a class,* as they are unjust towards creditors. They virtually forbid capitalists to loan capital to a poor man, under penalty of being compelled to contribute the amount of such loans to the support of his family, in case of his decease. Such absurd and dishonest legislation defeats the very object it professes to have in view. Instead of its accomplishing the purpose of compelling creditors to support the families of poor men, it only serves, as a general rule, to deter capitalists from becoming the creditors of poor men at all. Thus the laws not only fail of providing for a poor man's family after his death, but they contribute largely to make it impossible for him, while living, to borrow capital upon which to labor, and thus to make any accumulations of his own for their support.

There is no justice, or even appearance of justice, in such laws. If A have loaned capital to B, and taken a note for it, he, in equity, holds a lien upon that property for his debt. It is unreasonable to expect him to loan his capital to a poor man on any other condition. And there is no more reason why he should be compelled to support the debtor's family, by losing his lion, in case of the debtor's decease, than there is why any other particular individual should be compelled by law to support them by gifts from his own pocket. If, under these circumstances, a debtor die, leaving his family destitute, they must depend, for their support, upon their own labor, and the assistance of relatives and friends, or upon such provision as the public make, by general taxation, for the support of all who have no other means of subsistence. There is no justice in compelling those few individuals, who may have befriended, or loaned capital to the debtor, in his lifetime, to assume the burden of supporting his family after his death, by giving up to them their lien on the capital they have loaned him. If a poor man wish to provide for his family, in case of his death, he should keep his life insured. He will thus provide for his family, and his creditors too.

One object of these laws is to throw upon the creditors of a deceased person a burden, that might otherwise fall upon the public at large. But their effect is to create ten times as much pauperism as they prevent—because they deter capitalists from loaning capital to poor men, and thus prevent the latter from making such accumulations, in their lifetimes, as they otherwise might, for the support of their families after their death.

It will be shown, in a subsequent chapter, that all legislation, of the kind mentioned, which destroys a creditor's lien on the effects of his debtor, in order to give them to the debtor's family, is unconstitutional and void.

If the risk of loss to the creditor, by the death of the debtor, were obviated in the manner now suggested, and if the prior creditor held a prior lien upon the property of his debtor, there would be little or no danger in loaning capital to poor men, in amounts sufficient to employ their own hands respectively.

The risk of the debtor's success in business would be small—as small as the risk of success can be in any business in which capital is hazarded—because the business, in which each debtor would employ his borrowed capital, would be such as both himself and his creditor should have approved—inasmuch as the creditor would not of course loan his capital to a poor man, unless he should have first ascertained the business in which it was to be employed, and satisfied himself that it was a safe one. The business, therefore, in which each debtor would employ his borrowed

capital, would be such as commended itself, (in its prospects of profit,) to the judgments of both debtor and creditor. Such business would ordinarily be more safe than that, in the planning of which the judgment of only one person had been consulted.

The risks from fire, theft, sickness of the debtor and his family, and other extraordinary misfortunes, would be no greater than those to which property is always liable, and would be guarded against by the creditor by the rate of interest.

The only remaining risk, to the creditor, is that of the frugality and industry of the debtor.

There are undoubtedly persons, who, if they could borrow money, would be idle and prodigal so long as it lasted, with little regard either to the rights of their creditors, or to their own subsequent interests. But such persons are very few, and their prodigal habits generally become so publicly known that capitalists would be in very little danger of loaning money to them through ignorance of their characters.

But the mass of men, when they have, in their hands, the means of bettering their condition, are zealous to do it; and if they could borrow capital, on which to bestow their labor, and could have all the fruits of their labor except what they should pay as interest, they would almost universally exert themselves, both by industry and frugality, to make such accumulations as would place themselves beyond the reach either of poverty, or of dependence upon loans from others. And where such exertions were made, they would be successful, with but few exceptions; and those few exceptions would generally be the result only of some such unusual misfortune as property and business are always liable to. In few or no cases would any considerable portion of the loan be sunk by mismanagement, or erroneous judgment, on the part of the debtor—for as loans would usually be made for no longer than three or six months each, there would not be opportunity for much waste of capital, unless by mismanagement that was so gross as to be culpable, or by misfortunes of rare and extraordinary character. In all other cases, then, capitalists would either obtain the whole of their loans with interest, or at least the greater part of their loans. The probability is, that in the aggregate of loans, the whole amount of losses would not be one fifth, or even one tenth as great as capitalists suffer under the present system. The system, as a system—at least during the first few years of its operation—would be altogether better for capitalists than the present one—for the losses would be less, and the rates of interest higher. Competition on the part of borrowers would produce this result.

But it is to be understood that this state of things—this competition among borrowers, arising from poverty on the part of so large a portion of the community as are now poor—could continue but a short time. Most of them—particularly those in the full vigor of life—would at once begin to realize more from their labor than would be necessary for their subsistence, and the payment of their interest. The work of accumulation would be at once begun; and they would speedily be in possession of sufficient acquisitions of their own to serve as security against all reasonable risks in their business; and such persons would then be able to borrow money at lower rates of interest than at first. In a very few years they would have made such accumulations as would be sufficient to employ their own hands, independent of loans from others. In a few years more they would themselves have small amounts to loan to others. The tendency of the system

would be to individual accumulations by the mass of the people. The number of borrowers would decrease; the rate of interest would decline, until finally it would probably be no more than three or four per cent., and capital would have to go in search of borrowers at that.

The manifest tendency of the system would be to give to each man separately the use of sufficient capital to employ his own hands upon; to give him the use of this capital at the lowest possible rate of interest, that is consistent with free competition among borrowers; and to give him the entire fruits of his labor, except what he pays as interest. What more, consistently with the rights of property, can be done to distribute wealth justly among those who earn it, or to equalize the pecuniary condition of mankind?

The result of the system would be, that the future accumulations of society, instead of being held, as now, in large estates, by a few individuals, while the many were in poverty, would be distributed in small estates among the mass of the people. The large estates already acquired by single individuals, would, in two or three generations, at most, become entirely scattered. Afterwards we should see no such inequalities in the pecuniary conditions of men as now exist. There would probably never be any very large estates accumulated on the one hand, nor would there be any general poverty on the other. Some few incompetent or improvident individuals might always be poor; but there would be no such general poverty as now prevails among those who were honest, industrious, and frugal.

The aggregate accumulations of society would probably be greater than they are now—for then every man being dependent upon his own labor for his subsistence, all would of necessity labor, instead of a part only as now. Men laboring for themselves would also labor with more skill and energy, and practise more economy in the use of capital, than when laboring for others. There would be less capital squandered in luxury and display, and in extravagant and fanciful schemes, than now, because few or none would ever have fortunes large enough to enable them to indulge in ostentation and prodigality. The consequence, so far as these causes alone were concerned, would therefore probably be, that the aggregate accumulations of society would be greater than they now are. But it is of little moment whether they would be greater or less. Distribution is of infinitely more consequence than accumulation. Our present accumulations are quite large enough, if not altogether too large, unless they can be more equally distributed. The luxury, the vices, the power, and the oppressions of the overgrown rich, and of those who are becoming such at the expense of other men's rights, are probably much greater evils than the simple poverty of the poor would be, if it were the result of natural and necessary causes.

But the power of the one great agent of accumulation—labor-saving machinery—would be greatly increased, under the system proposed, beyond what it is, or ever can be under the present system. And why? Simply because the extreme, neither of poverty, nor of wealth, is favorable to invention. The man, who has much wealth, is either too much engrossed by the care of it, or too much sunk in the luxurious indulgencies it affords, to have either time or inclination left for such mental exertions as are required for mechanical invention. On the other hand, the man, whose extreme poverty leaves him no respite from manual toil, and affords him no accumulations beyond his daily bread, has no opportunity to cultivate any mechanical genius with which nature

may have endowed him, or to mature and realize any mechanical conceptions that may visit his mind—because to do so would require leisure, subsistence, and some little capital with which to make experiments. Thus the two extremes of society contribute nothing to the list of mechanical inventions. Neither the serfs nor the nobles of Russia, neither the slaves nor the slaveholders of America, neither the nobility nor the starving portion of the population of England and Ireland, make labor-saving inventions. On the other hand, in New England, where wealth is more equally distributed than perhaps in any other portion of the world, more labor-saving inventions are probably made than by any other people of equal number on the globe. And if the wealth of New England were distributed still more equally among the population, and if men labored more for themselves respectively, and less for others for wages, the number of valuable inventions would undoubtedly be still greater—because, if the wealth were more equally distributed, few or none would be so rich as to have their inventive powers smothered or stupefied by luxury, or overwhelmed by the care of their wealth; and, on the other hand, few or none would be so destitute as to have their powers fettered by poverty. But all, or nearly all, would be precisely in those moderate circumstances, that would at once stimulate their minds to the greatest activity, and also afford them leisure and capital for experiments. The practice of each man's laboring for himself, instead of laboring for another for wages—which practice would be greatly promoted by a greater equality of wealth—would also contribute to the increase of labor-saving inventions—because when a man is laboring for himself, and is to have all the proceeds of his labor, he applies his mind, with his hands, much more than when he is laboring for another. And this habitual use of men's minds, along with their hands, in labor, would undoubtedly give birth to multitudes of inventions that would otherwise never be made.

When we consider the almost incalculable amount of labor that is performed by labor-saving machinery, and the incalculable wealth it produces—how many times greater this labor and wealth are than those performed and produced by mere manual toil, we can hardly avoid forming some conception of the importance of labor-saving inventions to the wealth and comfort of man, and of the importance of such a distribution of wealth as will most tend to increase the number of such inventions in future. Without these inventions, we should be little else than savages. It is these inventions that give us our comfortable, neat, and even elegant dwellings, and our comfortable, beautiful, and abundant clothing. They also give us abundant food, both by improving the implements with which we cultivate the soil, and by supplying our other wants (than food) so easily as to leave us abundant time to cultivate the soil. They also give us numerous and easy roads, and easy and elegant carriages. They give us the rail-road car and the steamboat. The labor-saving printing press gives us those abundant means of knowledge, which prevail in civilized over savage life.

Although the surplus accumulations, made by labor-saving machinery, over and above consumption, are now held mostly by a few hands, yet it is not the fault of the inventions themselves that it is so; but of the causes that have heretofore been pointed out as obstructing the general distribution of wealth. So far as actual consumption is concerned, the benefits of labor-saving inventions are distributed as equally among rich and poor, as are the benefits of manual labor. It is to labor-saving machinery that the poor, no less than the rich, are indebted for their present

comfortable dwellings, abundant clothing, abundant food, good roads, good carriages, and such means of knowledge as the printing press affords them. It is to labor-saving inventions that we are all of us mainly indebted that we are not now savages, living in wigwams, clothed with the skins of beasts, and comparatively destitute of knowledge. All, then, are interested in the increase of these inventions, and in such an equalization of wealth, as, (in the manner already suggested,) will most promote their increase.

One such invention as Fulton's adds more to the wealth of the world than the mere manual labor of a whole generation. Yet how many Fultons, in the past ages of the world, have had their genius smothered by luxury, or starved by want; and how has poverty been entailed upon the world in consequence. Who can conceive what would have been the present wealth of the world, but for the want of opportunity, on the part of inventors, to enrich it by the productions of their genius? But war, and monopoly, (which is but a species of war,) have ever been employed in killing and starving mankind; when, with peace and equality of privileges, the labors of inventors would have made the earth one universal garden, and given, in profusion, to what then would have been its countless population, knowledge, comfort, and plenty.

The mind of man is fertile of invention almost beyond conception. All it needs is stimulus and opportunity to develope itself. And since every invention, made by a single individual, enures to the benefit of mankind at large, mankind at large are interested in placing each individual in such a pecuniary condition as that his mind will receive the proper stimulus, and enjoy the proper opportunity. And that condition is one neither of poverty, nor riches; but of moderate competency—such as will neither enervate him by luxury, nor disable him by destitution; but which will at once give him an opportunity to labor, (both mentally and physically,) and stimulate him by offering him all the fruits of his labor.

CHAPTER IV. SOCIAL, MORAL, INTELLECTUAL, AND POLITICAL RESULTS FROM THE PRECEDING PROPOSITIONS.

Social Results. To appreciate, in some measure, the important social influences of the preceding propositions, it is only necessary to consider that that portion of human virtue, which consists in one's doing good to others than himself, depends almost entirely upon sympathy—upon one's susceptibility of being affected by the feelings of others; and that this sympathy, or susceptibility, is mostly, if not wholly, the result of his having had, in some measure, a similar experience with others, or of his having had social relations with them. Thus those who have been sick, sympathize with the sick; the sorrowful sympathize with the sorrowful; the merry with the merry; the rich sympathize with the rich; the poor with the poor; the learned with the learned; the vicious with the vicious; kings with kings; slaves with slaves; and all men more or less with their immediate personal acquaintances. And it is from the sympathy, thus excited by personal intercourse, or by a similarity of experience, that much, perhaps most of the kindness, shown by one human being towards another, results. On the other hand, much of the indifference, or want of kindness, manifested by one man towards another, is the natural result of his having had little or no similar

experience, or little or no personal acquaintance with him. Thus kings sympathize little with the people, and the people little with kings; slaves sympathize little with masters, and masters little with slaves; the rich sympathize little with the poor, and the poor little with the rich; and few sympathize much with strangers.*

So again, most, or all, of the hatred and injustice, felt and practised by one man towards another, results from the fact, that the points of collision in men's characters and interests are not rounded, and smoothed, and softened by the kindly influences of sympathy and acquaintance. Much of the hatred existing among mankind is the hatred of class against class—of classes against other classes, with whom they have little personal acquaintance, or little common experience. The rich do not hate the rich, as a class; nor the poor, the poor. But the rich hate and despise the poor, and the poor hate and envy the rich; and it is solely, or principally, because these two classes have not sufficient personal acquaintance, and sufficient similarity of experience with each other, to awaken their sympathies, and thus soften or avert the collision of their feelings, interests, and rights. Thus the rich will often defraud, oppress, and insult the poor, and the poor defraud and commit violence upon the rich, with less compunction than the same individuals would have defrauded, injured, or insulted one of their own number. And every man, who will defraud others at all, will more willingly defraud a stranger than an acquaintance.

Such being the laws of men's minds, and such the conditions on which so large a portion of men's virtue towards each other depends, it is obviously a matter of the highest social importance, that men—so far as it can be effected without infringing their individual liberties and rights—should occupy such situations and circumstances relatively to each other, as will promote the widest personal acquaintance, and the nearest similarity of experience among them all. To the accomplishment of this end, perhaps nothing is more conducive or indispensable, than an approximation to equality in their pecuniary conditions. Extremes of difference, in their pecuniary circumstances, divide society into *castes;* set up barriers to personal acquaintance; prevent or suppress sympathy; give to different individuals a widely different experience, and thus become the fertile source of alienation, contempt, envy, hatred, and wrong. But give to each man all the fruits of his own labor, and a comparative equality with others in his pecuniary condition, and *caste* is broken down; education is given more equally to all; and the object is promoted of placing each on a social level with all; of introducing each to the acquaintance of all; and of giving to each the greatest amount of that experience, which, being common to all, enables him to sympathize with all, and insures to himself the sympathy of all. And thus the social virtues of mankind would be greatly increased.

Moral Results. Important moral results, other than those already mentioned as social, would be accomplished by carrying into operation the principles that have been set forth in the preceding propositions. To be convinced of this, we have only to look at all the criminal and vicious individuals in the community, and see how many of their crimes and vices can be traced either to their superabundant wealth, their extreme poverty, their desire for wealth, or their fear of poverty.

1. Those grosser offences against the rights of property, that are punishable by society as crimes, such as theft, robbery, forgery, and swindling, result, not from the love of crime, but almost without exception from one or another of these three sources, viz., the sufferings of actual poverty; the fear of coming poverty; or a desire for those luxurious displays and indulgences, which the perpetrators see to be enjoyed by the possessors of wealth. And all these motives to crime are aggravated, and individuals are often goaded to recklessness and audacity by that hatred of society, and that sense of outrage and wrong, which result from the observation of those great inequalities of condition, those extremes of poverty and wealth, which are brought about by that monopolizing and iniquitous legislation, which, while it deprives the many of their natural right to obtain capital on which to labor, and of their natural right to all the fruits of their labor, arbitrarily gives to the few the command of all the loanable capital, and consequently the control, and a large part of the fruits of other men's labor.

But if the principles of the preceding chapters were administered as law, the crimes resulting from these sources would mostly disappear. The causes now impelling to the commission of them would rarely exist. Nearly every man would be able to control his own labor, and secure to himself the whole of its fruits, (except what he should pay as interest on his capital;) and these would save him from that extreme poverty which instigates to crime. Monopolies also being broken down, there would be little or no great wealth, in the hands of single individuals, to excite his envy, or his desire for luxury and display. He would be able, without crime, to maintain a position near enough to the general level of society to save him from the temptation to crime.

2. Those innumerable frauds that pervade every department of traffic, but are not of that tangible character that can be proved and punished by society, result, in an important portion of the cases, from a fear of poverty, and, in another important portion, from a desire of that superior wealth, which the few acquire by means of monopolizing legislation, and which constitutes one of the principal distinctions of society. But if the propositions, advocated in the preceding chapters, were carried into effect, the motives to these frauds would be, in a great measure, extinguished; because, 1, there would be no such liability to extreme poverty as now; and 2, there being then few or no great fortunes in society, but, on the contrary, a somewhat general equality in wealth, large fortunes would not, as now, constitute the foundation for castes and distinctions; consequently they would not be objects of such general ambition as now; and, of course, would not prompt men, so often as now, to the commission of frauds for the sake of obtaining them. Neither would the possession of them, when acquired by fraud, be such a salve to a man's character, as now. Wealth is now such a mark of distinction and honor, that society palliate, if they do not justify, almost any measure, short of open crime, to secure it. But under a system, where every man could easily obtain capital, on which to labor, and could have all the fruits of his labor; and where there was such a general equality of wealth as would necessarily result from those two causes, there would be no caste or distinction founded on wealth; *superior* wealth would not be at all necessary to give one reputation; all men, as a general rule, could *honestly* obtain all the wealth that would be necessary to their respectability; and they would have little temptation, as now, to forfeit their character for integrity, for the sake of acquiring a degree of wealth that would give them no marked importance in society.

It is manifest also that the present *precariousness* of men's pecuniary condition is a great provocative to injustice and fraud. It is not natural to mankind to desire to defraud or injure each other. But the wheel of fortune, in the present state of things, is of such enormous diameter; those on its top are on so showy a height; and those underneath it are in such a pit of debt, oppression, and despair; and its revolutions are so rapid, unsteady, and convulsive, that it is no subject of wonder that those on its sides should feel compelled, by the necessity of self-preservation, to jostle and cheat each other out of their footing, in order to seize a secure one for themselves. But under the system proposed, fortune could hardly be represented by a wheel; for it would present no such height, no such depth, no such irregularity of motion, as now. It should rather be represented by an extended surface, varied somewhat by inequalities, but still exhibiting a general level, affording a safe position for all, and creating no necessity, for either force or fraud, on the part of any one, to enable him to secure his standing.

3. Intemperance is another of the vices attendant upon superabundant wealth, and extreme poverty. The rich often become luxurious, gluttonous, and drunken, apparently because life hangs heavy on their hands. Being relieved from the necessity to labor, they feel little motive to that healthful industry, which is the companion and guardian of temperance; and their minds having been starved while they were engaged in hoarding their wealth, they are now incapable of intellectual pursuits, and have little or no resource against *ennui* but in animal indulgences. On the other hand, the intemperance of the poor is the natural consequence of the extremities of their condition. The excitement, or the stupor of intoxication, brings at least a temporary relief from the anxieties that harass and unsettle their minds, and drive them to desperation.

4. Gambling also naturally results from too much wealth, and too severe poverty. The rich gamble for excitement, and because they can afford, or think they can afford the risks. The poor gamble in the hope of gain—tempted by the prospect of fleecing the rich, or driven to it by the hopelessness of their own condition.

5. Lewdness—the destroying vice of society—is enormously increased, if not mainly supported, by the precariousness and the inequality of men's pecuniary condition. The rich become lustful and libidinous from idleness and luxury, and their wealth enables them to purchase the gratification of their desires. The poor become reckless from want, or from envy of the rich; and sell their virtue for bread, or for the means of display. Purity dwells with moderate competence, with the simple board, with the modest garb, and with cheerful industry.

The ruin of the young, particularly of young females, is mostly accomplished by means of their absence from home. They are generally safe in their father's house. But the same want of capital that compels a poor man to sell his own labor, compels him also to sell the labor of his children; and to send them, in their youth, beyond his own roof or farm, to occupy some menial situation in a rich man's service, where toil, oppression, insult, neglect, and loneliness are their lot; where few or no kind counsels meet their cars; where no friendly eye watches over their ways, and no guardian hand protects them from the dangers that crowd around them. What armies of the youth of both sexes are annually driven, by poverty, from the parental roof, and parental care,

to seek menial employment in manufacturing and commercial towns, and to fall sacrifices to their own inexperience, and the enticements of the libertines that swarm in such places.

If every man could obtain the capital necessary to employ his own hands and the hands of his family, children would be reared at home much more generally than now. It would rarely be necessary for daughters to go abroad for employment; and never to occupy servile and degraded situations as now. And if daughters only were to be reared uniformly at home, society would be pure compared with what it is now. It would often be necessary for sons to go from home to learn some different calling from that followed by their fathers; but they would not be driven from home by poverty. And not being driven from home by poverty, they would not be driven into servile and degraded situations, where their loneliness and misery would urge them into vice. As there would then be no such extremes of poverty and wealth, as now, a son leaving his father's house for employment, would not leave an abode of want to become a menial in the mansion of the rich; he would merely leave one comfortable and virtuous home for another of like character, in a family situated in pecuniary respects much like his own, and in which he would be an equal and respected, perhaps cherished member, instead of a menial and an outcast. In such a situation his morals would be much more safe than when driven by poverty into a servile and lonely condition, where he would meet no sympathy from the family with which he lived, and find no virtuous companionships to keep him from vice.

That general equality of condition, and that pecuniary independence, which should enable parents always to rear their children at home, or which should merely save them from the necessity of placing them abroad, except in situations and families where the want of parental kindness and watchfulness would be, in some good measure, supplied to them, would save almost countless multitudes of the youth of both sexes from the ruin that now overtakes the neglected and outcast children of poverty.

But the system proposed would promote chastity in still another, and perhaps even more effectual way, to wit, by making marriage nearly universal, and by inducing it in early life. Celibacy is the great cause of licentiousness. If all men were to be married in early life, there would be very little libertinism—for although libertinism now invades married life, it does not originate there. Its principal source is in the unnatural and solitary state of large numbers of both sexes. The sexes are so nearly equal in number that if all of either sex were married, there would not be enough of the other left unmarried to give rise to any general profligacy.

The desire of matrimony is so strong and universal, and manifests itself so early in life, that nearly all would be married at an early age, if their pecuniary circumstances would admit of it. The causes, of a pecuniary nature, that prevent universal and early marriages, are these:

1. Young men cannot establish themselves in business of their own, immediately on attaining their majority, because they cannot obtain capital on which to employ their labor. Until they can obtain capital, and thus establish themselves, they do not wish to marry, because their station in society will not be agreeable, or because their income, while laboring for others, will not give them a sufficient support. But if freedom in banking, and freedom in the rate of interest, and the prior right of the prior creditor to the property of the debtor, were recognized as law, there would

be no difficulty in a young man's borrowing capital enough to employ his own hands upon; and his being married would improve, instead of injuring his chance of obtaining it; because his being married would afford his creditor an additional guaranty for his industry, economy, and morality. Other things being equal, a married man can always obtain both credit and employment, in preference to an unmarried one.

2. Men's fortunes, in the present state of things, are so precarious—there is so much danger that a man, who is in comfortable circumstances to-day, may, by some of the hazards of trade, lose his property to-morrow; and not only lose it, but be left with a debt upon him, which will be a charge upon his future earnings, and an obstacle in the way of his borrowing the capital necessary to make his industry lucrative—there are so many dangers of this kind, that a prudent man dare not marry until he has accumulated, as he thinks, property enough to protect him, to some reasonable extent, against the chances of misfortune. He therefore lives unmarried for years solely to make this accumulation. But if the obligation of debts attached only to the property that a man should have when his debt should become due, and not to his earnings afterwards, so that he could always acquit himself of his debts by paying to the extent of his means, this danger of being overwhelmed in debt and consequent poverty, would be removed. He would know that he could always be at least a free man, if not a rich one; and that he could always be sure at least of his earnings for the support of his family; and that if he could get capital, (as he could under the system proposed,) sufficient to employ his own hands upon, he could always support them in a condition of respectability.

3. A third motive, with many persons, for postponing matrimony, is the desire of first accumulating sufficient wealth to enable them to maintain a domestic establishment of such elegance and cost as will bring them within the caste or circle distinguished by wealth and display. But if the system proposed were carried into effect, it would produce such a comparative equality in men's conditions, that there would be no rank or caste founded on such distinctions; and thus this motive to the postponement of marriage would be removed.

Thus the various motives, of a pecuniary nature, which now operate to dissuade or deter men from early matrimony, would be, in a great measure, removed by the system proposed; and the morals of society would be very greatly purified by the change.

Under the present system, we see society agitated by the efforts of individuals, associations, and of society as large, to check the several crimes, frauds, and vices, that have now been enumerated, and that seem sometimes to threaten all human virtue. Legislatures, courts, prisons, churches, schools, and moral associations of all sorts, are sustained at an immense cost of time, labor, talent, and money. Yet they only mitigate, they do not cure the disease. And like all other efforts to cure diseases, without removing the cause, they must always be inadequate to the end in view. The *causes* of vico, fraud, and crime, to wit, excessive wealth and excessive poverty, must be removed, before society can be greatly changed. Just in proportion, or very nearly in proportion, as these causes are removed, will the ignorance, the vices, the frauds, and the crimes of all sorts naturally resulting from them, disappear.

Intellectual Results. The intellectual advancement of society would be immensely promoted by the adoption of the system proposed. To be convinced of this, we have only to consider the following facts:

1. The mental independence of each individual would be greatly promoted by his pecuniary independence. Freedom of thought, and the free utterance of thought, are, to a great degree, suppressed, on the part of a large portion of the poor in all countries, by their dependence upon the will and favor of others, for that employment by which they must obtain their daily bread. They dare not investigate, or if they investigate, dare not freely avow and advocate those moral, social, religious, political, and economical truths, which alone can rescue them from their degradation, lest they should thereby sacrifice their bread by stirring the jealousy of those on whom they are dependent, and who derive their power, wealth, and consequence from the ignorance and servitude of the poor.

2. The mass of the poor in all countries have but little leisure, or means, or opportunity for intellectual cultivation. Wherever capital is in the hands of the few, the competition for employment among laborers becomes so great as to reduce the price of labor to a sum that will give the laborer but a mean and wretched subsistence in return for the severest toil of which his body is capable. Under these circumstances, intellectual culture, to any considerable extent, becomes an impossibility. Even the desire of it is in a great measure crushed, and but feebly animates the breast of the mass of them. Their thoughts are confined, by the pressure of their physical necessities, almost wholly to the questions of what they shall eat, and how they shall live.

When it is considered how large a portion of the human race have in all ages been thus condemned, by extreme poverty, to an almost brutish and merely animal existence; that their minds were, nevertheless, naturally susceptible of the same cultivation and development as those other minds that have been cultivated and developed; that they needed, for their growth, but such an opportunity as all might have enjoyed, if each man could have controlled his own labor, and possessed its fruits; that their intellects, thus enlightened, would have contributed their share, equally with others, to the general progress of knowledge; that among them must have been a due proportion of superior minds, capable of becoming discoverers in science, inventors in the arts, and teachers in morals, religion, and law; when we consider these facts, we cannot entirely shut out the idea, although we can form no adequate idea, of what the world might now have been, if so large a portion of its intellectual light had not been thus needlessly and wickedly extinguished.

3. The system proposed would speedily result in the universal education of children. The universal education of children can, in the nature of things, never be accomplished except through the universal ability of parents to provide the means of educating their own children respectively. In some small portions of the most civilized parts of the world, educational systems have been established, which give knowledge to the children of the poor, at the public expense. Yet under these systems children are but partially and poorly educated, in comparison with what they would be, if all parents were able to meet the necessary expenses of educating their own children. These systems too, defective and inadequate as they are, prevail in but small districts of the world; and if extended at all, can be extended but slowly. Moreover they are but the unnatu-

ral and forced productions of an unnatural state of society, consequent on the unnatural distribution of wealth. They merely constitute one of the remedies, by which government attempts to mitigate the evils of its own injustice, to wit, the evils of that monopolizing legislation, by which they keep capital in the hands of the few; deprive the many of their right to labor independently for themselves; rob them of the fruits of their labor; and thus render it impossible for them to educate their children. Such being the character of public systems of education, their perpetuity cannot be relied on; nor can it even be advocated, except on the supposition that a large, or at least somewhat considerable, portion of the people are always to remain too poor to educate their own offspring. And if they cannot be relied on as permanent institutions where they already exist, still less can they be looked to as the means by which the world at large is over to be universally educated. The universal education of children can, in the nature of things, never come from any other source than the universal ability of parents to provide for their education. And this universal ability of parents can come from no other sources than their liberty to labor; their liberty to borrow capital on which to labor; and their liberty thus to secure to themselves all the legitimate fruits of their labor.

4. The intellect of society would be *much better directed,* under the system proposed, than under any that has ever existed. It would be directed more to the service and improvement of man, as man; and less to the aggrandizement of one portion of mankind, at the expense of the other portions, than it is, or ever has been under systems where wealth and power are distributed by arbitrary, instead of natural and equal laws. This system would present no such great prizes, either of wealth or power, as are presented by existing systems, to tempt the avarice and ambition of those stronger minds, that have great capacities for both good and evil, and that generally follow good or evil according to the respective influences of each upon their own elevation. The system proposed would bring such men down very nearly to the same social, political, and pecuniary level with the mass of men; and place entirely beyond their reach and their hopes those great fortunes, and that great political power, which can now be obtained, and which can only be obtained, by means of those arbitrary political arrangements that produce a corresponding poverty and subjection on the part of the masses.

So long as society, or its institutions, offer a few great prizes, either of wealth or power, for the acquisition of any one, so long many of the more powerful minds will be engrossed in the pursuit of them. Unable to obtain them, (inasmuch as they are in their nature unattainable,) consistently with the equal rights of all, they will propose to secure them by sacrificing the rights of a part, and sharing the spoils with their adherents, by means of partial and monopolizing legislation. Thus their contests with each other will be made to involve the interests, welfare, and rights of every other man—for every other man is to be made either a victim or a beneficiary of some one or more of the various schemes proposed by the different competitors. Thus nearly every individual mind in the community becomes occupied, necessarily occupied, as a party interested, on one side or the other, in these strifes, where power and plunder are the objects of the assailants, and defence and retaliation the objects of the assailed. Such contests not only necessarily suspend, to a great degree, all those labors and studies that really advance man as an intellectual and moral being, or promote the impartial welfare of the race, but they actually divert a vast mass of

mind into pursuits—of monopoly and war—that have for their objects, injury and destruction to mankind at large. Much of the intellect of society, under such circumstances, is not merely wasted, as regards purposes really beneficial to all mankind; it is worse than wasted; it is exerted for purposes of positive detriment and injury.

Such selfish, absorbing, and destructive agitations could evidently find no place under institutions, which, instead of offering dazzling prizes to the few, should, on the contrary, secure to each individual, without discrimination, the full enjoyment of his right to labor, to hire capital on which to labor, and to hold all the legitimate fruits of his labor. The mass of men, under such circumstances, could not be withdrawn from the quiet enjoyment of their just and natural rights, and the pursuit of their highest interests, to enlist, as they now do, as mercenaries under the lead of ambitious, rapacious, and unprincipled men, or to lend themselves as tools in their iniquitous enterprises of avarice and aggrandizement. Ambition, therefore, for want of troops, if for no other reason, would be obliged to abandon its war upon the equal rights of men; and to apply itself to achievements that promise good, instead of evil, to man in the aggregate. Thus preëminent minds, that are now employed and exhausted in the projection and execution of great plans of rapacity and power, in fierce struggles for the elevation of the few, and the corresponding prostration of the many, would be driven, by a sort of moral necessity, to seek more peaceful employments. And these other employments would generally be of such philosophical, scientific, or literary kinds, as active minds delight in, and such as conduce to the physical, intellectual, or moral advancement of the human family at large. And mankind at large, being thus relieved from many of those turbulent collisions, which now inflame their passions, and pervert their judgments, and having more leisure and quiet for intellectual pursuits, would rapidly acquire a more humane and intellectual character.

Political Results. If the several propositions stated in chapter second, were recognized as law, and if their effects upon the pecuniary conditions of men should be such as it is here claimed they would be, the only true and rightful ends of all political institutions, so far as they relate to men's pecuniary conditions, would seem to be very nearly accomplished. For what rightful objects have political institutions, in reference to pecuniary matters, beyond that of securing to each individual the free exercise of his natural right to acquire all he can by honest and moral means, and of his right to the control and disposition of all his honest acquisitions? Each man has the natural right to acquire all he honestly can, and to enjoy and dispose of all that he honestly acquires; and the protection of these rights is all that any one has a right to ask of government in relation to them. It is all that he *can* have, consistently with the equal rights of others. If government give any individual more than this, it can do it only by taking it from others. It, therefore, in doing so, only robs one of a portion of his natural, just, and equal rights, in order to give to another more than his natural, just, and equal rights. To do this, is of the very essence of tyranny. And whether it be done by majorities, or minorities, by the sword, the statute, or the judicial decision, it is equally and purely usurpation, despotism, and oppression.

Labor is one of the means, which every man has a natural right to employ for the acquisition of property. But in order that a man may enjoy his natural right to labor, and to acquire all the

property that he honestly can by it, it is indispensable that he enjoy fully and freely his natural right to make contracts; for it is only by contract that he can procure capital on which to bestow his labor. And in order that he may obtain capital on the best possible terms, it is indispensable that his natural right of contract be entirely unrestricted by any arbitrary legislation; also that all the contracts he makes be held obligatory fully to the extent, and only to the extent, to which, according to natural law, they can be binding.

But nearly all the positive legislation, that has ever been had in this country, either on the part of the general or state governments, touching men's right to labor, or their right to the fruits of their labor, or their rights of contract—whether such legislation has had reference directly to banks and banking, to the rates of interest, to insolvency and bankruptcy, to the distribution of the debtor's effects among his creditors, or to the obligation or enforcement of contracts—nearly all has been merely an attempt to substitute arbitrary for natural laws; to abolish men's natural rights of labor, property, and contract, and in their place establish monopolies and privileges; to create extremes in both wealth and poverty; to obliterate the eternal laws of justice and right, and set up the naked will of avarice and power; in short, to rob one portion of mankind of their labor, or the fruits of their labor, and give the plunder to the other portion.

Some of this legislation has probably been the result of an ignorance of natural law; but very much of it has undoubtedly been the result of deliberate design.

The system proposed would take men's pecuniary interests, in a great measure, out of the hands of the legislative branch of the government, and leave them to rest upon immutable principles of natural law, to be ascertained by the judiciary. If this were accomplished, the "natural, inherent, and inalienable right of individuals to acquire, possess, and dispose of property," would then have at least a semblance of reality in actual life; and would cease to be treated, as it now is, as a mere privilege to be enlarged, contracted, or utterly withholden, as those who administer the government may arbitrarily dictate. But so long as this right is admitted to be a subject of arbitrary legislation, so long it will be perpetually infringed, invaded, and denied, by innumerable legislative devices of the cunning and the strong, which a large portion of society, the ignorant, the weak, and the poor, can neither ferret out, nor resist.

If the judiciary should assert and maintain, (as they are constitutionally bound to do,) the natural right of all men to acquire, possess, and dispose of property, in accordance with the principles of natural law, they would do such a deed for freedom, humanity, and right, as has never yet been done since government was instituted. And why do they not do it? Many, if not all our state constitutions declare, either in form or substance, that "the right to acquire, possess, and dispose of property, is a natural, inherent, and inalienable right." The legal authority of this constitutional declaration, is to prohibit and annul all legislative enactments whatsoever, that would infringe the right of *any* individual to acquire and dispose of property on the principles of natural law. This principle may not, perhaps, be distinctly asserted in *all* our state constitutions; but it is, nevertheless, everywhere law; law, by an infinitely higher authority than constitutions and statutes. The right, (whether practically acknowledged, or not,) is an "inherent, essential, inalienable right" *of human nature:* it is the natural and necessary right of providing for one's own subsistence;

and can no more be surrendered to government, (which is but an association of individuals,) than to a single individual. It is, therefore, in the nature of things, impossible that any government can have the *right*, (however it may have the power,) to infringe it. Why, then, do not the judiciary sustain this principle, and annul all the arbitrary legislation against banking? against particular rates of interest? and all the other legislation, by which individuals are deprived of their natural right to make contracts, naturally lawful, for the acquisition and disposal of property? and by which a few monopolists are enabled to control so large a portion of the labor and capital of the community? Is the reason to be found in their ignorance? their cowardice? their bigotry? or in their corrupt subserviency to the other departments of the government, from whom they receive their appointments and salaries, and to whom alone they are made amenable for their conduct?

Were the judiciary to assert this principle, (that is, the natural right of men to make all contracts, that are in their nature lawful, for the acquisition and disposal of property,) and carry it out in all its ramifications, as they are morally and legally bound to do, government would no longer be, what it now, to a great extent, everywhere is, an organized system of plunder, usurpation, and tyranny, by which the intelligent, the rapacious, and the strong continually prey upon the ignorant, the weak, and the poor.*

Should the judiciary ever take this ground, government will then be reduced to a very simple and harmless affair, in comparison with what it now is. All those innumerable, arbitrary, conflicting, and over changing legislative enactments, which annually come upon us like visitations from some incarnated spirit of anarchy and injustice, to elevate, depress, and change the relative values of different kinds of property, (thereby putting into one set of pockets fortunes taken from others,) and to enlarge, diminish, and deny men's natural and equal rights of acquiring their subsistence, will then give place to judicial decisions founded upon the unchanging principles of natural law, and affecting uniformly the rights of all; and to a few simple legislative provisions for carrying these decisions into effect.

No reasonable objection can be made to this doctrine on the ground that natural law, in its application to all possible cases, is not already fully and absolutely known. If it be not, in any particular case, known, that is only a reason why it should be sought after, and ascertained, (by the proper tribunal, the judiciary;) and not why it should be arbitrarily set at defiance where it is plain and palpable. The truths of mathematics are not fully known in their application to all possible cases; yet is that any reason why they should not be adhered to so far as they are known, or can be ascertained? Is it any reason why the ruling power of a state should innovate upon mathematical principles by legislation, and enact that three and four shall be counted as fifteen, and eight and six as forty; and that the amount of men's dues to each other shall be determined by such processes as these? As much reason would there be in such a procedure, as there is in legislatures attempting to prescribe men's rights of property, or their rights to the acquisition of property, in defiance of the principles of natural law. Natural law is the science of men's rights, as mathematics is the science of numbers and quantities. It is impossible, in the nature of things, that men can have any rights, (either of person or property,) in violation of natural law—for natural law is justice itself. And justice is a science, to be learned; not an arbitrary rule, to be

made. The nature of justice can no more be altered by legislation, than the nature of numbers can be altered by the same means.

Natural law, in regard to all human rights, is capable of being ascertained with nearly absolute certainty. There are no Gordian knots in it, that must be cut by legislation. It has been said with very great reason, and probably with entire truth, that nothing approaches so near the certainty of mathematics, as the reasonings of the law. Sir William Jones, a man preëminently learned in the laws of different nations, ancient and modern, says, "It is pleasing to remark the similarity, or rather identity, of those conclusions, which pure unbiased reason, *in all ages and nations*, seldom fails to draw, in such juridical inquiries as are not fettered and manacled by positive institutions."*

The science of justice, then, is, in its nature, certain; and its truths are susceptible of being ascertained, to a very great extent, as absolutely as any other truths of an abstract nature. We have also, in this country, greater facilities for progress in the science of the law, (if law were suffered to rest on natural principles,) than in any other country. Individual rights, the only basis of natural law, are already acknowledged to a greater extent here than elsewhere. We have also a large number of separate states, each having an independent judicature. The decisions of these separate courts are continually coming under examination in all the others. If an error is committed by one of them, through want of investigation, or any other cause, the same question, when it arises in the others, is independently and more thoroughly scrutinized, and thus the truth is nearly certain to be ascertained. The science of the law, therefore, but for that legislation which innovates upon it, and sets all natural principles at defiance, would be carried further towards perfection in this country than it ever has been elsewhere.

If, however, the arbitrary commands of legislative bodies are better standards of right, than the everlasting principles of justice and natural law, why are not the former substituted for the latter in all cases whatsoever? Why do not legislatures make thorough work in demolishing, obliterating, and erasing everything like natural right? We have still, nearly whole branches of law, on which legislation has not yet dared to lay its Vandal hand. Why are they spared? Is it because the utter extinction of justice would defeat the purposes of rapacity itself, by not allowing men to produce enough to be worth the robbing? Or is it because knowledge, and consequent power, have at length become so far diffused among the mass of mankind, that no very considerable portion of them can now be reduced by the others to unqualified servitude?

CHAPTER V. THE LEGAL NATURE OF DEBT.

The nature of debt, and the extent of its moral and legal obligation, have been very much misunderstood; and from this misunderstanding, and the erroneous judicial decisions consequent thereon, have resulted perpetual ruin to a large proportion of debtors: utter confusion, and the violation of all natural law in regard to the rights of creditors, as against each other, in the prop-

erty of their debtors; and the destruction, in a great measure, of all credit, that is sound in itself, and safe and beneficial to both debtor and creditor.

This chapter and the succeeding one will attempt to prove that a debt—such as is evidenced by a promissory note, for instance—has *no legal* obligation, and generally no moral one, beyond the means of the debtor to pay at the time the debt becomes due.

Some illustrations will hereafter be given of cases, where a moral obligation to pay may remain, after the legal one has expired. The effect also of fraud, fault, neglect, and the violation of good faith, on the part of the debtor, will be explained in a subsequent part of the chapter. At present, the argument will have reference solely to the *legal* obligation of debt, and to cases where there has been no fraud, fault, neglect, or violation of good faith on the part of the debtor. That the debt, in such cases, is *legally* binding, at most, but to the extent of the debtor's means of payment at the time the debt becomes due, is proved by the following arguments.

1. The law requires no impossibilities of any man. If, therefore, a man contract to perform what proves to be an impossibility, the contract is valid only for so much as is possible.

Neither is a man bound, before he enters into a contract, to know, (because it is impossible that he should know,) the utmost extent of his ability; nor to foresee, (because it is impossible that he can foresee,) all the contingencies and accidents that may occur to defeat his purposes. He is, therefore, bound only to the faithful exercise of all his powers, and the faithful application of all his means. As this is the most that the debtor can contract for, the creditor is bound to know it, and, of course, must always be presumed to have understood the contract, subject to that limitation. A creditor is, therefore, as much bound to judge for himself, whether the means and ability of the debtor will be sufficient to enable him to fulfil his contract to the letter, as is the debtor himself, unless the debtor do something intentionally to mislead him in his judgment of them.

2. A contract to perform a *manifest* impossibility, is an immoral and absurd contract; and a contract, that is either immoral or absurd, is void from the beginning. It has no legal obligation whatever. And if a party pay value, as a consideration for such a contract, he must lose it, unless the receiver voluntarily restore it. The law will neither restore it to him, nor compel the fulfilment of even the possible portion of the contract.

Every contract would be an immoral and absurd one, and therefore void from the beginning, if it were a contract to perform a particular act, or to pay a particular amount of money, at a particular time, *at all events,* and without any implied reservation for contingencies, accidents, and misjudgments, that may make it impossible to fulfil the letter of the contract. The only way, therefore, to make any contract a moral, reasonable, and, therefore, valid one, is to understand it subject to the limitation of all contingencies that may make its fulfilment impossible; and as binding only to the extent of what shall be possible.

If, then, the contract be entered into, with these limitations implied, it imposes no obligation upon the debtor to make good, out of means that he may acquire after the contract shall have expired, any short comings, that were occasioned, not by his fault, neglect, or bad faith, but by

causes, which fixed a limitation upon his original liability, and of whose effects the creditor of course took the risk.*

3. *Time* is a material element of the contract. All the *legal* obligations of the contract, of necessity, come to maturity at the time agreed upon for its fulfilment; else the whole of the debt would not be due at that time. At the maturity of its legal obligations, it is plain that the contract can attach only to the property *then* in the hands of the debtor—for there is nothing else for it to attach to. And it is plain that it can attach to nothing acquired by the debtor subsequently—because to allow it to do so, would be to extend the obligations of the contract beyond the time to which they were originally limited. It would be equivalent to creating a new contract, for a new period of time. Or it would be equivalent to saying that the obligations of the contract had *not* come to maturity at the time agreed upon for its fulfilment.

But further. Although the preceding considerations are sufficient to prove that a debt has no *legal* obligation beyond the means of the debtor at the time the debt becomes due, they, nevertheless, do *not* convey a full and clear idea of the true nature and obligation of the contract of debt. And this leads to another proposition, as follows:

4. A contract of debt is a mere contract of bailment, differing, in no essential element of the contract, from other contracts of bailment.†

That it is so, is easily shown. Thus a promise to *pay* money, for "value," that has been "received," is evidently a mere promise to *deliver* money, which has been sold and paid for; because the "value," that has been "received" by the debtor, is nothing else than the equivalent, or price, paid by the creditor, for the money which the debtor promises to deliver, or pay to him.

The right of property, in this money, that is to be delivered to the creditor, (or in a quantum of value, in the hands of the debtor, sufficient to purchase the money,) obviously passes to its purchaser, the creditor, at the time he thus buys, and pays for it; and not, as is generally supposed, at the time it is finally delivered, or paid to him; for it is absurd to say that when a man has bought and paid for a thing, he does not, from that time, own it, merely because it is not delivered to him at that time. A promise to deliver, or pay money, especially when coupled with an acknowledgment that the equivalent, or price of the money promised, has been "received," is as good evidence that the right of property in the money, (or in an amount of value sufficient to purchase the money,) has already passed to the purchaser, as is a delivery itself.

The obligation of *debt*, then, on the part of the seller of the money, arises simply from the fact that the money, (or an amount of value sufficient to purchase the money,) which he has thus sold, and received his pay for, *and the right of property in which has already passed to the purchaser,* is, by agreement, to remain, for a time, in his, (the seller's,) hands, for his use. And the sum of his obligations, *as a debtor,* is, not, *at all events,* to preserve and deliver, but *to use due diligence* to preserve, and, (at the time agreed upon,) to deliver to the purchaser, the money, or value, which he has thus sold to him.

A debtor, then, is a mere seller of value, (generally measured by money,) which he is to deliver to the purchaser at a time subsequent to the sale. And a creditor is a mere purchaser of value,

that is to be delivered to him, (generally in the shape of money,) at a time subsequent to his purchase of it.

But the material point to be regarded, is, that the right of property, in the money, (or in the amount of value to be measured by money,) which is thus bought and sold, passes to its purchaser, by the sale, and, of necessity, at the time of the sale, and not at the time of final delivery, as is generally supposed.

The common error on this point, viz., *that the right of property,* in the value thus purchased and paid for by the creditor, *does not pass to him* until the final delivery of it to him in the shape of money, (or in whatever other shape it may be agreed to be delivered,) is the source of all our erroneous notions of the nature and obligations of debt; for if the right of property, in the value purchased by the creditor, passes to him at the time of the purchase, then the seller, or debtor, from that time until the time agreed on for its delivery, holds the value, thus sold, merely as the bailee of the purchaser, or creditor; and his obligations are only similar to the obligations of bailees in other cases. The value itself is at the risk of the purchaser, (or creditor,) from the time of the sale, unless it be lost through some fault, or culpable neglect, on the part of the seller, (or debtor.) The seller, (or debtor,) is only bound to due fidelity and diligence in the preservation of the value, and not for its absolute preservation. If it perish in his hands, or be lost out of his hands, without any fault or culpable neglect on his part, he is not answerable. The loss falls on the purchaser, and real owner, whose bailee he (the debtor) is from the time of the sale.

The contract of debt, therefore, presupposes a prior contract of sale, to wit, a sale, by the debtor to the creditor, of the money or value, which the debtor is to hold, for a time, as the bailee of the creditor, or purchaser.

It is important to be borne in mind, that this contract of sale, which, in point of law, precedes, although in point of time it is simultaneous with the contract of bailment, is, in reality, a sale, not of the specific money promised, but of a *certain quantum of value,* out of the debtor's whole property, to wit, a quantum of value sufficient to produce or purchase the amount of money promised; and which is to be converted into money by the time agreed on for the delivery.

This double contract of sale and bailment of necessity implies that the debtor has property in his hands, both for the sale and bailment to attach to—otherwise there would be no validity in either contract.* No contract, either of sale, or bailment, is of any validity, unless there be property for the contract to attach to, *at the time it is made.* It is in the nature of things impossible that a man *can* make a contract, either of bailment or sale, that can bind property, or convey any right to property, unless he have property, *at the time,* for the contract to attach to. All contracts of debt, therefore, whether morally void, or not, are *legally* void, unless the debtor have property, *at the time,* for the contract to attach to, and bind.‡

A contract of debt, then, in order to be valid, *must* attach to such property as the debtor has *at the time of the contract*—because there is nothing else for it to attach to, and it must attach to something, or be utterly invalid. Its validity, as a *legal* contract, depends upon its attaching to something, *at that time;* and, of consequence, it has no validity beyond the property to which it *then* at-

taches, (and such as may become indistinguishably mixed with it prior to its delivery;) its validity lives only in the life of the property to which it attaches; and when the property, to which it attaches, is exhausted, its validity, as a contract, is exhausted. The obligation of the contract is fulfilled, when all the property, to which it attaches, and which it binds, is delivered to the creditor.

This contract of bailment, or debt, differs from other contracts of bailment, in no important particular, unless in these, viz.:

1. That the bailment is of *a quantum of value*—to wit, enough to purchase the amount of money promised—existing in a form not designated by the contract, instead of a bailment of a specific thing. But this is obviously a difference of form merely, and not of principle.

2. That it is always of a quantum of value, that has just been sold by the debtor to the creditor. Indeed the bailment is one of the conditions of the sale. The debtor sells the value to the creditor, with a proviso that he (the debtor) shall be allowed to retain and use it for a time agreed upon.

3. That this quantum of value, not being designated, or set apart by the contract, from any other value, that the debtor may have in his hands, is, in reality, merged in the value of all the property, that the debtor, or bailee, has in his hands.

4. That this value is finally to be converted into some particular form, (generally that of money,) for delivery to the creditor, or bailor.

5. That the debtor, during the bailment, while bestowing his care and labor upon the whole property in his hands, in which the value bailed to him is merged, is allowed to take his necessary subsistence out of the mass; by reason of which it may sometimes happen, in cases of sickness, misfortune, or accident, that the value bailed may itself be diminished, or consumed.

6. The debtor, or bailee, is allowed to traffic with the whole property in his hands, and of course with the value bailed, which is merged in that property.

In this respect, however, the bailment of debt does not differ, in principle, from bailments to agents, factors, and commission merchants, who are authorized to traffic with, and exchange or sell the property intrusted to them. Where this is done, the same right of property, which the bailor had in the original commodity bailed, attaches to the equivalent which the bailee receives for it. And it is the same in the bailment of debt. The right of property, which the creditor has in the original quantum of value bailed to the debtor, follows that value, and clings to it, through all the forms and changes to which the labor and traffic of the debtor may subject it.

Some of these points will be further discussed and explained in the next chapter.

That a contract of debt is a mere contract of bailment, as has now been described—that is, a mere bailment, by the creditor to the debtor, of a quantum of value sold by the latter to the former, and to be finally delivered in the shape of money, but in the mean time to remain merged in the general property of the debtor—seems to be too nearly self-evident to render a more elaborate argument, *at this point,* necessary. It will, however, be further discussed in the next chapter.

If debt be but a bailment, the value bailed is at the risk of the owner, (that is, of the creditor,) from the time he buys and pays for it, and leaves it in the hands of the seller, or debtor, until the time agreed on for its delivery to himself. If it be lost during this time, without any fault or culpable neglect on the part of the bailee, or debtor, the loss falls on the owner, or creditor. All the obligations of the owner or debtor are fulfilled, when he has used such care and diligence, in the preservation of the value bailed, as the law requires of other bailees, and has delivered to the creditor, or owner, at the time agreed upon, the value bailed, or such part thereof, if any, as may then be remaining in his hands.

If such be *not* the natural limit to the obligation of the contract of debt, then there is *no natural* limit to it in any case, short of the absolute delivery of the amount mentioned; a limit, that requires a debtor to make good any loss that may befall the property of the creditor in his hands, whether the loss be occasioned by his fault, or not; and whether he ever be able to make good the loss, or not; a limit, which, in many cases, condemns the debtor and his family to perpetual poverty, and a liability to perpetual oppression from the creditor, for a misfortune, or accident, to which property is always liable, and for which the debtor is not morally responsible; a limit very nearly allied, both in its legal and moral character, as well as in its practical effects, to that, which, in former times, required the debtor and his family to be sold into slavery for the satisfaction of a debt, which the debtor could not otherwise pay.*

If such be *not* the natural limit to the *legal* obligation of debt—that is, if debts be *naturally* binding beyond the debtor's means of payment when the debts become due, then all insolvent and bankrupt laws are palpable violations of the true and natural obligation of debts, and, consequently, of the rights of creditors; such violations as no government has the moral right, (however it may have a constitutional authority,) to perpetrate.

On the other hand, if such *be* the natural limit to the legal obligation of debt, then we have no need of insolvent or bankrupt laws at all, for every contract of debt involves, within itself, the only honest bankrupt law, that the case admits of.

If such be the natural limit to the obligation of debt, *then there is, as a general rule, no moral,* any more than legal obligation to pay, beyond the means of the debtor at the time the debt becomes due; and any subsequent promise to pay, is gratuitous and void.‡

Taking it for granted, for the remainder of *this* chapter, that it has now been shown that a debtor is a mere bailee of the creditor, let us see some of the consequences, that follow from that proposition.

1. As a contract of debt does not designate the specific value, to which it attaches in the hands of the debtor, it cannot be said to attach to any one part of the value in his hands more than to another. It therefore attaches to all. And if it attaches to all, it necessarily operates as a lien upon all that the debtor has in his hands, *at the time the debt is contracted;* also upon all that may become indistinguishably mixed with that, prior to its delivery or payment to the creditor.* This being the fact, each debt of course becomes a lien *in the order in which it is contracted relatively to the others.*‡

2. A second creditor, by selling value to a debtor, and giving him credit for it, would hold a lien for his debt upon the specific value so sold to him, so long as it should be kept separate and clearly distinguishable from the value on which the prior creditor had a lien; because the first creditor could claim a lien only on that value, which was in the debtor's hands, and to which his contract attached, at the time it was entered into; and on such other value, as, (by labor done on the property, or otherwise,) might become indistinguishably mixed with that, prior to its delivery, or payment to him, (the creditor.)

If B mingle his property, as grain, wine, or money, for instance, indistinguishably with property of the same kind belonging to A, without the knowledge of A, or without any agreement, express or implied, that, in case of a diminution of the mass by accident or otherwise, there shall be a division of the remainder according to their original proportions respectively, the loss of any diminution that may befall the mass, falls upon B. On this principle, if a second creditor should suffer the value, which he should sell to a debtor, and on which he had a lien in the hands of the debtor, to become indistinguishably mixed with value in the same debtor's hands, on which a prior creditor had a lien, and there were no agreement between the two creditors, for a division in case of loss, the first creditor would be entitled to take his whole debt out of the mass before the second creditor should receive anything; for it could not be presumed, without an express agreement, that a prior creditor would authorize his debtor to give a second creditor an equal lien with himself on the whole property in the debtor's hands, even though the second creditor should pay an equal amount of value into the mass with that paid by the first creditor; because the first creditor might suppose the debtor incompetent to manage the two loans so advantageously, or so beneficially for his (the creditor's) security, as he would have managed one only, and might therefore not have consented to the mixture of the two loans on the footing of equal liens. The first creditor might also think it necessary for his security, that the whole labor of the debtor should be bestowed on the first loan; and might therefore have objected to the mixture of another loan with it, to take an equal lien with his own. And especially it could not be supposed, without an express agreement to that effect, that a creditor would have such confidence in the judgment of the debtor, as to be willing that he should take capital from others, at his (the debtor's) own estimate of its value, mix it with that received from himself, and place these subsequent creditors on the same footing with himself, as to their rights in the mass. The first creditor would wish an opportunity to judge for himself, instead of leaving it wholly with the debtor to judge, whether the value contributed to the mass by the succeeding creditors, was such as that his security would not be weakened by allowing them to share that security equally with himself, in proportion to their debts.

3. If each creditor holds a lien upon the value of all the debtor's property, in the order in which their debts respectively were contracted, it would of course be fraudulent for a debtor to pay a second creditor, before paying a first, especially if the first should suffer a loss in consequence.

For such a fraud the debtor would be liable to a prosecution for swindling, and would also be liable in damages, if any damages should be suffered by the first creditor in consequence of it;

and for these damages his future earnings would be liable forever, as in the case before mentioned, and not merely his present property, as in case of debt.

But the first creditor, in such a case, would have a right to recover, of the second creditor, the amount thus fraudulently paid to the latter by the debtor, on the ground that he (the second creditor) was not an innocent purchaser for value; that he had merely received, on a debt already contracted, value that belonged to a prior creditor; and that he (the second creditor) not having, either innocently or otherwise, paid any additional value to the debtor, as an inducement to the debtor's payment to him, would be in no worse condition on restoring the value to the first creditor, than he would have been if it had not been wrongfully paid to him.

This right of a prior creditor to recover of a succeeding one, any value that should be paid to the latter in fraud of the prior creditor's rights, taken in connexion with the debtor's liability as a swindler, and his perpetual liability for any damages caused to the prior creditor by such fraudulent payment, would be an effectual prevention of such payments. The principle of the prior right of the prior creditor, would thus be firmly established in practice; all those endless frauds, by which the value rightfully belonging to one creditor, is now with impunity appropriated to the payment of another, would be prevented; and credit would be placed on the secure basis of each creditor's knowledge of the property liable for his own debt.

4. If a creditor should not demand his debt at the time it became due, his neglect to do so would be a waiver of his prior right to payment, and would make it lawful for the debtor to pay a subsequent debt, if the latter should become due before the prior one was demanded.

For this reason, (as has before been mentioned,) the principle of the prior right of the prior creditor, would be no obstacle to banking, by the issue of notes payable on demand; nor to the payment of a subsequent note while a prior one was still in circulation—because a note payable on demand is due as soon as it is issued, and if its payment be not immediately demanded, the neglect is a waiver of the right of priority.

5. If a debt were not paid immediately on its becoming due, the creditor could not take interest for the delay out of the debtor's property, to the injury of a succeeding creditor—for interest, after a debt is due, is no part of the debt itself; it is only the damage that is allowed for the detention.* The first creditor holds a prior lien on the debtor's property only for his debt; and not for any damage he may sustain by reason of his debt not being paid when due. This claim for damage, being a separate matter from the debt itself, would not legally attach to the debtor's property, until its amount was legally ascertained and adjudged; and it could then attach to it only in its order with reference to other claims, and not to the prejudice of any prior ones.

The effect of this principle would be to make creditors prompt to collect their debts immediately on their becoming due, especially when there was any doubt as to the solvency of the debtors—because, as their claims for damage would not be entitled to the same priority as their debts, they would be liable to lose them entirely, or to be under the necessity of holding them against the debtor until he should have made some accumulations over and above his debts.

But the debtor would choose to pay when due, because for any damage occasioned by his delay, (unless the delay were occasioned by some other cause than fault on his part,) his future earnings would be liable, as in any other case of damage occasioned by his fault.

6. If a creditor should not demand, and, in case of nonpayment, sue for his debt, immediately, or at least very soon after the debt became due, the delay would afford a presumption that the debt was extinct, by reason of the debtor's inability to pay. And if, at a subsequent time, the creditor should sue for the debt, the burden of proof would then be upon himself to prove that, at the time the debt became due, the debtor actually had means in his hands to satisfy it.

So if a creditor should obtain judgment for his debt, and that judgment should remain unsatisfied for any considerable time, that fact would afford a presumption of the debtor's inability to pay, and throw upon the creditor the burden of proving that, at the time the judgment was obtained, the debtor had the means of paying it; because a judgment, founded merely on a debt, (and not on a wrong,) would attach only to the property that the debtor had in his hands at the time it was rendered.

7. If a debtor should be unable, when his debt became due, to pay the whole of it, it would be his duty to tender the most that it was in his power to pay. If the amount tendered should not be accepted in full discharge of the debt, it would be his duty to preserve it, (for the creditor's future acceptance,) separate and distinct, both from subsequent acquisitions of his own, and also from any future loans that he might procure.

In case of a tender made by a debtor, the creditor could afterwards obtain judgment only for the amount tendered, unless he should prove—at least to the reasonable satisfaction of a jury—that the debtor had not tendered all that it was in his power to pay. But it would not be necessary for a creditor, in order to obtain judgment for more than the amount tendered, to prove, by actual witnesses of the fact, that the debtor had a larger amount in his hands at the precise time the debt became due. It would be sufficient for him to show that the debtor had not reasonably accounted for all the property that he had had in his hands either when the debt was contracted, or at any time previous to its becoming due. For these reasons, it would be important for debtors, especially for those who had little or no property in their hands more than enough to pay their debts, to keep such accounts and vouchers of their dealings, as would enable them always to account for any losses that might happen prior to their debts becoming due.

8. If a debtor be merely the bailee of his creditor, then the laws, which, on the death of a debtor, give the property, that was in his hands, to his family, to the prejudice of his creditors, are all void—as much so as would be laws, that should arbitrarily give any other men's property to the same debtor's family.

9. If a debtor be merely the bailee of the creditor, a fine imposed upon the debtor by the government, as a punishment for an offence, cannot be satisfied out of property in his hands to the prejudice of his creditors. It can only attach to his property in its order relatively with other claims.

10. If a debtor be the mere bailee of the creditor, his obligations in regard to the preservation of the value bailed to him, are similar to the obligations of bailees in other cases.

The degree of care, which the law requires of a bailee *for hire,* is that degree of care, (incapable of being measured with perfect accuracy, and therefore only capable of being judged of by a jury in each case separately,) which reasonable and prudent men ordinarily take of their own property. The law, however, does not require of a bailee, that he possess an equal *judgment* with other men, for the management of property. The bailor, or owner of the property, must take the risk resulting from any defect of judgment, on the part of the bailee—for weakness of mind is no fault; and the bailor, therefore, must judge for himself of the mental capacity of the bailee, before he entrust his property to him. All that the law requires of the bailee is, that whatever judgment he may possess, be exercised honestly, in good faith towards his bailor, and with such care and diligence in the use, custody, and management of the property entrusted to him, as prudent men generally exercise in the use, custody, and management of their own property.

In the case of a *gratuitous loan,* the bailee is bound to exercise still greater care and diligence, in the preservation of the property bailed, than in a case of bailment for hire.

A bailment of debt, however, differs from other bailments, in this particular, to wit, that the value bailed is merged in, and indistinguishably mixed with, the general property of the debtor. The debtor must, of course, take the necessary subsistence of himself and family out of the whole mass of property in his hands; and hence arises an obligation somewhat peculiar to this species of bailment, to wit, an obligation to practise such a degree of economy and frugality in one's mode of living, as is obviously necessary to save the amount bailed from consumption, and enable the bailee to repay the whole loan to his bailor. *Good faith* requires this of the bailee; and the law of bailments requires of the bailee, in all cases, everything that is essential to good faith. But what that economy and frugality are, which good faith towards a creditor requires of a debtor, may depend upon a variety of circumstances, and be very different in different cases. If, for example, a man owed but one thousand dollars, and had ten thousand dollars of property in his hands, he could, consistently with good faith towards his creditor, maintain substantially the same style of living that a prudent man would, who possessed nine thousand dollars, and owed no debts at all. On the other hand, if a debtor had no property at all, in his hands, except what had been loaned to him; and out of that and the value added to it by his labor, he was under the obligation of paying his debt and supporting his family, good faith towards his creditor would require that he practise such a degree of economy, (a stringent frugality even where the case plainly demanded it,) as would be likely to enable him to accomplish both objects; because it cannot reasonably be supposed that his creditor would have loaned him the capital, except upon the understanding that he should practise all the economy that would be *obviously* necessary, (setting aside unusual and unexpected contingencies,) to enable him to repay it. Nevertheless, in the case of debt, the precise measure of duty, on the part of the debtor, or bailee, cannot be defined with perfect accuracy, any more than in the case of any other bailment. All that can be said is, that the debtor is bound to do all that good faith towards his creditor requires, under the particular circumstances of each case; and the *general* rule is, that a bailee must practise the same care, dili-

gence, and economy, in the management of the property bailed to him, that prudent men generally use in the management of their own property, in like circumstances; and the judgment of a jury is the final criterion for determining whether the care, diligence, and economy observed by a bailee have been such as are usually observed by other men.

11. If a bailee, or debtor, be guilty of any fraud in procuring the bailment, or of any fault, culpable neglect, or want of good faith in the custody, use, or management of the value bailed, whereby any loss should accrue to the bailor, or creditor, the bailee or debtor will be liable, *not on his contract*, but in an action on the case for damages; and for the satisfaction of these damages his future acquisitions will be liable *forever*, and not merely his present property, as in the case of debt. The reason of this distinction is, that the ground of his liability, in the former case, is a wrong done by him; in the latter, a contract. For a wrong done to another, the wrong doer can obviously be discharged from his liability only by making reparation. But from a contract he is discharged when he has delivered all the value, which the contract attaches to, and binds.

12. If a debtor do not pay his debt at the time it becomes due, (unless he have some valid excuse for not paying it at that time,) and all the property in his hands should afterwards be lost, even by accident—by such an accident as would have excused him forever from the payment, if it had happened *before* the debt became due—he will be liable in damages, (and his future acquisitions be responsible;) because, but for his fault in withholding the value beyond the time agreed on for its delivery, (or payment,) it would not have been exposed to the accident, by which it was lost. Such is the rule in other bailments; and the principle would apply with equal propriety to the bailment of debt.

13. If a debtor, before his debt becomes due, should use the value bailed to him in a manner wholly or plainly different from what could be reasonably presumed to have been the agreement of the parties that it should be used, and the creditor should suffer loss in consequence, the debtor would be liable in damages, and his future acquisitions will be responsible.

14. If a debtor, previous to his debt becoming due, should commence any wasteful, profligate, or manifestly unfaithful expenditure of the value bailed to him, whereby he should be plainly endangering his creditor's security, the creditor would have a right to the interference of a court of equity to restrain the debtor, and, if need be, compel him to make payment of what he had in his hands before the time agreed upon for the payment; for all the rights of the debtor, to hold the property, by virtue of the contract, are at an end the moment he violates the conditions of the bailment, if the creditor choose to avail himself of the violation to cancel the contract, and recover the property bailed.

Such are some of the leading principles, drawn from the general law of bailments, and applicable to the bailment of debt, if debt be but a bailment. How much more beneficial these principles are to the interests of both creditors and debtors; how much more strongly protective of the rights of creditors, and how much less barbarous and absurd towards debtors; how much more promotive of sound, safe, and generally diffused credit, than are the principles, (if arbitrary rules, that violate all principles, and acknowledge none, can themselves be called principles,) that are now acted upon by legislatures and courts of law, in reference to the same subjects, need not be

particularly set forth; for light and darkness, truth and falsehood, reason and absurdity, justice and injustice, present no stronger contrasts than those two systems do to each other. One system is founded in natural law, and, like all the principles of natural law, is defensive of all the rights, and benign in its influence upon all the lawful interests that it reaches. The other is a mere relic of that barbarous code, (as false in theory, as merciless in practice,) which sold the debtor and his family into slavery, or, (in later days,) doomed him to prison, like a felon, whenever, by reason of contingencies, to which all property is liable, and which he could not foresee, nor be expected to foresee, he proved unable to fulfil the *letter,* instead of the true law, of his contract.

It remains, in this chapter, to suggest the nature of the cases where a moral obligation to pay, may remain after the legal one has expired.

Where the contract has been entered into by both parties, creditor as well as debtor, with a view to profit only, and as a mere matter of business, and the loss has occurred from the necessary hazards of business, or the contingencies to which property is always liable, and not from any fraud, fault, neglect, or bad faith on the part of the debtor, *no* moral obligation will remain after the legal one is extinct.

But where the creditor has entered into the contract, and advanced capital to the debtor, not with a view to profit for himself, but as a matter of favor or kindness to the debtor, there a moral obligation will remain after the legal one has expired; because we are all under a moral obligation to save our friends from suffering any loss by reason of any kindnesses they may do for us.

Again. Where it was the intention of the creditor, that the only property, in the hands of the debtor, to which the contract of debt attached, or could attach, should be consumed by the debtor—as, for example, where one man should sell food to another, who was so destitute that he had nothing for his contract of debt to attach to, except the food itself which he had just bought of the creditor, and which it was the intention of the creditor that he should eat, there the moral obligation to pay would remain after the food was consumed, and after the *legal* obligation of the contract was consequently extinct.

There are some cases, where there would be a moral obligation to pay, where no *legal* one had ever accrued at all—as, for example, where a physician should render his services to a sick man, who had no property in his hands for a legal contract of debt to attach to.

It may be thought an objection to the system here advocated, that it makes no provision for the legal enforcement of moral obligations of so palpable a character as those here mentioned. But the objection ought to vanish, when it is considered how very few such cases would need to arise, if the *whole* system of credit, which natural law authorizes, and which has been here advocated, were in operation; for few persons only, if any, would then be so destitute as to have nothing for a legal contract to attach to, or as to need to receive pecuniary assistance on such grounds as these cases contemplate. Besides, there is no more reason why compensation should be enforced by law, for every kindness of a pecuniary nature, that one man does to another, than for kindnesses of any other sort. The honor, gratitude, and sense of duty of mankind may be safely trusted to make suitable returns for all the kindnesses which men will be likely to show to each

other, where they have no legal guaranty of compensation. Such is the prudent character of men's benevolence generally, that the number of such benefits conferred will not be so great as to bring any serious injury to their authors, even if some of them should actually go unrequited. Besides, the sense of gratitude, on the part of receivers, is generally commensurate with the generosity of givers. The cases, where the former falls short of the latter, are too few to be a matter of any concern to the government.

CHAPTER VI. THE LEGAL NATURE OF DEBT.—(Continued.)

Some persons may not have been convinced, by the arguments already offered, that debt is but a bailment. The doctrine is also too important to be dismissed without offering all the arguments that go to sustain it. Some further explanations of collateral questions are also necessary. These additional arguments and explanations have been reserved for a second chapter, for the reason that, to many minds, I apprehend, they will be unnecessary, and therefore tedious; and for the further reason that the matter will be simplified by presenting them separately from those in the preceding chapter.

There remain two lines of argument, which go to prove the same point, to wit, that debt is but a bailment—and which, for the sake of distinctness, will be presented separately. It will be impossible, in presenting them, to avoid entirely a repetition of some of the ideas already expressed.

FIRST ARGUMENT.

In order to get at the true nature and obligation of debt, it is necessary to consider that a promise to pay money is of no *legal* importance, except as *evidence* of debt. It does not, of itself, create the debt. It only aids to prove it.

Neither do the true nature and obligation of debt consist in, nor even rest at all upon, the merely *moral* obligation of a promise to pay. A naked promise to pay money is of no obligation, *in law,* however sincere may have been the intention of the maker to fulfil it. The *legal* obligation of debt never arises from the fact that a man has made a promise to pay money. It is entirely immaterial to the validity of a debt, whether the debtor have made any promise or not. The debt does not arise from the promise; the promise is only given as evidence of the debt.

The legal obligation of a debt, then, is something entirely distinct from the moral obligation of a promise, or the moral obligation to keep one's word. The promise is given merely because the debt is due, and as evidence that the debt is due. It is no part of the legal obligation of the debt itself.

If a promise be made when no debt is due, the promise is of no importance in law. On the other hand, if a debt be due, and no promise have been given, the debt is equally valid, as if a

promise had been given. These facts show that the promise is nothing material, either to the existence or to the obligation of a debt. A debt may be created without giving a promise; and a promise may be given without creating a debt.

In order, therefore, to get at the true nature of debt, it is necessary to separate it entirely from the idea of a promise. It is this false idea of the legal obligation of a promise, that interposes itself before our minds, and prevents our seeing the true nature and obligation of the debt.

But it is said by the lawyers, that when a man has "received value," as a "consideration" for his "promise," his promise is binding. But it is an entire misstatement of fact, and conveys wholly erroneous ideas of the nature of debt, to say that the debtor receives value, as a consideration for his *promise.* A man never pays a consideration for a *promise*—for a promise, as we have seen, has, of itself, no legal obligation, and is of no consequence to the validity of a debt. To say, therefore, that a man pays a consideration for a *promise,* is equivalent to saying that a man pays his money for nothing—for that which has no value of itself, and is of no legal obligation.

If, then, the creditor do not pay "value" to the debtor as a consideration for the debtor's *promise,* for what does he pay it to him? Obviously as the consideration, or price, of the *thing promised*—that is, as the price of the equivalent, which the debtor sells to him in exchange. If, for instance, A sells to B a horse for an hundred dollars, and takes B's promissory note therefor, he does not sell the horse for the note, but for the hundred dollars; and he takes the note merely as evidence that he has bought the hundred dollars, and paid an equivalent (or value) for them, *and that they are therefore now his, by right of property;* also as evidence of the time when they are to be delivered to him.

This brings us to a perception of the fact, that the "value received" by the debtor from the creditor, and the sum, or value, which the debtor promises to pay or deliver to the creditor, are merely equivalents, which have been mutually sold or exchanged for each other.

If these equivalents have been mutually sold, or exchanged for each other, each equivalent has bought and paid for the other; and, of necessity, the right of property in each equivalent passed to *its* purchaser, at the same time that the right of property in the other equivalent passed to *its* purchaser—that is, at the time of the contract.

But that, which makes one of these parties the debtor of the other, when there has been merely an exchange, or a mutual purchase and sale of equivalents, between them, is simply this, viz., *that the value, which is sold by one of the parties to the other, is, by agreement, to remain, for a time, in the hands of the seller, for his use.*

A debtor, therefore, is one, who, having sold value to another, *and passed the right of property in it to the purchaser,* retains it for use until a time agreed upon for its delivery. At the end of this time, the creditor can claim this value, *because it is his,* he having previously bought it, and paid for it—and *not* because the debtor has *promised* to deliver it at that time. The debtor's promise to pay, or deliver, this value to the creditor, at the time agreed upon, is not of the essence of the contract, by which the creditor acquired his right of property to the value promised; and it is of no importance whatever except as evidence that the value, thus promised to be paid, or delivered to the

creditor, has been already sold to him, paid for by him, and now belongs to him; and that the debtor has no right to retain it, for use, beyond the time when he has promised to deliver it. The promise, therefore, instead of being evidence that the right of property, in the value promised, has *not* passed to the creditor, is only evidence that it *had* (in point of law) passed to him before the promise to deliver it was made.

The right of property, in the value to be paid by the debtor, *must* have passed to *its* purchaser, the creditor, at the same time that the right of property, in the "value" paid by the creditor, passed to *its* purchaser, the debtor—that is, at the time of the contract; else the *creditor* would have parted with his "value," or property, (that which he paid to the debtor,) without receiving any equivalent for it. He would merely have received a promise, which, as we have seen, is of no legal value, of itself, and could be used only as evidence. And it could be used as evidence only to prove that the creditor had paid value to the debtor in exchange for an equivalent; that he had thus bought the equivalent; and that he was then, of course, the owner of the equivalent thus bought and paid for—notwithstanding it were still remaining in the hands of the debtor.

The promise, therefore, would be of no avail, even as evidence, unless the right of property in the value promised to be paid, or delivered, had already passed to the creditor—for that is the only fact, (in case of debt,) which the promise can be used to prove.

But perhaps it will be said, (and this is all that can be said on the other side,) that the promise, and the acknowledgement of the receipt of value, by the debtor, may be used to prove that the creditor has paid value to the debtor in exchange for an equivalent, which the debtor was to deliver, or pay, to the creditor at a *future* time. True it may; it can be used for that purpose, and no other. But that is, in reality, only asserting, instead of contradicting, what has already been stated, viz., that the promise may be used to prove that the creditor has bought value of the debtor, and paid for it; and that it, (the value thus bought and paid for,) is therefore now his, (the creditor's,) *by right of property,* and has been his ever since he bought and paid for it, to wit, ever since he paid his value to the debtor—for (as has before been mentioned) it is absurd to say, when a man has bought and paid for a thing, that he does not own it, (has not the right of property in it,) merely because it was left for a time in the hands of the seller.

The essential error in the common theory of debt, is, that it supposes that the creditor acquires no *present* right of property—at the time the contract is made, or at the time he pays *his* value to the debtor—in the equivalent which the debtor promises to pay or deliver to him; that he only acquires a right of property in this equivalent when it is finally delivered, or paid to him—which may be days, months, or years after he has really bought it and paid for it. It supposes that he pays *his* value to the debtor, and passes his right of property in it to the debtor, without at the time acquiring, in return, any equivalent right of property in the value which the debtor is to pay, or to deliver to him.

This error results, in part, in this way, to wit; because the value sold by the debtor to the creditor, is, at the time of the sale, merged in the whole value of all the debtor's property, and is to remain so merged until it is finally separated and converted into money, for the purpose of delivery, we overlook the fact, that the right of property in it has nevertheless as much passed to the pur-

chaser, (that is, to the creditor,) as if it were already separated from the mass of the debtor's property, and delivered to the creditor.*

This error is further strengthened by our confounding, in the first place, the idea of a promise, and the obligation of the debt; and, in the second place, the right of property, and the delivery of the property itself. The promise, and the obligation of the debt, as we have already seen, are entirely distinct matters. So also the right of property, and the delivery of property, are entirely distinct matters. Neither depends at all upon the other.* The right of property is acquired when it is bought and paid for; the delivery only gives the owner the *possession* of what was already his. A creditor, therefore, acquires a right of property in the value promised to him, at the time he pays *his* value for it—whether the actual delivery or payment of the value promised takes place at that time, or months, or years afterwards. If this were not so, the creditor, during the whole period, between the time when he pays *his* value to the debtor, and the time when the debtor finally delivers or pays to him the equivalent value, is without any right of property at all, either in the value he has parted with, or in the value that he is to receive for it. And if he has no rights of property, during all this time, to either of these values, he has, of necessity, no rights at all in reference to them; *and never can have by virtue of his contract.* He only holds a promise, which could be used as evidence of his rights of property, if he had any such rights; but which, on the theory that he has no such rights, can be of no use whatever.

If it be now established, that the value paid by the creditor to the debtor, and the value promised by the debtor to the creditor, are merely equivalents, that are mutually bought and sold for each other; and if it be also established that the right of property, in each of these equivalents, passes to *its* purchaser, at the same time that the right of property in the other equivalent passes to *its* purchaser, to wit, at the time of the contract, instead of at the time of delivery, these facts furnish us with an explanation, or definition of the true legal obligation of a debt. They define this obligation to be the obligation of a seller to preserve for, and deliver to his purchaser at a time agreed upon, value, which he has sold him, and the right of property in which has already passed to him.

If this definition be correct, a debt (or sum due) is merely an amount of value, which has been sold by one person to another, and is to be delivered to him at a time subsequent to the sale. And a debtor is merely one, who has sold value to another, but retains the custody and use of it for a time after the sale, and is bound to deliver it to the purchaser, on demand, or at a future time agreed upon.

If these definitions of debt, debtor, and the obligation of a debt, are correct, they prove that from the time the contract (by which the debt is created) is entered into, up to the time the value due is to be delivered, the debtor is the mere bailee of the creditor; for a man, who continues to hold property, that he has sold to another, is merely the bailee of the purchaser; he is the mere holder, user, and hirer of the value, which he himself has sold, but not delivered; and all the necessary consequences of bailment follow; and the legal principles of bailment apply. One of these principles, as has before been stated, is that if the property bailed be lost or injured during the

bailment, without any fault or culpable neglect on the part of the bailee, the loss falls on the bailor, or owner.

SECOND ARGUMENT.

It is a principle of natural law, that a contract for the conveyance of property is void, unless there be property owned by the maker, for the contract to attach to, *at the time it is made.* If, for instance, A should give to B, a deed of a farm, which A did not own, the deed would be void. It would convey no rights to B, simply because A owned no such farm for the contract to attach to—or, what is the same thing, because it is, in the nature of things, impossible that he could convey to B any rights, which he did not himself possess. And even if A should afterward become the owner of the farm, the deed that he had previously given of it to B, would give B no title to it. To convey the farm to B, a new deed would have to be given, simply because, at the time the first deed was given, A had no right of property in the farm, for his contract to attach to and convey. His first deed being void, at the time it was given, it could never afterwards be made a legal conveyance of rights subsequently acquired.

Again. If A should make a contract, purporting to convey to B his (A's) right, as heir, in his father's estate, while his father was yet living, the contract would be void, simply because, while his father was living, he had no right, as heir, in his estate. And even after his father should have died, and he should have become heir to his estate, B could not hold it under any contract that had been made prior to A's becoming entitled as heir—all for the simple reason, that at the time the contract was entered into, there was no legal right or property in A, for his contract to attach to and convey. And if it attached to nothing at the time it was entered into, it never could attach to anything. No contract, that a man can enter into at one time, can, in the nature of things, be made a legal conveyance of any rights which he did not then possess, and which he should only acquire subsequently.

If A were to give to B, a bill of sale of a horse, which he (A) did not own, B would acquire no rights to the horse by it; simply because A had, at the time, no ownership, or right to the horse, that he could convey. And even if A should afterwards become the owner of the horse, B could not hold him, or claim him, under the bill of sale that had been previously given—solely for the reason that, as there was no right of property, in A, to the horse, at the time the bill of sale was given, the contract was void. It conveyed nothing, because the maker of it had no rights that his contract could convey. There was nothing for the contract to attach to. The contract being void at the time it was entered into, nothing that might happen afterwards could make it a valid conveyance of rights subsequently acquired. B could then get the horse only by a new sale, or a new contract, to be made after A had become the owner of the horse.

In all these three cases, that have been named, where the sale proved void, for want of any right in A to the thing purported to be sold, B could recover back his consideration money, on the ground of its having been paid without any equivalent, or value received. And in an action to recover it, he could use the deed, bill of sale, or other contract, as evidence that he had paid the

consideration money; but the contract itself would convey him no rights, either to the land, the inheritance, or the horse, simply because A, at the time of making the contract, had no rights that he could convey. And B would recover his consideration money, *solely because the grant or contract had conveyed him no rights.*

These cases are put simply to illustrate the principle, that a contract, for the conveyance of property, is void, and conveys no rights whatever to the grantee, unless the grantor be the possessor, at the time the contract is entered into, of the rights his contract purports to convey. Any subsequent ownership, that he may acquire, is not transferred to the grantee by any contract made previous to his becoming the owner. There being, in the grantor, at the time the grant is made, no such rights as the contract purports to convey, the contract is void, inoperative; and being void at that time, nothing can give it validity at a future time. It can only be used as evidence that the grantee has paid his money without consideration, and ought to recover it back. And if he wishes to acquire the specific property contracted for, whenever it may afterwards happen to come into the hands of the grantor, he must do it by a new contract—the old one being absolutely inert, lifeless, invalid, *for any purpose of a conveyance.* And it is equally invalid, so far as any conveyance of rights is concerned, whether the grantee have actually recovered his consideration money, or not. It may be useful, as evidence, to enable the grantee to recover the money he has paid; but it is incapable of any validity as a conveyance.

The force and justness of this principle will be more clearly seen, when it is considered what a contract really is. It is merely a consent, agreement, assent—a mere operation of the mind. The written instrument, called a contract, is only the evidence of the mental contract, or consent. It has no validity otherwise than as such evidence. The only really material matter is the mental operation, or assent.* Now this mental exercise, or assent, can obviously produce no effect, except while it is in action. It must therefore pass the right of property *then*, or never. If, while it is in action, the right of property be in the person who experiences this assent, the assent passes the right of property to another. But if the right of property be not in him, while experiencing this sensation of assent, the sensation accomplishes nothing, because there is nothing on which it can operate. And if the person should ever after become the proprietor of the thing to be conveyed, he must experience the sensation again, in order to make the conveyance, because his former consent was of no force except while it continued.

This principle being established, that a contract for the conveyance of property, has no legal force, or validity, *as a conveyance*—that is, that it attaches to nothing, and conveys no right to anything—unless the maker, at the time the contract is made, be the owner of the rights he purports to convey, let us apply the principle to the case of a promissory note.

A promissory note is a contract (or, more accurately speaking, the evidence of a contract) for the conveyance of property—that is, of money. It is a bill of sale of money, that has been sold and paid for, and is to be delivered at a future time. It differs, in some particulars, from the contracts just mentioned, in regard to land, a horse, &c.; but it does not differ from them, in any particular that is essential to the principle just stated, to wit, that a contract for the conveyance of property, attaches only to the property that a man has when the contract is entered into—(and, of

consequence, to such other property as may become indistinguishably mixed with it prior to the delivery.) The rights, which a creditor acquires by a promissory note, (or by the contract of which the note is the evidence,) are rights which attach to the debtor's property the moment the contract is entered into, even though the money is not to be delivered for months or years afterward. And if the debtor have no property for the contract to attach to, at the time the contract is entered into, the contract is void, and can never afterwards attach to anything. And this is on the same principle, that a deed of a farm attaches to the farm from the moment the deed is made, and that the right of property in the farm *passes*, at that moment, from the seller to the buyer, even though the possession of the farm is, by agreement, not to be delivered for months or years afterwards. So also a bill of sale of a horse, attaches to the horse, and the right of property in the horse *passes* from the seller to the buyer at the moment the contract of sale is entered into, even though the horse, by agreement, is not to be delivered until a subsequent time. On the same principle, the right conveyed by a promissory note, (which is merely a contract for the sale and delivery of money,) attaches to the debtor's property, and the lien *passes* to the creditor at the moment the contract is entered into, even though the money is not to be delivered until months or years subsequent. The right of the creditor *must* attach at the time the contract is entered into, or, for the reasons already given, it can never attach at all; and would therefore convey no rights at all to the creditor.

The principal points, in which a deed of land, or a bill of sale of a horse, (where the possession is to be delivered at a time subsequent to the contract,) differs from a promissory note, are these:

1. A deed of land, or a bill of sale of a horse, necessarily describes or designates a particular piece of land, or a particular horse; and it necessarily applies or attaches only to the one so described, because there is, and can be no other precisely like it. Bat a promissory note does not describe the particular dollars, that are sold, or are to be delivered, but only the number of them. It therefore does not apply, or attach to, any particular dollars; and it is not necessary that it should, because all dollars are of equal value, and therefore it is immaterial what particular dollars shall be delivered.

2. As a promissory note does not describe or designate the identical dollars sold, it cannot apply, or attach to any particular dollars, any more than to any other dollars that the debtor may have.

3. As a promissory note does not describe, designate, or attach to any particular dollars, in preference to others, it does not imply that the identical dollars, that are finally to be delivered, now exist in the hands of the debtor. And if it does not imply that those identical dollars now exist in the hands of the debtor, it does not even imply that the amount of value, which the dollars contain, or (in other words,) the amount of value which the note conveys, now exists (in the hands of the debtor) of the debtor) *in the shape of dollars*, any more than that it exists in any other particular shape, from which it can, by the time agreed on for the delivery, be converted into the particular dollars that shall finally be delivered, or into any dollars that the debtor may have a right to deliver in fulfilment of his contract. As the note does not describe or designate the identical dol-

lars, that are sold by the contract, it does not imply or describe the particular shape, in which the amount of value sold, now exists; for if it do not imply that it exists in the shape of the identical dollars that are to be delivered, it does not imply that it exists in the shape of any other dollars, any more than that it exists in the shape of corn, wool, or iron. It only implies, therefore, that it exists, (that is, that the *amount* or *value* conveyed by the note exists,) in the hands of the debtor, *in some shape or other,* from which it is susceptible of being converted into dollars by the time agreed on for the delivery.

4. As the note does not describe the particular shape in which the value conveyed by it now exists, and does not even imply that it now exists in the shape of dollars, the note is, in effect, a lien upon all a man's property for the number of dollars mentioned in the note; or it is a sale of so much value, existing in some shape or other, as will procure, or exchange for the number of dollars mentioned in the note, rather than a sale of any particular dollars themselves. That such is the fact, is evident from two considerations, to wit; *first,* that the identical dollars sold are not described, and therefore cannot be known; and, secondly, that the debtor is to have the use of them until the time agreed upon for the delivery. As the dollars, while remaining in the specific shape of dollars, can be of no use to the debtor, and can be used by him only by converting them into other commodities, and as they are to be left in his hands, for a certain time, *solely that he may use them,* it follows that it must have been the intention of the parties that the debtor should have the right of converting them into other commodities that might be productive, or susceptible of use in the mean time — that is, until the time of delivery; and, therefore, that the creditor should have his lien upon them, or upon an amount of value equivalent to them, into whatever shape they might be converted, or through whatever changes they might pass, previous to delivery; and that, in time for the delivery, this amount or value was to be converted again into dollars for that purpose.*

5. As the contract, to be of any validity, (that is, to convey any rights,) must, from the moment it is entered into, attach to something or other in the hands of the debtor; and as it does not designate, or therefore purport to attach to the identical dollars that are to be delivered, it can only attach to the general property of the debtor, as a lien for the number of dollars to be delivered. Unless it thus attach to the general property of the debtor as a lien, it would, of necessity, be a nullity, having no legal operation whatever, simply because there is nothing else for it to attach to.

A promissory note, therefore, for an hundred dollars to be delivered at a future time, is, in reality, a contract of sale of *so much value,* existing, in some shape or other, in the hands of the debtor, as will produce an hundred dollars. Such a contract is, in effect, a lien, for that amount, upon a man's whole property, even though his whole property should be equal to an hundred times that amount — and why? Because, as the particular amount of value, or property, to which the contract attaches, is not described, or set off distinctly from the rest of his property, the debtor can never show, as long as any portion of his property remains in his hands, and the debt is unpaid, that the portion remaining in his hands is *not* the portion that was sold, and promised to be delivered. Besides, if, by the time of delivery, it shall appear that all his property has disap-

peared except a single hundred dollars, it is more reasonable to suppose that he has disposed of his own property, than that he has disposed of that to which his creditor had on equitable right.

A promissory note, then, for an hundred dollars, is a mere bill of sale of an hundred dollars, that are to be delivered at a future time; or rather a bill of sale of *so much value,* (now existing, or presumed to exist, in some other shape than that of the identical dollars which are to be delivered,) as will purchase an hundred dollars at the time agreed upon for the delivery. Although, then, a promissory note differs from a bill of sale of a horse, or a deed of land, in not describing or designating the identical dollars sold, and therefore in not attaching to any particular dollars which the debtor may have on hand at the time the contract is entered into, it is nevertheless precisely like a bill of sale of a horse, or a deed of land, in this respect, to wit, that the rights of the creditor attach, from the moment the contract is made, to an *amount of value,* (existing in the hands of the debtor, *in some shape or other,*) sufficient to produce, or be converted into, the number of dollars mentioned in the note.

But perhaps some may be disposed to deny that there is any such analogy, as I have supposed, between a promissory note and a deed of land, or a bill of sale of a horse; or any analogy that makes it necessary that there should be any property, in actual existence, for the contract expressed in the note, to attach to. And perhaps they will say that the different form of a promissory note from that of a deed, or bill of sale — the former being a "promise to pay" at a future time, and the two latter being express grants in the present tense — implies that the note conveys no such *present* right of property to the payee, as a deed does to the grantee, or a bill of sale to the vendee.

To see the fallacy of this objection, it is necessary to get rid of words, and get at ideas; or rather to get rid of that confusion of ideas, which results from the habit of arbitrarily using different words to convey the same essential ideas. For instance. We "pay" money for a horse, and we "sell" a horse for money — such is the common use of words. Yet, in reality, we as much "*pay*" the horse for the money, as the money for the horse. And we as much *sell* the money for the horse, as the horse for the money. The horse *buys* the money, as much as the money buys the horse. The horse and the money are equivalents, which are mutually exchanged for each other; which mutually *buy* each other; which are mutually *sold* for each other; which mutually *pay* for each other. In every exchange of equivalents of this kind, there are two purchases, and two sales. One of the parties sells his horse for money, the other his money for a horse. One of the parties buys a horse with money, the other buys money with a horse. And this is the whole matter.

When, therefore, a man sells a horse for money, and promises to deliver the *horse* at a future time, the contract is of precisely the same essential nature as where a man sells money for a horse, and promises to deliver, or "pay" the *money* at a future time. The horse and the money are the equivalents, that are exchanged for each other; that is, *the right of property* in each is exchanged for *the right of property* in the other. And the right of property in each equivalent *passes* at the same instant that the right of property in the other equivalent passes — else the contract is not reciprocal, mutual, or equal, and one of the parties receives no equivalent, or consideration, for the property he sells. And it is of no consequence when the *delivery,* either of the horse, or of the

money, actually takes place — whether in a month or a year after the contract — or whether the delivery of both equivalents takes place at one and the same time, or not. The right of property in both equivalents passes at the time of the contract, whether the delivery of either or both takes place then or not. The delivery is a mere incident to the contract, and is of no importance in itself, as affecting the rights of property, which each of the parties has acquired by the contract. After the contract is made, the horse belongs to *its* purchaser, as much before it is delivered to him as afterwards; and, by the same rule, the money belongs *to its* purchaser as much before it is delivered, or "paid" to him, as afterward. The same is true in regard to the sale of land. The right of property in the land passes at the time the contract is made, or the deed given, though the possession of the land itself be not delivered until a subsequent time. And, of consequence, the right of property in the equivalent, the consideration, the money, for which the land is sold, or exchanged, passes also at the time of the contract, though this equivalent, or money itself, be not delivered, or paid, until a subsequent time—else the contract would not be mutual, reciprocal, or equal, and the seller of the land would have parted with his right of property in the land, without receiving any consideration therefor—that is, without receiving any equivalent right of property in exchange. The delivery of money, then, on a note or contract made previously to the delivery, corresponds with a delivery of the possession of land, on a deed that has been previously given. The delivery has nothing to do with the right of property in either case—for that (the right of property) has previously passed, to wit, at the time the contract was entered into.

What we call "paying" money on a note, is the mere delivery of money that has been previously sold and paid for, and the right of property in which has previously *passed* to the purchaser. And it is solely because the money has been previously sold and paid for, and the right of property in it has passed to the purchaser, that the money itself is paid, or delivered. It is because the money has been previously bought by another, and therefore belongs to him, is owned by him, is, in fact, *his property,* that it is paid, or delivered to him. If it be not paid to him for this reason, or if it be not his property before it is delivered, the delivery is a gratuity; it is what he cannot claim as a right—for plainly a man cannot claim, on a contract, that property be delivered, or paid to him, as his, unless he has, by the contract, first acquired the ownership of it.

Contract rights to things, then, are actual *bona fide rights of property* in and to the things contracted for. No other intelligible meaning can be given of contract rights to things. A right to a mere promise, or a merely moral claim to the fulfilment of a promise, is nothing in law. The law, that governs men's title to property, cannot take notice of any such uncertain, intangible, and speculative rights, as that of a merely moral claim to the fulfilment of a promise, if such a claim, (depending, as it may, upon a thousand contingencies not in their nature susceptible of proof,) can be called a right. The law, in regard to property, can take notice of nothing less definite, certain, or tangible, than actual, proprietary rights, in actual, existing things. And unless a man acquire a *right of property* in a thing, by his contract, he acquires, *legally speaking,* no right at all by his contract. There is no other *legal* right to or in things, that he can acquire by contract. And this proprietary right is acquired—in all cases when it is acquired at all—the moment the contract is made; whether it be agreed that the delivery shall take place at that, or a future time. And this principle applies as well to money that is sold for a horse, or for land, and is agreed to be deliv-

ered, or paid, at a future time, as it does to land, or a horse, that is sold for money, and is agreed to be delivered at a future time.*

But perhaps it will be said that the words, "I promise," which are contained in the note, are not contained in the bill of sale of a horse, or deed of land; and that these words indicate some essential difference in the nature of these different contracts.

But the words, "I promise," are no essential part of the contract. Nor is a formal promise in any case essential to the validity of a debt—that is, to the obligation to deliver money that has been sold and paid for. A man may make as many naked promises to pay money, as he pleases, and they are of no obligation in law. On the other hand, if a man have received value from another, with the understanding that it is not a gift, or that an equivalent is to be paid for it, the debt is obligatory—that is, the obligation to deliver the equivalent is binding—whether there be any formal promise to pay or not. This we see in the case of goods sold, and charged on account. And the obligation to deliver the equivalent consists in this—that it, (the equivalent or money,) has been bought and paid for, and now actually belongs to the creditor, or purchaser, as a matter of property. The promise, then, is a matter of mere form in any case, and of no importance to the validity of an obligation to deliver an equivalent, that has, by contract, (consent,) been exchanged for value that has been received. It may be important as evidence of the contract; but it is no part of the contract itself; that is, it, of itself, conveys no rights of property to the promisee, and no rights of any kind, to the equivalent promised, which he would not have without any formal promise.

But it may be said, (and this is the language of the lawyers,) that where a man has paid a *consideration* for a promise, there the promise is binding. But the truth is, (as has before been stated,) that a man never pays a consideration for a *promise.* He simply pays an equivalent, a price, or consideration, for the *thing promised.* And his right of property to the thing promised, of course, attaches at the time of the contract—at the time he pays the equivalent for it—or it can never attach at all. And *then* the promise to deliver, or pay it, (the thing promised,) is made solely as evidence that it (the thing promised) has been sold, and now belongs to the promisee as a matter of property.

A promissory note, then, that is given for money, is, in its essence, precisely like a bill of sale, that is given of a horse, and that contains an agreement to deliver the horse at a future time; or it is precisely like a deed that is given of land, and that embraces an agreement, or memorandum, that the *possession* of the land is to be given at a future time. The language of these three contracts are, in their legal purport, essentially the same. For instance. The promissory note runs thus.

"Thirty days from date I promise to pay A. B. one hundred dollars, for *value received.*" Signed C. D.

The bill of sale runs thus.

"A. B. bought of C. D. one horse, to be delivered in thirty days from date. Received payment." Signed C. D.

The deed of land runs thus.

"In consideration of one hundred dollars, paid by A B, the receipt of which is hereby acknowledged, I hereby grant, sell, and convey to A B, one acre of land, *possession* to be delivered in thirty days from the date hereof." Signed C. D.

What difference is there in these three contracts, so far as a conveyance of proprietary rights to the thing promised to be paid, or delivered, is concerned? Obviously none whatever. The bill of sale says, in substance, that the horse has been sold, and that the "payment," the value, or the equivalent, has been "received;" and that the horse—which, having been thus sold and paid for, now of course belongs to the purchaser—is to be delivered to him in thirty days. The deed says that the land is sold, and its equivalent, or "consideration," has been "paid" and "received;" and that the possession of the land—(which, having been thus sold and paid for, now of course belongs to the purchaser)—is to be given in thirty days. The note says that the "value"—that is, the equivalent, the "payment," the "consideration," for the *money* promised, has been "received," (which implies that the money promised has been sold, and now belongs to the purchaser,) and that the money is to be delivered, or paid, in thirty days.

What possible ground is there for saying that the right of property in the land, or in the horse, is conveyed by the contract expressed in the foregoing deed, or bill of sale, and that the right of property in the money, (or in an amount of value sufficient to purchase the money,) is *not* conveyed by the contract expressed in the note? None, none whatever.

Suppose A and B should make a contract with each other for the exchange—or, what is the same thing, for the mutual purchase and sale—of an hundred dollars in money, and a horse; that is, A should sell to B a horse for an hundred dollars in money, and B should sell to A an hundred dollars in money for a horse; and that both the money and the horse are to be delivered in thirty days from the time of the contract. The promise of one would be to "pay" the money in thirty days, and of the other to "deliver" the horse in thirty days. Yet do not these mutual promises, or undertakings, mean precisely the same thing? And is not the contract, on the part of each, precisely the same throughout, that it is on the part of the other? The horse is the equivalent of the money, and the money of the horse. The money is *sold* for the horse, as much as the horse is sold for the money. And the horse *buys* the money, as much as the money buys the horse. The bargain is reciprocal and equal in every respect. The mutual purchase and sale have been a mere exchange of the rights of property in certain values, or equivalents. Why, then, attach a different meaning to the word "pay," when applied to the money, from what we attach to the word "deliver," when applied to the horse? Why say that the right of property in the horse *passes* to the purchaser of the horse at the time of the contract, but that the right of property in the money, (or in an amount of value sufficient to purchase the money,) does *not* pass to the purchaser of the money until the delivery, thirty days afterwards? Clearly there is no reason for it. Evidently, the right of property in one equivalent passes at the same time that the right of property in the other equivalent passes, to wit, at the time of the contract, without any regard to the time of the delivery.

The real, equitable, *bona fide* right of property in each of these articles, (the horse and the money,) is exchanged *by the contract*, and therefore necessarily *passes* at the time of the contract.

The *possession* merely of each remains with the seller for thirty days. All will agree that the right of property *in the horse* passes at the time of the contract, and that the possession merely remains with the seller during the thirty days. Why does not the right of property, *in the hundred dollars*, (or in an amount of value equivalent to the hundred dollars,) pass equally at the time of the contract, and the possession merely remain with the seller of the money for thirty days? The mutual purchase and sale of the horse and the money is a mere exchange of equivalents—a reciprocal and equal contract; and precisely the same rights of property, which pass to the purchaser of the horse, pass also to the purchaser of the money. Certainly, if the right of property in the horse, passes to the purchaser of the horse, *by force of the contract, and at the time of the contract*, the same right of property in the money passes also to the purchaser of the money, *by force of the contract, and at the time of the contract.* No proposition, in law, it seems to me, can be more self-evident than this.

Well, then, supposing this point to be established, that the right of property, in money that is promised—or rather in an amount of value existing, in some shape or other, in the hands of the debtor, sufficient to purchase the amount of money promised—passes to its purchaser at the time the contract is entered into, instead of the time of delivery—what follows?

From the time that property is sold, until it is delivered, the seller is the mere bailee of the purchaser; and the property itself is at the risk of the purchaser, unless the seller be guilty of some fault, or culpable neglect, in regard to the custody or use of it.

For instance. In the case before supposed, where A sells to B a horse, for an hundred dollars, giving him a bill of sale thereof; and B sells to A an hundred dollars for the horse, giving him a promissory note therefor—the horse and money to be each delivered to their respective purchasers in thirty days from the time of the contract—A holds the custody of the horse, for those thirty days, as the bailee of B. And if the horse, during those thirty days, die, be stolen, or otherwise lost or injured, by any of the casualties to which horses are liable, without any fault, or culpable negligence, on the part of A, the loss falls upon B, the purchaser. All lawyers will agree that this is the law in regard to the *horse.* On the same principle, then, that A is the mere bailee of the horse for those thirty days, B is the mere bailee of the money, (or of an amount of value equivalent to the money,) during the same time; that is, this money or value remains in the hands of B, for his use, the real ownership being in A; and if the *money,* during the thirty days that it is to remain in the hands of B, for his use, be lost by fire, or theft, or any of the accidents, or any of the casualties of *trade,* to which money is liable, without any fault, or culpable negligence on the part of B, the loss falls upon A, the purchaser and real owner of the money. Clearly the same principles apply to both the articles, horse and money. The right of property in each has been exchanged for the right of property in the other; and the custody and use of each are to remain with its seller for thirty days. Each purchaser, of course, takes the same risk as the other, of the commodity he has purchased, while it remains in the hands of its seller.

If A, the seller of the horse, while the horse remains in his possession, after the sale, should use it in any mode different from what it was understood that he should use it; or should neglect to take such reasonable care, in the use and treatment of the horse, as good faith towards the owner of the horse required of him; and should thereby be the cause of injury or death to the

horse, he (the seller) would be still liable for the value of the horse; not, however, on his contract, nor in an action of trover for the horse itself, but in an action on the case for damages, for the loss occasioned by his fault, as has before been explained. By the same rule, if B, the seller of the *money,* while it remained in his possession, should intentionally or negligently expose it to any other than the usual risks, to which it was understood that it was to be exposed, and thereby the money should be lost, then he (the seller of the money) would be still liable to the owner of it for the amount; *not, however, on his contract, nor in an action of trover for the money itself, but in an action on the case for damages, for the loss occasioned by his fault.*[*]

But if A, the seller of the horse, used the horse with such reasonable care, while it remained in his possession after the sale, as the law of bailments and good faith towards B; the owner of the horse, required of him, and the horse, nevertheless, came to injury or death, B, the purchaser and owner of the horse, must bear the loss. By the same rule, if B, the seller of the *money,* use such care in the preservation and management of it, while it remains in his possession after the sale, as the law of bailments and good faith towards A, the purchaser of the money, require of him, and it (the money) should, nevertheless, be diminished or lost, A, the purchaser and real owner of the money, must bear the loss.

Now the only objection which the lawyers will raise to this doctrine, or to the application of the principles of bailee and bailor to the cases of debtor and creditor, is simply this: They will say that the specific property, to which the contract of debt (at the time it is entered into) attaches, may, before the time agreed on for the delivery, be exchanged, by the debtor, for other property; and that the same contract, which attached to the original property, cannot attach to the new property for which that is exchanged.

They get this false idea from looking solely at the *general* rule in regard to bailments, and keeping the exceptions and qualifications to the rule out of sight; when, in fact, these exceptions and qualifications cover nearly or quite as many cases, in actual life, as the rule itself. For instance: the *general* rule, in bailments, is, that the specific thing loaned or entrusted to the bailee, is to be restored to the bailor. The exceptions or qualifications are, where there is either an express or implied authority given to the bailee to exchange the property bailed for something else. Wherever there is either an express or implied authority given to the bailee to make such exchange, the same right of property which the bailor had in the original commodity bailed, attaches to the new commodity, or equivalent, for which that has been exchanged. In the cases of the various kinds of commercial agencies, where the agent is entrusted with commodities of one kind, to be exchanged by him for money, or other commodities, the right of property in the money or other commodities, received by the bailee as the equivalent of the commodities bailed, vests in the bailor on the instant of the exchange, and never becomes vested in the bailee. In many, perhaps in the larger number of cases of commercial agencies, the bailee receives *express* authority for making the exchange; but not in all, nor nearly all. In many cases the authority is implied from collateral facts. And an implied authority is as good, in law, in any case whatever, as an express authority. All that is necessary, is, that there be valid grounds for the implication.

Considering, then, the relations of debtor and creditor to be those of bailee or bailor, are there any valid grounds for the implication of an authority, from the creditor to the debtor, to exchange, and traffic with, the property bailed, or loaned to the debtor?

There are several.

1. Inasmuch as the contract makes no designation of the particular form in which the value, to which the contract attaches, exists at the time the contract is entered into, it, of course, prescribes no particular form in which it *must exist at any time,* except at the time of delivery, when it must be in money. Since, then, there is, in the contract, no express or implied requirement that the debtor shall retain the value in any particular form, it impliedly allows him to use all reasonable discretion as to the form in which it will be expedient to keep it. And such a discretion allows him to convert it, by exchanges, into such different forms as a prudent and careful man might reasonably deem beneficial. Unless he were allowed this discretion, he would not be allowed to convert it from a perishable commodity into a durable one; nor from an unproductive into a productive one.

2. The capital loaned, is loaned to be *used.* This must always be presumed, because no other reasonable motive for the loan can be supposed. And if it be loaned to be used, and the form in which it is to be used is neither expressed nor implied by the contract, (as is the case in the instance of a promissory note,) it must be presumed that it was intended, by the creditor, that the debtor should use it in such manner as prudent men use their own capital. And as the habit of prudent men is to convert their own capital, by exchanges, or traffic, from one form into another; and as, in many kinds of business, they are obliged to do so, to derive any profit from their capital, it must always be presumed, (in the absence of any express or implied prohibition,) that the debtor was to be allowed the same discretion in the management of the loan, and in converting it from one form into another, by traffic, as prudent men exercise in the management of their own capital.

3. The contract of debt never describes the particular form, in which the amount of value, to which the contract attaches, exists at the time the contract of bailment or debt is entered into; but only the form in which it is finally to be delivered, to wit, that of money. The contract, therefore, only implies that the amount of value exists, *in some shape or other,* in the hands of the debtor. If, therefore, the debtor have not money for the contract to attach to, at the time it is entered into, it must attach to value existing in some other form, else it would attach to nothing, and therefore be void. When, then, the contract does attach to value existing in some other form than money, it certainly implies an authority to exchange the commodities, (in which the value is invested,) for money, at least, if for nothing else; because the contract expressly prescribes that the value to which the contract attaches shall finally be delivered to the creditor in the shape of money, and the debtor, therefore, could not fulfil his contract, unless he could convert this value into money. And if the debtor is authorized to convert into money, the value to which the contract attaches, there is no reason, that I know of, why he has not all fair and reasonable discretion as to the mode of converting it into money; nor why he may not do it by means of half a dozen intermediate exchanges, if he thinks he can thus do it more advantageously.

4. If the value, to which the contract attaches, do exist in the shape of money at the time the contract is entered into, (as in the case where money itself is loaned, and the debtor has no other property, than the loan, for the contract to attach to,) then the contract certainly implies an authority to exchange that money for other commodities, and those commodities back into money; because the money is obviously loaned to be used; as is proved by the facts, that no other reasonable motive for the loan can be supposed, and that, in most cases, the debtor agrees to pay interest for its use, which he could not afford to do unless the money were to be made productive to him. Now money itself can neither be used, nor made productive, in any other way than by being exchanged for other commodities, or by being wrought into some other shape than coin. These facts, then, are enough to prove that it must have been the intention of the lender, or bailor, that the borrower, or bailee, should be at liberty to exchange the money loaned, for other commodities. And then the fact that the amount of value, promised to be paid to the creditor, is finally to be delivered to him in the shape of money, proves that the debtor has the consent of the creditor to convert these other commodities back into money again.

Whether, therefore, the contract of debt attach, at the time it is entered into, either to value existing in the shape of money, or to value existing in any other shape, (not designated in the contract,) the contract and the collateral facts imply an authority to the debtor to traffic with the property or value to which the contract attaches. And, if this be the fact, then the rights of the creditor, or bailor, follow this value, and cling to it, in every form that it may pass through, in the hands of the debtor, from the time the contract is made, until it is finally delivered, or repaid to him, (the creditor,) in the shape of money.

If it have now been shown that the true relation subsisting between debtor and creditor is merely the relation of bailee and bailor; that a debtor is merely one who has sold value to another, and retains the possession and use of it for a time after the sale; and that the legal obligation of the debtor to pay money, and the legal purport of his promise to pay money, for value that he has received, are merely an obligation and promise to deliver money, which he has sold and received his pay for, and the right of property in which has already passed to the creditor, it follows that the creditor's right, acquired by his contract, attaches to nothing except to such property as actually existed in the hands of the debtor for the contract to attach to, at the time the contract was made, and to such other value as may have become indistinguishably mixed with it, between that time and the time agreed upon for its delivery or payment. And from *these* several propositions it also follows, that at the time a debt becomes due, a creditor has no claims, by virtue of his contract, upon anything except what remains of the property that he purchased by his contract, and upon such other value or property as may have become indistinguishably mixed with it, (unless the debtor have been guilty of some fault or culpable neglect in the use or custody of it, whereby it has been diminished or lost.)

The *utmost* extent, therefore, of the creditor's claim, (when the debtor has been guilty of no fault, neglect, or bad faith, in the custody or use of the property loaned to him,) is to the property actually existing in the hands of the debtor at the time the debt becomes due. He has a *prima facie* claim to the whole of this,* if it be necessary for the satisfaction of his debt. But if it be insuffi-

cient for the satisfaction of his debt—that is, if his purchase have been diminished in value or amount, while in the custody of the debtor, (without any fault or culpable neglect on the part of the debtor,)—he, the creditor, must bear the loss. The contract is extinct, fulfilled, on the delivery of whatever remains of the property originally bailed to the debtor. And if the whole of the value bailed have been lost, without the fault of the debtor, the loss falls on the creditor.

There is no escape from this conclusion but by denying that the contract attached to anything at the time it was made. And such a denial, instead of proving that the debt was obligatory *beyond* the debtor's means of payment, would only be equivalent to a denial that it ever had any legal validity at all. In order to maintain the validity of the contract, we must maintain that it attached to something—that is, that it conveyed to the creditor a proprietory right to some value existing in the hands of the debtor at the time the contract was entered into. And if the contract had any validity—that is, if it attached to anything—at the time it was entered into, its validity lived only in the life of the value, or property to which it attached; and when that value expired, or became extinct, the contract, or, in other words, all the rights which the creditor acquired by virtue of his contract, necessarily expired with it.

Taking it for granted that it has now been shown that a debtor is, in law, the mere bailee of his creditor, it may be important to repeat the statement of the principle, by which this bailment operates as a lien upon the whole property of the debtor, even though his property be many times greater than the debt. The principle is this. Suppose the debt to be one hundred dollars; and the whole amount of property, in the hands of the debtor, to be one thousand dollars. The contract attaches to and binds so much value, or property, in the hands of the debtor, as will bring one hundred dollars. But the contract does not designate the particular form, in which the value, or property, to which it attaches, exists. It, therefore, attaches to it in *every* form, as it exists in the hands of the debtor; simply because it cannot be shown that it attaches to that which exists in one form, any more than to that which exists in another form. Any portion, therefore, of the debtor's property, or the whole of it, if it should be necessary, is liable to be taken for the satisfaction of the debt; and this liability of the whole makes the debt a lien upon the whole. It is on this principle that a mortgage on land, for but a tenth part of the actual value of the land, is a lien upon the whole.

A promissory note, or other personal debt, where there is no designation of the particular articles of property, to which the contract attaches, is, in fact, a *sale* of all the property the debtor has in his hands, subject to his right of cancelling the sale by paying the amount of the debt in money, just as a mortgage is a sale of the land mortgaged, subject to the right of the debtor to cancel the sale by paying in money the amount for which the mortgage is given.

In other words, a contract of debt, without any designation of the specific property to which the contract attaches, is a contract by which the debtor *pledges* his whole property for the delivery, or payment of the amount sold out of it to the creditor, viz., the amount of the debt. Such a pledge gives the creditor a special, or conditional ownership of the whole property pledged; and the debtor thenceforth holds the whole property as the bailee of that portion of its value, which actually belongs to the creditor, and is merged in the value of his, (the debtor's) whole property.

If the point be now established, that a debt is a lien upon the whole property of the debtor; and if the debtor is the mere bailee of the amount of value sold and belonging to the creditor, it becomes necessary to show on what grounds it is, that the debtor has the right to appropriate, for his subsistence, any portion of the property on which his creditor holds a lien. Where a debtor has mortgaged *land* to his creditor, he, (the debtor,) has no right to sell any portion of that land, not even to provide himself with food. Why is it different in the case of the lien created by a personal debt, upon the whole property of the debtor? The reason is, that there is an implied permission, given by the creditor to the debtor, to appropriate enough of the property in his hands for his subsistence—subject to the condition that the debtor shall apply his care and labor to the increase and preservation of that property. This permission is to be implied from the following facts:

1. It is a self-evident fact that the debtor and his family must live; and being a self-evident fact, it must have been taken for granted by the creditor as a part of the contract—because all self-evident facts having any bearing on the contracts, are taken for granted in all lawful contracts.

2. If the debtor and his family must live, it is self-evident that they must derive their subsistence, either by selling their labor for wages, (independently of any property in their hands;) or by bestowing their care and labor upon the property in their hands, and taking their subsistence out of it, and its proceeds.

Now it is evident that the contract does not contemplate that the debtor is to sell his labor for wages to the neglect or disuse of the property loaned to him; for the only reasonable motive that can be supposed for the loan, is, that the debtor may use the capital loaned, that is, that he may bestow his labor upon it. And if he bestow his labor upon it, it follows that he must meanwhile take his subsistence out of it—because, while bestowing his labor upon it, he cannot be selling his labor for wages, and of consequence cannot derive his subsistence in any other way than from the property in his hands. And as the creditor's lien extends to *all* the property in his hands, it follows that the debtor must take his subsistence out of that to which the lien attaches—simply because there is no other property in his hands for him to take it out of.

In all this there is a strong analogy to the case of a lien on land—for there the debtor takes the produce of the land for his subsistence; which is hardly distinguishable in fact, and is not distinguishable in principle, from taking the land itself—inasmuch as the crops exhaust the fertility, and consume the value of the land.

3. The contract evidently supposes that the debtor, while laboring, is to have enough of the fruit of his labor for his subsistence, (because a man cannot labor without a subsistence;) that his labor is to be bestowed upon the capital on which the creditor has a lien; and, of course, that the value of his labor is to become incorporated indistinguishably with that of the capital. It follows that it must have been understood, both by debtor and creditor, as a self-evident matter, that the debtor, while laboring, should appropriate enough of the property in his hands for his subsistence, because without his subsistence, he could not bestow his labor upon the capital.

4. The nature of the contract proves that the creditor is interested in the labor of the debtor, because, at a given time, he (the creditor) is to receive the capital loaned, *with increase*. This, of course, the debtor could not afford, nor the creditor expect, unless the debtor were to bestow his labor upon the capital. And if he bestow his labor upon the capital, he must, of necessity, have his subsistence meanwhile. And as his contract is a lien upon everything in his hands, it must of necessity have been understood that he should appropriate his subsistence out of the property that is subject to the lien.

In short, the contract proceeds throughout upon the supposition that the subsistence of the laborer, while laboring on capital, must be provided for out of the capital on which he labors. And this supposition is not merely a reasonable, but it is a necessary one—for it is obvious that his subsistence must be thus provided for, whether he hold the relation of debtor to the capitalist, or that of a laborer for wages. In either case, his subsistence, while laboring, must be a tax upon the capital on which he labors.

In all this there is nothing that authorizes waste or prodigality on the part of the debtor; or that authorizes anything except what is consistent with such economy and frugality as good faith towards the creditor requires. But this point has been sufficiently explained in the preceding chapter.

Halting at this point, and looking back upon the ground we have gone over, does not that ground present a more rational view of the nature of debt, than any that has ever been practised upon by courts of law? Is it not the only view that can make the contract of debt consistent, either with morality, or with the idea that creditors acquire any tangible, legal rights, to actual things, by virtue of that contract?

This view of the contract of debt places the debtor and creditor, to a certain extent, in the relation of partners. The creditor furnishes capital, the debtor labor. The separate values of this capital and labor become indistinguishably mixed—that is, the labor bestowed upon the capital adds to its value, by converting it into new forms—as, for instance, by converting leather into shoes. The debtor, while thus bestowing his labor upon the capital, receives his subsistence out of the mass; in other words, his subsistence, while laboring, is the first charge (as in all cases it necessarily must be) upon the combined capital and labor. The creditor holds the next lien upon this combined capital and labor, for the amount of his investment, and his stipulated profits. The debtor is entitled to the residue, if any there be, as the reward of his labor. During the partnership, the creditor holds the debtor to the observance of economy and good faith. Under these circumstances, both parties take the natural risks of the business. The creditor risks his capital, the debtor his labor.*

All this is obviously a joint operation, a *bona fide* partnership. The creditor, as well as the debtor, is to derive a profit from it. The prospect of profit is the creditor's only motive for entering into the contract. The debtor, therefore, becomes a bailee, not merely for the benefit of himself, but also for the benefit of the creditor. What is there in morality, or in the legal rights of the parties to the capital and labor thus combined, that requires the debtor to take the risk, both of

his own labor, and of the creditor's capital, beyond the due exercise of his skill, industry, care, and good faith in the preservation and management of the latter?

The creditor adopts this mode of employing his capital, as being the most advantageous to himself. He has more capital than his own labor can advantageously employ. He must, therefore, in order to make his capital productive, either loan it to others, or employ the labor of others upon it, by hiring them, and paying them wages. He considers that, by loaning it, and offering the debtor an inducement to the exercise of his best skill, by a contract that gives to the debtor all the proceeds of the joint labor and capital, except a stipulated amount, (called interest,) he will better stimulate the laborer's industry, skill, and care, and thus reap a better profit to himself, than he will if he hire the man as a laborer for wages. And this is the reason why he loans his capital, instead of hiring the labor necessary to employ it. But there is nothing in all this, that morally or legally entitles his capital—while it is in the hands to which he has thus, with a view to his own profit, chosen temporarily to entrust it—to an insurance against the necessary risks to which capital is always liable. Nor is there anything in all this, that morally or legally entitles him to make this bailee, and partner, his slave for life, in case of any misfortune to the partnership business, by which both his capital and the debtor's labor should be lost. Nor is there in all this, anything that gives him any tangible, legal, proprietary rights, to property that his partner and bailee may earn after the partnership, or bailment, shall have terminated.

Endnotes

[*] One of the greatest—probably the greatest—of all the evils resulting from the existing system of privileged corporations for banking purposes, is that these incorporations amass or bring together, and place under the control of a single directory, the loanable capital that was previously scattered over the country, in small amounts, in the hands of a large number of separate owners. If this capital had been suffered to remain thus scattered, it would have been loaned by the separate owners, in small sums, to a large number of persons; each of whom would thus have been supplied with capital sufficient to employ his own hands upon, with the means of controlling his own labor, and thereby of securing to himself all the fruits of his labor, except what he should pay as interest. But when all this scattered capital is collected into one heap, and placed under the control of a single directory, it is usually loaned in large sums, to a few individuals—generally to the directors themselves and a few other favorites. It probably is not loaned to one tenth, one twentieth, or one fiftieth as many different persons, as it would have been if it had been suffered to remain in its original state, and had been loaned by its separate owners. Individuals, instead of borrowing one, two, three, or five hundred dollars to employ their own hands upon, as would be the case but for these incorporations of capital, now borrow fives, tens, and hundreds of thousands of dollars, upon which to employ the labor of others. This process of concentration, monopoly, and incorporation, by means of which one man, a director, or a favorite of a bank, is enabled to borrow capital enough to employ the labor of ten, twenty, or an hundred men, of course deprives ten, twenty, or an hundred other men of the ability to borrow even

capital enough to employ their own hands upon. Of consequence it compels them to sell their labor to him who has monopolized the capital. And they must sell their labor to him at a price that will give him a profit—generally a large profit. That is, they must sell it for much less than the amount of wealth it produces. In this way ten, twenty, or an hundred men are literally robbed of an important portion of the fruits of their labor, solely that a single monopolist may be gorged with wealth. It is thus that the legislation, which creates these large incorporations of privileged bankers, operates to plunder the many of the fruits of their labor, and pamper the few with the spoils.

[*] Mutual benefit is the only foundation for the morality of contracts; or, at least, to be moral, a contract should contemplate no injury to either party.

[*] If the capitalist were to hire his labor, instead of the laborer hiring the capital, the subsistence of the laborer would still be as much a charge upon the capital, as it is when the laborer hires the capital, and makes his own living the first charge upon the joint proceeds of the capital and labor.

[*] There is, of course, some sympathy between all men, for a common nature compels it; but it is not quick or strong between opposite classes, or strangers, as it is between similar classes and acquaintances.

[*] The judiciary probably would assert this principle, in this country, (and under a system of universal suffrage they would be sustained in doing it,) were it not that, by our constitutions, they are placed, in a great measure, beyond the reach of either the approbation or censure of the people at large, and made dependent upon, and the mere creatures of, the very departments, whose usurpations they are, in theory, designed to restrain. They receive their offices and salaries from, and are made amenable by impeachment solely to the other departments; and, as might be expected, they servilely and corruptly sustain all their arbitrary measures, in defiance of all the moral and constitutional obligations they are really under in the premises.

Although the natural rights of all men to acquire, possess, and dispose of property—which, of course, involves the right to make all the contracts, *naturally lawful*, by which property may be acquired or disposed of—is so clearly announced in most of our constitutions; although, as a principle of natural law, it is too manifest to be doubted, or denied; although it is a right, in its nature vital to the well being, and even to the self-preservation of every man; and although all our statute Books abound with enactments, infringing, denying, or withholding this right, on the part of a greater or less portion of the people; it is nevertheless hardly probable that a single one of all these thousand enactments has ever yet encountered the veto of the judiciary. What a sickening proof this, of the degradation, corruption, and servility of that branch of the government which holds all our rights in its hands.

The judiciary should be made entirely independent of the executive and legislative branches of the government. They should neither receive their appointments nor salaries from them; nor be amenable to them by impeachment. We might then hope that they would act as a check upon their usurpations, instead of acting, as they generally do now, as mere pimps and panders to

them, lending the covering of their sanction to hide the crimes of the legislatures from the eyes of the victims. Judges should be elected by the people; for short terms; their salaries should be fixed by the constitutions; and they should be amenable, by impeachment, to independent tribunals specially instituted for the purpose. They should also be separately chosen, at separate periods, and by separate districts of the people—that no party, however powerful in the nation, or in the state, might be able to choose the whole of the judiciary.

The judiciary is altogether the most important department of the government; or rather would be so, if it were properly constituted. Indeed, if judges were but honest and capable, there would be very little for the legislative department to do, in regard to property, except to provide the means for carrying the decisions of the judiciary into effect.

[*] Jones on Bailments, p. 133.

[*] A promissory note has been defined to be "a written promise to pay money absolutely, and *at all events*." (Bailey on Bills, p. 1. Kent's Commentaries, Lect. 41.) And courts now act on that theory, and on the theory that such a contract is binding. But if such were the legal meaning of the contract, it would plainly be an immoral, absurd, and, therefore, void contract—of no legal obligation whatever.

[†] A bailment is where one person is temporarily intrusted with the property of another, either for safe keeping, as in the case of a special deposit; or to be used, as in the case of a horse lent for a journey; or to be sold, as in the case of goods intrusted to a commission merchant; or for some other purpose; under an agreement, express or implied, that he will comply with the conditions on which it is intrusted to him, and finally restore it to the owner, (or its equivalent, if it be sold,) or otherwise dispose of it agreeably to the owner's directions. The owner is called the bailor—the person intrusted, the bailee. If the property be lost or injured in the hands of the bailee, without any fault, or culpable neglect on his part, the loss falls on the owner.

[*] The value sold by the debtor to the creditor may often be the same "value," which he has just "received" of the creditor. It *must* be the same, where the debtor has no other property. But where he has other property, the value that he sells to the creditor is merged in the value of his whole property, and continues so until it is finally separated from it to be delivered to the creditor.

[†] On this point more hereafter.

[*] To say that value entrusted to a debtor was lost through his incapacity for the judicious management of it, (as it often really is, instead of by accident,) makes the case no stronger in favor of the perpetual liability of the debtor; because a want of capacity is nothing for which the debtor is culpable, or for which he can rightfully be held liable. The creditor, therefore, must judge for himself, and must always be presumed to have judged for himself, and to have taken the risk of the debtor's capacity, or incapacity, before he entrusted his property to him. All he could expect, or have a right to require of the debtor, was the faithful exercise of whatever capacity he possessed. It is neither policy, equity, nor law, that a man shall be protected against the legitimate consequences of his own negligence, or be permitted to throw them even upon another person equally negligent; much less upon an innocent person. The law requires diligence of all. This

principle, therefore, forbids that a creditor, who has been so negligent as to entrust his property to an incompetent debtor, should hold the debtor responsible for its loss, when the latter has faithfully exercised his best ability for its preservation.

[†] I shall hereafter have occasion to speak of the exceptions to this rule, and to show in what cases a moral obligation to pay may remain, after the legal one has expired.

[*] This point will be more fully established in the next chapter.

[†] That is, each debt becomes a lien in the order in which it is contracted, *if the debtor practise no fraud.* But if a debtor should fraudulently conceal a former debt, when contracting a succeeding one, the first creditor might thereby lose his prior lien, and the second creditor become entitled to it, in preference to him. The principle, on which the debtor's fraud would have this effect against the rights of his first creditor is this. Possession is *prima facie* evidence of property. There is no exception to this rule, unless in cases of real estate, where legislation has substituted public records, for possession, as evidence of property. There being no exception to the rule as to personal property, all persons are bound to know it, and govern themselves accordingly. If, therefore, A put his personal property into the hands of B—no matter on what private agreement between themselves, whether on the bailment of debt, or any other bailment—he thereby virtually and *legally* asserts, *to the world,* that B is the owner of it; and he cannot retract that assertion to the injury of any third person, who has been deceived by it, or who has purchased, without notice of the contrary, and actually paid value for the property. The sale, will, therefore, be a valid one to the purchaser, and the original owner can look only to his bailce for the damages.

This principle makes it necessary that the owner of property should take upon himself the risk (as he evidently ought) of any dishonest sales of it by those, to whom he voluntarily intrusts it, and whom he holds out to the world as the owners, instead of enabling him to throw this risk upon innocent and ignorant purchasers, who proceed according to law in presuming, (where they are not informed, or put upon inquiry to the contrary,) that the one having the property in his possession, is the true owner of it.

On this principle, a second debt, (which involves a safe of value in the debtor's hands,) contracted by concealing from the creditor the existence of a former debt, might be valid against the prior creditor, and operate as a prior lien on the debtor's property.

But there would be little or no danger of such transactions; because, first, the habit of obtaining credit is so general, as to serve as reasonable notice to put creditors on inquiry; and every creditor would therefore be bound either to take the risk of any prior debts, or to make special inquiry of his debtor, before giving him credit, whether he were already in debt? If his debtor were to answer falsely, and thereby induce him to give him credit on the idea that his (the debtor's) property was free from any prior lien, the act would be one of swindling towards the prior creditor, and would be properly punishable as swindling, especially if the prior creditor should suffer any actual harm from the second lien; and perhaps it would be the same if he did not suffer any. The case would be parallel to that of a man, who, after having given one mortgage of land, should afterwards, before that mortgage was recorded, give another mortgage to another

person, who had no knowledge of the first mortgage; and should thereby deprive the first mortgagee of his prior lien.

Debtors would have little or no temptation to practise such frauds; for it would not only make them liable as swindlers, but also liable in damages, where any actual loss should be suffered by the first creditor; and for these damages their future earnings would be liable *forever,* as will hereafter be shown, and not merely their present property, as in case of debt. If, therefore, a debtor should be unable to obtain a second credit on account of the lien of a prior one on his property, his true course would be to do the best he could with the means in his hands, until his present debt should come to maturity, then pay it, or pay to the extent of his ability, and thus cancel it. He would then be free to contract a new one.

It perhaps might be expedient for debtors, when contracting second debts, to take written acknowledgments from their creditors that their former debts (naming them) were disclosed to them. This would put it out of the power of creditors to impute fraud to their debtors; and would also prevent any collision between creditors as to the order of their respective rights. Probably, however, this precaution would be unnecessary, for the burden of proof would always be upon the second creditor to show the fraudulent concealment, and not upon the debtor to prove his disclosure, or that no disclosure was asked. The second creditor's own testimony would be inadmissible to give himself a prior lien; and, uncorroborated, it would be suspicious testimony even in a criminal prosecution for swindling. The probability, therefore, is, that for want of proof of any fraud, if for no other reason, there would be no collision among creditors, as to the order of their respective liens, unless second creditors, at the time of giving credit, should take *written* declarations from their debtors that there were no prior liens on their property. And debtors would not, of course, dare to put *false* declarations of that kind in writing, because they would thereby convict themselves of swindling. So that there would be no collision among creditors on this ground unless in some few cases, where debtors might be such open villains as to put their fraudulent representations in writing.

The principle stated in this note would be no obstacle to a debtor's selling or exchanging any property in his hands for an equivalent value of a different kind, provided he should act according to his best judgment, and with no intent to lessen the value of his creditor's security; because the lien of his creditor is not a special lien on specific articles of property, (none such being designated by the contract,) but upon the *amount of value* that inheres in *all* the property in his hands—which *value* he has an implied authority from the creditor to convert into different forms, by labor and traffic, at his discretion, (as will be more fully shown in the next chapter.) And when he sells an article for money, or makes an exchange of it for another commodity, the exchange is a mere conversion of the same value into a different form. The creditor's right attaches to it, or adheres to it, in its new form, in the same manner, and to the same extent, that it did in its original one.

[*] Ogden vs. Saunders, 12 Wheaton, p. 340.

[*] Suppose A sells to B, *and receives his pay for,* an hundred bushels of grain, out of a certain mass consisting of a thousand bushels; and A promises that he will separate the hundred bushels from the mass in which they are merged, and deliver them to B in one month from the time of

the contract. In this case the right of property in the hundred bushels, passes to B, the purchaser, at the time of the contract—and if the mass should be destroyed before the delivery, (without any fault on the part of A) the loss of the hundred bushels would fall upon B, the purchaser and owner of them. And this is but a parallel to the case of debt, where A should sell to B, *and receive his pay for,* an hundred dollars' worth of yalue out of his (A's) whole estate; and should promise that this hundred dollars' worth of value should be separated from the mass of his estate, (in which it is merged,) converted into money, and delivered to B, the purchaser, (or creditor,) in one month from the time of the contract. In this case, as in the case of the grain, the right of property in the hundred dollars' worth of value, would pass to B, the purchaser of it, *at the time of the contract;* and if the whole estate of A, in which B's hundred dollars' worth of value was merged, should then be lost or destroyed prior to the delivery, without any fault or culpable neglect on the part of A, (the bailee, or debtor,) the loss of the hundred dollars' worth of value would fall upon B, the purchaser and owner of it.

[*] The delivery may sometimes be important as evidence of the right of property, when there is no other evidence of it. But it is of no importance to the right itself, if the right can be proved by any other testimony. And a promise to deliver property, and an acknowledgment that the property has been paid for, (as in the case of a promissory note,) are as good evidence that the right of property has passed to the promisee, as is the delivery itself.

[*] The validity of this assent, for the conveyance of property, results from the facts that men have an inherent right to dispose of their property; that they can dispose of it only by the consent, or assent of their minds, or wills to do so; and that, consequently, whenever this consent, or assent, takes place, it actually *passes* the right of property, (in the thing to which it applies,) to the person to whom the proprietor designs it to go. It is truo the law requires some outward manifestation of this assent—such as a delivery of the thing sold, or a written or oral contract as proof of it—before it (the law) will declare that the right of property has actually passed to another; but this is required, not because the outward manifestation is of any intrinsic importance, but because we can have no evidence of a man's mental sensations except from some outward exhibition of them.

[*] Although a deed of land, or a bill of sale of a horse may contain an agreement that the possession shall remain in the seller for a time; and although such an agreement would imply that the horse or farm was left in his possession to be used by him, still it would not, as in the case of a note, (or bill of sale of dollars,) imply that the horse or farm might, in the mean time, be converted into any other shape for use, or be exchanged for any other commodity; because the horse and farm, unlike the money, are productive and useful in their present shape.

[*] It will be understood, when I say that the right of property in the "money" passes to the purchaser at the time it is sold, or contracted for, (though not delivered until a future time,) that I mean, not the right of property in the identical pieces of money that are to be delivered, or paid, but (for the reasons heretofore given) the right of property in an *amount* of *value,* existing in some shape or other, in the debtor's hands, equivalent to the money, and which is to be converted into money in time for the delivery.

[*] This distinction between the liability of a debtor, *on his contract*, for the money itself, and his liability, for the same amount, *in an action on the case for damage*, where the loss has been occasioned by his fault or negligence, is an important one in several respects, as regards both debtors and creditors, (as has heretofore been shown,) notwithstanding the amount recoverable in each case should be the same.

[*] This *prima facie* claim may be defeated as to any particular property in the hands of the debtor, clearly distinguishable from the bulk of his property, and which the debtor can show to have been either *loaned* or *given* to him since his debt was created.

[*] That is, he risks his labor, all over and above his necessary subsistence while laboring; which is no more than the capitalist would be obliged to risk if he hired his labor; and which, therefore, is not entitled to be considered as a risk created by the loan.

8. WHO CAUSED THE REDUCTION OF POSTAGE? OUGHT HE TO BE PAID? (1850)

Source

Who caused the Reduction of Postage? Ought he to be Paid? (Boston: Wright and Hasty's Press, 1850).

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WHO CAUSED the REDUCTION OF POSTAGE? OUGHT HE TO BE PAID?

BOSTON: WRIGHT & HASTY'S PRESS, NO. 3 WATER STREET.

1850.

TO THE PUBLIC.

The reduction of postage, which was made in 1845, was forced upon Congress, against the determined opposition of that body, by the establishment of private mails, and such an exposure of the unconstitutionality of the laws prohibiting private mails, as satisfied Congress of their inability to suppress the competition, and preserve the revenues of the Post-Office Department, otherwise than by the reduction of the government postage. And they accordingly reduced the postage to a point that made competition unprofitable, without even bringing the constitutionality of their prohibitory laws to the test of a decision by the Supreme Court.

The further reduction, made by the law of 1851, is but a natural consequence of the former one—it being proved, by the surplus revenue that accrued under the act of 1845, that a low rate of postage will pay the expenses of the Department.

The first reduction was *forced;* the second was the result of the surplus revenue that accumulated under that forced reduction.

Whoever, therefore, caused the first reduction, is the real author also of the second—and thus of the whole reduction—that is, from the original rates of 6¼, 10, 12½, 18¾, and 25 cents, *for each piece of paper,* (less than four,) *to an uniform rate of three cents, the half ounce, for all distances, within the United States, if prepaid, or five if not prepaid.*

The law of 1851 also provides that so soon as the revenue of the post office Department shall exceed the expenditures by five per cent in a year, the postage shall be reduced *to two cents the half ounce.*

The laws both of 1845 and 1851 also make large reductions in the postage of newpapers, circulars, periodicals, and pamphlets.

The subscribers present to the public the following "Letter" and "Statement" of Lysander Spooner—together with a copy of his argument of the "*Unconstitutionality of the Laws of Congress Prohibiting Private Mails,*"—as proof that Mr. Spooner has been the principal, and by far the most efficient agent in effecting the reduction of postage.

Our object, in presenting this evidence, is to submit to the public the question, whether the accomplishment of so great a service, by Mr. Spooner, does not demand some compensation at the hands of those who are enjoying the fruits of his exertions?

The English people, by voluntary contribution, gave to Rowland Hill, a munificent testimonial of their gratitude for his services in reducing the postage. The English government also honorably rewarded him. Shall Mr. Spooner go entirely unrewarded?

Mr. Spooner's claims to a compensation, are enhanced by the fact that, in his contest with the government in 1844, (which caused the first reduction of postage,) he became involved in debts which he has hitherto been unable to discharge. We cannot believe the public will be content to enjoy the fruits of such a service, and make no remuneration for the exertions and losses by which it was accomplished.

It will be seen by the "Letter" and "Statement" of Mr. Spooner, and the evidence he produces in support of them, that he published his argument in January 1844, and established his private mails in the same month—avowing, in his public advertisements, his "intention thoroughly to agitate the question, and test the constitutional right of free competition in the business of carrying letters," if he should be sustained in his enterprise by the patronage of the public. This patronage was not extended to him, in a sufficient degree to meet the expenses of his mails, and of the conflict which the government carried on against him. And in six or seven months he was obliged to surrender the business—but not until the principle which he had established by argument, had become so far fixed in the public mind as to make the suppression of the private mails impossible, otherwise than by a reduction of the postage.

The merit of Mr. Spooner consists in his being the first to establish by argument the unconstitutionality of the laws prohibiting private mails, and the first to establish mails *on that principle,* and challenge the government to test the question—whereby a reduction of the postage was coerced.

That Mr. Spooner's argument, and the establishment of his mails, had the merit and the efficacy we have ascribed to them, we subjoin the following opinions expressed by the press, and by distinguished legal gentlemen:

The New York Express (January 13, 1844,) says of the argument, "The writer has certainly made out a very strong case."

January' 30, 1844, the same paper called it "A very able argument,' and said "We do not see how it can be got over."

February 7th, 1844, the same paper said, "Mr. Spooner has discussed that great question with surpassing ability."

The New York Tribune (January 18, 1844,) said, "This pamphlet deserves attention. It is certainly an able statement of one side of the subject, and the people may find after all that the Postmaster has stretched a point in the constitution."

The New York Evening Post (January 29, 1844,) called it "A very able pamphlet," and said, "We hold with Mr. Spooner in this matter."

The New York Journal of Commerce (February 29, 1844,) said, "It has been concurred in by the general voice of the legal gentlemen who have examined it."

Hon. Rufus Choate certifies that he "had occasion to examine it carefully," and that "the author's leading and important position, that all laws prohibiting private mails were unconstitutional, was maintained with a force and cogency, calculated, under the obvious limitations applicable to it, to convince every unbiassed judgment."

Hon. Franklin Dexter certifies that he "considers it as quite unanswerable;" that "as U. S. District Attorney," he "had occasion to consider it carefully, and could make no answer to it satisfactory to himself."

Hon. Simon Greenleaf, (late Law Professor in the Cambridge Law School,) certifies that he has read it, and "should think it a very difficult work to refute it."

Hon. Benjamin F. Butler, (late U. S. Attorney General,) although, out of deference to the practice of the government, he forbears to say the laws prohibiting private mails are unconstitutional, yet says that Mr. Spooner's "argument goes very far to show that no power to pass any such laws has been delegated to the Congress of the United States. If the question were a new one, I should expect the courts to repudiate the claim of the Federal Government to any such authority."

Judge Story, in June 1844, (five months after the publication of Mr. Spooner's argument,) on the trial of a case for the violation of the Post-office laws, said, (as reported in the Boston Daily Advertiser of June 18,) that "there were many difficulties in maintaining in the United States any *exclusive* right to establish post-offices and post roads."

Senator (now Judge) *Woodbury,* February 6, 1845, (about one year after the publication of Mr. Spooner's pamphlet,) said in the Senate of the U. S.: "Were the question a new one at this moment, the whole restrictions on private enterprise and private competition in carrying letters themselves, could not stand an hour."

Senator Simmons said February 6, 1845, in the Senate of the U. S.. "The power to establish a mail was not given to enable the government to make exorbitant charges for service, much less to enable it to enforce a compliance with them, if made."

Hon. Mr. Dana, M. C. of New York, said in the U. S. House of Representatives, February 25, 1845. "The validity of that (the government) monopoly is not beyond all doubt. Stake not the Department, under present circumstances, upon the hazard of a law suit. Prejudice is too strong against you. Success is almost impossible; victory is useless; defeat ruin."

We think these opinions of Messrs Story, Woodbury, Simmons, and Dana, are fairly to be attributed to Mr. Spooner's argument—inasmuch as such opinions, (so far as we know,) had never before been heard from the Bench, or in Congress.

We think also, that the reduction of the government rates, without bringing the constitutional question before the Supreme Court, is a virtual admission, on the part of Congress themselves, that they did not feel it safe to subject the constitutionality of their prohibitory laws to the investigation of that tribunal; otherwise they would not have succumbed to such a defiance of their authority, without bringing the question to a judicial decision, as the Postmaster General was invited by Mr. Spooner to do.

Mr. Spooner's "Statement," which follows this card, will be found to contain numerous extracts from debates in Congress, and from reports of the Post-office Committees, all showing conclusively that the necessity of getting rid of the competition of the private mails, and the acknowledged impossibility of doing it otherwise than by a reduction of postage, were the motives which induced Congress to make the reduction in 1845.

It is on these grounds that we think that Mr. Spooner's argument, and the establishment of his private mails, (with other private mails, which grew up, as we think, mainly under the protection of his argument and example,) were the immediate and most efficient causes of that reduction.

Hon. Simon Greenleaf certifies that "the reduction of postage (in 1845) seems justly attributable to his (Mr. Spooner's) exertions."

Judge Kent, of New York, certifies that "one thing is certainly evident, that Mr. Spooner has displayed talent and energy in obtaining a reduction of the charges of postage, and deserves the gratitude of all of us for the obtaining of a great public benefit."

Hon. Benjamin F. Butler says, "That your (Mr. Spooner's) efforts have largely contributed to awaken attention to this great interest, no man can deny. And whatever I may have thought of them, before my recent perusal of your pamphlet, (published by you in 1844,) I am now satisfied that you were induced to engage in those efforts under a deep conviction of the unconstitutionality of the laws with which they conflicted, and that you may, therefore, be regarded as having rendered, in this matter, good service to the country."

Hon. Robert Rantoul, Jr., says, "I think Mr. Spooner entitled to the gratitude of his country for his able and efficient labors to illustrate the constitution, and to facilitate correspondence."

Hon. William H. Seward also says, in reference to the same services, "I am quite satisfied that Mr. Spooner deserves well of the country, and of the age."

For further evidence of the efficiency of Mr. Spooner's efforts in effecting the reduction that was made in 1845, we must refer to his "Letter" and "Statement," which follow this card; and especially to the extracts he has given from the report of the Postmaster General, the reports of Committees, and the Debates in Congress. And we take leave to repeat that the reduction of 1851 is a legitimate result of the reduction of 1845, and is therefore attributable also to Mr. Spooner's exertions.

It is due to Mr. Spooner to say that he was not the first to suggest this contribution. At the time the new postage law went into operation, in 1845, it was proposed to him that the public be called upon to remunerate him for his services in bringing it about; and he was requested to prepare such a statement of the facts as was necessary to be laid before the public for that purpose. He then declined, from motives of delicacy, to furnish the statement, and the matter was necessarily dropped. It has since been proposed to him again; and a sense of duty to himself and his creditors, has induced him to furnish the "Statement" which follows.

From the mercantile, manufacturing, banking, and professional community, who have already realized large sums from the reduction of 1845, and who will realize similar profits from the one of 1851, we are confident something liberal may be expected. We trust also that other persons, whose savings have been, and will be less, will yet feel it a pleasure and a duty to contribute such *small sums*, (one dollar each, for instance,) as, if numerous as we think they ought to be, will, in the aggregate, make up a testimonial that will honorably mark the public gratitude for so great a service as the reduction of the postage.

As it will necessarily be impossible for agents to visit all those, who may be disposed to contribute, *we invite each person, without waiting for further solicitation, to send his contribution, by mail, to* "*Lysander Spooner, Boston, Mass.*"

In the cities we invite the merchants to move in the matter, by sending their contributions individually, or by acting collectively, as may seem to them proper.

In each village, where many will be disposed to contribute sums too small to be sent singly by mail, will not some public spirited individual take it upon himself to act as a collector of contributions, and forward them as above directed?

To ensure the success of the objects in view, it is important that each one should feel the obligation to do his own part, and not omit it, in the confidence that others will be more just or liberal than himself.

P. S. Will not editors, whose interests have been largely promoted by the reduction of postage, give the foregoing card an insertion, with such comments as the facts given in the following "Letter" and "Statement" may seem to them to justify?

LETTER. Boston, 1851. M. D. PHILLIPS, Esq.,

Dear Sir:—

You were pleased to suggest to me, as have many others, that the public were indebted to me for the Cheap Postage Law, that was passed in 1845. And you and others have proposed that those persons who have realized large savings from the reduction of postage, be requested to recognize the obligation. With this view you have desired me to put on paper the facts necessary to enable the public to understand my agency in the matter.

The question of indebtedness and obligation, on the part of the public, is one to be settled by each individual for himself; but the following pages will probably satisfy those who may read them, of these facts, viz: That I was the first to prove by argument—certainly the first to prove to the satisfaction of any considerable portion of the public—that Congress had no Constitutional power to forbid the establishment of mails, by the States, or by private individuals, in competition with the mails of the United States; 2, that I was the first to establish mails *on that principle*, and invite the government to test the question before the judicial tribunals; 3, that these events were followed by a recognition of the correctness of the principle, by an important portion of the bar, the press, the people, and, in one instance, by the bench, (Judge, Story,) and, in another instance, in the Senate, (by Levi Woodbury; 4, that numberous other private mails were speedily established, whose operations, by diminishing the revenues of the general Post office, threatened the Department with bankruptcy; and, finally, that Congress were compelled, in order to save the Department from becoming a burden upon the treasury, to reduce the postage to a rate that would rid the Department of the competition of the private mails; and that these were the immediate causes that led to the passage of the cheap postage act of 1845.

The importance of the Constitutional principle I contended for, whether viewed politically, socially, or commercially, will be in some measure appreciated, when it is considered that, if the government of the United States have the power to forbid the States and individuals carrying letters, newspapers, and other mailable matter, it can, at will, suppress, to any extent it pleases, all written and printed communications between man and man. Theoretically, this absolute power was claimed by the government; practically, it was exercised to a very injurious and tyrannical extent.

The right of the States and individuals to establish mails has not yet been fully established by judicial decisions. The act of 1845, in terms, denies it; although the act itself was practically a concession to it—for it is not to be supposed that Congress would have yielded to a competition so destructive of their revenues, and based, as the Post-office Committee of the House of Representatives said, "upon the impudent assumption that the government of the United States have no authority to restrain or punish" the competitors—it is not, I say, to be supposed that Congress would have been so regardless, both of their own dignity, and of the duty of maintaining their Constitutional prerogatives inviolate, as to have thus succumbed to the usurpations of a few private persons, without so much as bringing the case before the Supreme Court, if they had had

any real confidence that their authority would there have been sustained. They would naturally have vindicated their authority first, and considered the reduction of postage afterwards.

It was my intention—had I been sufficiently sustained by the public—to carry the question to the last tribunal. But after a contest of some six or seven months, having exhausted all the resources I could command, I was obliged to surrender the business, and with it the question, into the hands of others, who did not see sufficient inducement for contesting the principle, after the reduction of postage had taken place.

But, great as was the relief afforded by the act of 1845, the value of my movement did not end there. That act, by the proof it afforded that a low rate of postage will support the Department, became but a preparatory step to the still further reduction made by the act of 1851.

I understand that my claim to be remunerated for my services and losses, has been objected to, on the ground that I engaged in the enterprise with a view to make money; that, so far as I was concerned, it proved to be a losing business; that, in this respect, it stands but on a level with enterprises generally that prove unfortunate, presenting no claim for indemnity or compensation from the public. The error of this objection consists in this, that it leaves entirely out of view the benefits the public have received from my unrewarded labors. Those benefits distinguish this case from all those unfortunate private adventures, which propose no benefit to the public, in which the public have no interest, from which they derive no advantage, and whose authors they are consequently under no obligation to compensate.

It is true I hoped to realize a profit from the enterprise; although I trust I had also a proper sense of pride and duty in the establishment of so important a principle. But no person—no one certainly in my circumstances—would have been justified in entering upon so expensive a contest with the government, unless he had trusted to come out of it, at least without loss.

With reference to my prospects of profit, it is also to be considered, that although the legal idea, and the argument sustaining it, may have had as much originality as any of those mechanical or chemical ideas, which the government protects by securing to their authors an exclusive property in them; and although my ideas were of far greater value to the public than almost any one of those that have ever been thus guaranteed to their authors; still, being legal ones, I could obtain for them no patent, and secure for them no monopoly. All persons, who could read my argument, or hire a lawyer to read it for them, were at once free to avail themselves, as many did, of my thoughts, and establish themselves in competition with me in carrying them into practice. The idea and the argument were therefore necessarily a free gift, on my part, to the public, because the public were sure to get the benefit of them, without being under any compulsion to make any payment to me.

Nevertheless, I looked for a profit from the undertaking—a legitimate profit from the business of carrying letters in the midst of free competition—for I could not believe that the public would be so unmindful of one who should vindicate for them so great a right—a right so vital to civil liberty, so important in a pecuniary view, and the establishment of which was sure to result in the reduction of the government postage to the lowest rate to which free competition could bring

it—as to give him no preference in business over those who had done nothing for them in that behalf. Probably such would not have been the case, had not the fact of my being the first to establish mails in avowed defiance of the authority of Congress, and the fact that my mail arrangements were at the outset more extensive than those of any other person, (to wit, from Boston to Baltimore,) induced the Postmaster General to direct nearly or quite all his efforts, for the suppression of private mails, against me alone. By employing a large police in the cities and on the roads, he was enabled occasionally to detect and arrest my carriers, and thus obstruct my mails. In this way the confidence of the public in the certain transmission of their letters through my mails was diminished, and their patronage accordingly withheld. In the mean time, other private mails were allowed to pursue their business, either in entire, or comparative, quiet; and their mails being the surer conveyance, they secured the larger share of business, and their proprietors reaped the profits which should have been the reward of my labors.

The consequence was that, after having sustained the conflict for some six or seven months, and placed the principle, on which I acted, so fully before the public as that it finally compelled the concession of Congress to it, I was obliged, by want of means, to abandon the business, after having incurred debts which to this day I have been unable to discharge.

I subjoin the following "*Statement,*" and a copy of my argument. The two embrace the proofs of all the more important assertions made in this letter.

With these remarks I leave the question of obligation, on the part of the public, to be determined by each person individually, to whom application may be made for contributions.

Very truly
Your Obt. Servt.,

LYSANDER SPOONER.

STATEMENT.

THE CONSTITUTIONAL QUESTION.

My argument on the "Unconstitutionality of the Laws of Congress Prohibiting Private Mails," was published in January, (about the 10th,) 1844.

Copies were sent to most of the members of Congress, and to the Postmaster General.

On the 6th of Feb., 1844, it was published at length, in the New York Express.

Of this argument the *New York Express* said, (*January* 13*th,* 1844,)—"The writer has certainly made out a very strong case."

January 30*th,* the same paper called it, "A very able argument," and said, "we do not see how it can be got over."

February 7th, the same paper said, "Mr. Spooner has discussed that great question with surpassing ability."

The *New York Tribune,* (*January 18th,* 1844,) gave an extended synopsis of the argument, and said:

"This pamphlet deserves attention. It is certainly an able statement of one side of the subject, and the people may find, after all, that the Postmaster has stretched a point in the Constitution."

The *New York Evening Post,* (January 29th, 1844), called it "A very able pamphlet," and said, "we hold with Mr. Spooner in this matter.

The *New York Journal of Commerce,* (*February 29th,* 1844), said, "It has been concurred in by the general voice of the legal gentlemen who have examined it."

Hon. Rufus Choate, Hon. Simon Greenleaf, Hon. Franklin Dexter, Hon. Benjamin F. Butler, Hon. William Kent, Hon. William H. Seward, and Hon. Robert Rantoul, Jr., give the following certificates:

"I have been requested to express an opinion respecting a pamphlet entitled '*The Unconstitutionality of the Laws of Congress Prohibiting Private Mails, by Lysander Spooner,*' published in 1844. Having had occasion to examine this pamphlet carefully, soon after it appeared, I am happy to say that I was impressed with the ability and research displayed in it. The arguments it presented were, to a great extent, original, and the author's leading and important position, that all laws prohibiting private mails were unconstitutional, was maintained with a force and cogency, calculated, under the obvious limitations applicable to it, to convince every unbiased judgment.

"Boston, 9 Feb. 1849.

RUFUS CHOATE."

"Andover,May 2, 1849.

"Gentlemen,

—I have received your favor of April 27, requesting my opinion on the constitutionality of the laws against private mails.

"My attention has never been specially called to that question, and it is out of my power, at present, to command the time necessary for a thorough examination of it. I can only say that, having read over Mr. Spooner's argument, I have been deeply impressed with its cogency, and the research it displays, *and should think it a very difficult work to refute it.* In effecting a reduction of the postage, *which seems justly attributable to his exertions,* he has performed a service deserving not only the gratitude of the community, but a remuneration of the expenses it must have cost him.

"Respectfully, your Obedient Servant,

"S. GREENLEAF."

"To Messrs. John W. Wetherell, John C. Wyman, and Oliver H. Blood."

"Boston,January 31, 1850.

"Samuel E. Sewall, Esq.,—Dear Sir,

—In answer to the inquiry contained in Mr. Lysander Spooner's letter to you, I very willingly state that I consider his printed argument, against the power of Congress to prohibit private mails, as quite unanswerable.

"That argument was produced, and substantially repeated, in the defence of certain prosecutions which I was, as U. S. Dist. Attorney, specially required to institute against persons who had set up private mails. *I had, of course, occasion to consider it carefully, and I could make no answer to it satisfactory to myself.* Since that time my attention has been again drawn to the subject, as Lecturer on Constitutional Law at the Cambridge Law School, and I felt obliged to state the opinion that Congress possessed no such power.

"FRANKLIN DEXTER."

(*Hon. B. F. Butler's* letter discusses the question, at too great length to be inserted entire. I give the more important portions.)

"New York,Feb. 26, 1850.

"Lysander Spooner, Esq.,—Sir,

— * * * I regard the provisions of the existing Acts of Congress, creating a government monopoly in the transmission of 'mailable matter,' as inexpedient and oppressive; and, so far as those provisions impose penalties on individuals for carrying, for hire, on their persons, or in their vehicles or vessels, by land or water, letters, newspapers, or packages, *your argument goes very far to show, that no power to pass any such laws has been delegated to the Congress of the United States. If the question were a new one, I should expect the courts to repudiate the claim of the Federal Government to any such authority.* * * * * *

"I am not prepared to say that the several Congresses that passed, and the several Presidents that approved, these laws, transcended their powers, and violated the Constitution. *

"That your efforts have largely contributed to awaken attention to this great interest, no one can deny; and, whatever I may have thought of them before my recent perusal of your pamphlet, (published by you in 1844,) I am now satisfied that you were induced to engage in those efforts under a deep conviction of the unconstitutionality of the laws with which they conflicted, and that you may therefore be regarded as having rendered, in this matter, good service to the country.

"Very Respectfully, your Obedient Servant,

"B. F. BUTLER."

"New York,May 18, 1849.

"My Dear Mr. Howe,

—I return the pamphlet containing the argument of Mr. Lysander Spooner, on the Unconstitutionality of the Laws Prohibiting Private Mails.

"That he has established this point, I am not prepared to say, while I appreciate the force of his reasoning.

"One thing is certainly evident, that Mr. Spooner has displayed talent and energy in obtaining a reduction of the charges of postage, and deserves the gratitude of all of us for the obtaining of a great public benefit.

"I am Faithfully Yours,

"W. KENT."

"Auburn,June 2, 1849.

"Gentlemen,

—My engagements leave me no leisure to examine the interesting question discussed by Mr. Spooner in the pamphlet you have submitted to me. It seems clear enough, however, that his opinion of the Unconstitutionality of the Laws Prohibiting Private Mails was adopted by him in good faith, and upon at least plausible grounds, while it has been discussed with great ability and fairness. Inasmuch as the agitation of the question, very proper under such circumstances, contributed to the reformation of our Post system and the establishment of cheap postage, I am quite satisfied that Mr. Spooner deserves well of the country and of the age.

"I am, with great Respect, your Humble Servant,

"WILLIAM H. SEWARD."

"To Messrs. John W. Wetherell, Oliver H. Blood, and John C. Wyman."

"Beverly,Dec. 27, 1849.

"I have read and examined with some care Mr. Spooner's pamphlet on the supposed power of Congress to prohibit private mails. His argument against the existence of such a power is lucid and thorough—indeed it seems to exhaust the inquiry on that side of the question.

"As it is of transcendent importance that the constitutional limits of the action of the Federal Government should be clearly defined and settled by general acquiescence, and as this can only be done by a consideration of the whole argument for and against every questionable claim of

Federal power; as nothing can contribute more towards the progress of civilization and social improvement, and to perpetuate and strengthen the bonds of our glorious Union, than the cheap, rapid, safe and unrestricted intercommunication of thought, through written or printed vehicles, over the whole territory comprised in this group of republics, I think Mr. Spooner entitled to the gratitude of his country, for his able and efficient labors to illustrate the Constitution, and to facilitate correspondence.

"ROBERT RANTOUL, JR."

The public will judge whether this argument, or the agitation of the question produced by it, and by the establishment of my mails, had any thing to do in calling out the following opinions.

Judge Story's Opinion.

In June, 1844, (five months after the publication of my argument,) the first intimation, so far as I know, that ever came from the Bench, that the laws prohibiting private mails were unconstitutional, came from Judge Story, on the trial of Winsor Hatch.

After giving the case to the defendant, on the ground that the facts proved, did not bring the case within the letter of the statute, Judge Story, (as he is reported in the Boston Daily Advertiser of June 18th,) said:

"That there was a very grave and important question behind all this, which was not raised by this case, but which had been of late agitated; and whenever a case occurred, requiring its decision, must be decided at Washington, by the Supreme Court of the United States. This was, whether the United States had any *exclusive* right to establish post offices and post routes. This was a question of great importance, *and there were many difficulties in maintaining that power in the United States.*"

As reported in the Boston Mail, of June 17th, Judge Story said:

"That a still more important question lay behind all these, and that was, whether the government had, by the Constitution, any *exclusive* right to set up post offices and post roads, or whether its jurisdiction extended any farther than the right to make laws regulating the conduct of those actually employed in the service of the United States mail. This question, he said, he should embrace the first proper opportunity to carry before the full bench of the Supreme Court, *plainly intimating that his own opinions were opposed to any such exclusive right on the part of the government.*"*

Senator Woodbury's Opinion.

February 6th, 1845. In a debate in the Senate, on the new postage bill, pending an amendment to restrict the transmission of *newspapers* out of the mail, Senator Woodbury, now Judge Wood-

bury, of the Supreme Court of the United States, (as reported in the *Globe,* and the report copied in the *Boston Times* of Feb. 14,) said:

"How abhorrent, also, was the principle involved in such a prohibition! We choose to become common carriers, on the great highways of the nation, of letters, and newspapers, and periodicals, and therefore assume the power to punish all others who choose to exercise their individual rights to be likewise common carriers. * * *

"What, sir!—are we to interfere in this way with the mails in which our constituents shall carry or send their own property? Are we to regulate the prices of labor or freight, or the private rights of the people in any thing, merely by construction? *No power was ever given in the old Confederation, or in the present Constitution, to exercise such officious and restrictive interference.*

"*He was alarmed at the progress of the government in setting up such a monopoly, as well as officious interference.*Were the question a new one at this moment, the whole restrictions on private enterprise and private competition in carrying letters themselves, could not stand an hour.**Government would be left to carry its own letters, at its own prices; and individuals placed in the same position, or both hire others who would do it best or cheapest.*"

Senator Woodbury made other remarks of a similar character, too long to be quoted at length.

Senator Allen's Opinion.

February 6, 1845. Pending the same amendment, on which Senator Woodbury expressed the opinions just quoted,

Senator Allen said,

"It was very easy to see that, if the United States had a right and absolute control over the printed matter of the country, and therefore absolute power to make it circulate through *one channel,* they likewise had a right to say *how much* should circulate through that channel, and consequently had entire control over the press of the United States. That was the consequence. If Congress could prohibit the editors of newspapers from circulating their journals except through the public mail, so Congress could prohibit them from circulating more than a given number of their journals, or circulating them upon particular roads, and thus put the entire business under the administration of the Congress of the United States. * * * * * * *If that power exist in the Constitution, it ought not to exist there, and the Constitution ought to be amended for that reason.* He had no idea of allowing this government to put its hand upon the press of the country, and interdict, between it and the country, any communication."

January 27, 1845. Senator Merrick said,

"It is known to all who hear me, that this (exclusive) power on the part of Congress to control this system, has of late been called into question in some quarters of the country." * *

"Some (Senators) have ridiculed the idea of resorting at all to the use of penal enactments, as being, under any circumstances, unavailing and incapable of execution."

Why "incapable of execution under any circumstances?" Because unconstitutional. It is not to be supposed that Senators would "*ridicule*" the idea that constitutional laws could be enforced.

Senator Simmons' Opinion.

February 6, 1845. Senator Simmons said,

"The power to establish a mail was not given to enable the government to make exorbitant charges for service, much less to enable it to enforce a compliance with them, if made."

Hon. Mr. Dana's Opinion.

February 25, 1845. Hon. Mr. Dana (of New York) said, (in the House of Representatives,)

"But it may be said that the constitutionality of the penal laws, to suppress the expresses, may be easily ascertained by a trial. Sir, the Post Office is too great a blessing to this country to be lightly put in jeopardy. Your monopoly and exorbitant charges are extremely odious. *The validity of that monopoly is not beyond all doubt. Stake not the department, under present circumstances, upon the hazard of a law-suit. Prejudice is too strong against you. Success is almost impossible; victory is useless; defeat ruin.*"

When such opinions as have now been cited were expressed by the Press, the Bar, the Bench, in the Senate and in the House of Representatives, it is easy to see, (as, it will hereafter appear, was repeatedly asserted in Congress,) that the reduction of postage was the only thing that could save the Post Office Department from complete prostration.

MY PRIVATE MAILS.

On the 23*d day of January,* 1844, my mails were started from New York, to Philadelphia, Baltimore and Boston, as will appear by my advertisements in several of the New York papers of that date.

In my advertisements I stated,

"The Company design, (if sustained by the public,) thoroughly to agitate the question, *and test the constitutional right,* of free competition in the business of carrying letters. The grounds on which they assert this right, are published, and for sale (at the offices) in pamphlet form."

Some days before starting my mails, I wrote to the Postmaster General, informing him that I was about to establish mails, and inviting him to try the constitutional question.

The enterprise was strenuously supported from the beginning, by the *New York Express, Journal of Commerce, and Evening Post.* Other papers subsequently advocated the principle. Many stood

neutral for a time. Few opposed, so far as they came under my observation, except those that had the patronage of the Post-office Department.

THE ACTION OF THE GOVERNMENT.

The action of the government in relation to the matter will be seen by the following extracts from the reports of Committees, the resolutions of the House of Representatives, the debates of the Senate, and the report of the Postmaster General.

The interesting epithets, which *some* of them apply to my conduct, would indicate that they had sufficient spirit, and a sufficient appreciation of the enormity of my offence, to have induced them to carry the question before the Supreme Court, before condescending to yield by reducing the postage, if they had not been overruled by others, or if, in their cooler moments, they had not themselves doubted what the decision of that Court might be.

The effect, which a little time and reflection had upon the feelings and language of some of the members, is quite noticeable, as, for example, in the case of Mr. Merrick, the Chairman of the P. O. Committee of the Senate. Those persons, who, on the 22d Feb., 1844, were described by him as "destitute of all patriotic or moral principles," are, on the 27th Jan., 1845, spoken of as "private competitors, sustained by public opinion." And their acts, which, at the former date, were designated by him as "*such flagrant outrages,*" and "*such flagitious conduct,*" became at the latter date, "private enterprise." And "the conclusion, to which he comes" is, that after all Congress themselves have been the great sinners, and their first duty is to reform their own legislation, and thus "*satisfy and propitiate an enlightened public.*"

FIRST RESOLUTION OF THE HOUSE OF REPRESENTATIVES.

On the 29*th of January,* 1844, six days after my mails were started, the House of Representatives

"*Resolved,* That the Committee on the Post Offices and Post Roads be instructed to inquire if any person or persons have, in opposition to the laws of the United States, established offices, and provided conveyances for transporting letters, papers, and other mail matter, in violation of the regulations adopted by Congress, from time to time, for the government of the Post Offices of the United States; and report to this House the result of their inquiry."

FIRST REPORT OF THE P. O. COMMITTEE OF THE HOUSE.

On the 28*th of February,* 1844, the Committee reported, in answer to the foregoing resolution, that they

"Have become satisfied from information which has reached them through the public press, through letters, pamphlets, and other sources, that the laws of the United States, establishing and regulating the Post Offices of the Union, passed in pursuance of the Constitution, are daily violated and evaded. These infractions of existing laws, prompted by a sordid feeling of selfishness and avarice, are now openly and wantonly perpetrated by individuals, *under the impudent assumption that the government of the United States have no authority to restrain or punish them.* They claim the right, in contempt of all existing law, and in open defiance of its sanctions, to establish 'offices, and provide conveyances for transporting letters, papers, and other mail matter.' *And they further contend that the power* '*to establish Post Offices, and Post Roads,*' *delegated to the government of the United States, is not exclusive, but may be exercised either by the States or private individuals.* In conformity to these opinions, real or pretended, extensive combinations have been formed, and are now daily violating existing laws, to the evident injury of the revenue of that important branch of the national service.

The committee are unanimously of opinion, that the power granted by the Constitution, to establish Post Offices and Post Roads, and the laws passed in pursuance of it, are both fraudulently evaded, and wantonly violated and defied, and that the government ought without hesitation to interpose its strong arm to arrest, and forever suppress such lawless conduct. The power to do this, if ever before questioned, has hitherto been regarded as the constitutional prerogative of Congress; for, from the foundation of the Post Office Department, the power has been exercised: and, in other times, the exercise of such a power has been submitted to in a spirit of loyalty and patriotism. That time has gone by; and the recent discovery, that a power that has been exercised by this government from its infancy, without a question, and without a doubt, may be violated with impunity, renders further legislation necessary to protect the public service, and presents a question no less momentous than this: Whether the Constitution and Laws of the country, or a lawless combination of refractory individuals shall triumph?

These outrages are of daily occurrence upon the principal lines of intercommunication between the important cities and towns of the Union, and, in some instances, are carried on under a belief, or pretence, that the existing laws cannot be enforced; and one of the active agents in their perpetration, and who is represented to be irresponsible in a pecuniary point of view, has even challenged a prosecution, in order to test the power of the government to restrain, prevent, or punish him for offences of that kind."

SECOND RESOLUTION OF THE HOUSE OF REPRESENTATIVES.

On the 5*th March,* 1844, the House of Representatives

"*Resolved,* That the Postmaster General be requested to report to this House, what steps have been taken to prevent and punish the infractions of the laws of the United States prohibiting the

establishment of any private mail or post, for the transportation of letters and packets; and whether in his opinion the existing laws are adequate to the suppression of such offences."

REPORT OF THE POSTMASTER GENERAL.

On the 30*th March,* 1844, the Postmaster General made a report in answer to the call of the preceding resolution. The following are extracts.—

"One Lysander Spooner, at the head of what he has been pleased to denominate the 'American Letter Mail Company,' openly established his head-quarters in New York, and commenced the business of transporting letters between that city and Baltimore, and to other points. He professed to do this business openly, and defied the existing laws; *invited a prosecution to test their constitutionality;* and (as he supposed generously) offered to admit all facts necessary to establish his guilt. This offer, however, was coupled with a condition, that he was to be permitted to pursue his business unmolested until the Supreme Court of the United States had decided his acts illegal, and the laws of Congress referred to constitutional.* I could not consent thus to countenance for a single moment this open and lawless movement; and declined the conditions of Mr. Spooner, and gave orders and took the necessary steps to have him and his agents arrested by appropriate writs. When his agents could be certainly identified, they were denied a transit in the railroad cars, engaged in the transportation of the mail.*

"One of these cases has been decided in the District Court of Maryland, and Mr. Spooner's agent subjected to a fine of fifty dollars. * * * *

"Upon the decision of this case in Maryland, the head of the 'American Letter Mail Company,' issued his card, announcing his intention to confine his operations *in the free States;* alleging as his reason, that he was of opinion that no judge or jury in a free state would sustain the opinion of Judge Heath. Entertaining an opinion that the law was the same in both States, and equally confident that the result would be the same, whether tried in Maryland or Pennsylvania, New York or Massachusetts,† I have caused Mr. Spooner and his coadjutors to be arrested in all those States, whenever they have been found violating the law.

"This Company does not desist, and await the event of the suits instituted, but is still, as the reports of the agents inform me, in the daily violation of the existing laws. The daily expense of keeping up a police to detect these men is very considerable, and will not, I apprehend, be met by all the penalties which may be recovered. Who constitute this 'American Letter Mail Company,' besides Mr. Spooner, is a fact heretofore concealed from the public.

"I have deemed it unnecessary to accompany this report with any of the numerous letters and reports from postmasters, and the agents of the department, connected with this subject. I wish I could say, in answer to the resolution, that the 'American Letter Mail Company,' are the only persons engaged in this business of transporting letters over mail routes, for hire, to the very great injury of the revenue of the department. Other persons, in various parts of the United

States, are engaged in this business, against whom prosecutions have been ordered, where the proof could be obtained. The extent of the business thus carried on, can only be measured by the evident decline in the revenue of the department, which, I regret to say, from present appearances, will fall below the expenditures of the current year, notwithstanding the utmost economy has been pursued."

SECOND REPORT OF THE P. O. COMMITTEE OF THE HOUSE.

On the 15*th of May,* 1844, Mr. Hopkins, in behalf of the *majority* of the Committee of the House, on Post Offices and Post Roads, made a report, from which the following are extracts:

"At this time, the necessity of adopting measures to preserve our national mail system is forcibly presented to our deliberations."

"Events are in progress of fatal tendency to the Post Office Department, and its decay has commenced. Unless arrested by vigorous legislation, it must soon cease to exist as a self-sustaining institution, and either be cast on the treasury for support, or suffered to decline from year to year, till the system has become impotent and useless."

"Why this loss of revenue, when the general business and prosperity of the country is reviving, and its correspondence is on the increase? Because the correspondence, to a great and increasing extent, is conveyed by individuals and companies, who have embarked in this species of business in competition with the government, and the present provisions of law are not fully sufficient to prevent the abuse."

"If individuals are permitted to engage in the business, by confining their operations to the routes in which they incur but a small expense, and transact a large business, they can perform the service on such routes at a less charge than the government, and will necessarily, in time, deprive it of all the business arising within the sphere of the competition. Individual enterprise, if left unchecked, will engross the productive routes, and the government must be left to convey the unproductive mails only."

"This illicit business has been some time struggling through its incipient stages. * * * It has now assumed a bold and determined front, and dropped its disguises; opened offices for the reception of letters, and advertised the terms on which they will be despatched out of the mail."

"Regarding it as a flagrant wrong, morally and politically, that the will and interests of this nation, as involved in the assumption and exercise of the Post Office power, should be defeated to create employment for individuals, and gratify the spirit of private gain, we propose to punish the transaction, in whatever form carried on or undertaken."

"Let us first bring the correspondence of the country into the mails, by passing effectual laws against the private cupidity that makes a business of carrying it out of them."

"We propose the discontinuance of the privilege, (the franking privilege,) in the State, the Treasury, the War, and the Navy Departments, and in all the bureaus attached to them. In fine, an entire abrogation of the frank, except for the official correspondence of the President, of Congress, and of the General Post Office."

REPORT OF THE MINORITY OF THE P. O. COMMITTEE OF THE HOUSE OF REPRESENTATIVES.

On the same day, May 15*th,* 1844, Mr. Dana, on the part of the *minority* of the Committee, (consisting of Messrs. Dana, Grinnell and Jenks,) made a report, from which the following are extracts:

"If it were possible for the Post Office Department to sustain itself without the interposition of Congress, we might shrink from the responsibility of making any suggestions on the subject. But such a course is not open to us. Action cannot be avoided; for if Congress remain passive, the department must be prostrated."

"Until very recently, the establishment has been a special favorite with the people. We regret to say, (but such is the fact,) that its popularity, like its revenue, has of late been greatly reduced."

"While the people are thus unitedly pressing for a reform, the condition of the department itself, in trumpet tones, proclaims its necessity. Although its affairs are ably and faithfully administered, it is a lamentable truth that the department is involved in serious and lasting embarrassment; its revenue is greatly diminished from causes which are still in active operation, and daily extending; and unless an effective remedy be speedily applied, the whole establishment must be overwhelmed and prostrated."

"An opposition Post Office was openly and publicly organized; its arrangements advertised; and it is now in active operation; continually spreading its lines of transportation."

"*The opposition Post Office is extensively patronised.* We have no desire to scrutinize the motives of its patrons. Many, we have no doubt, are actuated by the mere selfishness of gain; but there are others whom we believe to be governed by other and higher motives. Having for years remonstrated in vain against what they deem to be exorbitant and oppressive rates of postage, they have at last adopted the conclusion that it is right to oppose and evade laws which they consider as unjust and oppressive; and they have accordingly taken redress into their own hands. We are far from sanctioning this view of the subject. Patriotism demands of all men obedience to laws constitutionally enacted, until they can be modified or repealed by legitimate means; but, while we pointedly condemn the conduct of these men, we cannot but respect the motives of such as sustain the opposition post office, from conscientious but mistaken views of duty, impelling them to resist what they deem to be an unjust and oppressive monopoly."

"From the circumstances already noticed, there is reason to fear that the receipts of the present year will fall half a million short of those of last year."

"The opposition are already dividing with the government the revenues of the routes from the city of New York to Buffalo, to Baltimore, and to Boston, and are extending their lines to routes of secondary importance, which operate as feeders to the main lines; and if they proceed unchecked, it is doubtful whether, in 1845, a single State in the Union will furnish sufficient postage to meet its own mail disbursements."

"*It is clear that a crisis has arrived requiring decisive action.* Temporizing expedients, and half-way measures, will not answer. Pressing evils demand an immediate and efficient remedy. What remedy shall be applied? *The first object to be accomplished, clearly is, to get rid of the expresses or private mails. Any measure which will not accomplish this object, is unsuited to, or at least insufficient for, the occasion.* Penal enactments, inflicting fines and imprisonment on all persons concerned in the transportation of letters out of the mail, have been suggested as the remedy. With such a reduction of postage as will satisfy the public, and insure united action to execute the laws, the proposed remedy might be effectual; but without such a concession to the popular will, we fear the remedy would not only be inefficient, but, by exciting stronger prejudices against the department, aggravate the existing evil. The people, with great unanimity, in person, and through their State legislatures, ask for a radical reduction of postage, and instead of the *fish* they ask, we give them the *serpent* they detest. We greatly fear that such an answer to their petitions will arouse a spirit of opposition to the department dangerous to encounter, and difficult to allay. Our government is entirely based on popular opinion; the House of Representatives, the laws, and the Constitution itself, are the mere reflection of the popular will. If laws are enacted by their representatives, in opposition to the will of the people, it is impossible to enforce them; the decided resistance of a respectable minority is sufficient to nullify a law for all practical purposes; and so difficult is it to convict even a single individual of wealth and influence of an offence, that it has grown into a proverb,—that penal laws are spider's webs, in which small flies get entangled, and the large ones break through. How can it be possible, then, to enforce penal sanctions against the combined power of wealth, influence, and numbers, sustained by a strong public sympathy? We do not believe it can be done, and, under present circumstances, we should regret to see the experiment tried, lest it produce evils more serious than those it is intended to cure."

"But if we can secure the popular feeling in favor of the department, the laws to suppress private post offices can be readily executed."

"As yet, public opinion has not entirely arrayed itself on either side of this question; it is in suspense, waiting the action of Congress in relation to the reduction of postage. Grant the demands of the people, and they will go with you in sustaining the department, and in enforcing the laws for its protection; deny their petitions, and the great mass of the community will take ground against the department, and the final result will be its prostration, and the establishment of private mails in its stead. We believe there is one way, and only one way, in which the department can be sustained, its popularity redeemed, and its revenue restored, and its accommodations and benefits extended,—and that is, by making it the safest, the cheapest, and the most expeditious mode of transmitting letters and intelligence. Reduce radically the tariff of postages, and the increase of mail matter will compensate for the reduction of the rates, and, in a short

time, restore the revenue to its former flourishing condition, and secure to the department the confidence and co-operation of the people. Then, if attempts are made to violate or evade the laws, their sanctions, however severe, may be enforced; for the community will unite in their execution. *We again repeat that, in our opinion, the first thing to be accomplished is, to get rid of the expresses; and any sacrifice that may be necessary to accomplish this object, ought to be made unhesitatingly. So long as the present high rates of postage are sustained, there will be great pecuniary inducements for the opposition to continue their operations, even at some risk of prosecutions,—and letter writers have strong motives to patronise the opposition;* but if the tariff of postage be reduced to the rates charged by the express, neither, for so small a chance of gain, will be willing to incur the risk of penalties. Any reduction which is insufficient to drive away the express competition, will only diminish the revenue, without a hope of compensation by the increase of mail matter. A proposition to reduce postage to five cents for one hundred miles, and to ten cents for any greater distance, we should consider of this character. About two-thirds of the letters sent along the mail routes between Washington and Boston would be subject to the ten cent rate; the express will carry them for six cents, and realize a good profit, sufficient to make it an object to brave prosecutions; and the people, indignant at being put off with so small an abatement, will, to a great extent, patronise and countenance the opposition. Without a greater reduction of postage, we fear the expresses cannot be suppressed."

"The reduction we propose will conciliate the popular feeling, expel the expresses, and bring nearly all the correspondence of the country into the mails."

"The entire abolition of the franking privilege, except as to the business of the Post Office Department itself, we unqualifiedly recommend. This is a reform which, more than all others, is demanded by the people; and the demand is enforced by the necessities of the department as a revenue measure."

REPORT OF THE P. O. COMMITTEE OF THE SENATE.

On the 22d of February, 1844, Mr. Merrick, Chairman of the P. O. Committee in the Senate, made a report, from which the following are extracts:

"The indispensable duty of doing something is upon us, and an effort *must* be made to reform this most important and useful branch of the public service. This necessity is imposed both by a proper regard to the public will, and the pecuniary condition of the Post Office Department itself."

"The cause of this great falling off, in a season of reviving prosperity in the trade, business, and general condition of the country, cannot be regarded as transient, but, on the contrary, is known to be deep and corroding, and, unless arrested in its operation by the timely interposition of Congress, must so cripple the revenues of the department as either to destroy its usefulness, or throw it as a burden upon the general Treasury. This cause is the dissatisfaction felt generally throughout the country, but most strongly in the densely peopled sections, with the rates of postage now established by law, and the consequent resort to various means of evading its payment,

leading first to the clandestine employment of private expresses, and more recently to the unblushing violation and open defiance of the laws. Your committee would be far from recommending any concessions whatever to those who have shown themselves to be destitute of all patriotic or moral principles, and are engaged in the daily perpetration of such flagrant outrages; but it forms no part of their duty to deal with them now; they leave them, therefore, to the care of the executive, and judicial officers of the government, and turn to lament that condition of the public feeling which can tolerate and countenance such flagitious conduct. Much as they deprecate the loss of the fair and proper revenues of the department, deeply and sincerely as they should regret any material abridgment of the advantages and utility of the Post Office establishment, both sink into insignificance when weighed with the fatal effects of a loss of reverence for the laws, or an alienation from government of the affections of large bodies of its citizens."

"We have seen that dissatisfaction with the existing regulations of the Post Office Department prevails with a large number of the people of the country; that the consequences of that discontent have been a heavy diminution of its revenues during the past year, and a disregard in several striking instances of the laws enacted for its protection, with the apparent sanction, or at least connivance, of large numbers of the people. Let us, then, carefully inquire whether this discontent does not arise from some such discordant action of that department as is above alluded to, and whether it be not in the power, and consequently the duty, of Congress, promptly to correct this evil, and, by restoring the harmonious action of the department, bring to its support the good feelings of the public."

"We come now to consider the still more important provisions of the bill, (reported by the committee,) which propose an average reduction of the existing rates of postage by about one half."

"Enough has been said to show the opinion of your committee to be, that the rates of postage should be reduced as much as possible, consistently with the preservation of the usefulness and efficiency of the Post Office Department, and the support of that department by contributions levied equally upon *all* who are served by it, according to the amount of service rendered. Can the reduction proposed by the bill be made, consistently with these views? We have seen in the outset that something *must* be done; that the revenues of the department are rapidly falling off, and a remedy must in some way be found for this alarming evil, or the very consequences dreaded by some, from the reduction of rates proposed, will inevitably ensue, namely, a great curtailment of the service, or a heavy charge upon the national Treasury for its necessary expenses. It is believed that, in consequence of the disfavor with which the present rates and other regulations of this department are viewed, and the open violations of the laws before adverted to, not more than, if as much as, one-half the correspondence of the country passes through the mails; the greater part being carried by private hands, or forwarded by means of the recently established private expresses, who perform the same service, at much less cost to the writers and recipients of letters than the National Post Office."

"The question then recurs, can the reduction of the rates of postage proposed by the bill be made, consistently with the purposes to continue the present amount of mail service, and provide for the expenditures of the Post Office Department by its own revenue?

"The committee think it can. And further, they are persuaded that it is the *only certain* means of effecting those very desirable objects!"

"The public will be satisfied and pleased, the committee think, with the reduction proposed by the bill."

*DEBATES IN CONGRESS IN 1844, AND 1845.**

In the Senate.

March 22d, 1844. "Mr. SIMMONS offered an amendment increasing the distance from one hundred to two hundred and fifty miles for the lowest rate of postage," proposed by the bill, (5 cents.)

"The object, (he said,) was to ensure the transmission of their letters by mail instead of the express. Gentlemen would see, by looking at the distance between Albany and Boston, Boston and New York, and other routes on which expresses were established, that they exceeded a hundred miles. But the private expresses carried letters on those routes at six and a quarter cents. If we put the postage at ten cents, it would not have the effect to bring all that matter into the mail. The lowest rate of postage was five cents under this bill, and he was of the opinion that it ought to extend to distances not exceeding two hundred and fifty miles. If not, the provision would not have the intended effect."

March 22d, 1844. Mr. BUCHANAN said,

"That the Senator from Rhode Island, (Mr. Simmons,) had stated, that if the rate of postage were not reduced, according to his proposed amendment, private expresses would continue to carry the greater part of the letters between the principal cities. Mr. B. said he could not recognize the existence of such expresses as an argument in favor of the amendment. They were plainly and palpably in violation of the constitution of the United States. That instrument granted to Congress the power, and, as a necessary consequence of this grant of power, imposed upon them the duty, 'to establish post offices and post roads.' This was a sovereign power, and if individuals could establish private expresses, or opposition lines to rival the public mails, we might as well at once surrender the important powers of government. This grant of power was exclusive in its nature, and neither states nor individuals could impair or arrest its exercise. Constitutionally speaking, as (well) might individuals establish a mint, and undertake to coin money, as to establish these private expresses. In point of principle, both were equally destitute of foun-

dation. These private expresses must be put down; and if the present laws were not sufficiently severe for the purpose, new laws must be enacted. It concerned both the interest and honor of the country, that Congress should not suffer the exercise of its unquestionable constitutional powers to be impaired or defeated by the lawless action of individuals. And well was it for the country that we did possess the power. What would become of the mail facilities, which the people now enjoyed in the thinly settled portions of our country, if all the leading routes were rendered profitless to the government by these private expresses!"

March 29th, 1844. Mr. MERRICK, (Chairman of the P. O. Committee,) said,—

"In what condition did the Committee find the Post Office Department when they took up this subject? He would ask the Senate to look at that condition, and then say whether they were to fold their arms and do nothing. The Post Office laws had become odious and unpopular, and were therefore evaded by the people everywhere. The system was everywhere and universally contemned and despised, and considered as grievously unjust to the body of the people. This state of things held out a pernicious example to the country. An habitual trampling upon the laws was injurious to public morals, and to the stability of free government. Apart from other considerations, this alone ought to prompt us to render the laws worthy of support."

"The principal cause (of the decrease of revenue,) is stated to be the number of private posts, called express mails, established on all the leading steamboat and railroad routes through the country. The Post Office establishment must become a burden on the public Treasury, unless you adopt a new system. * * * * You must do something, or appeal to the national treasury for the support of the establishment. It was out of the question, when the revenues were so rapidly decreasing, to attempt to defray the expenses of the unprofitable routes. Something should be done that would prevent evasions of the law by satisfying public opinion. We could not stand still where we are."

"As to the private expresses, every guard was resorted to for the purpose of arresting them. But the committee had thought it impossible, in the present state of feeling in regard to the system, to enforce the laws against the conveyance of letters out of the mail."

April 1*st,* 1844. Mr. PHELPS said,

"As to putting down private expresses, it was idle to talk of doing it by any other legislation than that which would carry public opinion along with it. The public must be shown that the Post Office Department will transport mail matters as cheap as private expresses, and as expeditiously, or all laws to put down private expresses will become nugatory." * * "He was opposed to the principle of enforcing a law by penalties, against the general feelings of the community."

April 1*st,* 1844. Mr. SIMMONS said,

"The operation of private expresses was considered by the Department the chief cause of its embarrassment. To this, therefore, the Senate should look as the first thing to be remedied." * * * He "entered into various calculations to show that a small reduction on the express routes would not put down the competition which interfered with the income of the Department."

April 17*th,* 1844. Mr. MERRICK said,

"He wished to impress upon the minds of Senators that the Department was in such a condition that it was impossible to stand still. Something must be done for its relief. Some legislation must take place, or the Department must become a charge upon the treasury." * *

"He adverted to recent decisions of the judiciary against the Department and in favor of the private expresses, and quoted various newspaper paragraphs to show the excitement got up against the General Post Office, and in favor of those expresses."

April 17*th,* 1844. Mr. BREESE advocated "a uniform rate of postage of five cents per half ounce for all distances." * * "He felt satisfied that, by going at once to the root of the disease, such a reform could be accomplished as would effectually resuscitate the revenues of the Department, and give universal satisfaction to the people. Any thing short of this would be wholly inadequate to effect such a reform as the public expected." * * "He believed that a reduction ought to be made to two cents, and that it would be a more productive rate than any other that could be adopted."

April 17*th,* 1844. Mr. HANNEGAN said he "had been assailed for his opposition to the illegal expresses. He should, nevertheless, do all he could to put them down as violations of law. He was certain that the plan of the committee would not remedy the evil. But if we reduced the rates further, it would be attended with an increase of the number of letters mailed."

April 18*th,* 1844. Mr. ATHERTON said he "hoped the motion to strike out the rate of 3 cents for distances less than 30 miles would not prevail. This reduction he conceived to be, perhaps, the most important of any that had been proposed. It would be found particularly so at the North, where towns of considerable size were frequently near each other. And it was also important, considered in relation to its operation on the private expresses, of which so much had been said."

In the House.

June 12*th,* 1844. Mr. HALE said,

"The Committee recommend vigorous legislation, pains and penalties, as if they could afford a sovereign remedy.

"Now, Mr. Chairman, I undertake to say that if the action proposed by the Post Office Committee be adopted by this House, and the relief asked for be withheld, instead of putting down, you will increase the private expresses; and ten will spring up where there now is only one. The difficulty lies deeper than some gentlemen imagine. It is in this. The system, as at present conducted, with its present high rates of postage, does not commend itself to the favorable consideration of the people. Instead of looking upon it as intended for their benefit and accommodation, they look upon it with jealousy and distrust, and regard it as a monopoly. * * * It is to counteract this state of things, and present this Department to the country in a position commending itself to their judgments and their hearts, that we should now exert ourselves. Will penal enactments effect this? No, Sir, no. Far different from this must be our course, if we would attain the object which all profess to desire."

June 12*th*, 1844. Mr. PATTERSON thought "if this bill, (a bill for putting down the private expresses), should be passed without a bill reducing the rates of postage, that such was the feeling throughout the country, that it would be impossible to carry it out."

June 12*th*, 1844. Mr. THOMPSON said,

"It had struck him as something strange that members should be found willing to justify the setting at naught the Post Office laws—for such he understood to be the tenor of the remarks of some who had spoken on the subject."

A bill passed the Senate at this session, (April 29th, 1844,) reducing the rates to

cents for 30 miles—for a single letter.

cents for 100 miles—for a single letter.

cents for 300 miles—for a single letter.

cents for all over 300 miles.

This bill was sent to the House, referred to the Committee on Post Offices and Post Roads, and by that Committee "reported to the House without amendment," *June* 12*th*, 1844. But as Congress adjourned but five days afterwards, (June 17th,) the House had not time to act upon the bill, and it was lost.

In the Senate.

January 16*th,* 1845. Mr. NILES said,

"The law is openly violated, and private expresses are established between all the important commercial cities, which convey a large portion of the letters which would otherwise be conveyed in the mail."

"The people see and appreciate the immense advantages of a system of low postage. They have had a foretaste of these advantages, through the private expresses, and they will not relinquish them." * * * "Reduce the postage to a reasonable rate, so as to satisfy the public mind, and the violations of the law will cease."

January 27*th,* 1845. Mr. MERRICK* said,

"Private competitors for the performance, and, of course, for the profits of the service, are springing up upon all the important and valuable routes, and, under the public countenance, are superseding the mails of the United States, to the great detriment of the service, to the injury of the public morals, to the great real disadvantage of the very public by whom they are countenanced and encouraged, and, if not checked, to the certain ultimate prostration of the whole Post Office system. These are grave and alarming evils, and demand the most serious and grave consideration."

"Private enterprise is successfully competing with the government in the performance of the service on all the important and valuable routes, and deprive it of the income necessary to support the existing Post Office establishment."

"Sustained by public opinion, these private competitors are daily extending their operations, and unless the power and authority of Congress is wisely, and prudently, and promptly interposed, they must soon prostrate the Department."

"Others again advance the opinion that *extreme* reduction of rates is the only means of putting down this private competition, and advise a reliance solely upon underbidding by the Government as the means of securing to it the whole business, and repudiate the idea of deriving any aid from penal enactments."

"The conclusion to which I have come is, that we should first reform all the evils complained of, so far as they have any real existence, and by this means satisfy and propitiate an enlightened public. Remove all just causes for dissatisfaction, and the dissatisfaction will soon cease; and that public, which is now in some quarters willing to see your Post Office establishment go down, nay, are even ready to aid in its destruction, will soon begin to look upon it with very different feelings."

"Some have ridiculed the idea of resorting at all to the use of penal enactments, as being, under any circumstances, unavailing and incapable of execution."

January 27*th*, 1845. "Mr. WOODBURY was in favor of reducing the postage to three cents upon letters conveyed not more than thirty miles. If you keep up the rates for short distances, you have no chance of breaking up the expresses running from the great cities. He supposed that the increase of letters by cheap postage would fully keep up the revenue, *and by low rates you will break up the great evil now complained of, and which we were aiming to reach—the expresses.*"

January 28*th*, 1845. Mr. MILLER "objected that *five* cents for 100 miles would not meet the competition of private expresses, nor *ten* cents for greater distances. * * To compete with them the reduction should be to 5 cents. Besides, unless for short distances the reduction was to 3 cents, none of the correspondence carried by private hands or private expresses, would come into the mail."

January 28*th*, 1845. Mr. MERRICK said,

"First make a reasonable reduction of postage to meet the expectation of the public, and then trust to restringent laws to protect the monopoly of the Department. That was the only practicable way of putting down the private competition of these expresses, so injurious to the Post Office revenue."

January 28*th*, 1845. "Mr. WOODBURY considered the proposition of *three* cents for short distances, and so on ratably for greater distances to *ten* cents, likely to effect both objects—that of putting down the expresses and increasing the revenue."

January 29*th*, 1845. "Mr. MILLER felt assured that the rates and distances proposed in the original bill would fail of meeting public expectation, or of remedying the grievances complained of by the Department in relation to the interference of private or public expresses."

January 29*th*, 1845. Mr. SIMMONS said,

"What was the object in view in the passage of this bill? To prevent the interference of expresses, and to preclude the carrying of letters by private hands." * * "It was manifest, then, that the reduction proposed by the Senator from Maryland would not have the slightest influence upon this private interference."

January 29*th*, 1845. Mr. BREESE said,

"The present high rates have brought the Department and the system into disrepute, and means are sought by which to be relieved from its oppressions. Penal laws cannot effect the object. It is in vain to resort to them. Your law must be in accordance with public sentiment, or it

will be evaded." * * "Mr. B. repeated that he did not believe any such measure as the one now proposed would gratify the public. * * They (the people) will see that letters are carried more than one hundred miles for five or six cents, (by the private mails), and they will demand that the government shall carry them for the same, or they will abandon the use of the mails and patronize private enterprise. This is natural: and all the penal laws you can enact will not prevent it."

January 30*th,* 1845. Mr. PHELPS said,

"In spite of all the penal enactments that could be devised, so long as private expresses would carry single letters for 5 cents while the government charged 10, penal laws would be disregarded, and the expresses would flourish and be sustained by public sentiment."

February 3*d,* 1845. Mr. MERRICK said,

"The point in which the whole success of the measure depended, was the protection of the Department from the competition of the private expresses."

February 6*th,* 1845. Mr. SIMMONS said,

"One question presented is, whether or not the reduction to ten cents for distances over one hundred miles will remove one of the difficulties in our way, which is the interference of private mails or expresses in the business of letter carrying, and the consequent reduction of our receipts."

"I have no faith in the sentiment that you can prevent the people of this country from employing such of their own citizens as will do their work the cheapest, by a system of prosecutions such as this bill contemplates; and I should have no favor for it if I thought it would produce that result.

"I believe the right and the only practicable way to command business sufficient to support the Post Office Department is to do it better and cheaper than individuals can. This the government can afford to do, and is, in my judgment, bound to do. The power to establish a mail was conferred on the government in this expectation, and for this purpose. It was not given to enable the government to make exorbitant charges for service, much less to enable it to enforce a compliance with them, if made. I think the existing charges for letter-carrying are of this character; and I am not disposed to denounce all who afford or employ other means of communication than the United States mail."

"If further reduction is refused, the people will, in greater numbers than at present, leave your mail, and seek other modes of conveyance. They may regret this, but they will submit to 'the necessity that impels them to the separation.' No man can expect any thing else who knows the history, or can appreciate the character of this people."

"The Post Office Department is at present without adequate means, because it has not the public opinion in its favor. This will continue as long as the cause of it is allowed to remain, and after the passage of this bill, as well as now, unless our postage is as low as that of individual carriers. Our object should be to gain the good opinion and business of the public."

"A prudent course demands an effectual reduction—one that will secure the business to our mail. Can we hope to do this by reducing our charge for letter-carrying from threefold, as it now is, to double the rates charged by our competitors, as he proposes? Individuals have not succeeded in taking the business from the mail by such a course; they underbid to get business, and do the same to regain it when lost. It is a new idea that this may be easier done by a prosecution for penalties, as this bill contemplates. Nobody should expect to succeed in getting custom for the mail by prosecuting or persecuting the people whose support it wants. There are obvious reasons against trying such an experiment."

"Do you expect to induce people to patronize your mail by commencing prosecutions against them? If any individual were to propose to do any such thing, he would be thought a fit subject for a mad-house."

February 6*th,* 1845. "Mr. PHELPS said the bill would be ineffectual, and you would never get rid of these expresses until you carry as cheap as they do. There is only one course to be taken, and that is to come down in your prices and satisfy the public that you carry letters as cheap for them as any one else will do."

February 7*th,* 1845. Mr. ATHERTON "urged the necessity and great importance" of an amendment to the effect that the postage of letters not exceeding 50 miles be 3 cents; saying "it was on short distances that competition had to be put down, which could only be done by a reduction to 3 cents."

In the House.

February 25*th,* 1845. Mr. DANA said,

"The condition of the Post Office Department itself requires some change in the system. The Department is running down—its revenues and its accommodations are diminishing." * *

"Your high rates of postage have driven the letters from the mails, and they have found cheaper channels of transportation. On nearly every important mail route expresses have been established. They carry letters at one third or one fourth of the regular postage, and deliver them personally as soon, if not earlier, than the mailed letters are ready for delivery at the Post Office. The people find them a great convenience. They don't know how to dispense with them, unless you will so modify your Post Office system as to provide a substitute."

"What is the remedy for the diversion of the letters from the mails? Some of our friends suggest that it is to be found in penal enactments. * * But your penal laws against the expresses will remain a dead letter upon your statute book. Public opinion is against them—they cannot be executed. * * Nothing can be more absurd than to attempt to fetter the great mass of the people, contrary to their will, by penal laws. * * Such laws cannot be executed here. If it is as easy, as some suggest, to suppress the expresses by prosecutions, why has it not been done? They are in constant, open, and avowed operation."

"The Department is here openly braved. If it be so easy to put down the expresses, why has it not been done?"

"What then is the remedy? Reduction—make your conveyance the cheapest and best. To do this you must reduce the rates of postage radically, and at once. Bring them down below competition, and do it now. Wait for another Congress to assemble and it may be too late. As yet the people have not taken a decided stand against you—they are waiting for your action. Reform your system, cheapen postages, expedite transportation, and the people will go with you, and sustain you. They will clear the expresses and all other impediments from your path. Adjourn without doing any thing, and when you assemble here again you will find the Department bankrupt, new and extended facilities provided to dispense with mail accommodations, and a large majority of the people disposed to encourage and patronise them. A reduction that would have been satisfactory at the last session would be unavailing now; one which would be gladly accepted at this session would be contemned at the next. The longer you delay, the greater must be the concession. A 5 cent uniform rate of postage now will bring all letters into the mail. A 2 or 3 cent rate will be required for that purpose when you meet again. Come down, then, at once, with a good grace, to 5 cents, and agitation will cease. Delay, and the demand will continue to increase, and agitation become more violent. The ultra reductionists hope there will be no action at this Congress; they think us behind the spirit of the age, and are willing to endure the infliction of high postage another year, in the expectation of a greater reduction than can now be had. Sir, their calculations are correct—the consequences they anticipate will surely come. But I hope that this question may not be thrown over; that we shall act promptly and liberally—respond to the just demands of the people, and quiet this agitation. The Post Office will thus regain its lost popularity."

"The first object is to get rid of the expresses and private mails. Any reform short of this is futile and useless. A cheap and dear system of postage cannot long continue in operation together. Cheapen your system, or the expresses will drive you off the road."

March 1*st,* 1845. Mr. PATTERSON said,

"There appears to be no difference of opinion, from one end of the land to the other, that the present rates of postage are inequitable and grievously burdensome, rendering the Post Office Department so unpopular with the people as to make it impossible to prevent its revenues from being infringed upon by private enterprise in a thousand ways, in bold and open violation of the

laws. As deplorable and demoralizing as this state of things is, it will continue so long as the people have before them daily evidence of the great injustice of the rates of postage, in the fact that private enterprise will perform the service for one third the money."

A bill passed the Senate at this session, *fixing a uniform rate of postage of five cents, for a half ounce, for all distances.* This bill was sent to the House, and there changed so as to fix the rates at five cents, for three hundred miles, and ten cents for any greater distance. In this form it was agreed to by the Senate, and became a law.

No considerable debate was had in the House at either session. In 1845, debate was cut off by the "previous question."

THE ACTION OF CONGRESS IN 1843, CONTRASTED WITH THAT IN 1844 AND 1845.

To see more distinctly the effect produced upon the minds of Congress, by the establishment of private mails, and the denial of the power of Congress to prohibit them, we have but to contrast the action of Congress immediately before those events, with their action immediately afterwards—as follows:

February 28*th,* 1843, the Senate passed a bill, fixing the rates of postage for a "single sheet,"

At 5 cents for 30 miles,

At 10 cents for 100 miles,

At 15 cents for 220 miles,

At 20 cents for 400 miles,

At 25 cents for all over 400 miles. And double and triple those rates for double and triple letters.

This bill was sent to the House, and on the 2d of March, 1843, amended so as to fix the rates of postage, at

5 cents under 50 miles, and

10 cents over 50 miles,

for quarter ounce letters; and double and triple those rates for the second and third additional *quarter ounce.*

This amendment could hardly be considered a reduction, except on the condition of the people's stinting themselves to *quarter ounce letters.* Under this amendment, letters weighing *over a quarter of an ounce,* would pay 10 cents for all distances *under* 50 miles, and 20 cents for all distances *over* 50 miles.

As regards letters weighing over a *quarter of an ounce*, this would probably have been a positive increase on the old rates of postage.

On the same day, (March 2d, 1843,) the Senate "*disagreed*" to this amendment of the House, *without a division.* On the 3d of March, 1843, the House insisted on its amendment, and asked a conference. On the same day, the Senate insisted on their disagreement, and granted a conference. But the conference made no report, and it being the last day of the session, the bill was lost.

This was the condition in which the postage reform stood, in both branches of Congress, on the 3d of March, 1843, *the last day of the session previous to the publication of my argument, and the establishment of the private mails.* The Senate proposed nothing that deserved the name of reduction. The House proposed no reduction, except on the petty and vexatious condition of restricting the people to *quarter ounce letters.*

On the 29*th of April,* 1844, (about three months after the establishment of my mails,) the Senate passed a bill, fixing the rates of postage, for a single letter,

At 3 cents for 30 miles,

At 5 cents for 100 miles,

At 10 cents for 300 miles,

At 15 cents for all over 300 miles.

This bill was not agreed to by the House, and the matter went over to the next session.

February 8th, 1845. The Senate, by a vote of 38 to 12, passed a bill, fixing a uniform rate of postage, of 5 cents, for a half ounce, for all distances. This bill was amended in the House, so as to make the postage

5 cents for 300 miles, and

10 cents for over 300 miles,

for a half ounce. This amendment was agreed to by the Senate, *March* 1*st,* 1845; and this was the bill that became a law.

What was it that produced, in the minds of Congress, the remarkable changes evinced by these several bills, between the 3*d of March,* 1843, and the 1*st of March,* 1845? There can be but one answer to this question.

THE EXAMPLE OF ENGLISH POSTAGE.

Some persons have supposed that the example of cheap postage in England had much to do in bringing about the reduction of postage here.

It undoubtedly did something to increase, among the people, the desire—(an unavailing desire of long standing)—for cheap postage. But it had but little effect upon Congress.

The English system went into operation *January* 10*th,* 1840; yet on *January* 10*th,* 1844, (four years after,) no change had been made in this country; and, so far as I am aware, no *radical* change had ever been proposed, or had many friends, in Congress. The reason was this. The diminished receipts, and the increased expenses, under the cheap system in England, caused a loss of about half their original revenue. This loss could be borne in England, because under their high rates their revenue had been about double their expenses. But in this country, the expenses had entirely consumed the revenue. And it was a fixed principle, with our government, that the department should support itself. This principle was adhered to by Congress with bigoted tenacity. The English example, therefore, really operated upon the minds of a large portion of Congress, to *deter* them from a reduction. It was quoted, along with other statistics, as proving that a reduction of rates would be attended with a reduction of revenue; and consequently that no reduction of rates could be made consistently with the principle of making the department sustain itself.

It was only when opposition post offices were established, and the constitutional right of individuals to establish mails had begun to be the prevalent doctrine, and Congress saw that it was only at low rates that their mails could long get any considerable number of letters to carry, that they discovered that the principle of making the department support itself was about to operate differently from what it ever had done before, viz: in favor of low rates, rather than high ones. And it was for *this* reason, more than any other, that the act of 1845 was passed, as the debates show. The great argument in Congress, in favor of the reduction, was, not the blessings of cheap postage, but that, without a reduction, the department would inevitably be prostrated by competition.

HALE AND CO'S LETTER MAIL.

I have said before, in my letter to Mr. Phillips, that I was "the first to establish mails in avowed defiance of the authority of Congress,"—"on the principle that Congress had no Constitutional power to forbid the establishment of mails by the States, or by private individuals, in competition with the mails of the United States;" and "that I was the first to invite the government to test that question before the judicial tribunals."

This renders it necessary that I should make an explanation in regard to the mails of *Hale & Co.*

The *clandestine* transmission of letters through the Expresses established for the transportation of packages and merchandise, had doubtless been carried on for years previous to 1844, as appears by the Annual Reports of the P. M. General in 1841, (and document D. appended thereto,) 1842 and 1843.

A case of this kind was tried in New York, in *November,* 1843, before Judge Betts. On this trial, Judge Betts held that the statutes of Congress prohibiting the setting up of "*any foot or horse post,*"

and forbidding "*any stage coach, or other vehicle, packet boat or other vessel,*" to carry letters, did not apply to *passengers* on board vessels and land carriages.

The omission to prohibit *passenger posts* was obviously accidental, occasioned by the fact that, at the time these statutes were passed, (1825 and 1827,) there were no railroads, and comparatively few steamboats in the country, and the facilities for establishing *passenger posts* had not become such as to attract the attention of Congress.

Under cover of this decision, that the *letter* of the laws then in existence did not apply to *passengers,* Hale and Kimball, as appears by their advertisement, commenced carrying letters, between New York and Boston, December 21, 1843, thirty-two days before my mails were started, and about twenty days before the publication of my argument.

The point of distinction between Hale & Co. and myself is this:

They made no denial of the validity of the then existing laws of Congress, or of the Constitutional power of Congress to pass other laws prohibiting *passenger* posts; they only evaded the plain design of the law, by availing themselves of an accidental omission in its letter, after the omission had been pointed out to them by Judge Betts. They acted within the letter of the law, although they violated its spirit. I denied and *disproved,* not only the validity of the then existing laws, but the Constitutional power of Congress to pass any other laws, prohibiting either passenger posts, or any other private posts, which individuals or the States might choose to set up on the highways of the nation. I established my mails avowedly on that principle, (as will appear from my advertisements, an extract from which is quoted on pages 24 and 25,)—published an argument in defence of it—sent copies of that argument to Congress, and publicly challenged,* and privately invited, the P. M. General to test that question.

There was nothing in the movement of Hale & Co. to threaten the security of the government monopoly, or to coerce the government into a reduction of postage. Congress had only to supply the omission in the *letter* of the law, (as they could do in three lines,) so as to make it apply to *passenger* posts, as well as to "*horse,*" "*foot,*" and other private posts, and their monopoly would then have been perfectly safe as against Hale & Co.† And the action of Congress in 1843, (as has already been exhibited,) sufficiently proves that Congress would have supplied this omission, without making any very important reduction in the postage, had not the Constitutional question been raised. But the want of Constitutional power, which I alleged and proved, on the part of Congress, to pass any prohibitory laws at all, was an omission, which Congress could not supply; and this it was that opened the door to the general establishment of private mails throughout the country, and compelled a reduction, as the only means left of sustaining the Department.

It was not the *evasions,* either of the intent or the letter, of the existing laws, that alarmed Congress for the safety of their monopoly; for those evasions had been going on for years, as Congress were particularly informed by the P. M. General, as early as 1841. But it was, (as the P. O. Committee of the Senate said,) "the unblushing violation, and open defiance, of the laws," and, (as the P. O. Committee of the House said,) "the impudent assumption that the government of the United States had no Constitutional power to restrain or punish" the establishment of pri-

vate mails,—that created the first effervescence in Congress. And it was this same "unblushing violation," "open defiance," and "impudent assumption,"—sustained, as they chanced to be, by argument which could not be met, by several of the most influential presses in the country, by the opinions of large numbers of the bar, by the intimation of Judge Story, by the declaration of Senator Woodbury, and doubtless also by the opinions of many other members of Congress who did not think it wise to express them in advance of a decision by the Supreme Court,—that compelled the general admission, on the part of Congress, that their iniquitous usurpations over the free transmission of intelligence could not be maintained, and that the only means by which the Post Office Department could be saved from prostration, was a reduction of postage.

That the P. M. General considered the mail of Hale & Co., and the grounds on which they acted, as of little or no importance, is evidenced by the fact that in his report, before given, in part, (p. 28,) although he goes into particulars in regard to my mails, he does not so much as mention Hale & Co., although they commenced carrying letters thirty days before I did.

In short, their mails were only a new form of *evasion,* involving no principle, and based on no denial of the authority of Congress, and could therefore be of no practical importance as coercive of a reduction of postage.

Endnotes

[*] When it is considered that judges are always extremely reluctant to hold any legislation unconstitutional, and that the Supreme Court of the United States have never, except, I think, in one or two instances only, held a law of *Congress* unconstitutional,since the foundation of the government, I think those who knew Judge Story, will hardly suspect that he would thus have gone beyond the necessities of the case then before him, and thrown out so distinct an intimation against the power of the government, at a time too when his opinion would naturally have so much influence in encouraging the establishment of additional private mails, and in inducing the public to give them their support, to the prejudice of the revenues of the government, unless he were not only clear in his own mind on the question, but had also learned the opinions of his associates on the bench of the Supreme Court—(as he could hardly have failed to do—for that Court remained together at Washington some two or three months after the agitation of the question had commenced.)

[*] "*Were the question a new one.*" The Constitution is the same now, on this point, that it was when it was "*new,*" and the constitutional question is, therefore, the same now that it would have been then.

[*] The Postmaster General here misrepresents my proposed admission, by leaving out the most important part of it. Before starting my mails, I informed him of my intention to start them, and added,

"I shall be ready at any time to answer to any suit, which you may think it your duty to institute.

"Until I know the course intended to be pursued by the Department, I can of course give no assurance as to the defence I shall choose to make. I will say, however, that if an amicable suit only should be instituted, it is not my present intention to put you to any trouble in proving facts, *or to take advantage of any defects in the existing law;* but *to meet the constitutional question fully and distinctly.*"

Previous to this time, Judge Betts had decided that there was a loop-hole in the law prohibiting private posts, which prevented its applying to *passengers* on board public conveyances. Judges Story, Sprague, and Conklin subsequently confirmed this opinion, while it was controverted by Judges Randall and Heath. It was this defect, (which was sufficient for my defence), that I proposed to take no advantage of, if an amicable suit only should be instituted. But it was no part of his purpose to try the constitutional question—but only to break me down by brute force, without having either the law or the constitution on his side—and hence my proposal was declined.

[*] In this report, the Postmaster General seeks to convey the impression that he considered my conduct plainly illegal. If he really did so consider it, it was his *sworn* duty to have me prosecuted; and he would have committed perjury in neglecting to do so—for the law which he was sworn to execute, required him to "prosecute offences against the post office establishment." Yet, after my mails had been in operation some weeks, three or four, I think, an agent of the Department called upon my counsel, Josiah Howe, Esq., of New York City, and proposed that if I would then desist from conveying letters, no prosecutions should be instituted on account of those that had been carried. And it was only when this proposition was promptly and peremptorily rejected, that the prosecutions were commenced.

[†] Undoubtedly "the *law* was the same in both (all) the States;" but the *Judges* in New York and Massachusetts, proved to be different from those in Maryland and Pennsylvania. The Postmaster General never obtained any verdicts in New York or Massachusetts. It is proper to say, however, that all the decisions were made upon the construction of the statute, and not upon the meaning of the constitution.

[*] Extracted from the National Intelligencer and Congressional Globe.

[*] See the full report of his Speech in the Tri-Weekly National Intelligencer of February 1, 1845.

[*] So far as my advertisement, before mentioned, was such a challenge.

[†] That Hale & Co. had no intention of contesting any principle, is evidenced not only by the fact that they made no denial of the power of Congress, when they commenced carrying letters, but also by the fact that the P. M. General, in his report, before given, (page 28,) makes no allusion to them, or to any one but myself, as having invited him to test the Constitutional question; and still further by the fact that, on the very day that the omission in the letter of the law was supplied, (so as to make it apply to *passengers,*) Hale & Co. abandoned their business—though their pockets were full of money—thus showing that they had no idea of spending any money in

defence of any Constitutional principle, that was important to the public, or restrictive of the power of Congress.

9. ILLEGALITY OF THE TRIAL OF JOHN W. WEBSTER (1850)

Source

Illegality of the Trial of John W. Webster (Boston: Bela Marsh, 1850).

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ILLEGALITY of the TRIAL of JOHN W. WEBSTER.

BY LYSANDER SPOONER.

BOSTON: BELA MARSH, 25 CORNHILL. 1850.

Entered, according to Act of Congress, in the year 1850. By LYSANDER SPOONER, in the Clerk's Office of the District Court of Massachusetts.

Wright's Steam Press, 3 Water st.

ARGUMENT.

Dr. Webster was not tried by a legal jury; but by a jury *packed*, by the court, either with a view to a more easy conviction than could otherwise be obtained, or with a view to a conviction which otherwise could not be obtained at all.

The jury was packed by excluding from the panel three persons, on account of their opposition to capital punishment, and substituting in their stead three persons not thus opposed. That opposition, it was supposed by the court, (and correctly too, of course), would either render the persons entertaining it less ready to convict the defendant, than they otherwise would be; or would prevent them from convicting at all, whatever the evidence might be.

But exclusion for either or both of these reasons is illegal. If the punishment prescribed by statute, be such as to disincline, or deter, the minds or consciences of the men drawn as jurors, from a conviction, the statute must fail of execution, rather than the jury be packed to avoid that obstacle.

Even if the persons, drawn as jurors, should themselves request to be excused from serving, *or should even refuse to be sworn*, on the ground that they could not conscientiously render a verdict "according to the evidence," if that verdict were to be followed by the penalty of death, *still the court could not discharge them.* The trial must, in the first place, be postponed until a subsequent term of the court, and until an entire new jury be drawn. If this new jury should have among them

persons entertaining the same scruples, as those drawn at the former term, the trial must be again postponed; and so on, from term to term, until a jury, drawn in the usual way, shall be found, who will consent to be sworn to try the case. If such a jury cannot be obtained at all, then the trial must be postponed until the statute, prescribing the punishment of death, be repealed, and such a penalty substituted, as jurors will *all* consent to aid in enforcing. In no event, and for no reason whatever, can the jury be packed, in the manner it was done in Dr. Webster's case, *for that is destroying the trial by jury itself,*—as I will now proceed to show.

The trial by jury is a trial by "*the country,*" in contradistinction to a trial by *the government.* The jurors are drawn by lot from the mass of the people, for the very purpose of having all classes of minds and feelings, that prevail among the people at large, represented in the jury. They are drawn by lot from the mass of the people, for the very purpose of making the jury a fair epitome, mentally and morally, of "the country,"—that is, of the *whole* country.

A tribunal, thus selected, is supposed to be a more just, impartial, and competent tribunal, than the government itself, or any department of it would be. And unanimity, on the part of the members of this tribunal, is required, in order that no man may be punished or condemned, unless the whole country, (so far as that is supposed to be fairly represented by the jury), shall concur in the conviction and punishment. This concurrence of the *whole* "country," as a condition of conviction and punishment, is required from motives of both justice and caution towards the life, liberty, property, and character of the person accused. It is supposed that if *any portion* of "the country," (as represented in the jury), dissent from the conviction or punishment, that dissent gives sufficient reason at least to *doubt* the propriety or justice of such conviction or punishment.

Now it is clear, that if the government can exclude, on account either of their opinions or feelings, any persons thus drawn by lot, the trial is no longer a trial by "the country," but only by a portion of the country. It is, in fact, a trial by *the government,* instead of "*the country,*"—because it is a trial by that portion only of the country, which has been selected by the government, on account of their having no opinions or feelings different from its own.

Such an exclusion, therefore, works the abolition of the trial by jury itself,—because it works the abolition of the trial by "*the country,*" and institutes a trial by *the government,*—or, what is the same thing, a trial by persons selected by the government, on account of their concurrence in, or their subservience to, its own opinions and feelings.

Whenever, therefore, the government presumes even to question the persons drawn as jurors, as to whether they entertain any opinions or feelings different from those entertained by the government, (as the latter are expressed in the statute book), and says to one "be sworn," and to another "stand aside," (according as he concurs with, or dissents from, the opinions or feelings of the government), the government manifestly assumes to abolish the trial "by the country," and to institute a new tribunal, constituted solely of persons specially selected by the government, on account of their readiness to carry out the purposes of the government.

But it will be said that the difference of opinion, between the government and the individual—(which constitutes the ground, on which the former excludes the latter from the panel)—is a

difference about that, with which the juror has nothing to do, to wit, the punishment, and not the guilt, of the accused person.

There are two answers to this objection:

1. The conviction is sought—or rather the guilt or innocence of the accused person is sought to be ascertained—mainly, if not solely, with a view to his punishment, if he be found guilty. Punishment, or no punishment, then, is the *practical* question at issue. Conviction is but a means, punishment the end. The former has reference, wholly, or nearly so, to the latter. Now, it is to be observed that, in law, means are rarely considered independently of ends. They are never authorized, independently of ends. The difference between them, then, is theoretical, rather than practical. Although, therefore, there may be a theoretical distinction between the question of conviction, and the question of punishment, there can hardly be said to be any *practical*, or even *legal*, difference between them.

2. Admitting, for the sake of the argument, a clear legal distinction between the question of guilt, and the question of punishment, it does not follow that the former is to be determined without any reference to the latter. The law does not require a man to cease to be a man, and act without regard to consequences, when he becomes a juror. The courts themselves, at the same time that they exclude one man from the panel because he looks forward to the consequences of a conviction, will yet instruct those who remain on the panel, that they are to scrutinize the testimony with all that caution which the momentous results of their decision naturally dictate. No court presumes to tell a jury that they are to try a capital case with the same indifference and unconcern as to consequences, that they would a case where the results of their decision would be less important. On the contrary, all courts usually press upon a jury a solemn consideration of the consequences involved, as a motive to the exercise of unusual, and even extreme, caution. But in so doing, it is plain that they act upon an entirely opposite principle from that on which they acted in excluding individuals from the panel. Because these latter individuals looked forward to the consequences of their decision, and felt a little more sensibility to those consequences than the statute requires, or the government approves, the government excludes them; while, at the same time, the government instructs those who remain on the panel, that they are to keep these consequences in view, and act with corresponding caution.

The result, therefore, is, that the government—when it affixes the penalty of death to the commission of a crime, and excludes a man from the panel on account of his views of that penalty—virtually assumes to set up a standard of sensibility, in regard to the matter in issue, beyond which a juror may not go. And the consequence is, that the accused person is tried, not by "the country"—not by persons who fairly represent all the degrees of sensibility, which prevail among the people at large—but by persons selected by the government for no other reason than that they lack that degree of sensibility, touching the matter in issue, which a greater or less portion of "the country" possess. To select a jury on this principle, is nothing more nor less than *packing* a jury,—in the worst sense of that term. What is ever the object of packing a jury, but to get rid of all persons, whose sensibilities will be likely to thwart the purposes of the government? that is,

defeat (or secure, as the case may be) the conviction and punishment of the accused, contrary to the wishes of the government?

The provision of the Bill of Rights, which guarantees to every man a trial by "the country," does not say that he shall be tried by such portions only of the country as possess but a *statutory* degree of sensibility—a degree of sensibility not incompatible with the efficiency of such penal codes as may be enacted by the legislature—but by "the country" *unreservedly*—by "the country" with all its sensibilities. And if it happen that those sensibilities are such as that any persons, drawn as jurors, either will not try, or will not convict, where death is the penalty to follow, then the statute affixing that penalty must be so changed as to conform to the sensibilities of the country, or it must become a dead letter, and criminals go unpunished, and even untried, rather than the trial "by the country" be abolished, and a trial by the government be substituted. Otherwise the statute prevails over the Bill of Rights.

Whenever the statute, that affixes the penalty, and the Bill of Rights, which guarantees a trial "by the country," are found to be *practically* incompatible with each other, the latter, being the paramount law, must prevail. But the government, by excluding a part of "the country" from the panel, in order that the statute may have effect, virtually say that the statute must prevail over the Bill of Rights.

It may here be mentioned, in passing, that it seems never to have occurred to the government, that if they assume to set up a statutory standard of sensibility for jurors, and to exclude from the panel all men, whose sensibilities rise above that standard, they ought to be equally bound to exclude all whose sensibilities fall below it. But they make no inquisition in that direction.

But, in truth, opposition to capital punishment does not *necessarily* imply any unusual degree of sensibility. It may result solely from the conviction—founded on the incontestible experience of mankind—that there is no such certainty in human testimony, as to secure the innocent from suffering the penalty designed only for the guilty. In multitudes of cases, where the accused were innocent, the evidence has nevertheless been so strong as to justify, and even to require, a conviction, if the principle be admitted that human testimony is, *in its nature,* sufficiently certain to justify or require a conviction, that is to be followed by the penalty of death. A person, therefore, may be opposed to capital punishment for this reason alone—a reason that implies a deliberate and philosophical estimate of the weight of human testimony. Yet, all those, who thus weigh the evidence a little more philosophically, and in the light of a wider observation, than the government, must be excluded. Is such a principle to be tolerated? One of the very objects of the trial by jury, is to have the evidence weighed differently from what it is supposed the government might weigh it. Yet now, because a man thus weighs it, he is excluded from the panel.

Again. It is not only a supposable case, but a highly probable one, that a person may be opposed to the death penalty, on the ground that it is a "*cruel* punishment," (and if unnecessary, it is "cruel,") and that therefore the government has no *constitutional* right to inflict it—"cruel punishments" being expressly prohibited by the Bill of Rights. In that case a man would be excluded from the panel simply for forming a different opinion from the government, on a question as to

the constitutional powers of the government. If such a principle prevail, all barriers, interposed by a jury, not only to the infliction of "cruel punishments," but to the assumption, by the government, of all manner of unconstitutional authority, are swept away.

The question has thus far been discussed on the supposition that the question of punishment, and the question of guilt, are distinct—and that, *in strict law,* the jury are judges only of the latter. And I take it for granted that it has been shown, that even under that supposition, men cannot be excluded from the panel by the government, in order that the will of the government, (as expressed in its criminal code), may escape the influence and the veto of that moral law, and that law of human nature, which require and compel all men, jurors as well as others, to regard more or less the consequences that are to follow their actions. If the criminal code be *practically* inconsistent with that law of human nature, and theoretically inconsistent with the moral law, as this is understood by any considerable portion of "the country," the code must give way to, or be made to conform to, those higher laws, or the "trial by the country" must be abandoned.

But, in fact, the position is not a true one, that the jury have legally nothing to do with the question of punishment, but only with the question of guilt. The language of Magna Charta is equally explicit on the point of punishment, as on that of conviction; and it provides as clearly that a man shall not be *punished,* but by "the judgment of his peers," as that he shall not be condemned but by the same "judgment." These are the words of Magna Charta:

"No freeman shall be arrested, or imprisoned, or deprived of his freehold, or his liberties, or free customs, or be outlawed, or exiled, or in any manner destroyed; *nor* will we pass upon him, nor condemn him, unless by the legal judgment of his peers, or the law of the land."*

Here are plainly two clauses in this chapter of Magna Charta—two distinct provisions. The first relates to the arrest and punishment, the other to the conviction. That they are distinct clauses, is proved by the fact that they are separated from each other by the disjunctive "*nor.*" Thus, "No freeman shall be arrested, imprisoned, or deprived of his freehold, or his liberties, or free customs, or be outlawed, or exiled, or in any manner destroyed;" (all the preceding words are but saying that no freeman shall be arrested or *punished;*) "*nor* will we pass upon him, nor condemn him, but by the judgment of his peers, or the law of the land."

It is plain that "the judgment of his peers" goes to the whole question, and to the *separate* questions, of *punishment* and guilt.

And this is as it should be. The trial by jury was intended to be—what it has so often been denominated—"the palladium of liberty;" the great bulwark for the protection of individuals against the oppression of the government. But it would be but a partial and imperfect protection against that oppression, if the "judgment" of the jury, as to the degree of punishment to be inflicted, could not be interposed between the convict and the government. The government could punish the slightest offences in the most cruel and unreasonable manner. The people, as single individuals, need protection against cruel and unreasonable punishments, as well as against unjust condemnations. And they can secure this protection only on the principles here contended for.

If there could be any doubt as to the meaning of the language of Magna Charta, on this point, that doubt would be settled by an established rule of interpretation, which courts are bound to apply to all laws and legal instruments whatsoever, viz., that we are to get as much good out of a law, (or other legal instrument,) as possible; that is, that we are to make its words mean as much good, (in connexion with the matter of which they are treating,) as they can fairly be made to mean. Interpreted by this rule, this chapter of Magna Charta is explicit beyond cavil, to the point that the "judgment" of the jury shall be had on the question of punishment, as well as on the question of guilt.

The *spirit* of the provision undoubtedly requires that "the judgment" of the jury shall be taken on the question of punishment *separately* from the question of guilt. But where a juror, knowing the extent of the punishment authorized by the statute, consents to try a case, and renders his verdict without offering any objection to that punishment, his consent to it may, *perhaps*, be fairly inferred. But where he refuses to try the case, solely because he disapproves of such punishment, his consent is clearly withheld.

The Bill of Rights of Massachusetts, is, if possible, more explicit than Magna Charta in submitting the question of *punishment* to the "judgment" of the jury; indeed, the first clause on the subject, *in terms*, makes the whole trial, (so far as the jury are concerned,) a question of punishment, rather than of guilt. That clause, it will be seen, uses no terms that express conviction of guilt, as a separate thing from punishment. It does not say, like Magna Charta, that no man shall be "passed upon, nor condemned;" it only says that no subject shall be arrested or *punished*. It is only in the second paragraph that the trial of his guilt by a jury is *clearly* provided for.

These are the words:

"No subject shall be arrested, imprisoned, despoiled or deprived of his property, immunities, or privileges, put out of the protection of the law, exiled, or deprived of his life, liberty, or estate, but by the judgment of his peers, or the law of the land.

"And the government shall not make any law that shall subject any person to a capital or infamous punishment, except for the government of the army and navy, without trial by jury."

The language of the first of these paragraphs seems to be explicit, that the jury are to pass upon the question of punishment, and I take it for granted that it settles the question.*

To conclude. It is plain, that if the more humane and conscientious persons can be discharged from the panel, on account of their revolting against the barbarity of the laws, which they are called upon to aid in enforcing, an accused person does not have a trial by "the country," but only by the more inhuman and unfeeling portion of it.

Suppose the statute were to prescribe the penalty of death for a theft of forty shillings, (as it has sometimes done in England.) Probably not one man in ten in this Commonwealth would consent to be sworn to try a person accused of such a theft. In such a case, could all the men who were thus scrupulous, be excluded from the panel, or even be discharged at their own request, until a jury were packed entirely of men so brutal as to be willing to have a man hanged for stealing forty shillings? Certainly not, I think. And if not, then men cannot be discharged at all, on

account of their opposition to such penalties as may be prescribed by statute; and whenever men, drawn as jurors, refuse to be sworn to try a case, on account of the penalty annexed to the offence to be tried, the trial must, in the first instance, be postponed until, at some subsequent term of the court, a jury drawn in the usual way, shall be found, who will swear to try the case. If such a jury can never be found, the trial must stop, until that penalty be changed for such a one as *all men,* drawn as jurors, can conscientiously assent to.

If the doctrine here attempted to be maintained be correct, the trial by jury secures a merciful criminal code—such a code as "the country," (as represented in a jury drawn by lot from the great body of the people,) can conscientiously aid in enforcing. If the doctrine be erroneous, we have no such security. We can have only such a code as a bare majority of the people may chance to approve; and all that justice and tenderness towards life, liberty, property, and character, which has heretofore forbidden the condemnation of an accused person, so long as any portion of the "country," (as represented in a jury drawn by lot,) doubted his guilt, or disapproved his punishment, must give place to a sternness, not to say ferocity, which packs a jury with a special view to a more easy conviction, or a heavier penalty, than could otherwise be obtained or inflicted.

In Dr. Webster's case, three persons, equal to one fourth of the jury, were excluded from the panel, on account of their opposition to the death penalty. These three persons, it is fair to presume, represented a corresponding portion of the community, that is, one fourth of the whole. Thus one fourth of "the country" were virtually disfranchised of their constitutional right to be heard, both on the question of the guilt, and the question of the punishment, of one of their fellow men. Will so large a portion of the community acquiesce in such a disfranchisement?

Endnotes

[*] The phrase, "*By the law of the land,*" (say Coke, Kent, Story, and others,) does not mean a statute passed by a legislature—(for then this clause would impose no restraint upon the Legislature)—but is a technical phrase, meaning, "by the due course and process of law," which Coke afterwards explains to be, "by indictment or presentment of good and lawful men, where such deeds be done, in due manner, or by writ original of the common law," &c. &c. 2 Coke's Institutes, 45, 50; 2 Kent's Comm. 13; 3 Story's Comm. 661; 4 Hill's Rep. 146: 19 Wendell, 676; 4 Dev. N. C. Rep. 15.

[*] Because the jury pass upon the question of punishment, it must not be supposed, if they award any particular punishment, or degree of punishment, that their decision is necessarily final, any more than that their verdict that he is guilty is necessarily final. A man may be relieved of the punishment by the executive, or acquitted of the guilt by the judiciary, (on a question of law being raised,) notwithstanding the "judgment" of the jury. But he cannot be convicted of the guilt, nor subjected to the punishment, *against their judgment.* Their judgment is indispensable to his conviction and punishment; but it is not indispensable to his acquittal and discharge. Thus, if their judgment be in *his favor,* it is final; the government cannot appeal from it; but if it be *against*

him, he may appeal to the judiciary on the question of guilt, and to the executive, (and to the judiciary also, if the legislature so provide,) on the question of punishment.

10. A DEFENCE FOR FUGITIVE SLAVES (1850)

Source

A Defence for Fugitive Slaves, against the Acts of Congress of February 12, 1793, and September 18, 1850 (Boston: Bela Marsh, 1850).

HTML and other formats: <oll.libertyfund.org/title/2225>.

Act of Congress of 1793.

An Act respecting Fugitives from Justice, and persons escaping from the service of their Masters.

Sec. 1.*Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled,* That whenever the executive authority of any State in the Union, or of either of the territories northwest or south of the river Ohio, shall demand any person as a fugitive from justice, of the executive authority of any such state or territory to which such person shall have fled, and shall moreover produce the copy of an indictment found, or an affidavit made before a magistrate of any state or territory as aforesaid, charging the person so demanded, with having committed treason, felony or other crime, certified as authentic by the governor or chief magistrate of the state or territory from whence the person so charged, fled, it shall be the duty of the executive authority of the state or territory to which such person shall have fled, to cause him or her to be arrested and secured, and notice of the arrest to be given to the executive authority making such demand, or to the agent of such authority appointed to receive the fugitive, and to cause the fugitive to be dellvered to such agent when he shall appear: But if no such agent shall appear within six months from the time of the arrest, the prisoner may be discharged. And all costs or expenses incurred in the apprehending, securing, and transmitting such fugitive to the state or territory making such demand, shall be paid by such state or territory.

Sec. 2.*And be it further enacted,* That any agent appointed as aforesaid, who shall receive the fugitive into his custody, shall be empowered to transport him or her to the state or territory from which he or she shall have fled. And if any person or persons shall by force set at liberty, or rescue the fugitive from such agent while transporting, as aforesaid, the person or persons so offending shall, on conviction, be fined not exceeding five hundred dollars, and be imprisoned not exceeding one year.

Sec. 3.*And be it also enacted,* That when a person held to labor in any of the United States, or in either of the territories on the northwest or south of the river Ohio, under the laws thereof, shall escape into any other of the said states or territory, the person to whom such labor or service may be due, his agent or attorny, is hereby empowered to seize or arrest such fugitive from labor, and to take him or her before any judge of the Circuit or District Courts of the United States, resid-

ing or being within the state, or before any magistrate of a county, city or town corporate, wherein such seizure or arrest shall be made, and upon proof to the satisfaction of such judge or magistrate, either by oral testimony or affidavit taken before and certified by a magistrate of any such state or territory, that the person so seized or arrested, doth, under the laws of the state or territory from which he or she fled, owe service or labor to the person claiming him or her, it shall be the duty of such judge or magistrate to give a certificate thereof to such claimant, his agent or attorney, which shall be sufficient warrant for removing the said fugitive from labor, to the state or territory from which he or she fled.

Sec. 4.*And be it further enacted*, That any person who shall knowingly and willingly obstruct or hinder such claimant, his agent or attorney when so arrested pursuant to the authority herein given or declared: or shall harbor or conceal such person after notice that he or she was a fugitive from labor, as aforesaid, shall, for either of the said offences, forfeit and pay the sum of five hundred dollars. Which penalty may be recovered by and for the benefit of such claimant, by action of debt, in any court proper to try the same; saving moreover to the person claiming such labor or service, his right of action for or on account of the said injuries or either of them.

JONATHAN TRUMBULL,
Speaker of the House of Representatives.

JOHN ADAMS,
Vice President of the United States, and President of the Senate,

Approved February 12th, 1793.

GEORGE WASHINGTON,
President of the United States.

Act of Congress of 1850.

An Act to amend, and supplementary to the Act, entitled "An Act respecting Fugitives from Justice, and persons escaping from the service of their Masters," approved February 12, 1793.

Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled, That the persons who have been, or may hereafter be, appointed commissioners, in virtue of any act of Congress, by the circuit courts of the United States, and who, in consequence of such appointment, are authorized to exercise the powers that any justice of the peace or other magistrate of any of the United States may exercise in respect to offenders for any crime or offence against the United States, by arresting, imprisoning, or balling the same under and by virtue of the thirty-third section of the act of the twenty-fourth of September, seventeen hundred and eighty-nine, entitled, "An act to establish the judicial courts of the United States," shall be, and are hereby authorized and required to exercise and discharge all the powers and duties conferred by this act.

Sec. 2.*And be it further enacted,* That the superior court of each organized territory of the United States shall have the same power to appoint commissioners to take acknowledgments of ball and affidavit, and to take depositions of witnesses in civil causes, which is now possessed by the circuit courts of the United States; and all commissioners who shall hereafter be appointed for such purposes by the superior court of any organized territory of the United States shall possess all the powers and exercise all the duties conferred by law upon the commissioners appointed by the circuit courts of the United States for similar purposes, and shall moreover exercise and discharge all the powers and duties conferred by this act.

Sec. 3.*And be it further enacted,* That the circuit courts of the United States, and the superior courts of each organized territory of the United States, shall from time to time enlarge the number of commissioners, with a view to afford reasonable facilities to reclaim fugitives from labor, and to the prompt discharge of the duties imposed by this act.

Sec. 4.*And be it further enacted,* That the commissioners above named shall have concurrent jurisdiction with the judges of the circuit and district courts of the United States, in their respective circuits and districts within the several States, and the judges of the superior courts of the Territories, severally and collectively, in term time and vacation; and shall grant certificates to such claimants, upon satisfactory proof being made, with authority to take and remove such fugitives from service or labor, under the restrictions herein contained, to the State or Territory from which such persons may have escaped or fled.

Sec. 5.*And be it further enacted,* That it shall be the duty of all marshals and deputy marshals to obey and execute all warrants and precepts issued under the provisions of this act, when to them directed; and should any marshal or deputy marshal refuse to receive such warrant or other process, when tendered, or to use all proper means diligently to execute the same, he shall, on conviction thereof, be fined in the sum of one thousand dollars to the use of such claimant, on the motion of such claimant, by the circuit or district court for the district of such marshal: and after arrest of such fugitive by such marshal or his deputy, or whilst at any time in his custody, under the provisions of this act, should such fugitive escape, whether with or without the assent of such marshal or his deputy, such marshal shall be liable, on his official bond, to be prosecuted for the benefit of such claimant, for the full value of the service or labor of said fugitive in the State, Territory, or district whence he escaped; and the better to enable the said commissioners, when thus appointed, to execute their duties faithfully and efficiently, in conformity with the requirements of the constitution of the United States and of this act, they are hereby authorized and empowered, within their counties respectively, to appoint in writing under their hands, any one or more suitable persons, from time to time, to execute all such warrants and other process as may be issued by them in the lawful performance of their respective duties; with an authority to such commissioners, or the persons to be appointed by them, to execute process as aforesaid, to summon and call to their aid the bystanders, or *posse comitatus* of the proper county, when necessary to insure a faithful observance of the clause of the constitution referred to, in conformity with the provisions of this act; and all good citizens are hereby commanded to aid and assist in the prompt and efficient execution of this law, whenever their services may be required, as aforesaid, for that

purpose; and said warrants shall run and be executed by said officers anywhere in the State within which they are issued.

Sec. 6.*And be it further enacted,* That when a person held to service or labor in any State or Territory of the United States has heretofore or shall hereafter escape into another State or Territory of the United States, the person or persons to whom such service or labor may be due, or his, her, or their agent or attorney, duly authorized, by power of attorney, in writing, acknowledged and certified under the seal of some legal office or court of the State or Territory in which the same may be executed, may pursue and reclaim such fugitive person, either by procuring a warrant from some one of the courts, judges, or commissioners aforesaid, of the proper circuit, district or county, for the apprehension of such fugitive from service or labor, or by seizing and arresting such fugitive where the same can be done without process, and by taking and causing such person to be taken forthwith before such court, judge or commissioner, whose duty it shall be to hear and determine the case of such claimant in a summary manner; and upon satisfactory proof being made, by deposition or affidavit, in writing, to be taken and certified by such court, judge, or commissioner, or by other satisfactory testimony, duly taken and certified by some court, magistrate, justice of the peace, or other legal officer authorized to administer an oath and take depositions under the laws of the State or Territory from which such person owing service or labor may have escaped, with a certificate of such magistracy or other authority, as aforesaid, with the seal of the proper court or officer thereto attached, which seal shall be sufficient to establish the competency of the proof, and with proof, also by affidavit, of the identity of the person whose service or labor is claimed to be due as aforesaid, that the person so arrested does in fact owe service or labor to the person or persons claiming him or her, in the State or Territory from which such fugitive may have escaped as aforesaid, and that said person escaped, to make out and deliver to such claimant, his or her agent or attorney, a certificate setting forth the substantial facts as to the service or labor due from such fugitive to the claimant, and of his or her escape from the State or Territory in which such service or labor was due to the State or Territory in which he or she was arrested, with authority to such claimant, or his or her agent or attorney, to use such reasonable force and restraint as may be necessary under the circumstances of the case, to take and remove such fugitive person back to the State or Territory from whence he or she may have escaped as aforesaid. In no trial or hearing under this act shall the testimony of such alleged fugitive be admitted in evidence; and the certificates in this and the first section mentioned shall be conclusive of the right of the person or persons in whose favor granted to remove such fugitive to the State or Territory from which he escaped, and shall prevent all molestation of said person or persons by any process issued by any court, judge, magistrate, or other person whomsoever.

Sec. 7.*And be it further enacted,* That any person who shall knowingly and willingly obstruct, hinder, or prevent such claimant, his agent or attorney, or any person or persons lawfully assisting him, her, or them, from arresting such fugitive from service or labor, either with or without process as aforesaid; or shall rescue, or attempt to rescue, such fugitive from service or labor, from the custody of such claimant, his or her agent or attorney, or other person or persons lawfully assisting as aforesaid, when so arrested, pursuant to the authority herein given and declared; or shall aid, abet, or assist such person, so owing service or labor as aforesaid, directly or indirectly, to es-

cape from such claimant, his agent or attorney, or other person or persons, legally authorized as aforesaid; or shall harbor or conceal such fugitive, so as to prevent the discovery and arrest of such person, after notice or knowledge of the fact that such person was a fugitive from service or labor as aforesaid, shall, for either of said offences, be subject to a fine not exceeding one thousand dollars, and imprisonment not exceeding six months, by indictment and conviction before the district court of the United States for the district in which such offence may have been committed, or before the proper court of criminal jurisdiction, if committed within any one of the organized Territories of the United States; and shall moreover forfeit and pay, by way of civil damages to the party injured by such illegal conduct, the sum of one thousand dollars for each fugitive so lost as aforesaid, to be recovered by action of debt in any of the district or territorial courts aforesaid, within whose jurisdiction the said offence may have been committed.

Sec. 8.*And be it further enacted,* That the marshals, their deputies, and the clerks of the said district and territorial courts, shall be paid for their services the like fees as may be allowed to them for similar services in other cases; and where such services are rendered exclusively in the arrest, custody, and delivery of the fugitive to the claimant, his or her agent or attorney, or where such supposed fugitive may be discharged out of custody for the want of sufficient proof as aforesaid, then such fees are to be paid in the whole by such claimant, his agent or attorney; and in all cases where the proceedings are before a commissioner, he shall be entitled to a fee of ten dollars in full for his services in each case, upon the delivery of the said certificate to the claimant, his or her agent or attorney; or a fee of five dollars in cases where the proof shall not, in the opinion of such commissioner, warrant such certificate and delivery, inclusive of all services incident to such arrest and examination, to be paid in either case by the claimant, his or her agent or attorney. The person or persons authorized to execute the process to be issued by such commissioners for the arrest and detention of fugitives from service or labor as aforesaid, shall also be entitled to a fee of five dollars each for each person he or they may arrest and take before any such commissioner as aforesaid at the instance and request of such claimant, with such other fees as may be deemed reasonable by such commissioner for such other additional services as may be necessarily performed by him or them: such as attending to the examination, keeping the fugitive in custody, and providing him with food and lodging during his detention, and until the final determination of such commissioner: and in general for performing such other duties as may be required by such claimant, his or her attorney or agent, or commissioner in the premises; such fees to be made up in conformity with the fees usually charged by the officers of the courts of justice within the proper district or county, as near as may be practicable, and paid by such claimants, their agents or attorneys, whether such supposed fugitive from service or labor be ordered to be delivered to such claimants by the final determination of such commissioners or not.

Sec. 9.*And be it further enacted,* That upon affidavit made by the claimant of such fugitive, his agent or attorney, after such certificate has been issued, that he has reason to apprehend that such fugitive will be rescued by force from his or their possession before he can be taken beyond the limits of the State in which the arrest is made, it shall be the duty of the officer making the arrest to retain such fugitive in his custody, and to remove him to the State whence he fled, and there to deliver him to said claimant, his agent or attorney. And to this end the officer aforesaid is hereby

authorized and required to employ so many persons as he may deem necessary, to overcome such force, and to retain them in his service so long as circumstances may require; the said officer and his assistants, while so employed, to receive the same compensation, and to be allowed the same expenses as are now allowed by law for the transportation of criminals, to be certified by the judge of the district within which the arrest is made, and paid out of the treasury of the United States.

Sec. 10.*And be it further enacted,* That when any person held to service or labor in any State or Territory, or in the District of Columbia, shall escape therefrom, the party to whom such service or labor shall be due, his, her, or their agent or attorney, may apply to any court of record therein, or judge thereof in vacation, and make satisfactory proof to such court, or judge in vacation, of the escape aforesaid, and that the person escaping owed service or labor to such party. Whereupon the court shall cause a record to be made of the matters so proved, and also a general description of the person so escaping, with such convenient certainty as may be; and a transcript of such record authenticated by the attestation of the clerk, and of the seal of the said court, being produced in any other State, Territory, or District in which the person so escaping may be found, and being exhibited to any judge, commissioner, or other officer authorized by the law of the United States to cause persons escaping from service or labor to be delivered up, shall be held and taken to be full and conclusive evidence of the fact of escape, and that the service or labor of the person escaping is due to the party in such record mentioned. And upon the production by the said party of other and further evidence, if necessary, either oral or by affidavit, in addition to what is contained in the said record, of the identity of the person escaping, he or she shall be delivered up to the claimant. And the said court, commissioner, judge, or other person authorized by this act to grant certificates to claimants of fugitives, shall, upon the production of the record and other evidences aforesaid, grant to such claimant a certificate of his right to take any such person identified and proved to be owing service or labor as aforesaid, which certificate shall authorize such claimant to seize or arrest and transport such person to the State or Territory from which he escaped: *Provided,* That nothing herein contained shall be construed as requiring the production of a transcript of such record as evidence as aforesaid; but in its absence, the claim shall be heard and determined upon other satisfactory proofs competent in law.

HOWELL COBB,
Speaker of the House of Representatives.

WILLIAM R. KING,
President of the Senate, pro tempore.

Approved September 18th, 1850.

MILLARD FILLMORE.

A DEFENCE for FUGITIVE SLAVES, against the acts of congress of february 12, 1793, and september 18, 1850.

BY LYSANDER SPOONER.

BOSTON: BELA MARSH, 25 CORNHILL, 1850.

CHAPTER I. Unconstitutionality of the Acts of Congress of 1793 *and* 1850.

Section 1.

Admitting, for the sake of the argument—*what is not true in fact*—that the words, "person held to service or labor," are a legal description of a slave, and that the clause of the Constitution in reference to such persons, and the Act of Congress of 1793, and the supplementary Act of 1850, for carrying that clause into effect, authorize the delivery of fugitive slaves to their masters—said acts (considered as one,) are nevertheless unconstitutional, in at least seven particulars, as follows:—

1. They authorize the delivery of the slaves without a trial by jury.

2. The Commissioners appointed by the Act of 1850, are not constitutional tribunals for the adjudication of such cases.

3. The *State* magistrates, authorized by the Act of 1793, to deliver up fugitives from service or labor, are not constitutional tribunals for that purpose.

4. The Act of 1850 is unconstitutional, in that it authorizes cases to be decided wholly on *ex parte* testimony.

5. The provisions of the Act of 1850, requiring the exclusion of certain evidence, are unconstitutional.

6. The requirement of the Act of 1850, that the cases be adjudicated "in a summary manner," is unconstitutional.

7. The prohibition, in the Act of 1850, of the issue of the writ of *Habeas Corpus* for the relief of those arrested under the act, is unconstitutional.

These several points I propose to establish.

*Section 2. Denial of a Trial by Jury.**

Neither the Act of 1793, nor that of 1850, allows the alleged slave a trial by jury. So far as I am aware, the only argument, worthy of notice, that has ever been offered against the right of an alleged fugitive slave to a trial by jury, is that given by Mr. Webster, in his letter to certain citizens of Newburyport, dated May 15, 1850, as follows:—

> "Nothing is more false than that such jury trial is demanded, in cases of this kind, by the constitution, either in its letter or in its spirit. The constitution declares that in all criminal prosecutions, there shall be a trial by jury; the reclaiming of a fugitive slave is not a criminal prosecution.
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> "The constitution also declares that in suits at common law, the trial by jury shall be preserved; the reclaiming of a fugitive slave is not a suit at the common law; and there is no other clause or sentence in the constitution having the least bearing on the subject."

In saying that "the reclaiming of a fugitive slave is not a criminal prosecution," Mr. Webster is, of course, correct. But in saying that "the reclaiming of a fugitive slave is not a suit at the common law," within the meaning of the constitutional amendment, that secures a jury trial "in suits at common law," he raises a question, which it will require something more than his simple assertion to settle.

To determine whether the reclaiming of a fugitive slave is a "suit at common law," within the meaning of the above amendment to the constitution, it is only necessary to define the terms "suit" and "common law," as used in the amendment, and the term "claim," as used in that clause of the constitution, which provides that fugitives from service and labor "shall be delivered up on *claim* of the person to whom such service or labor may be due."

All these terms have been defined by the Supreme Court of the United States. Their definitions are as follows:

In the case of *Prigg* vs. *Pennsylvania,* the court say—

> "He (the slave) shall be delivered up on *claim* of the party to whom such service or labor may be due. * * * A *claim* is to be made. What is a claim? It is, in a just juridical sense, a demand of some matter, as of right, made by one person upon another, to do, or to forbear to do, some act or thing as a matter of duty. A more limited, but at the same time an equally expressive definition was given by Lord Dyer, as cited in Stowell *vs.* Zouch, Plowden 359; *and it is equally applicable to the present case;* that 'a claim is a challenge by a man of the propriety or ownership of a thing which he has not in his possession, but which is wrongfully detained from him.' The slave is to be delivered up on the claim."—16 *Peters* 614-15.

In *Cohens* vs. *Virginia,* the court say:

> "What is a *suit?* We understand it to be the prosecution, or pursuit, of some *claim,* demand, or request. In law language, it is the prosecution of some demand in a court of justice. 'The remedy for every species of wrong is,' says Judge Blackstone, 'the be-

ing put in possession of that right whereof the party injured is deprived.' The instruments whereby this remedy is obtained, are a diversity of *suits* and actions, which are defined by the Mirror to be 'the lawful demand of one's right;' or, as Bracton and Fleta express it, in the words of Justinian, '*jus prosequendi in judicio quod alicui debetur,*'—(the form of prosecuting in trial, or judgment, what is due to any one.) Blackstone then proceeds to describe every species of remedy by suit; and they are all cases where the party sueing claims to obtain something to which he has a right.

"To commence a suit, is to demand something by the institution of process in a court of justice; and to prosecute the suit, is, according to the common acceptation of language, to continue that demand."—6 *Wheaton* 407-8.

In the case of *Parsons* vs. *Bedford et. al.,* the court define the term "common law," with special reference to its meaning in the amendment to the constitution, which secures the right of trial by jury "in suits at common law." The court say:

"The phrase 'common law,' found in this clause, is used in contradistinction to equity, and admiralty, and maritime jurisprudence. The constitution had declared in the third article, 'that the judicial power shall extend to all cases in *law* and equity arising under this constitution, the laws of the United States, and treaties made or which shall be made under their authority, &c., and to all cases of admiralty and maritime jurisprudence. It is well known that in civil causes, in courts of equity and admiralty, juries do not intervene, and that courts of equity use the trial by jury only in extraordinary cases to inform the conscience of the court. When, therefore, we find that the amendment requires that the right of trial by jury shall be preserved in suits at common law, the natural conclusion is, that this distinction was present to the minds of the framers of the amendment. *By common law, they meant what the constitution denominated in the third article, 'law;' not merely suits which the common law recognized among its old and settled proceedings, but suits in which legal rights were to be ascertained and determined, in contradistinction to those where equitable rights alone were recognized, and equitable remedies were administered; or where, as in the admiralty, a mixture of public law, and of maritime law and equity was often found in the same suit.*" * * * *

"In a just sense, the amendment, then, may be construed to embrace all suits which are not of equity and admiralty jurisprudence, whatever may be the peculiar form which they may assume to settle legal rights."—3 Peters, 446.

Such are the definitions given by the Supreme Court of the United States, of the terms "claim," "suit," and "common law," as used in the constitution and amendment. If these definitions are correct, they cover the case of fugitive slaves. If they are not correct, it becomes Mr. Webster to give some reason against them besides his naked assertion, that "the reclaiming of a fugitive slave is not a suit at the common law."

Mr. Webster is habitually well satisfied with the opinions of the Supreme Court, when they make for slavery. Will he favor the world with his objections to them, when they make for liberty?

Perhaps Mr. Webster will say that, in the case of a fugitive slave, the matter "in controversy," is not "*value*"—to be measured by "*dollars*," but freedom. But it certainly does not lie in the mouth of the slaveholder, (however it might in the mouth of the slave,) to make this objection—because the slaveholder claims the slave as property—as "value" belonging to himself.

Section 3. The Commissioners, authorized by the Act of 1850, are not Constitutional Tribunals for the performance of the duties assigned them.

The office of the Commissioners, in delivering up fugitive slaves, is a *judicial* office. They are to try "suits at common law," within the meaning of the constitution, as has just been shown. They are to give, not only judgment, but final judgment, in questions both of property, and personal liberty—(of property, on the part of the complainant, and of liberty, on the part of the alleged slave.) Indeed, the Supreme Court have decided that the office of delivering up fugitive slaves is a judicial one. Say they,

> "It is plain, then, that where a claim is made by the owner, out of possession, for the delivery of a slave, it must be made, if at all, against some other person; and inasmuch as the right is a right of property, capable of being recognized and asserted by proceedings before a court of justice, between parties adverse to each other, it constitutes, in the strictest sense, a *controversy* between the parties, and a *case* arising under the constitution of the United States; *within the express delegation of judicial power given by that instrument.*"—*Prigg vs. Pennsylvania,* 16 *Peters,* 616.

These Commissioners, therefore, are "judges," within the meaning of that term, as used in the constitution. And being judges, they necessarily come within that clause of the constitution, (Art. 3, Sec. 1,) which provides that "The judges, both of the supreme and inferior courts, shall hold their offices during good behavior, *and shall, at stated times, receive for their services, a compensation,* which shall not be diminished during their continuance in office."

The object of this provision of the constitution, in requiring that all "judges" shall receive a fixed salary, or "a compensation, *at stated times,*" instead of receiving their pay in the shape of fees in each case—thus making its aggregate amount contingent upon the number of cases they may try—was to secure their impartiality and integrity, as between the parties whose causes should come before them. If a judge were to receive his compensation in the shape of fees for each case, he would have a pecuniary inducement to give a case to the plaintiff, without regard to its merits. And for these reasons. Plaintiffs have the privilege of selecting their own tribunals. If a particular judge be known as uniformly or usually giving cases to plaintiffs, he thereby induces plaintiffs to bring their cases before him, in preference to other tribunals. He thus tries a larger number of cases, and of course obtains a larger amount of fees, than he would if he were to decide impartially. He thus induces also the institution of a larger number of suits than would otherwise be instituted, because if plaintiffs are sure, or have a reasonable probability, of gaining their causes, without regard to their merits, they will of course bring many groundless and unjust suits, which otherwise they would not bring.

It is obvious, therefore, that the payment of judges by the way of fees for each case, has a direct tendency to induce corrupt decisions, and destroy impartiality in the administration of justice. And the constitution—by requiring imperatively that judges "*shall* receive" a fixed salary, or "a compensation at stated times," has in reality provided that the rights of no man, whether of property or liberty, shall ever be adjudicated by a judge, who is liable to be influenced by the pecuniary temptation to injustice, which is here guarded against.

The legal objection I now make is not that the Commissioners or judges are paid *double* fees for deciding against liberty, or for deciding in favor of the plaintiffs—(a provision more infamous probably, for the pay of the judiciary, than was ever before placed upon a human statute book)—but it is that they are paid in fees at all; that they receive no "compensation at stated times," as required by the constitution; that their pay is contingent upon the number of cases they can procure to be brought before them; in other words, contingent upon the inducements, which, by their known practice, they may offer to the claimants of slaves to bring their cases before them.

The argument on this point, then, is, that inasmuch as the constitution *imperatively requires* that "judges *shall receive, at stated times,* a compensation for their services," and inasmuch as the Act of 1850 makes no provision for paying these Commissioners any "compensation at stated times," they are not constitutional tribunals, and consequently, have no authority to act as judges or commissioners in execution of the law; and their acts and decisions are of necessity binding upon nobody. In short, a Commissioner, instead of being one of the judges of the United States, paid by the United States, is, in law, a mere hired kidnapper, employed and paid by the slave-hunter—and every body has a right to treat him and his decisions accordingly.*

Section 4. The State Magistrates, authorized by the Act of 1793, to deliver up fugitives from service or labor, are not constitutional tribunals for that purpose.

The Act of 1793 *requires* the *State* magistrates—"any magistrate of a county, city, or town corporate"—to deliver up fugitives from service or labor. This provision is plainly unconstitutional, for several reasons, to wit:

1. The *State* Courts are not "established" by Congress, as the constitution expressly requires that all courts shall be, in whom "the judicial power of the United States shall be vested."

2. The "judges" of the *State* courts do not "at stated times, receive for their services a compensation," (from the United States,) as the constitution requires that the judges of the United States shall do.

3. The judges of the *State* courts do not receive their offices or appointments in any of the modes prescribed by the constitution. The president does not "nominate," nor does he "by and with the consent of the Senate, appoint" them to their offices; nor is their "appointment vested in the president alone, in the courts of law, or in the heads of departments."

4. The *State* magistrates are not commissioned by the President of the United States, as the constitution requires that "all officers of the United States" shall be.

5. The *State* judges are not amenable to the United States for their conduct in their offices; they cannot be impeached, or removed from their offices, by the Congress or the government of the United States.

For these reasons the Act of 1793, requiring the *State* magistrates to deliver up fugitives, is palpably unconstitutional. Indeed the Supreme Court of the United States have decided as much; for they have decided that,

"Congress cannot vest any portion of the judicial power of the United States, except in courts ordained and established by itself."—*Martin vs. Hunters, Lessee,* 1 *Wheaton* 330.

> Also, "The jurisdiction over such cases, (cases arising under the constitution, laws, and treaties of the United States,) could not exist in the State courts previous to the adoption of the constitution, and it could not afterwards be directly conferred on them; for the constitution expressly requires the judicial power to be vested in courts ordained and established by the United States."—*Same, p.* 335.

But although this act is thus palpably unconstitutional, the Supreme Court, in the Prigg case, with a corruption, that ought to startle the nation, and shake their faith in all its decisions in regard to slavery, declared that "no doubt is entertained by this court that State magistrates *may, if they choose,* exercise that authority, unless prohibited by State legislation."—16 *Peters,* 622.

Thus this court, who knew—as the same court had previously determined—that Congress could confer upon the State magistrates no "judicial power" whatever, nevertheless attempted to encourage them to assume the office of judges of the United States, and use it for the purpose of returning men into bondage—under the pretence that an act of Congress, *admitted to be unconstitutional,* would yet be a sufficient justification for the deed.

That court knew perfectly well that a law authorizing a claimant to arrest a man, on the allegation that he was a slave, and then take him before the first man or woman he might happen to meet in the street, and authorizing such man or woman to adjudicate the question, would be equally constitutional with this act of 1793, and would confer just as much judicial authority upon such man or woman, as this act of 1793 conferred upon the State magistrates; and that it would be just as lawful for such man or woman to adjudicate the case of an alleged slave, and return him into bondage, under such a law, as it is for a State magistrate to do it under the law of 1793.

It is worthy of remark, that the same judge—and he a northern one, (Story,)—who delivered the opinion, declaring that "Congress cannot vest any portion of the judicial power of the United States, except in courts ordained and established by itself," delivered the other opinion declaring that "no doubt is entertained by this court that State magistrates may, if they choose, exercise that authority, unless prohibited by State legislation."

It is also worthy of notice, that every one of the definitions before given, (Sec. 2,) of "claim," "suit," and "common law,"—from which it appears that a "claim" for a fugitive slave is a "suit at common law," within the meaning of the constitution, and must therefore be tried by a jury—were taken from opinions delivered in the Supreme Court by Story. He also, in the Prigg case, said

that a claim for a fugitive slave "constitutes, in the strictest sense, a *controversy* between the parties, and a *case* 'arising under the constitution of the United States,' within the express delegation of *judicial power* given by that instrument." And yet this same Story, in his Commentaries on the Constitution, says that this "suit at common law," this "*controversy* between the parties," this "*case* arising under the constitution, within the express delegation of *judicial power* given by that instrument," has no more claim to a *judicial* investigation on its merits, than is had when a fugitive from justice is delivered up for trial. He says,

> "It is obvious that these provisions for the arrest and removal of fugitives of both classes contemplate *summary ministerial* (not judicial, but *ministerial*—that is executive) proceedings, and not the ordinary course of judicial investigations, to ascertain whether the complaint be well founded, or the claim of ownership be established beyond all legal controversy. In cases of suspected crimes the guilt or innocence of the party is to be made out at his trial; and not upon the preliminary inquiry, whether he shall be delivered up. All that would seem in such cases to be necessary is, that there should be *prima facie* evidence before the executive authority to satisfy its judgment, that there is *probable cause* to believe the party guilty, such as upon an ordinary warrant would justify his commitment for trial. And in cases of fugitive slaves there would seem to be the same necessity for requiring only *prima facie* proofs of ownership, without putting the party, (the claimant,) to a formal assertion of his rights by a suit at law." 3 *Story's Commentaries*, 677-8.

The Act of 1850 is unconstitutional for the same reason as is the Act of 1793; for the Act of 1850 (Sec. 10,) authorizes *any State Court of record, or judge thereof in vacation,* to take testimony as to the two facts of a man's being a slave, and of his escape; and it provides that any testimony which shall be "satisfactory" to such *State* "court, or judge thereof in vacation," *on those two points,* "shall be held and taken to be full and conclusive evidence" of those facts, by the *United States* "court, judge, or commissioner," who may have the final disposal of the case.

It thus authorizes the *State* court, or judge thereof in vacation, absolutely, and without appeal, *to try those two points in every case*—leaving only the single point of identity to be tried by the United States "court, judge, or commissioner."

Now it is as clearly unconstitutional for Congress to give, to a *State* court or judge, final jurisdiction, (or even partial jurisdiction,) of two-thirds of a case, (that is, of two, out of the only three, points involved in the case,) as it would be to give them jurisdiction of the whole case.

I suppose the ground, if any, on which Congress would pretend to justify this legislation, is the following provision of the constitution—(Art. 4, Sec. 1.)

> "Full faith and credit shall be given in each State to the public acts, records, and judicial proceedings of every other State. And the Congress may by general laws prescribe the manner in which such acts, records and proceedings shall be proved, *and the effect thereof.*"

But "the public acts, records, and judicial proceedings" *of a State*, which are here spoken of, are only "the public acts, records, and judicial proceedings," done, made, and had, *by State officers, under the laws of the State.* A State judge is not an officer of the *State*, when exercising an authority conferred upon him by the United States; nor are his "acts, records, or judicial proceedings," the "acts, records, or judicial proceedings" *of the State*—but only of the United States.* It is only when acting as an officer *of the State, under the laws of the State*, that his "acts, records, and judicial proceedings" are the "acts, records, and judicial proceedings" *of the State.*

Congress seem to have been inspired with the idea that, although they could not directly confer upon a State judge that "judicial power," which the constitution requires to be vested only in judges of the United States, yet, if, by any unconstitutional law, they could but *induce* a State judge to exercise "the judicial power of the United States," so far as to hear and determine upon the evidence, (in a case arising under the constitution and laws of the United States,) *and make a record of his proceedings and determination*, they (Congress) could then, by virtue of this article of the constitution, "prescribe the manner in which such *records and judicial proceedings* shall be proved, *and the effect thereof*," (before a court of the United States,) as if they were really the "records and judicial proceedings" of the State itself.

If this wonderfully adroit process were to succeed, Congress would be able to transfer all the *real* "judicial power of the United States," to the *State* "courts, or judges thereof in vacation"—leaving the United States courts nothing to do but to receive the "*records*" made by these State courts and judges, and give them such "*effect*" as Congress might prescribe.

But this remarkable contrivance must fail of its purpose, unless it can be shown that the "acts, records and judicial proceedings," which may be had and made by a State "court of record, or judge thereof in vacation,"—not by virtue of any authority granted them by the State, but only by virtue of an unconstitutional law of Congress—are really the "acts, records, and judicial proceedings" of the State itself.

The motive of this attempt, on the part of Congress, to transfer to the State courts and judges full and final jurisdiction over the two facts, that a man was a slave, and that he escaped, is doubtless to be found in the statement made by Senator Mason, of Virginia, the Chairman of the Committee that reported the bill, and the principal champion of the bill in the Senate. In a speech upon the bill, on the 19th day of August, 1850, (as reported in the Washington Union and Intelligencer,) in describing "the actual evils under which the slave States labor in reference to the reclamation of these fugitives," he said—

> "Then again, it is proposed, (by one of the opponents of the bill,) as a part of the proof to be adduced at the hearing after the fugitive has been recaptured, that evidence shall be brought by the claimant to show that slavery is established in the State from which the fugitive has absconded. Now, this very thing, in a recent case in the city of New York, was required by one of the judges of that State, which case attracted the attention of the authorities of Maryland, and against which they protested, because of the indignities heaped upon their citizens, and the losses which they sustained in that city. In that case, the judge of the State court required proof

> that slavery was established in Maryland, and went so far as to say that the only mode of proving it was by reference to the statute book. Such proof is required in the Senator's amendment; and if he means by this that proof shall be brought that slavery is established by existing laws, it is impossible to comply with the requisition, for no such proof can be produced, I apprehend, in any of the slave States. *I am not aware that there is a single State in which the institution is established by positive law.* On a former occasion, and on a different topic, it was my duty to endeavor to show to the Senate that no such law was necessary for its establishment; certainly none could be found, and none was required in any of the States of the Union."

It thus appears by the confession of the champion of the bill himself, that every one of these fugitive slave cases would break down on the first point to be proved, to wit, that the alleged fugitive was a slave—if that fact were left to be proved before a court that should require the claimant to show any law which made the man a slave. It was therefore indispensable that this fact should be proved only to the satisfaction of one of those State judges, who have acquired the habit of deciding men to be slaves, without any law being shown for it.

Section 5. Ex parte Evidence.

The Act of 1850 is unconstitutional, in that it authorizes cases to be decided wholly on ex parte testimony.

The 4th Section of the act makes it the "duty" of the "court, judge, or commissioner," to deliver up an alleged fugitive, "upon satisfactory proof being made by deposition or *affidavit,* in writing, * * or by other satisfactory testimony, * * and with proof also by *affidavit* of the identity of the person," &c.

It thus *allows* the whole proof to be made by "*affidavit*" alone, which is wholly an *ex parte* affair. And if this testimony be "satisfactory" to the court, judge, or commissioner, they are authorized to decide the case upon that testimony alone, without giving the defendant any opportunity to confront or cross-examine the witnesses of the claimant, or to offer a particle of evidence in his defence.

The 10th Section of the act is of the same character as the 4th, *except that it is worse.* It first provides that a claimant—by a wholly *ex parte* proceeding—may make "satisfactory proof"—to "any court of record, or judge thereof in vacation," in the "State, Territory, or District," from which a fugitive is alleged to have escaped—that a person has escaped, and that he owed service or labor to the party claiming him. It then, not merely permits, but *imperatively requires,* that this *ex parte* evidence, when a transcript thereof is exhibited in the State where the alleged fugitive is arrested, "*shall be held and taken to be full and conclusive evidence* of the fact of escape, and that the service or labor of the person escaping is due to the party in the record mentioned."

It thus absolutely *requires,* that on the production of certain *ex parte* evidence by the claimant, the court, judge, or commissioner *shall* decide these two points—the fact of escape, and that the fugitive owed service or labor to the claimant—*against the defendant, without giving him a hearing.*

It then *permits* the judge to decide the only remaining point, to wit, *the identity* of the person arrested with the person escaped—upon the same testimony. But it *allows* him to receive "other and further evidence, *if necessary,*" on this single point of identity.

Thus this section imperatively prescribes that, at the pleasure of the claimant, certain *ex parte* testimony "shall be held and taken to be full and conclusive evidence," on two, out of the three, points involved in the case. And on the only remaining point, it requires "other and further evidence," only on the condition that it shall be "*necessary*" in the mind of the judge or commissioner. And if "other and further evidence" be "necessary," that also may be "either oral, or by *affidavit,*" which last is necessarily *ex parte.*

Thus the act authorizes the whole case to be decided wholly on *ex parte* evidence, if such evidence be "satisfactory" to the commissioner; and, at the option of the claimant, it makes it *obligatory* upon the commissioner to receive such testimony as "full and conclusive evidence," on two, out of the only three, points involved in the case.

There is not a syllable in the whole act that suggests, implies, or requires that the individual, whose liberty is in issue, shall be allowed the right to confront or cross-examine a single opposing witness, or even the right to offer a syllable of rebutting testimony in his defence.

Now, I wish it to be understood that I am not about to argue the enormity of such an act, but only its unconstitutionality.

The question involved is, whether Congress have any constitutional power to authorize courts to decide cases, "suits at common law," or any other cases, on *ex parte* testimony alone?

The constitution declares that "the judicial power shall extend to all *cases* in law and equity, arising under this constitution, the laws of the United States, * * to *controversies* to which the United States shall be a party; to *controversies* between two or more States, between a State and citizens of another State, between citizens of different States," &c., &c.

What then is a "*case?*" "Case" is a technical term in the law. It is a "suit," a "controversy" before a judicial tribunal, or umpire. The constitution uses the three terms, "case," "suit," and "controversy," as synonymous with each other. They all imply at least two parties, who are antagonists to each other. There can be no "controversy," where there is but one party. Nor can there be a "controversy" where but one of the parties is allowed to be heard.

Say the Supreme court, "A case in law or equity consists of the right of one party, as well as of the other."

Cohens vs. Virginia, 6 Wheaton 379.

What is this "right" which is at the same time "the right of one party, as well as of the other?" It cannot be a right to the thing in controversy; because that can be the right of but one of them. The "right," therefore, that belongs to "one party as well as the other," can be nothing less than the equal right of each party to produce all the evidence naturally applicable to sustain his own claim, and defeat that of his adversary; to have that evidence weighed impartially by the tribunal

that is to decide upon the facts proved by it; and then to have the law applicable to those facts applied to the determination of the controversy.

It has already been shown that the claim to a fugitive slave, is a "case," "suit," and "controversy," arising under the constitution of the United States; and as such, to use the language of the court, is "within the express delegation of *judicial power* given by that instrument."

The question now arises, what is "*the judicial power* of the United States?"

I answer, it is the power to take judicial cognizance or jurisdiction of, *to try,* adjudicate, and determine, all "cases," "suits," and "controversies, arising under the constitution and laws of the United States," &c.

The judicial power, therefore, being a power *to try* cases, necessarily includes a power to *determine what evidence is applicable to a case,* and to *admit,* hear, and weigh all the evidence that is applicable to it. A case can be tried only on the evidence presented. In fact, the evidence constitutes the case to be tried. If a part only of the evidence, that is applicable to a case—or that constitutes the case—or that is necessary for the discovery of the truth of the case—be presented, weighed, and tried, the case really in controversy between the parties is not tried, but only a fictitious one, which Congress or the courts have arbitrarily substituted for the true one. If, whenever a case, arising under the constitution or laws of the United States, is instituted by one indivdual against another, Congress have constitutional power to substitute a fictitious case for the real one, and to require that the real one abide the result of the fictitious one, they have power to authorize cases to be tried on *ex parte* testimony—otherwise not. In what clause of the constitution such a power is granted to Congress, no one, so far as I am aware, has ever deigned to tell us.

No one will deny that the question, what evidence is admissible in a case, or makes part of a case, or is applicable to a case, is, *in its nature,* a judicial question. And if it be, *in its nature,* a judicial question, the power to determine it is a part of "the judicial power of the United States," *and consequently is vested solely in the courts.* And Congress have clearly as much right to usurp any other "judicial power" whatever, as to usurp the power of deciding what evidence is, and what is not, admissible—or what evidence shall, and what evidence shall not, be admitted.

As a general rule, the decision of these questions, of the admissibility of evidence, is left to the courts. But legislatures are sometimes so ignorant or corrupt as to usurp this part of "the judicial power;" and the courts are always, I believe, ignorant, servile, or corrupt enough to yield to the usurpation.

The simple fact that all questions of the admissibility of evidence are, *in their nature,* judicial questions, proves that the power of deciding them, is a part of "the judicial power of the United States;" and as *all* "the judicial power of the United States" is vested in the courts, it necessarily follows that Congress cannot legislate at all in regard to it, either by prescribing what evidence shall, or what shall not, be admitted, in any case whatever. For them to do so is a plain usurpation of "judicial power."

Among all the enumerated powers, granted to Congress, there is no one that includes, or bears any, the remotest, resemblance to a power to prescribe what evidence shall, and what shall

not, be admitted by the courts, in the trial of a case. There is none that bears any resemblance to a power to authorize or require the courts to decide cases on *ex parte* testimony alone. If a judge were thus to decide a case, of his own will, he would be impeached. The assumption, on the part of Congress, of a power to authorize the courts to do such an act, is a thoroughly barefaced usurpation. If Congress can authorize courts to decide cases, on hearing the testimony on one side only, they have clearly the same right to authorize them to decide them without hearing any evidence at all.

Section 6. The provisions of the act of 1850 *requiring the exclusion of certain evidence, are unconstitutional.*

Those provisions of the act, which specially require the exclusion of certain testimony, naturally applicable to the case, are unconstitutional for the same reason as are those which purport merely to authorize or allow the decision of the case on *ex parte* testimony. That reason, as has been already stated in the preceding section, is that such legislation is an usurpation, by Congress, of "the judicial power"—or rather an attempt to control the judicial power—for which no authority is given in the constitution. "The judicial power" being vested in the courts, Congress can of course neither exercise nor control it.

If congress can, by statute, require the exclusion of any testimony whatever, that is naturally applicable to a case, they can require the exclusion of all testimony whatever, and require cases to be decided by the courts, without hearing any evidence at all.

There are two provisions in the act of 1850, which specially require the exclusion of testimony, on the part of the defendant. The first is the one, (sec. 10), already commented upon, which requires that certain *ex parte* testimony taken by the claimant, "shall be held and taken to be full and conclusive evidence," on the two points to which it relates, to wit, the fact of slavery, and the fact of escape. This requirement that this *ex parte* testimony shall "be held and taken to be full and conclusive evidence" of those two facts, is an express exclusion of all rebutting testimony relative to those facts.

The other provision of this kind, is in the 4th section, in these words.

"In no trial or hearing, under this act, shall the testimony of such alleged fugitive be admitted."

The act itself admits that the testimony of one of the parties, the claimant, is legitimate evidence—for it permits it to be received, and, if it be "satisfactory" to the court, judge, or commissioner, allows the case to be determined on his testimony alone. Indeed, without the claimant's own testimony, his case could rarely, if ever, be made out—because he alone could generally know whether he owned the slave, and he alone (except the slave) could know whether the slave escaped, or whether he had permission to go into another state. It is therefore indispensable to the success of these cases generally, that the claimant's own testimony should be received; and if his testimony be admissible, the testimony of the opposing party must be equally admissible; and for Congress to prohibit its admission is, for the reasons already given, an usurpation of "the judicial power."*

Section 7. The requirement of the act of 1850, *that the cases be adjudicated* "*in a summary manner,*" *is unconstitutional.*

Section 6th of the act makes it the "duty" of the court, judge, or commissioner, "to hear and determine the case of such claimant in a summary manner."

This determining the case in a summary manner is only another mode of excluding testimony on the part of the defendant. The plaintiff of course prepares his testimony beforehand, and has it ready at the moment the alleged fugitive is arrested. If the case then be tried, without giving the defendant time to procure any testimony, the decision must necessarily be made upon the testimony of the claimant alone. Such is the design of the act, for the defendant being arrested, the act requires that he shall be "taken *forthwith* before such court, judge, or commissioner, whose duty it shall be to hear and determine the case of such claimant in a *summary manner,*"—that is, without granting the delay necessary to enable the defendant to obtain testimony for his defence.

The whole object and effect of this provision is to make it necessary for the court to determine the case on the evidence furnished by the plaintiff alone. And the exclusion of all testimony for the defendant, by this "summary" process, is equally unconstitutional with its exclusion in the manner commented on in the last two preceding sections—for the right of a party to be heard in a court of justice, necessarily implies a right to reasonable time in which to procure his testimony.

Section 8. The suspension of the writ of Habeas Corpus, by the act of 1850, *is unconstitutional.*

Section 6th of the act provides that "the certificates in this and the first section mentioned, shall be conclusive of the right of the person or persons in whose favor granted, to remove such fugitive to the state or territory from which he escaped, *and shall prevent all molestation of such person or persons, by any process issued by any court, judge, magistrate, or other person, whomsoever.*"

This is a prohibition upon the issue of the writ of *habeas corpus,* and is a violation of that clause of the constitution, which says 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."

In cases where no appeal lies to a superior court, (and in this case no appeal is granted, and the constitution, art. 3, sec. 2, clause 2, does not require an appeal,) the *habeas corpus* is the only mode of relief for a person deprived of his liberty by any illegal proceeding; and a prohibition upon the use of the *habeas corpus* for the purpose of inquiring into the proceedings, and determining whether they have been legal, and releasing the prisoner if they have been illegal, is as palpable a violation of the constitution on this point as it is possible to conceive of.

Upon a writ of *habeas corpus,* it would be the duty of the court to inquire fully into the several questions, whether the person, who had assumed to act as judge, and restrain the prisoner of his liberty, was really a judge, appointed and qualified as the constitution requires? Whether the law, under color of which the man was restrained, was a constitutional one? Whether the prisoner

had been allowed a trial by jury? Whether he had been allowed to offer all the testimony, which he had a constitutional right to offer, in his defence. Whether he had had reasonable time granted him, in which to procure testimony? And generally into all questions involving the legality of his restraint; and to set him at liberty, if the restraint should be found to be illegal.

CHAPTER II. The Right of Resistance, and the Right to have the Legality of that Resistance judged of by a Jury.

If it have been shown that the acts of 1793 and of 1850, are unconstitutional, it follows that they can confer no authority upon the judges and marshals appointed to execute them; and those officers are consequently, in law, mere ruffians and kidnappers, who may be lawfully resisted, by any body and every body, like any other ruffians and kidnappers, who assail a person without any legal right.

The rescue of a person, who is assaulted, or restrained of his liberty, without authority of law, is not only morally, but legally, a meritorious act; for every body is under obligation to go to the assistance of one who is assailed by assassins, robbers, ravishers, kidnappers, or ruffians of any kind.

An officer of the government is an officer of the law only when he is proceeding according to law. The moment he steps beyond the law, he, like other men, forfeits its protection, and may be resisted like any other trespasser. An unconstitutional statute is *no law,* in the view of the constitution. It is void, and confers no authority on any one; and whoever attempts to execute it, does so at his peril. His holding a commission is no legal protection for him. If this doctrine were not true, and if, (as the supreme court say in the Prigg case,) a man *may, if he choose,* execute an authority granted by an unconstitutional law, congress may authorize whomsoever they please, to ravish women, and butcher children, at pleasure, and the people have no right to resist them.

The constitution contemplates no such submission, on the part of the people, to the usurpations of the government, or to the lawless violence of its officers. On the contrary it provides that "The right of the people to keep and bear arms shall not be infringed." This constitutional security for "the right to keep and bear arms," implies the right to use them,—as much as a constitutional security for the right to buy and keep food, would have implied the right to eat it. The constitution, therefore, takes it for granted that, as the people have the right, they will also have the sense, to use arms, whenever the necessity of the case justifies it. This is the only remedy suggested by the constitution, and is necessarily the only remedy that can exist, when the government becomes so corrupt as to afford no peaceable one. The people have a legal right to resort to this remedy at all times, when the government goes beyond, or contrary to, the constitution. And it is only a matter of discretion with them whether to resort to it at any particular time.

It is no answer to this argument to say, that if an unconstitutional act be passed, the mischief can be remedied by a repeal of it; and that this remedy may be brought about by discussion and the exercise of the right of suffrage; because, if an unconstitutional act be binding until invali-

dated by repeal, the government may, in the mean time disarm the people, suppress the freedom of speech and the press, prohibit the use of the suffrage, and thus put it beyond the power of the people to reform the government through the exercise of those rights. The government have as much constitutional authority for disarming the people, suppressing the freedom of speech and the press, prohibiting the use of the suffrage, and establishing themselves as perpetual and absolute sovereigns, as they have for any other unconstitutional act. And if the first unconstitutional act may not be resisted by force, the last act that may be necessary for the consummation of despotic authority, may not be.

To say that an unconstitutional law must be obeyed until it is repealed, is saying that an unconstitutional law is just as obligatory as a constitutional one,—for the latter is binding only until it is repealed. There would therefore be no difference at all between a constitutional and an unconstitutional law, in respect to their binding force; and that would be equivalent to abolishing the constitution, and giving to the government unlimited power.

The right of the people, therefore, to resist an unconstitutional law, is absolute and unqualified, from the moment the law is enacted.

The right of the government "to suppress insurrection," does not conflict with this right of the people to resist the execution of an unconstitutional enactment; for an "insurrection" is a rising against the *laws,* and not a rising against usurpation. If the government and the people disagree, as to what are *laws,* in the view of the constitution, and what usurpations, they must fight the matter through, or make terms with each other as best they may.

But for this right, on the part of the people, to resist usurpation on the part of the government, the individuals constituting the government would really be, *in the view of the constitution itself,* absolute rulers, and the people absolute slaves. The oaths required of the rulers to adhere to the constitution, would be but empty wind, as a protection to the people against tyranny, if the constitution, at the same time that it required these oaths, committed the absurdity of protecting the rulers, when they were acting contrary to the constitution. The constitution, in thus protecting the rulers in their usurpations, would continue to act as a shield to tyrants, after they themselves had deprived it of all power to shield the people. It would thus invite its own overthrow, and the conversion of the government into a despotism, by those appointed to administer it for the liberties of the people.

This right of the people, therefore, to resist usurpation, on the part of the government, is a strictly *constitutional* right. And the exercise of the right is neither rebellion against the constitution, nor revolution—it is a maintenance of the constitution itself, by keeping the government within the constitution. It is also a defence of the natural rights of the people, against robbers and trespassers, who attempt to set up their own personal authority and power, in opposition to those of the constitution and people, which they were appointed to administer.

To say, as the arguments of most persons do, that the people, in their individual and natural capacities, have a right to *institute* government, but that they have no right, in the same capacities,

to preserve that government by putting down usurpation—and that any attempt to do so is revolution, is blank absurdity.

The right and the physical power of the people to resist injustice, are really the only securities that any people ever can have for their liberties. Practically no government knows any limit to its power but the endurance of the people. And our government is no exception to the rule. But that the people are stronger than the government, our representatives would do any thing but lay down their power at the end of two years. And so of the president and senate. Nothing but the strength of the people, and a knowledge that they will forcibly resist any very gross transgression of the authority granted by them to their representatives, deters these representatives from enriching themselves, and perpetuating their power, by plundering and enslaving the people. Not because they are at heart naturally worse than other men; but because the temptations of avarice and ambition, to which they are exposed, are too great for the mere virtue of ordinary men. And nothing but the fear of popular resistance is adequate to restrain them. As it is, the great study of many of them seems to be to ascertain the utmost limit of popular acquiescence. Once in a while they mistake that limit, and go beyond it.

But, to return. As every body who shall resist an officer in the execution of these fugitive slave laws, will be liable to be tried for such resistance, and to be thus laid under the necessity of proving the unconstitutionality of the laws to the satisfaction of the tribunal by whom he is tried; and as judges are in the nearly unbroken habit of holding all legislation to be constitutional; and especially as the Supreme Court of the United States have held, (in the Prigg case, as before cited,) that the sending of men into bondage is so important an object to be accomplished, that an officer *may, if he choose, exercise an authority conferred only by an unconstitutional law;* it becomes those, who may be disposed to resist the execution of the laws in question, to ascertain what are their chances of escaping unharmed in running the gauntlet of such a judiciary as the nation is blessed with.

One liability, imposed by the act, (sec. 7,) is that any person, who shall in any way assist in the rescue, "shall forfeit and pay, by way of civil damages to the party injured by such illegal conduct, the sum of one thousand dollars for each fugitive so lost as aforesaid, to be recovered by action of debt," &c.

There is one consolation, in view of this liability, and that is, that in the suit for this $1000, the claimant will be under the necessity of proving his property in the fugitive; and this, (as is shown by Senator Mason's speech, before cited,) could be done in no case whatever.

I say the claimant will have to prove his property in the fugitive, because it is not clear that the act intends, (although at first blush such may be its apparent meaning,) that the judgment given by the court, judge, or commissioner, delivering the alleged slave to the claimant, shall be sufficient evidence, or even evidence at all, of such claimant's property in the slave, in a civil suit for damages for the loss of the slave. And in the absence of such clear intention, I apprehend no court would dare put such a construction upon the act, or allow such use to be made of that judgment. The right of action for damages, which is given to the master, is given him, not for the purpose of punishing those who rescue the alleged fugitive, (for that punishment is provided for

by fine and imprisonment,) but to enable the owner to recover payment for the loss of his property. In such an action he is of course necessitated to prove, (and Congress have no power to make any law to the contrary,) that the man he claims as his property, is really his—because, in a free state certainly, every man is *prima facie* the owner of himself.*

The claimant could recover payment for his slave but once, although an hundred or a thousand persons were engaged in the rescue; and these hundred or thousand persons could unite in the payment, thus making the burden a light one upon each individual.

As this action is given to the owner, to enable him to recover the value of his slave, and not as a penalty upon those who rescue him, the law is clearly unconstitutional in fixing that value at a specific sum. The value must be ascertained by a jury, if it exceed twenty dollars. Congress have as much right to say that, in case of any other injury done by one man to the property of another, the wrong-doer "shall forfeit and pay, by way of civil damages to the party injured by such illegal conduct, the sum of one thousand dollars, (and no more,) to be recovered by action of debt," without regarding whether the injury were really $10, or $10,000, as to say the same in this case. The power of determining the amount of injury done by one man to the property of another, by violating a law of the United States, is a part of "the judicial power," and is vested solely in the courts, and Congress have no authority whatever to decide that question.

Furthermore, the law is also unconstitutional in authorizing the owner to recover the full value of the slave. It should only authorize him to recover the damages actually sustained by the rescue. The owner does not lose his property in his slave by having him taken out of his hands on a particular occasion. His property in him remains, and the law presumes that he can take his slave again at pleasure, as he could before the rescue. Because there has been one rescue, the law does not presume that the slave is forever lost to his owner. And the defendants would be entitled to prove that the slave was still within reach of the master, where his master might at any time retake him. And it would be no answer to this fact, to say, that if the slave were retaken, he would probably be rescued again. The law presumes nothing of that kind, and could not presume it, even though the slave had been seized by the owner, and rescued by the defendants, an hundred times. The law would still presume that if the master were to take the slave again, he would be suffered to hold peaceable possession of him. Consequently the owner, in case of a rescue, is entitled to recover only the damages actually suffered by that particular rescue, and not the full value of the slave, as if he had been lost to him forever. And this suit for damages, being a "suit at common law," within the meaning of the constitution, must be tried by a jury; and the damages must be ascertained by a jury, instead of being fixed by statute.

If this view of the law be correct, the pecuniary liability incurred in rescuing a slave, would be very slight, so far as the right of the master to recover damages was concerned.*

The only other liability incurred in rescuing an alleged fugitive, is a liability to be indicted and tried criminally for the act, and if convicted, subjected to "a fine not exceeding one thousand dollars, and imprisonment not exceeding six months."

There are two chances of security against these punishments.

1. They can be inflicted only upon "indictment and conviction." There is a probability that a grand jury will not indict, for it is not their duty to do so, if they think the law, that has been resisted, is unconstitutional. A grand jury have the same right to judge of the law, as a traverse jury.

2. If an indictment be found, the jury who try that indictment, are judges of the law, as well as the fact. If they think the law unconstitutional, or even have any reasonable doubt of its constitutionality, they are bound to hold the defendants justified in resisting its execution.

From this right of the jury to judge of the law in all criminal cases, it follows that in all forcible collisions between the government and individuals, (as in the case of resistance to the execution of a law,) the right of judging whether the government or the people are in the right, lies in the first instance, not with the government, or any permanent department of it, but with the people—that is, "*the country,*" whom the jury represent; for the jury represent "the country," or the people, *as distinguished from the government.** The people, therefore, in establishing government, *with trial by jury,* do not surrender their liberties into the hands of the government to be preserved or destroyed, as the government shall please. But they retain them in their own hands, by forbidding the government to injure any one in his life, liberty, or property, without having first obtained the consent of "the country"—that is, of the people themselves—who are supposed to be fairly represented by a jury, taken promiscuously from the whole people, and therefore likely to embrace persons of all the varieties of opinion that are generally prevalent among the people.

Hence it follows that, under the trial by jury, no man can be punished for resisting the execution of any law, unless the law be so clearly constitutional, as that a jury, taken promiscuously from the mass of the people, will *all* agree that it is constitutional. But for some principle of this kind, by which the opinions of substantially the whole people could be ascertained, men, in agreeing to a constitution, would be liable to be entrapped into giving their consent to a government that would punish them for exercising rights, which they never intended to surrender. But so long as it rests with a jury, instead of the government, to say what are the powers of the government, and what the liberties of the people—and so long as juries are fairly selected by lot from the whole population, the presumption is that all classes of opinions will be represented in the jury, and every man may therefore go forward fearlessly in the exercise of what he honestly believes to be his rights, in the confidence that, if his conduct be called in question, there will be among his judges, (the jury,) some persons at least, whose judgments will correspond with his own.

And inasmuch as a single dissentient in the jury is sufficient to prevent a conviction, it follows that if the government exercise any powers except such as substantially the whole people intended it should exercise, it is liable to be resisted, without having any power to punish that resistance. It may indeed overcome that resistance and enforce the law, constitutional or unconstitutional, unless resisted by a force that is stronger than its own. But it cannot punish that resistance afterward, unless substantially the whole people, through a jury, agree that the law was constitutional.

But this right of a jury, in all criminal prosecutions, to judge of the constitutionality of the law that has been resisted, is not the whole of a jury's rights; they have the right to judge also of

its *justice*. Juries are never sworn to try *criminal* cases "according to law." They are only sworn to "try *the issue* according to the evidence." The "issue" is *guilty* or *not guilty*. This issue is to be tried on the natural principles of justice, as those principles exist in the breasts of the jurors, and not according to any arbitrary standard which legislators may have attempted to set up. *Guilt* is an *intrinsic* quality of actions, and cannot be imparted to them by all the legislatures that ever assumed to exercise the power of converting justice into injustice, and injustice into justice. The question for a jury, in trying "the issue," then, is not simply whether the accused has been guilty *of* violating a law; but whether he has been guilty *in* violating it? And unless they *all* answer this last question in the affirmative, he cannot be convicted.

The trial by jury might safely be introduced into a despotic government, if the jury were to exercise no right of judging of the law, or the justice of the law.

If juries were to find men guilty, simply because the latter had exercised their natural rights in defiance of unjust laws, juries, instead of being, as they are wont to be called, "the palladium of liberty," would be the vilest tools of oppression—the instruments of their own enslavement—for in condemning others for resisting injustice, at the hands of the government, they authorize their own condemnation for a similar cause. No honest man could ever sit on a jury, if he were required to find a man "guilty," and thus become accessory to his punishment, for doing an act, which was just in itself, but which the government, in violation of men's natural rights, had arbitrarily forbidden him to do.

Furthermore, a jury, before they can convict a man, must find that he acted with a *criminal intent*—for it is a maxim of law that there can be no crime without a criminal intent. There can be no criminal intent in resisting injustice. To justify a conviction, therefore, the law, *and the justice of the law*, must both be so evident as to make its transgression satisfactory proof of an evil design on the part of the transgressor.

Such are some of the principles of the trial by jury: and the effect of them is to subject the whole operations of the government, both as to their constitutionality and their justice, to the ordeal of a tribunal fairly representing the whole people, and thus to restrain the government within such limits as substantially the whole people, whose agent it is, agree that it may occupy. But for this restraint, our government, like all others, instead of being restricted to the accomplishment of such purposes as the whole people desire, would fall, as indeed it very often has fallen, into the hands of cliques and cabals, who make it, as far as possible, an instrument of plunder and oppression, for the gratification of their own avarice and ambition.

There is, therefore, substantial truth in the saying, which, we have been recently told,* "has, in England, become traditional, and drops from the common tongue, that 'the great object of King, Lords, and Commons, is to get twelve men into a jury box.' " And in this country, the great object of Presidents, Senators, and Representatives is the same. But such have been the ignorance and the frauds of legislators and judges, and such the ignorance of the people, on this point, that juries have generally been merely contemptible tribunals, looking after facts only, and not after rights, and ready to obey blindly the dictation of legislatures and courts, and enforce any thing and every thing, which the permanent branches of the government should require them to en-

force. And we now see the results of their degradation and submission, in the audacity of the legislature in passing such laws as those of 1793 and 1850, and in the conduct of the courts in sanctioning, as constitutional, the former of these laws, as they undoubtedly will sanction the latter, unless deterred by the intelligence and firmness of the people.

It is this intrusting of the liberties of the people, to the hands of the people—represented by a jury taken promiscuously from the mass of the people—instead of intrusting them to the government, which represents at most but a part, and generally a small part, of the people—that makes the trial by jury "the palladium of liberty." If governments were intrusted with authority to define the liberties of the people, they would of course say that the people had no liberties that could be exercised contrary to the will of the government. And if governments had authority to define their own powers, and to punish all who resisted their power as thus defined, all governments would declare themselves absolute of course. And the simple right to punish resistance, without getting the consent of the people in each individual case, would, of itself, make any government absolute; for the power to punish necessarily carries all other powers with it. The power to punish disobedience is the power that compels obedience. It is, in its very nature, an absolute and uncontrollable power. And if a government have this power, it is absolute of course. And oaths and parchments are things of no importance in such a case, for they are necessarily but straws in the way of a power that is otherwise unrestrained.

It is no argument to say that the constitution has provided a judicial department, with power extending to "all cases arising under the constitution and laws of the United States." The answer is, that this constitution has made juries a part of this judicial department, and given them special jurisdiction of crimes, and made their acquittal final; and that it is only in cases of conviction that a question can be carried beyond them.

The *permanent* officers of this department—the judges, so called—by the very constitution of their office, are unfit to be trusted with any question arising between the government and the people, as to the powers of the former, and the liberties of the latter; for the judges receive their offices directly from those other departments of the government, and not from the people. They are also dependant upon those other departments for their salaries, and are amenable to them by impeachment. They are of course nothing but instruments in their hands, and have always proved themselves to be so. I think there is not to be found on record, either in our general or state governments, a single instance, in which the judiciary have ever held a law unconstitutional, that provided in any way for *punishing* the people for the exercise of their rights. The statute books of both the national and state governments have abounded, and still abound, with statutes creating odious and oppressive monopolies, infringing men's natural rights, violating the plainest principles of justice, having no authority in the constitutions under which they purport to be enacted, and providing fines and imprisonments for those who may transgress them; and yet, (so far as I am aware), no one of this long catalogue of enactments ever encountered the veto of the judiciary. I apprehend that the whole judiciary of this country, state and national, might be safely challenged to produce a single instance, in which they have ever vindicated a single principle of either natural or constitutional liberty, against the penal encroachments of the legislatures on which

they were dependent. On the contrary, they have uniformly—probably without a solitary exception—proved themselves, in all questions of this nature, to be nothing but the willing instruments of usurpation and oppression. They do not accept their offices with any other intention than that of holding all laws constitutional, which they suppose the legislature will pass—for nobody accepts an office, unless with the intention of being obedient to those, to whom they are amenable.*

The idea, so constantly asserted, that the *permanent* judiciary, the judges, have a right to decide all constitutional questions, *authoritatively for the people*, is one of those gross impostures, by which men have always been defrauded of their rights. There is not a syllable in the constitution, that makes a decision of the judiciary—of its own force, and without regard to its correctness—binding upon any body, either upon the executive, or the people. In the very nature of things, nothing but the *law* can be binding upon any one. If a judicial decision be according to law, it is binding; if not, not. An unconstitutional judicial decision is no more binding, than an unconstitutional legislative enactment—and a man has the same right to resist, by force, one as the other, and to be tried for such resistance by a jury, who judge of the law for themselves.

Suppose the judiciary, in a suit between two pretended mothers, for the custody of a child, should give the judgment of Solomon, that the child be cut in two, and a half given to each; does any one suppose the executive would be bound to carry the judgment into effect? or that the opinion is obligatory as an authority upon any body? Yet it would be as much binding as any other erroneous decision.

If a judicial decision contrary to the constitution, were binding simply because it were a judicial decision, the judiciary could constitutionally make themselves absolute sovereigns at once.

A judicial decision, as such, has therefore no *intrinsic* authority at all; its constitutional authority rests wholly upon its being in accordance with the constitution. And we can determine whether it be in accordance with the constitution, only by first determining the meaning of the constitution, independently of the decision, and then comparing the decision with it. If we take the decision as authority for the meaning of the constitution, all decisions will of necessity be constitutional, and the judges are of course, constitutionally speaking, absolute despots.

It is no argument, in answer to this view of the case, to say, that decisions may be so grossly and palpably unconstitutional as not to be binding; but that in all *doubtful* cases they are obligatory. The constitution knows nothing of doubtful cases. In its view decisions and laws are simply either constitutional or unconstitutional. It knows nothing of their being more or less grossly and palpably so. If they are constitutional, they are binding; if they are not constitutional, they are not binding, though their variation from the constitution be but the smallest that can be discovered.

The constitution does not assume that it *needs* any authoritative interpreter. It assumes that its meaning is known to the people who ordained and established it, just as all legal instruments assume that their true meaning is understood by the parties to them. The people, as parties to the constitution, would not be bound by it, unless they were presumed to understand it—for no one is bound by a contract, which he is not presumed to understand.

The constitution as much presumes that the people understand its own meaning, as it does that they understand a judicial opinion. It presumes itself to be as intelligible as the opinions of courts. It would be absurd for it to presume that courts would express its intentions more intelligibly than it has itself expressed them—for, in that case, the language of the courts would be more authoritative than the language of the constitution; they would consequently make the constitution whatever they should please to make it; and they would also make themselves whatever they should please to be. But the constitution has no such suicidal character as that. On the contrary, it presumes that the people are competent to understand both the meaning of the constitution and the meaning of the courts; and consequently that they are competent to determine whether the opinions and decisions of the courts correspond with the constitution, and whether, therefore, their decisions are to be obeyed or resisted.

What, then, it may be asked, is the use of the judiciary, if it be not to decide doubts as to the meaning of the constitution? The answer is, that it is their office to try certain "cases," "controversies," and "suits," mentioned in the constitution. These cases are presumed to arise out of disagreements as to facts, or from the dishonesty of one or the other of the parties, and not from their ignorance of the law, (or constitution),—for every body is presumed to know the law, although all do not in fact know it—neither the people nor the courts. And the judiciary are to try these "cases," "controversies," and "suits,"—that is, they are to ascertain the facts, and determine the resulting rights of the parties—*by the standard of the constitution, as a known standard; a standard that is presumed to be known to both the parties, as well as to the courts.*

The judiciary are in a situation analagous to that of any other umpire, who should be agreed upon, for instance, by the parties in a controversy, to measure a certain commodity by a certain standard—as, for example, to measure certain cloth by a yard stick. The submission of this controversy to the umpire, implies that the parties, as well as the umpire, understand the length of the yard stick—but that they nevertheless disagree as to the true admeasurement of the cloth. They therefore agree to abide the decision of the umpire.

In the performance of his office, it becomes necessary for this umpire—for a guide to his own duty, and not for the information of the parties or the public,—to ascertain what is a yard stick. And if he honestly measure the cloth by a yard stick, the parties are bound by his admeasurement. But if this umpire, either from ignorance or design, measure the cloth by a stick, that is either more or less than a yard, calling such stick a yard stick, the admeasurement is not binding upon the parties—because the submission of the case to the umpire was made upon the express condition that the admeasurement should be made by a yard stick. And the party, who has been wronged by the false admeasurement, has a right to resist the execution of the umpire's decree.

The case is the same with the judiciary. They are umpires, appointed to measure the rights of parties, *by a certain standard,* to wit, the constitution. This standard is presumed to be known to the parties, as well as to the umpires, (for all are presumed to know the law), although it may in fact be known to none of them. The umpires—in order to perform their own duty, and not for the information of the parties or the public,—must necessarily ascertain, if they can, what the constitution really is. But if, through ignorance or design, they put a false meaning upon the constitu-

tion—*thus adopting a false standard*—and then measure the rights of the parties by this false standard, the parties are not bound by their decision, because the submission was made to them only on the condition that their rights should be measured by that particular standard, the constitution—and not by any false standard which the umpires, through ignorance or design, might adopt. And the party, who is wronged by the decision, has a right to resist the execution of it, to the best of his power. And if tried criminally for such resistance, his triers (the jury) must judge whether the decision of the umpires was according to the standard agreed upon by the parties—that is, according to the constitution.

But it is thoroughly ridiculous to talk of these umpires having fixed or established the standard itself—that is, the meaning of the constitution—merely because, in a particular instance, they measured the rights of certain parties by the constitution. There would be as much reason in saying that the umpire, who measured the cloth by a yard stick, established the length of the yard stick by so doing, as to say that the judiciary establish the meaning of the constitution, whenever they pretend to measure rights by the constitution. Any thing they said or did in one instance, between certain parties, has no binding force, *of itself,* in any subsequent case between the same, or any other, parties. The standard, alone, or a true admeasurement by the standard alone, is binding in all cases. If the first admeasurement were correct, that admeasurement established simply the rights measured by it. It did nothing towards *fixing the standard itself,* by which the rights were measured. And any subsequent correct admeasurement will, in like manner, establish the rights measured by it; but will do nothing towards fixing the standard itself. The standard itself needs not to be fixed, for it was fixed before any rights at all had been measured by it. But to say because one admeasurement has been made *thus,* therefore all future admeasurements must be made *thus,* is ridiculous. The admeasurements are all bound to be made correctly, according to the standard. But if one have been made wrong, that is no reason why all future admeasurements must be made wrong, nor why the people are bound to presume that all future admeasurements will be made wrong. Whether any admeasurement be made wrong, or not, each one must judge for himself, and resist the decision of the umpires at the peril of being tried for such resistance by a jury.

CHAPTER III. Liability of United States Officers to be punished, under the State Laws, for executing the acts of 1793 *and* 1850.

If the laws of 1793 and 1850 are unconstitutional, they are *no laws,* in the view of the constitution; consequently they confer no authority on any one; and the United States judges, commissioners, marshals, &c., who may assist in sending men into slavery, in performance of them, are liable to be punished, under the State laws, as kidnappers, the same as they would have been if Congress had passed no act on the subject.

The constitution contemplates that all officers of the United States, except Senators and Representatives, may be punished for any crimes done under color of their office; for it declares, that,

in addition to impeachment, they "shall be liable, and subject to, indictment, trial, judgment, and punishment according to law." (*Art.* 1, *Sec.* 3, *Ch.* 7).

If any one of these officers were to commit murder, rape, arson, theft, or any other crime, either under color of his office, or otherwise, his office is no protection to him against the laws of the State. And it is the same in the case of kidnapping, as it would be in the case of any other crime.

The only question, that can be raised in their defence, is, whether they are bound to know that an act, that has passed through the regular forms of being enacted, is unconstitutional?

This question is answered by the simple principle, that every body is bound to know the law. If that obligation be imperative upon any one, it is imperative upon those who administer the law. The constitution is the fundamental, the paramount law, and all officers of the government are sworn to support it. Of course they are presumed to know it, and bound to know it, else their oaths to support it would be but nonsense.

If they are bound to know the constitution itself, they are of course bound to know whether an act, that has passed Congress, be in conformity with it,—else in executing the act they would be liable to commit a breach of their oaths to support the constitution.

They are also sworn to administer and execute the *laws* of the United States. Unless they were presumed to know, and bound to know, what are, and what are not, laws of the United States, within the meaning of the constitution, this oath also is an absurd one.

If the judges or executive officers were bound to consider every act, that may pass Congress, a constitutional one—that is, a *law*, within the meaning of the constitution,—their oath to support the constitution, and their oath to support the laws, would come in conflict with each other, whenever an unconstitutional act was passed.

Indeed we all know that the *judiciary* are not bound to consider an act of congress constitutional; and if the judiciary are not, no other branch of the government is, for each department of the government judges of the constitution for itself, independently of the others,—else no one branch would be any restraint upon the others, and the whole object of having the government divided into different departments, to act as checks upon each other, would be lost. Every law, therefore, must pass the ordeal of all branches of the government, (if brought before them), before it can be executed.

The constitution (Art. 1, Sec. 6), protects those who *make* an unconstitutional law,—that is, "the Senators and Representatives,"—from any legal responsibility for the act, by providing that "for any speech or debate in either house, they shall not be questioned in any other place." Unless, therefore, those who *execute* an unconstitutional law, can be held responsible for their acts, there is no crime, however contrary to the constitution, which congress may not authorize to be committed with impunity; and all ideas of there being any legal and practical restraints upon the government of the United States, short of a resort to force, are fallacious.

For all acts, therefore, *that are criminal in themselves,* the officers of the United States are liable to be tried under the State laws, and punished, unless they show that the acts were done in pursuance of some *constitutional* law of the United States. And no presumption in favor of the constitutionality of the law can be allowed, if the acts done are criminal in themselves; for the presumption must always be that the constitution authorizes nothing criminal in itself.

In the trial of an United States officer for a crime committed under color of an unconstitutional law of Congress, the question whether the law were constitutional, would be a question to be judged of, in the first instance, by a jury. If they held the law unconstitutional, and convicted the defendant, he would have a right of appeal to the Supreme Court of the United States. But corrupt as that court is, they would rarely dare, against the general voice of the juries of the country, to hold a law constitutional, that licensed crimes against the people.

In saying that the officers of the government are bound to know the law, (and consequently to know whether an act of congress be constitutional), I am only laying down the general principle of criminal law—a principle, which the government usually enforces without mercy, against private individuals, and which is certainly as sound when applied to an officer of the government, as when applied to private persons.

But in truth the maxim, that ignorance of the law excuses no one, is a very absurd and unjust one, *if applied without any limitation,* inasmuch as it would nullify the first principle of criminal law, that there can be no crime without a criminal intent. The rule is also one, which judges themselves could not live under, for they are every day committing errors, which would be crimes, if ignorance were not a legal excuse.

But the rule *is* a sound one, so far as it is necessary to compel all men, officers of the government, as well as private persons, to use all reasonable and proper diligence to ascertain the law. And where a law requires any thing, *that is criminal in itself,* an officer is bound to act with far greater caution, and to use far greater diligence, to ascertain whether it be constitutional, than he is where the act required to be done is right in itself—because the presumption of law is always in favor of justice. Nothing, therefore, but entirely clear and conclusive proof of the constitutionality of a law, ought to justify an officer in executing it, if it require him to do any thing that is intrinsically criminal.

This liability of the officers of the United States, to the criminal laws of the states, is no hardship upon them—for it applies only in cases where the acts done by them are *mala in se, criminal in themselves.* And they, like other men, can be convicted only where the jury find that they either *knew* that the acts done by them were intrinsically criminal, or were *culpably* ignorant of their character in that respect. Now, it would really be no hardship that a man should be punished for an act, that he knew to be to be intrinsically criminal, even though it were authorized by all the governments in the world; because governments have no rightful power to authorize such acts, and their authority is, morally speaking, no justification to the agent. An officer of the government, who performs an act criminal in itself, does it voluntarily for hire, (for he is at liberty to resign his office); and he has no more moral excuse for the act than any other man has, who perpetrates a crime for pay. It is therefore a special grace, and bad enough in principle, to allow officers

of the government, in any case, to set up a law of the government, as an excuse for a known crime. If this grace be extended so as to allow an unconstitutional law, (which is really no law at all), to be used as a justification for crimes, we in reality license the government to perpetrate all crimes at pleasure.

The question now arises, whether these fugitive slave laws are so plainly unconstitutional, as to afford no legal excuse for those who execute them?

In the first place, there would seem to be no doubt, so far as the *commissioners* are concerned. The acts required of them are *judicial* acts; yet they plainly are not judicial officers, within the meaning of the constitution. And inasmuch as the act of delivering a man into bondage is intrinsically a crime, they are inexcusable for assuming judicial powers for the purpose of executing it.

The objection which lies against the commissioners, on account of the tenure of their offices, and their want of fixed salaries, does not apply to judges of the established courts. But all the other grounds of unconstitutionality are as strong in the case of the judges as in the case of the commissioners. And the question is, whether an act of Congress, requiring that a man—found in a free state, and *prima facie* a free man and citizen of the United States—be delivered into slavery; without a trial by jury; on *ex parte* evidence; and a part of that *ex parte* evidence taken in another state, by a *state* "court, or judge thereof in vacation," and made binding upon the United States court that delivers him up; denying him the right to give his own testimony; and depriving him, by "a summary manner" of proceeding, of all opportunity of procuring other testimony in his favor; be so plainly unconstitutional, that a jury would be bound to hold a judge guilty of a criminal intent in executing it?

That the act of delivering a man into slavery is intrinsically a crime of a high grade no one can deny. The presumption of law therefore, is, that the constitution gives no authority for it. The burden is therefore upon the judge to show that the acts of Congress are so clearly constitutional, as to overcome this presumption, and justify the act. If he can show this, he is entitled to the benefit of it; otherwise not.

To illustrate the principles here maintained, let us suppose that Congress pass an act for the trial and punishment of traitors; providing that a person accused of treason, may be tried and convicted wholly on *ex parte* evidence; that *ex parte* evidence, taken in another state than the one in which he is tried, and before "any (state) court of record, or judge thereof in vacation," "shall be held and taken (by the United States court) to be full and conclusive evidence of the treason," leaving nothing but the identity of the individual to be proved on the trial; enacting also that he shall be tried "forthwith," after being arrested, and "in a summary manner," that will allow him no opportunity to procure evidence in his defence; that he shall not have a trial by jury, as the constitution requires that he shall have; but that he shall be tried by a single judge; (and that judge, it may be, not one having a fixed salary, and therefore free from any pecuniary interest in his conviction, but one depending solely upon fees for his pay, and who is to receive ten dollars if he convict the accused, and sentence him to death, and but five dollars if he acquit him); enacting further that, in case of conviction, no appeal shall be allowed to a higher court on any question of either law or fact; that no writ of *habeas corpus* shall be issued in his behalf; but that, on the

contrary, the judge, that convicted him, shall at once issue his warrant to the marshal, requiring him, under penalty of a thousand dollars, to hang the man immediately before he can be rescued by the people; suppose all this, and does any one doubt that the judge, marshal, and every body else who should assist in executing the law, would be bound to know that such a law was unconstitutional, and would therefore be guilty of murder in executing it? and liable to be punished as murderers under the laws of the state, in which the transaction occurred? Yet what difference is there, in principle, between that case, and a case of kidnapping under the statutes we have been discussing? If there be any difference, sufficient to constitute a valid excuse, the government officers must go acquitted of their crime; otherwise they must be convicted.

The same principles of responsibility to the criminal laws of a state, that apply to judges, commissioners, and marshals, apply also to the militia, who turn out, at the command of the president, to assist in enforcing an unconstitutional law. If the militia are bound to know nothing of the constitutionality of a law of Congress, or to know no law but the orders of a superior officer, we live under a military despotism.

In addition to these liabilities to the criminal law, the officiers of the United States are liable to civil suits for damages, if they execute an unconstitutional law of Congress to the injury of private persons. And judgments recovered in the state courts could be invalidated, if at all, only on an appeal to the supreme court of the United States.

Finally. If these fugitive slave laws are unconstitutional, the delivery of persons into slavery under color of them, is a crime; and the state magistrates, on application to them, are bound to place the officers of the United States under bonds to keep the peace in this particular. If those officers then proceed, contrary to the obligation of their bonds, to execute the law, their bonds are liable to be enforced, unless invalidated on an apppeal to the supreme court of the United States.

Unless these principles be sound, it is manifest that the states have no power to protect their citizens against any crimes, which Congress, by unconstitutional enactments, may please to license to be committed against them.

APPENDIX. A. Neither the Constitution, nor either of the acts of Congress of 1793 *or* 1850, *requires the surrender of Fugitive Slaves.*

In the preceding chapters, it has been admitted, for the sake of the argument, that the constitution, and the acts of Congress of 1793 and 1850, require the delivery of Fugitive Slaves. But such really is not the fact. Neither the constitutional provision, nor either of said acts of congress, uses the word slave, nor slavery, nor any language that can *legally* be made to apply to slaves. The only "person" required by the constitution to be delivered up, is described in the constitution as a "person *held* to service or labor in one state, under the laws thereof." This language is no legal description of a slave, and can be made to apply to a slave only by a violation of all the most im-

perative rules of interpretation, by which the meaning of all legal instruments is to be ascertained.

The word "held" is a material word in this description. Its legal meaning is synonymous with that of the words "bound," and "obliged." It is used in bonds, as synonymous with those words, and in no other sense. It is also used in laws and other legal instruments. *And its legal meaning is to describe persons held by some legal contract, obligation, duty, or authority, which the law will enforce.* Thus, in a bond, a man acknowledges himself "*held,* and firmly bound and obliged" to do certain things mentioned in the bond,—and the law will compel a fulfillment of the obligation. The laws "hold" men to do various things; and by holding them to do those things, is meant that the laws will compel them to do them. Wherever a person is described in the laws as being "*held*" *to do any thing,*—as to render "service or labor," for example,—the legal meaning *invariably* is that he is held by some *legal* contract, obligation, duty, or authority, which the laws will enforce,—(either specifically, or by compelling payment of damages for non-performance). I presume no single instance can be found, in any of the laws of this country, since its first settlement, in which the word "held" is used in any other than this legal sense, when used to describe a person who is "*held*" *to do any thing,* "under the laws." And such is its meaning, *and its only meaning,* in this clause of the constitution. If there could be a doubt on this point, that doubt would be removed by the additional words, "under the laws," and the word "due" as applied to the "service or labor," to which the person is "held."

Now a slave is not "held" by any legal contract, obligation, duty, or authority, which the laws will enforce. He is "held" only by brute force. One person beats another until the latter will obey him, work for him, if he require it, or do nothing if he require it. This is slavery, and the whole of it. This is the only manner in which a slave is "*held* to service or labor."

The laws recognize no obligation on the part of the slave to labor for or serve his master. If he refuse to labor, the law will not interfere to compel him. The master must do his own flogging, as in the case of an ox or a horse. The laws take no more cognizance of the fact whether a slave labors or not, than it does of the fact whether an ox or a horse labors.

A slave then is no more "held" to labor, in any *legal* sense, than a man would be in Massachusetts, whom another person should seize and beat until he reduced him to subjection and obedience. If such a man should escape from his oppressor, and take refuge in Carolina, he could not be claimed under this clause of the constitution, because he would not be "held" in any *legal* sense, (that is, by any legal contract, obligation, duty, or authority), but only by brute force. And the same is the case in regard to slaves. Senator Mason of Virginia, in the extract before given from his speech, virtually admits this to be the fact.*

It is an established rule of legal interpretation, that a word used in laws, to describe *legal* rights, must be taken in a *legal* sense. This rule is as imperative in the interpretation of the constitution, as of any other legal instrument. To prove this, let us take another example. The constitution (Art. 1, Sec. 6), provides that "for any speech or debate in either house, they (the Senators and Representatives) *shall not be questioned* in any other place." Now this provision imposes no restriction whatever upon the Senators and Representatives being "questioned for any speech or

debate," by any body and every body, who may please to question them, or in any and every place,—with this single exception, that they must not "be questioned" *legally*,—that is, they must not be held to any *legal* accountability.

It would be no more absurd to construe this provision about *questioning* Senators and Representatives, so as to make it forbid the people, in their private capacity, to ask any questions of their Senators and Representatives, on their return from Congress, as to their doings there, instead of making it apply simply to a *legal* responsibility, than it is to construe the words "held to service or labor," as applied to a person held simply by brute force, (as in the case supposed in Massachusetts), instead of persons held by some legal contract, obligation, or duty, which the law will enforce.

As the slave, then, is "held to service or labor," by no contract, obligation, or duty, which the law will enforce, but only by the brute force of the master, the provision of the constitution in regard to "persons held to service or labor" can have no more legal application to him, than to the person supposed in Massachusetts, who should at one time be beaten into obedience, and afterwards escape into Carolina.

The word "*held*" being, in law, synonymous with the word "*bound*," the description, "person *held* to service or labor," is synonymous with the description in another Section, (Art. 1, Sec. 2), to wit, "those *bound* to service for a term of years." The addition, in the one case, of the words "for a term of years," does not alter the meaning, for it does not appear that, in the other case, they are "held" beyond a fixed term.

In fact, every body, courts and people, admit that "persons *bound* to service for a term of years," as apprentices and other indented servants, are to be delivered up under the provision relative to "persons *held* to service or labor." The word "*held*," then, is regarded as synonymous with "*bound*," whenever it is wished to deliver up "persons *bound* to service." If, then, it be synonymous with the word "*bound*," it applies only to persons who are "*bound*," in a *legal* sense,—that is, by some *legal* contract, obligation, or duty, which the law will enforce. The words cannot be stretched beyond their *necessary* and proper *legal* meaning; because all legal provisions in derogation of liberty must be construed strictly. The same words that are used to describe a "person held to service or labor," by a *legal* contract, or obligation, certainly cannot be legally construed to apply also to one who is "held" only by private violence, and brute force.

Mr. Webster, in his speech of March 7th, 1850, admits that the word "held" is synonymous with the word "bound," and that the language of the constitution itself contains no requirement for the surrender of fugitive slaves. He says—

> "It may not be improper here to allude to that—I had almost said celebrated—opinion of Mr. Madison. You observe sir, that the term slavery is not used in the constitution. The constitution does not require that fugitive slaves shall be delivered up; it requires that persons bound to service in one state, and escaping into another, shall be delivered up. Mr. Madison opposed the introduction, of the term slave or

slavery into the constitution; for he said he did not wish to see it recognized by the constitution of the United States of America that there could be property in men."

Had the constitution required only that "persons *bound* to service or labor," should be delivered up, it is evident that no one would claim that the provision applied to slaves. Yet it is perfectly evident also that the word "held" is simply synonymous with the word "bound."

One can hardly fail to be astonished at the ignorance, fatuity, cowardice, or corruption, that has ever induced the north to acknowledge, for an instant, any constitutional obligation to surrender fugitive slaves.

The Supreme Court of the United States, in the Prigg case, (the first case in which this clause of the constitution ever came under the adjudication of that court), made no pretence that the *language itself* of the constitution afforded any justification for a claim to a fugitive slave. On the contrary, they made the audacious and atrocious avowal, that for the sole purpose of *making* the clause apply to slaves, they would disregard,—as they acknowledged themselves obliged to disregard,—all the primary, established, and imperative rules of legal interpretation, *and be governed solely by the history of men's intentions, outside of the constitution.* Thus they say:

> "Before, however, we proceed to the points more immediately before us, it may be well,—*in order to clear the case of difficulty,*—to say, that in the exposition of this part of the constitution, we shall limit ourselves to those considerations which appropriately and exclusively belong to it, without laying down any rules of interpretation of a more general nature. It will, indeed, probably, be found, when we look to the character of the constitution itself, the objects which it seeks to attain, the powers which it confers, the duties which it enjoins, and the rights which it secures, as well as the known *historical* fact that many of its provisions were matters of compromise of opposing interests and opinions; *that no uniform rule of interpretation can be applied to it, which may not allow, even if it does not positively demand, many modifications in its actual application to particular clauses.* And, perhaps, the safest rule of interpretation after all will be found to be to look to the nature and objects of the particular powers, duties, and rights, with all the lights and aids of *contemporary history;* and to give to the words of each just such operation and force, consistent with their legitimate meaning, as may fairly secure and attain the ends proposed. * * * * *Historically,* it is well known, that the object of this clause was to secure to the citizens of the slaveholding states the complete right and title of ownership in their slaves, as property, in every state in the Union into which they might escape from the state where they were held in servitude." 16 *Peters,* 610-11.

Thus it will be seen, that on the strength of history alone, they assume that "many of the provisions of the constitution were matters of compromise," (that is, in regard to slavery); but they admit that the words of those provisions cannot be made to express any such compromise, if they are interpreted according to any "uniform rule of interpretation," or "any rules of interpretation of a more general nature," than the mere history of those particular clauses. Hence, "in order to clear the case of (that) difficulty," they conclude that "perhaps the safest rule of interpretation

after all will be found to be to look to the nature and objects of the particular powers, duties, and rights, with all the lights and aids of contemporary history; and to give to the words of each just such operation and force, consistent with their legitimate meaning, as may fairly secure and attain the ends proposed."

The words "*consistent with their legitimate meaning,*" contain a deliberate falsehood, thrown in by the court from no other motive than the hope to hide, in some measure, the fraud they were perpetrating. If it had been "*consistent with the legitimate meaning of the words*" of the clause, to apply them to slaves, there would have been no necessity for discarding, as they did, all the authoritative and inflexible rules of legal interpretation, and resorting to *history* to find their meaning. They discarded those rules, and resorted to history, to make the clause apply to slaves, for no other reason whatever, than that such meaning was *not* "consistent with the legitimate meaning of the words." It is perfectly apparent that the moment their eyes fell upon the "words" of the clause, they all saw that they contained no legal description of slaves.

Stripped, then, of the covering, which that falsehood was intended to throw over their conduct, the plain English of the language of the Court is this,—that *history* tells us that certain clauses of the constitution were intended to recognize and support slavery; but inasmuch as such is not the legal meaning of the words of those clauses, if interpreted by the established rules of interpretation, we will, "*in order to clear the case of* (*that*) *difficulty,*" just discard those rules, and pervert the words so as to *make* them accomplish whatever ends *history* tells us were intended to be accomplished by them.

It was only by such a naked and daring fraud as this, that the court could make the constitution authorize the recovery of fugitive slaves.

And what were the rules of interpretation, which they thus discarded, "in order to clear the case of difficulty," and make the constitution subserve the purposes of slavery? One of them is this, laid down by the Supreme Court of the United States:

> "The intention of the instrument must prevail; this intention must be collected from its words." 12 *Wheaton*, 332.

Without an adherence to this rule, it is plain we could never know what was, and what was not, the constitution.

Another rule is that universal one, acknowledged by all courts to be imperative, *that language must be construed strictly in favor of liberty and justice.*

The Supreme Court of the United States have laid down this rule in these strong terms.

> "Where rights are infringed, where fundamental principles are overthrown, where the general system of the laws is departed from, the legislative intention must be expressed with *irresistible clearness,* to induce a court of justice to suppose a design to effect such objects." *United States vs. Fisher, 2 Cranch*, 390.

Story delivered this opinion of the court, (in the Prigg case), discarding all other rules of interpretation, and resorting to history to make the clause apply to slaves. And yet no judge has

ever scouted more contemptuously than Story, the idea of going out of the words of a law, or the constitution, and being governed by what history may say were the intentions of the authors. He says,

> "Such a doctrine would be novel and absurd. It would confuse and destroy all the tests of constitutional rights and authorities. Congress could never pass any law without an inquisition into the motives of every member; and even then they might be reexaminable. Besides, what possible means can there be of making such investigations? The motives of many of the members may be, nay must be, utterly unknown, and incapable of ascertainment by any judicial or other inquiry; they may be mixed up in various manners and degrees; they may be opposite to, or wholly independent of each other. The constitution would thus depend upon processes utterly vague, and incomprehensible; and the written intent of the legislature upon its words and acts, the *lex scripta,* would be contradicted or obliterated by conjecture, and parol declarations, and fleeting reveries, and heated imaginations. No government on earth could rest for a moment on such a foundation. It would be a constitution of sand, heaped up and dissolved by the flux and reflux of every tide of opinion. Every act of the legislature, (and for the same reason also every clause of the constitution), must therefore be judged of from its objects and intent, as they are embodied in its provisions." 2 *Story's Comm.*, 534.

Also he says,

> The constitution was adopted by the people of the United States; and it was submitted to the whole, upon a just survey of its provisions, as they stood in the text itself. * * Opposite interpretations, and different explanations of different provisions, may well be presumed to have been presented in different bodies, to remove local objections, or to win local favor. And there can be no certainty, either that the different state conventions, in ratifying the constitution, gave the same uniform interpretation to its language, or that, even in a single state convention, the same reasoning prevailed, with a majority, much less with the whole, of the supporters of it. * * It is not to be presumed that even in the convention which framed the constitution, from the causes above mentioned, and other causes, the clauses were always understood in the same sense, or had precisely the same extent of operation. Every member necessarily judged for himself; and the judgment of no one could, or ought to be, conclusive upon that of others. * * *Nothing but the text itself was adopted by the people. * * Is the sense of the constitution to be ascertained, not by its own text, but by the* 'probable meaning,' to be gathered by conjectures from scattered documents, from private papers, from the table-talk of some statesman, or the jealous exaggerations of others? Is the constitution of the United States to be the only instrument, which is not to be interpreted by what is written, but by probable guesses, aside from the text? What would be said of interpreting a statute of a state legislature, by endeavoring to find out, from private sources, the objects and opinions of every member; how every one thought; what he wished; how he interpreted it? Suppose different persons had different opinions, what

> is to be done? Suppose different persons are not agreed as to the 'probable meaning' of the framers, or of the people, what interpretation is to be followed? These, and many questions of the same sort, might be asked. *It is obvious, that there can be no security to the people in any constitution of government, if they are not to judge of it by the fair meaning of the words of the text, but the words are to be bent and broken by the 'probable meaning' of persons, whom they never knew, and whose opinions, and means of information, may be no better than their own? The people adopted the constitution, according to the words of the text in their reasonable interpretation, and not according to the private interpretation of any particular men.*" 1 *Story's Comm. on Const.*, 387 to 392.

And Story has said much more of the same sort as to the absurdity of relying upon "history" for the meaning of the constitution.

It is manifest that if the meaning of the constitution is to be warped in the least, it may be warped to any extent, on the authority of history; and thus it would follow that the constitution would in reality be *made* by the historians, and not by the people. It would be impossible for the people to make a constitution, which the historians might not change at pleasure, by simply asserting that the people intended thus or so.

But, in truth, Story and the court, in saying that history tells us that the clause of the constitution in question, was intended to apply to fugitive slaves, are nearly as false to the history of the clause, as they are to its law.

There is not, I presume, a word on record, (for I have no recollection of having ever seen or heard of one), that was uttered either in the national convention that framed the constitution, or in any *northern* state convention that ratified it, that shows that, *at the time the constitution was adopted,* any *northern* man had the least suspicion that the clause of the constitution, in regard to "persons held to service or labor," was ever to be applied to slaves.

In the national convention, "Mr. Butler and Mr. Pinckney moved to require 'fugitive *slaves* and *servants* to be delivered up like criminals.' " "Mr. Sheiman saw no more propriety in the public seizing and surrendering a *slave or servant,* than a horse." (*Madison papers*, 1447-8.)

In consequence of this objection, the provision was changed, and its language, as it now stands, shows that the claim to the surrender of *slaves* was abandoned, and only the one for *servants* retained.*****

It does not appear that a word was ever uttered, *in the national convention,* to show that any member of it imagined that the provision, *as finally agreed upon,* would apply to slaves.

But after the national convention had adjourned, Mr. Madison went home to Virginia, and Mr. Pinckney, to South Carolina, and in the *State* conventions of those states, set up the pretence that the clause was intended to apply to slaves. I think there is no evidence that any other southern member of the national convention followed their example. In North Carolina, Mr. Iredell, (not a member of the national convention), said the provision was intended to refer to slaves; but that "The northern delegates, owing to their particular scruples on the subject of slavery, did not choose the word *slave* to be mentioned."

I think the declarations of these three men, Madison, Pinckney, and Iredell, are all the "*history,*" we have, that even *southern* men, *at that time,* understood the clause as applying to slaves.

In the *northern* conventions no word was ever uttered, so far as we have any evidence, that any man dreamed that this language would ever be understood as authorizing a claim for fugitive slaves. It is incredible that it could have passed the northern conventions without objection, (indeed it could not have passed them at all), if it had been understood as requiring them to surrender fugitive slaves; for, in several of them, it was with great difficulty that the adoption of the constitution was secured, when no such objection was started.

The construction, placed upon the provision at the present day, is one of the many frauds which the slaveholders, aided by their corrupt northern accomplices, have succeeded in palming off upon the north. In fact the south, in the convention, as it has ever done since, acted upon the principle of getting by fraud, what it could not openly obtain. It was upon this principle that Mr. Madison acted when he said that they ought not to admit, *in the constitution,* the idea that there could be property in man. He would not admit that idea, *in the constitution itself;* but he immediately went home and virtually told the State convention that that was the meaning which he intended to have given to it in practice. He knew well that if that idea were admitted in the instrument itself, the north would never adopt it. He therefore conceived and adhered to the plan of having the instrument an honest and free one in its terms, to secure its adoption by the north, and of then trusting to the fraudulent interpretations that could be accomplished afterwards, to make it serve the purposes of slavery.

Further proof of his fraudulent purpose, in this particular, is found in the fact that he wrote the 42d number of the Federalist, in which he treats of "the powers which provide for the harmony and proper intercourse among the states." But he makes no mention of the surrender of fugitives from "service or labor," as one of the means of promoting that "harmony and proper intercourse." He did not then dare say to the *north* that the south intended ever to apply that clause to slaves.

But it is said that the passage of the act of 1793, shows that the north understood the constitution as requiring the surrender of fugitive slaves. That act is supposed to have passed without opposition from the north; and the reason was that it contained no authority for, or allusion to, the surrender of fugitive *slaves;* but only to fugitives from *justice,* and "persons held to service or labor." The south had not at that time become sufficiently audacious to make such a demand. And it was twenty-three years, so far as I have discovered, (and I have made reasonable search in the matter), after the passage of that act, before a slave was given up, *under it,* in any *free* state, or the act was acknowledged by the supreme court of any *free* state, to apply to slaves.

In 1795, two years after the passage of the act of congress, and after the constitution had been in force six years, a man was tried in the supreme court of Pennsylvania, on an indictment, under a statute of the state, against seducing or carrying negroes or mulattoes out of the state with the intention to sell them, or keep them, as slaves.

"Upon the evidence, in support of the prosecution, it appeared that negro Toby had been brought upon a temporary visit to Philadelphia, as a servant in the family of General Sevier, of the state of Virginia; that when General Sevier proposed returning to Virginia, the negro refused to accompany him"—but was afterwards *forcibly* carried out of the state. It appeared also in the evidence, that it was *proposed*, by Richards, the defendant, that the negro be *enticed* into New Jersey, (a slave state), and there seized and carried back to Virginia.

"The evidence, on behalf of the defendant, proved that Toby was a slave belonging to the father of General Sevier, who had lent him to his son, merely for the journey to Philadelphia."

The defendant was found *not guilty*, agreeable to the charge of the Chief Justice; and what is material is, that the case was tried wholly under the laws of Pennsylvania, which permitted any traveller, who came into Pennsylvania, upon a temporary excursion for business or amusement, to detain his slave *for six months*, and entitled him to the aid of the civil police to secure and carry him away. *Republica vs. Richards 2 Dallas* 224.

Not one word was said, by either court or counsel, of the provision of the United States constitution, in regard to "persons held to service or labor," or of the act of 1793, as having any application to slaves, or as giving any authority for the recovery of fugitive slaves. Neither the constitution, nor the act of Congress was mentioned in connection with the subject.

Is it not incredible that this should have been the case, if it had been understood, at that day, that either the constitution, or the act of 1793, applied to slaves?

Would a man have used force in the case, and thus subjected himself to the risk of an indictment under the state laws? or would there have been any proposition to entice the slave into a slave state, for the purpose of seizing him, if it had been understood that the laws of the United States were open to him, and that every justice of the peace (as provided by the act of 1793) was authorized to deliver up the slave?

It cannot reasonably be argued that it was necessary to use force or fraud to take the slave back, for the reason that he had been *brought*, instead of having *escaped*, into Pennsylvania, for that distinction seems not to have been thought of until years after. The first mention I have found of it was in 1806. *Butler vs. Hopper, 1 Washington C. C. R.* 499.

In 1812 it was first acknowledged by the supreme court of New York, that the act of 1793, applied to slaves, although no slave was given up at the time. But New York then had slaves of her own. *Glen vs. Hodges, 9 Johnson* 67.

In 1816 the supreme court of Pennsylvania first acknowledged that the constitution and the act of 1793 applied to slaves. But no slave was then given up. *Commonwealth vs. Holloway, 2 Sargent & Rawle* 305.

In 1823 the supreme court of Massachusetts first acknowledged that the constitutional provision in regard to "persons held to service or labor" applied to slaves. *Commonwealth vs. Griffith, 2 Pickering* 11.

Few, if any, slaves have ever been given up under the act of 1793, in the free states, until within the last twenty or thirty years. And that fact furnishes ground for a strong presumption that during the first thirty years after the constitution went into operation, it was not generally understood, in the free states, that the constitution required the surrender of fugitive slaves.

But it is said that the ordinance of 1787, passed contemporaneously with the formation of the constitution, requires the delivery of fugitive slaves, and that the constitution ought to be taken in the same sense. The answer to this allegation is that the ordinance does *not* require the delivery of fugitive slaves, but only of persons "from whom labor or service is lawfully claimed." This language certainly is no legal description of a slave.

But beyond, and additional to, all this evidence, that the constitution does not require the surrender of fugitive slaves, is the conclusive and insuperable fact, that there is not now, nor ever has been, any legal or constitutional slavery in this country, from its first settlement. All the slavery that has ever existed, in any of the colonies or states, has existed by mere toleration, in defiance of the fundamental constitutional law.

Even the statutes on the subject have either wholly failed to declare who might, and who might not, be made slaves, or have designated them in so loose and imperfect a manner that it would probably be utterly impossible, at this day, to prove under those statutes, the slavery of a single person now living. Mr. Mason admits as much in the extracts already given from his speech.

But all the statutes, on that subject, whatever the terms, have been unconstitutional, whether passed under the colonial charters, or since under the state governments. They were unconstitutional under the colonial charters, because those charters required the legislation of the colonies to "be conformable, as nearly as circumstances would allow, to the laws, customs, and rights of the realm of England." Those charters were the fundamental constitutions of the colonies, and of course made slavery illegal in the colonies—inasmuch as slavery was inconsistent with the "laws, customs, and rights of the realm of England."*

There was therefore no legal slavery in this country, so long as we were colonies—that is, up to the time of the revolution.

After the Declaration of Independence, new constitutions were established in eleven of the states. Two went on under their old charters. Of all the new constitutions, that were in force at the adoption of the constitution of the United States, in 1789, not one authorized, recognized, or sanctioned slavery.**All the recognitions of slavery, that are now to be found in any of the state constitutions, have been inserted since the adoption of the constitution of the United States.*

There was therefore no legal or constitutional slavery, in any of the states, up to the time of the formation and adoption of the constitution of the United States, in 1787 and 1789.

There being no legal slavery in the country, at the adoption of the constitution of the United States, all "the people of the United States" become legally parties to that instrument, and of course members of the United States government, by its adoption. The constitution itself declares that "We the people of the United States * * do ordain and establish this constitution."

The term "people" of necessity includes the whole people; no exception being made, none can be presumed—for such a presumption would be a presumption against liberty.

After "the people" of the whole country had become parties to the constitution of the United States, their rights as members of the United States government were secured by it, and they could not afterwards be enslaved by the state governments—for the constitution of the United States is "the supreme law," (operating "directly on the people and for their benefit," say the supreme court, 4 *Wheaton* 404-5), and necessarily secures to *all* the people individually all the rights it intended to secure to any; and these rights are such as are incompatible with their being enslaved by subordinate governments.

But it will be said that the constitution of the United States itself recognizes slavery, to wit, in the provision requiring "the whole number of *free* persons" and "three fifths of all other persons" to be counted in making up the basis of representation and taxation. But this interpretation of the word "free" is only another of the fraudulent interpretations, which the slaveholders and their northern accomplices have succeeded in placing upon the constitution.

The legal and technical meaning of the word "free," as used in England for centuries, has been to designate a native or naturalized member of the state, as distinguished from an alien, or foreigner not naturalized. Thus the term "*free* British subject" means, not a person who is not a slave, but a native born, or naturalized subject, who is a member of the state, and entitled to all the rights of a member of the state, in contradistinction to aliens, and persons not thus entitled.

The word "free" was used in this sense in nearly or quite all the colonial charters, the fundamental constitutions of this country, up to the time of the revolution. In 1787 and 1789, when the United States constitution was adopted, the word "free" was used in this political sense in the constitutions of the three slaveholding states, Georgia, South Carolina, and North Carolina. It was also used in this sense in the articles of Confederation.*

The word "*free*" was also used in this political sense in the ordinance of 1787, in four different instances, to wit, three times in the provision fixing the basis of representation, and once in the article of compact, which provides that when the states to be formed out of the territory should have sixty thousand *free* inhabitants, they should be entitled to admission into the Confederacy.

That the word "free" was here used in its political sense, and not as the correlative of slaves, is proved by the fact that the ordinance itself prohihited slavery in the territory. It would have been absurd to use the word "free" as the correlative of slaves, when slaves were to have no existence under the ordinance.

This political meaning, which the word "free" had borne in the English law, and in all the constitutional law of this country, up to the adoption of the constitution of the United States, was the meaning which all legal rules of interpretation required that congress and the courts should give to the word in that instrument.

But we are told again that the constitution recognizes the legality of the slave trade, and by consequence the legality of slavery, in the clause respecting the "importation of persons." But the word "importation," when applied to "persons," no more implies that the persons are slaves, than

does the word "transportation." It was perfectly understood, in the convention that framed the constitution—and the language was chosen with special care to that end—that there was nothing in the language itself, that legally recognized the slavery of the persons to be imported; although some of the members, (how many we do not know), while choosing language with an avowed caution against "admitting, *in the constitution*, the idea that there could be property in man," intended, if they could induce the people to adopt the constitution, and could then get the control of the government, to pervert this language into a license to the slave trade.

This fraudulent perversion of the legal meaning of the language of the constitution, is all the license the constitution ever gave to the slave trade.

Chief Justice Marshall, in the case of the Brig Wilson, (1 *Brockenbrough*, 433-5), held that the words "import" and "imported," in an act of Congress, applied to free persons as well as to slaves. If, then, the word "importation," in the constitution, applies properly to free persons, it certainly cannot imply that any of the persons imported are slaves.

If the constitution, truly interpreted, contain no sanction of slavery, the slaves of this country are as much entitled to the writ of *habeas corpus* at the hands of the United States government, as are the whites.

Appendix B. Authorities for the Right of the Jury to judge of the Law in Criminal Cases.

The House of Representatives of the United States, by a vote of more than two to one, once affirmed the right of the jury to judge of the law, in criminal cases, to be an "indisputable right,"—and impeached one of the Justices of the Supreme Court of the United States for infringing it. The following is a copy of the caption, and one of the articles, of an impeachment, found by the House of Representatives, (in 1804), against Samuel Chase, one of the Judges of the Supreme Court.

"Articles exhibited by the House of Representatives of the United States, in the name of themselves, and of all the people of the United States, against Samuel Chase, one of the Associate Justices of the Supreme Court of the United States, in maintenance and support of their impeachment against him, for high crimes and misdemeanors."

ARTICLE I.

> That, unmindful of the solemn duties of his office, and contrary to the sacred obligation by which he stood bound to discharge them "faithfully and impartially, and without respect to persons," the said Samuel Chase, on the trial of John Fries, charged with treason before the Circuit Court of the United States, held for the district of Pennsylvania, in the city of Philadelphia, during the months of April and May, one thousand eight hundred, whereat the said Samuel Chase presided, did, in

his judicial capacity, conduct himself in a manner highly arbitrary, oppressive, and unjust, viz.

1. In delivering an opinion, in writing, on the question of law, on the construction of which, the defence of the accused materially depended, tending to prejudice the minds of the jury against the case of the said John Fries, the prisoner, before counsel had been heard in his defence.

2. In restricting the counsel for the said Fries from recurring to such English authorities as they believed apposite; or from citing certain statutes of the United States, which they deemed illustrative of the positions, upon which they intended to rest the defence of their client.

3. In debarring the prisoner from his constitutional privilege of addressing the jury (through his counsel) on the law, as well as on the fact, which was to determine his guilt, or innocence, and at the same time endeavoring to wrest from the jury their indisputable right to hear argument, and determine upon the question of law, as well as the question of fact, involved in the verdict which they were required to give:

In consequence of which irregular conduct of the said Samuel Chase, *as dangerous to our liberties, as it is novel to our laws and usages,* the said John Fries was deprived of the right, secured to him by the eighth article amendatory of the constitution, and was condemned to death without having been heard by counsel, in his defence, to the disgrace of the character of the American bench, *in manifest violation of law and justice, and in open contempt of the rights of juries, on which, ultimately, rest the liberty and safety of the American people.*"

This charge was made by the House of Representatives, against that judge, by a vote of 83 yeas, to 34 nays. Of course, all those who voted for this charge, believed it to be an "indisputable right of the jury to hear argument, (on the law), and determine upon the question of law, as well as the question of fact, involved in the verdict," and that an infringement of that right was both "dangerous to our liberties," and "novel to our laws and usages," a "manifest violation of law and justice," an "open contempt of the rights of juries, on which, ultimately rest the liberty and safety of the American people." Whether those who voted *nay,* had the same opinion on this point, or whether they voted nay on the ground that the fact of the infringement of the right of the jury was not sufficiently proved, does not appear.

The judge was tried by the Senate on this impeachment. On the trial it was proved that, although the judge, before the trial of Fries was commenced, gave notice to the counsel of Fries that he should lay some restrictions upon them, in addressing the jury on the law, and in citing ancient English authorities, which he considered inapplicable and improper, yet when those restrictions were objected to, he gave them notice that they might have full freedom in those particulars. It also appeared that in his charge to the jury, he said to them:

"It is the duty of the court in this case, and in all *criminal* cases, to state to the jury their opinion of the law arising on the facts; but the jury are to decide on the present

and in all *criminal* cases, *both the law and the facts,* on their consideration of the whole case."

But notwithstanding his offer of entire freedom to the counsel of Fries in arguing the law, and citing authorities, as they should think proper, and notwithstanding his charge to the jury, distinctly instructing them that they were judges of the law as well as the fact, in that and in all criminal cases, yet, inasmuch as his conduct at the first had been somewhat arbitrary and improper, and such as it was supposed, might prejudice the minds of the jury against Fries, on the question of law involved in his defence, sixteen out of thirty-four Senators voted to convict the judge, on this charge of infringing the right of the jury to judge of the law. The sixteen Senators, who voted for his conviction, of course held that the jury had the right to judge of the law. And it is not only supposable, but highly probable, that of the eighteen Senators, who voted for his acquittal, some or all held the same opinion, but believed that the judge had not really infringed, or intentionally infringed, the right of the jury in that particular.

Thus we have the decided opinions of eighty-three, out of one hundred and seventeen members of the House of Representatives, and of sixteen out of thirty-four, Senators, of the United States, in favor of the doctrine that the jury have the right to judge of the law,—while there is no distinct evidence that either of the other thirty-four Representatives, or the other eighteen Senators, repudiated the doctrine.

The Supreme Court of the United States also, in a charge given to a jury, *in a civil case,* (John Jay, Chief Justice, doing it in behalf of the whole court), gave these instructions to them:—

> "It may not be amiss, here gentlemen, to remind you of the good old rule, that on questions of fact, it is the province of the jury, on questions of law, it is the province of the court, to decide. But it must be observed, that by the same law that recognizes this reasonable distribution of jurisdiction, *you have nevertheless a right to take upon yourselves to judge of both, and to determine the law as well as the fact in controversy.* On this, and on every other occasion, however, we have no doubt you will pay that respect, which is due to the opinion of the court; for, as on the one hand, it is presumed that juries are the best judges of facts, it is, on the other hand, presumable that the court are the best judges of law. But still both objects are lawfully within your power of decision." *The State of Georgia vs. Brailsford, et al.* (3 Dallas 4).

On the 14th of July, 1798, Congress passed an act for punishing certain libels against the government of the United States. By this act it was declared that "the jury who shall try the cause, shall have a right to determine the law and the fact, under the direction of the court, as in other cases."

The words "under the direction of the court," may, to unprofessional readers, make the meaning of this provision equivocal. Such readers may think the word "direction," equivalent to "*dictation.*" But if that meaning were given to it, the provision would be absurd,—would contradict itself,—for then the jury would *not* "have the right to determine the law and the fact," as the statute provides that they shall have; but the law would be determined by the court, and the jury would be bound by their determination. The word "direction," then must mean something that is

consistent with the jury's "determining the law and the fact," instead of their being bound by any opinion of the court. And that meaning can only be one that is equivalent to advice, guidance, information, instruction, and assistance, which every body admits that a court have a right, and are bound, to render to a jury, still leaving them finally to determine the matter for themselves,—as we see was done by the Supreme Court in the case just cited.

The use of the words "as in other cases," is an admission, on the part of Congress and the president, that "in other cases" "the jury have the right to determine the law and the fact."

In addition to these opinions of Congress, the President, and of the Supreme Court of the United States, I add some other eminent authorities, on both sides of the question.

James Wilson, one of the signers of the Declaration of Independence, one of the most distinguished among the framers of the United States constitution, and afterwards one of the Judges of the Supreme Court of the United States, says,—

"It is true, that, in matters of law, the jurors are entitled to the assistance of the judges; but it is also true that, after they receive it, they have the right of judging for themselves." *1 Wilson's Works*, 12.

"The Roman juries were judges of law as well as of fact." *2 Wilson's Works*, 320.

"The antiquity of this institution among the most civilized people of the world, is urged as an argument, that it is founded in nature and original justice. The trial by a jury of our own equals seems to grow out of the idea of just government, and is founded in the nature of things." *2 Wilson's Works*, 319.

In the case of United States vs. Battiste, Story said it had been the opinion of "the whole of his professional life," that the jury had *not* the right to judge of the law. *2 Sumner*, 243.

In United States vs. Wilson, Justice Baldwin, of the Supreme Court of the United States, held that the jury *had* the right to judge of the law. *Baldwin's C. C. R.* 108.

Two years afterwards, in the case of United States vs. Shive, the same judge held that they had *not* the right to judge of a particular question of law put in issue in that case. *Baldwin's Rep.*, 510.

In 1804, the Judges of the Supreme Court of New York, in a case of *libel*, were equally divided in opinion on the question,—Kent and Thompson being in favor of the right, and Lewis and Livingston against it. *The People vs. Croswell. 3 Johnson's Cases*, 337.

At the next session of the legislature of New York an act concerning libels "passed both houses unanimously" providing,

"That on every such indictment or information, the jury, who shall try the same, shall have a right to determine the law and the fact, under the direction of the court, as in other criminal cases." *3 Johnson's Cases*, 412.

In Commonwealth vs. Knapp, (1830), the Supreme Court of Massachusetts said,—

"As the jury have the right, and, if required by the prisoner, are bound, to return a general verdict of *guilty,* or *not guilty,* they must necessarily, in the discharge of this duty, decide such questions of law as well as of fact, as are involved in the general question. * * *

"It is their duty to decide all points of law, which are involved in the general question of the guilt or innocence of the prisoner." *10 Pickering*, 496.

In Commonwealth vs. Kneeland, (1838), the same court said,—

"In criminal cases, by the form in which the issue is made up, the jury pass upon the whole matter of law and fact." *20 Pickering*, 222.

In Commonwealth vs. Porter, (1845), the same court decided that the jury had *not* the right to judge of the law, but were bound to take it as laid down to them by the court. *10 Metcalf*, 263.

In the case of Townsend vs. the State, the Supreme Court of Indiana held that the jury had *not* the right to judge of the law. *2 Blackford*, 151.

Two years afterwards, in the cases, Warren vs. the State, and Armstrong vs. the State, the same court held that the jury *had* the right to judge of the law. *4 Blackford*, 150-249.

In the case of Pierce vs. the State, the Supreme Court of New Hampshire held that the jury had *not* this right. *13 N. H. Rep.*, 536.

In the case of the State vs. Snow, the Supreme Court of Maine, say,—

"The presiding judge erred, in determining that, in criminal cases, the jury are not the judges of the law as well as the fact. Both are involved in the issue they are called upon to try; and the better opinion very clearly is, that the law and the fact are equally submitted to their determination." *6 Shepley*, 348.

In the case of the State vs. Jones, the Supreme Court of Alabama say,—

"The power of the jury to judge both of law and fact, results necessarily from the very constitution of that body, and from their right to find a general verdict (of not guilty) for the prisoner, which the court cannot disturb * * When a juror is sworn, he is invested with the office of judge, and authorized to pronounce the law in the particular case he has to try, and does so when he renders his verdict, whether he abides by, or disregards the opinion of the court." *5 Alabama Reports*, 672-3.

In the case of Montgomery vs. Ohio, the Supreme Court of Ohio held that the jury had *not* the right to judge of the law. *11 Ohio Rep.*, 424.

In Montee vs. Commonwealth, the Supreme Court of Kentucky said,—

"They (the jury), have the right, in all cases, to find a general verdict of guilty or not guilty. As guilt or innocence, is a deduction from the law and facts of the case, the jury must, therefore, necessarily decide the law, *incidentally,* as well as the facts, before they can say that the accused is guilty or not guilty." *3 J. J. Marshall*, 149.

The constitution of Kentucky declares that "in all indictments for libels, the jury shall have a right to determine the law and the facts, under the direction of the court, as in other cases."

The constitution of Indiana has the same provision.

The constitution of Illinois has the same provision.

The constitution of Texas has the same provision.

The constitution of Ohio has the same provision.

The constitution of Tennessee provides that "in all indictments for libels, the jury shall have a right to determine the law and the facts, under the direction of the court, as in other criminal cases."

The constitution of Michigan provides that "in all prosecutions or indictments for libels, * * the jury shall have the right to determine the law and the fact."

The constitution of Missouri declares that "in all prosecutions for libels, the truth may be given in evidence, and the jury may determine the law and the facts under the direction of the court."

The constitution of Arkansas provides that "in all indictments for libels, the jury shall have the right to determine the law and the facts."

The constitution of Wisconsin says that "in all criminal prosecutions or indictments for libel, * * * the jury shall have the right to determine the law and the fact."

The constitution of Mississippi declares that "in all prosecutions or indictments for libels, * * * the jury shall have the right to determine the law and the facts under the direction of the court."

The constitution of Maine declares that "in all indictments for libels, the jury, after having received the direction of the court, shall have a right to determine, at their discretion, the law and the fact."

The new constitution of New York provides that "in all criminal prosecutions or indictments for libels, * * * the jury shall have the right to determine the law and the fact."

The foregoing statutory and constitutional provisions for the right of the jury to judge of the law in cases of *libel,* had their origin in a false decision by Lord Mansfield, in 1784, in which he held that, in the trial of an indictment for libel, the jury had no right to take it upon themselves to judge whether the writing charged as libellous, was really so, or not,—but that they must leave that question wholly with the court. *3 Term Reports*, 428 note.

This decision created much agitation in England, inasmuch as its effect was to give to the judiciary the power to restrain, within such limits as it pleased, the freedom of the press, in the discussion of the characters and conduct of public men. To remove any doubts excited by the decision, and to maintain the legitimate freedom of the press, Parliament soon after passed a special act, "that on the trial of an indictment or information for a libel, the jury may give a general verdict of guilty or not guilty, upon the whole matter put in issue, and shall not be required or di-

rected by the court or judge to find the defendant guilty, merely on the proof of the publication by the defendant of the paper charged to be a libel, and of the sense ascribed to the same in the indictment or information." *Stat. 32 Geo. 3, c.* 60.

The purport of this act is that the jury may judge both of the law and the fact.

The example of Parliament was followed extensively in this country, as the preceding citations show.

On the general question of the right of the jury to judge of the law, in criminal cases, there has been for centuries the same disagreement among judges in England as in this country. If this disagreement proves nothing else, it at least proves this, that the permanent judiciary are utterly unworthy to be intrusted with the decision of the law in criminal cases. If after centuries of controversy, they cannot determine a point so important to the liberties of a people as is the one whether the jury may rightfully judge of the law? that is, whether "the country" may judge of its own liberties? they are manifestly unfit to be entrusted with the decision of any other question involving the freedom of the people.

Appendix C. Mansfield's argument against the Right of the Jury to judge of the law in criminal cases.

Mansfield's argument, if argument it can be called, against the right of the jury to judge of the law, is this.

"They (the jury) do not know, and are not presumed to know, the law; they are not sworn to decide the law; they are not required to do it. * * The jury ought not to assume the jurisdiction of law; they do not know, and are not presumed to know, any thing of the matter; they do not understand the language, in which it is conceived, or the meaning of the terms; they have no rule to go by but their passions and wishes." 3 *Term Rep.* 428 *note.*

One answer to this argument is, that the jury are the "peers" of the accused, and consequently are supposed to know the law as well as he does. *He* is presumed to know the law, otherwise he could not be held guilty of a *criminal intent* in violating it. If, then, *he* is rightfully presumed to know the law, his "peers" must be presumed equally to know it. If his "peers" do not know the law, then it must be presumed that he did not know it, and that he therefore had no criminal intent in transgressing it.

The effect, therefore, of trial by jury, in criminal cases, is to hold no accused person responsible for a more precise or accurate knowledge of the law, than is common to his fellow men. And this is all that he ought to be held responsible for. If he is to be held responsible for a more accurate knowledge of the law than his "peers"—his fellow-men in the same rank and condition of life—he is liable to be held guilty in law, when he had no criminal intent, and had been guilty of no culpable neglect in ascertaining the law—for that neglect cannot be legally culpable, which is common to the mass of mankind.

Mansfield's argument goes to this extent, that the common people, (such as juries are composed of), know nothing of the law, and are not presumed to know any thing of it; and yet, if one of their number transgress it, he is then presumed to have known it, and to have had a criminal intent, (without which there can be no crime), in transgressing it.

This doctrine looks as if *judges,* as well as juries, sometimes "had no rule to go by but their passions and wishes." Whatever imperfection there may be in the judgment of juries, I apprehend they have never, (unless under the dictation of a court), acted upon so atrocious a principle as the one here avowed by Mansfield.

Mansfield's argument is the argument of all who oppose the right of the jury to judge of the law. And it seems to prove very satisfactorily that, if the people cannot trust their liberties in their own hands, there is little hope for them at the hands of judges—for the doctrine of those, who oppose the right of the jury to judge of the law, is, that the people must trust their liberties in the hands of judges, whose reasons and rules of judgment are unintelligible to the people, and the justice or injustice of whose decisions the people consequently cannot understand.

This doctrine supposes that it is not necessary that the people should know, for themselves, whether they are living under a just government, or a tyrannical one; that if they are ever punished for doing what they think they have a right to do, and what they think they never gave up their right to do, it is quite sufficient for them to have the word of the judges that the punishment is according to law.

Such liberty as this, Mansfield no doubt thought was good enough for mankind at large. But whether it is such liberty as will always satisfy the people themselves, remains to be seen. They will probably prefer a liberty, that is a little more intelligible, even though it should be, (what in reality it would not be), a little less refined.

The people, it is true, are not very learned in the laws. But they have sufficiently clear ideas of liberty, justice, and men's natural rights, to be reasonably competent to determine whether, in a given case, one man has infringed the rights of another, and ought to be punished therefor. And it seems to be a somewhat strong trait in the Anglo-Saxon character, that they prefer to trust their liberties in the hands of their "peers," rather than in the hands of judges, whose pretended superiority in knowledge may be merely a cloak for practising such oppressions as cannot be otherwise justified to the minds of those who are the subjects of them.

Story's argument is substantially the same with Mansfield's, (*United States vs. Battiste,* 2 *Sumner,* 243.)

Mansfield and Story, I think, are the most distinguished authorities of modern times, against the right of the jury to judge of the law. One would infer from their opinions, and the grounds of them, that neither had ever heard, or supposed that the world had ever heard, of the common law of England, or of such an instrument as Magna Charta.

The idea that, in this country, where the people institute government for the preservation of their rights, and where they must be presumed to know what rights they had in view in so doing, they are not competent, as jurors, to judge when those rights are invaded, is absurd.

It cannot be said that if they judge of the law, their ignorance may be dangerous to the prisoner; because if he be convicted against law, he has his appeal to the court. It is only when they acquit, that their judgment is final. Magna Charta does not say that a man *shall be punished* by the judgment of his peers; but only that he shall not be punished "*unless* by the judgment of his peers." He may be acquitted, but cannot be convicted, against their judgment.

Appendix D. Effect of Trial by Jury, in nullifying other Legislation than the Fugitive Slave Laws.

If jurors, in criminal cases, have the right to judge of the law, of its constitutionality, and its justice, the trial by jury can be made efficient for nullifying nearly all unconstitutional and unjust legislation; because it makes it safe to violate, and resist the execution of it.

It would, for instance, make it safe to resist the execution of all those unequal and iniquitous revenue laws, which in reality confiscate ten, twenty, thirty, or fifty per cent of one man's property, under pretence of taxation, while ninety-nine one-hundredths, more or less, of all the other property of the country goes free of taxation; laws, the object of which is, not only to make one man pay the taxes of others, but also to make the mass of the people pay to a few domestic manufacturers, ten, twenty, thirty, or fifty per cent more for their commodities, than they would be worth in free and open market.

It is as much the duty of a man to defend his property against such laws, as to defend it against pirates and highwaymen. And the execution of such laws would certainly be resisted, if it were understood that jurors had a right, in trying men for such resistance, to judge of the justice of the laws.

The laws against smuggling also, which confiscate a man's entire cargo, as a punishment for evading a tax gatherer, who, but for the evasion, would have seized a half or a quarter of it, would be nullified by the trial by jury, if it were understood that jurors had a right to judge of the justice of the laws.

The laws against smuggling are unconstitutional, as well as unjust. The constitution gives not the slightest authority for laws, that punish men for concealing their property from the tax gatherer. Men have a natural right to conceal their property; for they may fear other robbers than the tax gatherer. The government must find property before they can tax it; and when they have found it, they are authorized *only to tax it.* They have no authority to confiscate it, as a punishment to the proprietor for not having voluntarily exposed it for taxation.

The constitution declares simply that "the congress shall have power to lay and collect taxes, duties, imposts, and excises," &c. Here is no authority for confiscating property, which the owner had refused to expose to, or had attempted to conceal from, the tax gatherer.

The constitution gives no more power to confiscate imported goods, for the reason mentioned, than to confiscate domestic property. Suppose a direct tax were laid, who imagines that

congress would have power to confiscate all property, which the owners should refuse to expose to, or should attempt to conceal from, the assessors? Yet they would have the same right in that case, that they have in the case of imported goods; for the constitution makes no distinction, in this particular, between imported and domestic goods.

The state governments have power to lay taxes also; but who supposes they have power to confiscate property, or punish the owner by imprisonment, because he refuses to disclose how much money he has in his pocket, or attempts to conceal any other property from the assessors? Yet the states have as much power to do so, as have congress.

The true trial by jury would also abolish the government monopoly in the carriage of letters and papers. If mankind have any natural rights, the right of transmitting intelligence to each other, in any way that is intrinsically innocent, is one of them. And juries, if they knew their duties, would sustain that right, by refusing ever to convict a man for exercising it.

The laws against this right is another of the many laws, for which the constitution gives no authority. The constitution says simply that "Congress shall have power to establish post-offices and post roads." It gives them no power to forbid others to establish post-offices and post roads in competition with those of Congress. Suppose the constitution had said that Congress shall have power to establish stage coaches, steam-boats, and rail-roads, for the transportation of passengers and merchandize; does any one imagine that that would have given them any authority to prohibit others from establishing stage-coaches, steam-boats, and rail-roads in competition with those of Congress? Yet that case would have been a parallel one to the post-office power.

The trial by jury would also open all vacant wild lands to the settler, free of charge by, or interference from, the government. The Creator gave lands, not to governments, but to men. And men have the same natural right to take possession of unoccupied wild lands, without permit from the government, that they have to dip water from the stream, to breathe the air, or enjoy the sunshine. And juries, if they knew their duties, would protect men in the enjoyment of this right, by acquitting them, if indicted as trespassers, or for resisting the government in its attempts to dispossess them of their lands.

What is true of lands, is true also of all mines, salt springs, &c., which men find in the earth. A man has the same right to dig gold out of the earth, without asking permission of the government, if he can find a spot unoccupied by any other man, that he has to dig roots.

In the state governments, the trial by jury would abolish all restrictions upon contracts, that are intrinsically lawful, between man and man. It would, for example, abolish the laws which prohibit free banking, and limit the rates of interest; laws, which make currency scarce, and make credit and capital difficult to be obtained. Also the laws, which forbid the sale of certain commodities, unless inspected by officers of the government; which forbid men to act as pilots, auctioneers, or innholders, unless specially licensed; and all other laws, which require that men obtain a special license from the government for doing any act or business that is intrinsically lawful.

In fact the trial by jury would abolish the whole catalogue of laws against acts not criminal in themselves, by which monopolies are sustained, and men are deprived of their natural rights;

laws founded on the principle that the destruction of private rights is promotive of the public good.

The trial by jury would compel the free administration of justice. A man has a natural right to enforce his own rights, and redress his own wrongs. If one man owe another a debt, and refuse to pay it, the creditor has a natural right to seize sufficient property of the debtor, wherever he can find it, to satisfy the debt. If one man commit a trespass upon the person, property, or character of another, the injured party has a natural right either to chastise the aggressor, or to take compensation for the injury out of his property. But as the government is an impartial party, as between these individuals, it is more likely to do exact justice between them, than the injured individual himself would do. The government also, having more power at its command, is likely to right a man's wrongs more peacefully than the injured party himself could do it. If therefore, the government will do the work of enforcing a man's rights, or of redressing his wrongs, *free of expense to him,* he is under a moral obligation to leave the work in the hands of the government,—but not otherwise. When the government forbids him to enforce his own rights, or redress his own wrongs, and deprives him of all means of obtaining justice, except on the condition of his employing the government to obtain it for him, *and of paying the government for doing it,* the government becomes itself an accomplice of the oppressor. If the government will forbid a man to protect his own rights, it is bound to do it for him, *free of expense to him.* And so long as government refuses to do this, juries, if they knew their duties, would protect a man in defending his own rights.

Probably one half of the community are virtually deprived of all protection for their rights, except what the criminal law affords them. Courts of justice, for all civil suits, are as effectually shut against them, as though it were done by bolts and bars. Being forbidden to maintain their own rights by force,—as, for instance, to compel the payment of debts,—and being unable to pay the expenses of civil suits, they have no alternative but submission to many acts of injustice, against which the government is bound either to protect them, *free of expense,* or allow them to protect themselves.

The free administration of justice is one of the principles of Magna Charta. Its language is, "We will sell to no man, we will deny no man, nor defer right or justice." What is it but selling right and justice, to compel a man to pay the cost of it? or any part of the necessary cost of it? There would be the same reason, in compelling a party to pay the judge and the jury for their services, that there is in compelling him to pay the witnesses, or any other *necessary* charges.

The above principle of Magna Charta is incorporated into many of our state constitutions; but it is a dead letter in all of them. But if the trial by jury were rightly understood, the administration of justice would have to be made free, or juries would protect men in defending their rights by force.

This compelling parties to pay the expenses of civil suits, is one of the many cases, in which government is false to the fundamental principles, on which it is based. What is the object of government but to protect men's rights? On what principle does a man pay his taxes to the government, except on that of contributing his proportion towards the necessary cost of protecting the

rights of all? Yet when his own rights are actually invaded, this government, which he contributes to support, becomes his enemy, and will neither protect his rights, (except at his own cost), nor suffer him to do it himself.

The free administration of justice would promote simplicity and stability in the laws. The mania of legislation would be in a great measure restrained, if the government were compelled to pay the expenses of all the suits that grow out of it.

Endnotes

[*] The argument on this point is substantially the same as one embraced in the Letter of Hon. Horace Mann, published in the Boston Atlas, June 10, 1850. Although the argument implies no merit on my part—it being made up of definitions given by the Supreme Court—it may yet be proper for me—by way of avoiding the appearance of plagiarism—to say that it was published in Burritt's Christian Citizen of June 8th, 1850, two days before the publication of Mr. Mann's.

[*] The Commissioners are probably unconstitutional *judicial* tribunals for another reason, to wit, that the law, which authorizes their appointment, makes no provision that they "shall hold their offices during good behavior," as the constitution requires that "judges" shall do. The law says nothing of the tenure, by which they shall hold their offices; it simply provides "That it shall be lawful for the Circuit Court of the United States, to be holden in any district, * * to appoint such and so many discreet persons, in different parts of the district, as such court shall deem necessary, to take acknowledgments of bail and affidavits," &c. Stat. 20th Feb., 1812, U. S. Stat. at Large, Vol. 2, p. 678.

I understand the general opinion to be that, under this law, the commissioners are entitled to hold their offices only during the pleasure of the courts that appoint them.

[*] In truth, "the acts, records, and judicial proceedings" of a State judge, when exercising a judicial authority purporting to be conferred upon him by the United States, are not even the "acts, records, or judicial proceedings" of the *United States*—for the United States have no constitutional power to confer any such authority upon him—and consequently his acts, in execution of such an authority, are legally nothing more than his private acts as an individual.

[*] On general principles, the testimony of the parties themselves, in all cases, civil and criminal, is legitimate, and neither Congress nor the courts have any authority to exclude it.

In *civil* cases the testimony of the parties is legitimate, because they alone know the *whole* truth, as to the matter in controversy, and it is hardly possible to conceive of a case in which it would not be for the interest of one or the other of the parties to disclose it. If, therefore, the parties themselves are allowed to testify, it is morally certain, as a general thing, that the whole truth will be told. If the parties *agree* in their testimony, the facts of the case are at once ascertained, and the necessity and expense of further testimony is saved. If they disagree, the testimony of

third persons can then be brought in as supplementary to that of the parties; and the presumption must be that it will corroborate the party whose testimony is true. But if the testimony of third persons alone is received, there can be no certainty at all that the whole truth is told, in hardly any conceivable case; and consequently there can be no certainty that the decision corresponds with the real merits of the case.

It is absurd to exclude both the parties, on the ground of interest, for two reasons. 1. Because they have the same interests respectively; their opposing interests therefore exactly balance each other; and they consequently stand on a perfect level with each other in that respect. 2. Because, being parties, their interests are necessarily known to the tribunal that weighs their testimony, and that tribunal will of course make the proper allowance for their interests, and judge of the credibility of their testimony accordingly.

In suits in equity, all courts receive the testimony of the parties themselves; and there is no rational ground whatever for making a distinction, in this respect, between suits in equity, and suits in law. Blackstone says,

"It seems the height of judicial absurdity, that in the same cause, between the same parties, in the examination of the same facts, a discovery by the oath of the parties should be permitted on one side of Westminster Hall, (in the equity courts), and denied on the other, (in the law courts); or that judges of one and the same court should be bound by law to reject such a species of evidence, if attempted on a trial at bar, but, when sitting the next day as a court of equity, should be obliged to hear such examinations read, and to found their decrees upon it." 3 Blackstone, Ch. 28.

In *criminal* cases, nothing can be more absurd, cruel, or monstrous, nothing more manifestly contrary to all the dictates of humanity, justice, and common sense, than to close the mouth of an accused person, and forbid him to offer any explanation or justification of his conduct, or to give any denial to the testimony brought against him—and thus throw him, for the protection of his life, liberty, and character, upon such evidence of other persons as chance may happen to throw in his way.

No doubt the *guilty* would generally attempt to hide their guilt by falsehood; but to presume that an accused person will testify falsely, is to presume him guilty before he is heard, which we have no right to do. The law presumes an accused person innocent until he is proved guilty. Consistently with this presumption, the law is bound to presume that he will tell the truth, because, if he be innocent, as the law presumes him to be, the truth would best serve his purpose.

If the principle of shutting the mouth of an accused person, and compelling him to rely for his defence upon such stray evidence as may chance to fall in his way, be a sound one, it should be acted upon always, and everywhere. The father should strike, but never hear, his child. And it should be the same throughout society. A man accused of any thing offensive or injurious to others, should never be allowed, with his own lips, either to deny the act, or justify it.

It is manifest that if such a principle were acted upon in society generally, it would lead to universal war. Yet the principle would be no less absurd or monstrous in society at large, than it is in courts of justice.

The fear of falsehood, which has led to the adoption of this principle, has no justification in practical life; for a guilty man is much more likely to entrap, than to exculpate himself, when he attempts to defend himself by falsehood.

[*] In the case of Hill *v.* Low, the court held that under the law of 1793, the claimant, in a suit for the penalty, against a person for harboring, concealing, or rescuing a fugitive, was under the necessity of proving his property in the fugitive, and that the certificate of the magistrate was not proof. The reasons given for that opinion seem very satisfactory and conclusive, and to be as applicable to a case under the act of 1850 as under that of 1793.—4 *Washington C. C. Rep.* 327.

[*] If however, it should be held that the $1000, required to be paid to the claimant, is in the nature of a penalty, *in addition to the fine and imprisonment,* it follows that in a suit for that penalty, the jury will have a right to judge of the constitutionality of the law, as in case of an indictment.

[*] In all criminal cases, the jury are told that the defendant has "for trial, put himself upon the country, which country you are."

[*] By Hon. Horace Mann.

[*] If judges were made amenable to the people by election, we might have more hope of their having some respect for the rights of the people.

[*] I am confident that Mr. Calhoun made the same admission within two or three years last past, but I have not the paper containing it at hand.

[*]*Servants* were, at that time, a very numerous class in all the states; and there were many laws respecting them, all treating them as a distinct class from slaves.

[*] Washburn, in his "Judicial History of Massachusetts," (p. 202), says,

"As early as 1770, and two years previous to the decision of Somersett's case so famous in England, the right of a master to hold a slave had been denied, by the Superior Court of Massachusetts, and upon the same grounds, substantially, as those upon which Lord Mansfield discharged Somersett, when his case came before him. The case here alluded to, was James vs. Lechmere, brought by the Plaintiff, a negro, against his master to recover his freedom."

[*] Perhaps it may be claimed by some that the constitution of South Carolina was an exception to this rule. By that constitution it was provided that the qualifications of members of the Senate and House of Representatives "*shall be the same as mentioned in the election act.*"

"The election act" was an act of the Provincial Assembly passed in 1759, which provided that members of the assembly "shall have in this province a settled plantation or freehold estate of at least five hundred acres of land, *and twenty slaves.*"

But this act was necessarily void, so far as the requirement in regard to slaves was concerned, because slavery being repugnant to the laws of England, it could have no legal existence in the

colony, which was restricted from making any laws except such as were conformable, as nearly as circumstances would allow, to the laws, statutes, and rights of the realm of England.

This part of the act, then, being void at the time it was passed, and up to the time of the adoption of the constitution of the State, the provision in that constitution could not legally be held to give force *to this part of the act.* Besides, there could be no slaves, *legally speaking,* in 1778, for the act to refer to.

[*] For proof that such was the meaning of the word "free" in those instruments, I must refer to my argument on "The Unconstitutionality of Slavery."