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REMARKS on the Amendments to the Federal Constitution, proposed by the Conventions of Massachusetts, New-Hampshire, New-York, Virginia, South and North-Carolina, with the minorities of Pennsylvania and Maryland, by a FOREIGN SPECTATOR.

NUMBER XXI.

The silence of the constitution, on trial by jury in civil cases, has been construed into an implied prohibition, and criti[ci]zed as such with great severity, by the minority of Pennsylvania.^(a) Though what is already said may be a sufficient reply to this alarming reproach, we shall discuss their arguments in order to remove the apprehensions of many well-disposed persons, on a matter of such consequence. They first consider the express stipulation of trial by jury, in all criminal cases, as exclusive of it in civil. This only proves, at the best, that the constitution regards the latter as less necessary; but we have clearly seen that the diversity of this institution, and the difficulty of devising a mode and extent agreeable to all the states, sufficiently accounts for the omission; and that it is supplied by the constitutional power of Congress to establish and *ordain* such inferior courts as they may judge proper, from time to time, which implies all necessary regulations of proceedings.

Secondly, they say that the appeal from both law and fact being expressly established, is inconsistent with trials by jury; unless the United States should be drawn into the absurdity of calling and swearing juries merely for the purpose of contradicting their verdicts, which would render juries contemptible, and worse than useless. The appeal from both law and fact is not absolutely established, but with *such exceptions* as the Congress shall make. Nor is appeal, as to fact, altogether incompatible with trial by jury. It is usual, in courts at common law, to supercede a verdict, and grant a new trial. In such case, a contradiction between the two juries is not a proof of either being perjured, but that one has better judgment than the other. The reasoning of Blackstone on this matter is very interesting. "Our ancestors saw, that a jury might give an erroneous verdict, and, if they did, that it ought not finally to conclude the question in the first instance: but the remedy which they provided,^(b) shews the ignorance and ferocity of the times, and the simplicity of the points then usually litigated in the courts of justice. They supposed that, the law being told to the jury by the judge, the proof of fact must be always so clear, that, if they found a wrong verdict, they must be willfully and corruptly perjured; whereas a jury may find a verdict very manifestly wrong, without any bad motive at all: from inexperience in business, incapacity, misapprehension, inattention to circumstances, and a thousand other innocent causes.

I admire the wisdom of suffering time to bring to perfection new remedies, &c. If every verdict was final in the first instance, it would tend to destroy this valuable method of trial, and would drive away all causes of consequence to be decided according to the forms of the civil law, &c. Causes of great importance, titles to land, and large questions of commercial property, come often to be tried by a jury, merely upon the general issue: where the facts are complicated and intricate, the evidence of great length and variety, and sometimes contradicting each other; and where the nature of the dispute very frequently introduces nice questions and subtilities of law,” &c.^(c) Whenever a new trial is thus granted, there is in reality an appeal from one jury to another, though under the same judges; why then may there not be appeal from one court and jury to another? The revision of fact is not more unreasonable in the latter case. I scruple not to assert that in some causes, original cognizance by juries is very compatible with appeal, both as to law and fact, to the supreme federal court; which may then either remand the cause to the original court for a second trial of the fact, or commit it to some other court in the district for the purpose. The examples of Georgia and Connecticut show that appeal both as to law and fact is practicable.^(d) The establishment of some inferior appellate courts will also facilitate it.

The third proof of this minority is, “that the federal courts are to decide on all causes of law and equity, which is a well-known characteristic of the civil law; and have cognizance not only of the laws of the United States, and of treaties, and of all cases affecting ambassadors, but of all cases of admiralty and maritime jurisdiction, which last are matters belonging exclusively to the civil law in every nation of Christendom.” This only proves that a part of the federal judicial system cannot be conducted by the mode of common law; and it moreover conveys an effectual vindication of the appeal both as to law and fact in that part at least. If cases of admiralty are not in the original cognizance susceptible of jury-trial, a compleat appeal from the inferior courts to the supreme is very reasonable. The same applies to certain cases of equity, and some causes originating under treaties and the laws of the union.

The minority of Maryland would secure “the trial by jury in all cases, the boasted birth-right of Englishmen, and their descendants, and the palladium of civil liberty.” The minority of Pennsylvania does “abhor the idea of losing this transcendant privilege, with the loss of which, it is remarked by a learned author, that in Sweden the liberties of the commons were extinguished by an aristocratic senate.” I respect the learned Blackstone; but he is mistaken in this matter.^(e) That sort of trial by jury, which obtained in that country about the middle of last century, when Whitlock was ambassador there, is yet preserved. The revolutions of government have not changed the judicial system, though the administration of it has occasionally been corrupted by the baneful spirit of party. I observe also that the aristocracy he mentions, was nothing else than the alternate tyranny of two parties, and this in a great measure was the result of licentiousness—an evil natural to free states. As for those juries, though remaining for years, &c. they bear some resemblance to the English,^(f) (and, both in the original and appellate county courts, are of excellent use) for the trial of plain facts. Trial by jury, in civil cases, is no doubt, if well regulated, a valuable safe-guard of liberty, but not comparable to the *habeas corpus* writ, and trial by jury in criminal cases; these are the principal bulwarks of civil liberty. It is in many respects very beneficial, and ought to be exercised in every practicable case. Its extent must be determined by the situation of civil affairs, and by the degree of knowledge in the great body of the people: a considerable degree of virtue is also required in this as in other branches of a free constitution.

The minority of Maryland must well know that it cannot be proper in all cases. They propose, in the above-mentioned 4th am. “that there be an appeal in all cases of revenue, as well *to matter of fact* as law; and that Congress may give the state courts jurisdiction of revenue cases, for such sums and in *such manner* as they may think proper.” By their own doctrine, “the appeal from fact *destroys that trial* in civil cases.” By *such manner*, is also implied an option to dispense with it.

Finally, I beg leave to remark, that the boasted birth-right of Englishmen is a very unmeaning panegyric on trial by jury, or any other civil blessings, which, I presume, Providence intended for all nations, English or French, Christians or Mussulmen. With all esteem for the English nation, I also assert, that this birth-right of human nature, like all others, wants further improvement. Among other things, I think it wrong to demand a perfect unanimity in civil cases, and highly absurd to inforce it, by keeping the jurors without meat and drink, candle and fire, as if such mortification was intended to strike up an inward light, or procure a supernatural revelation. I will not pretend, with Pope, that “wretches hang, that jurymen may dine;” but, as a party, I should fear that their hungry decision might bring me to starving.

(a) *See the address.*

(b) *A writ of attaint against the jurors, by which they and their families were ruined—3d vol. p. 402–3.*

(c) *Blackstone’s Commentaries, vol. 3, p. 389–390.*

(d) *See their constitutions.*

(e) *Blackstone’s Commentaries, 3d vol. p. 381.*

(f) *Whitlock on parliament, 2 vol. p. 427.*

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