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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 XXIII.

The last amendment on the judicial power, is this, by the minority of Maryland, *That the federal courts shall not be entitled to jurisdiction by fiction or collusion*, 7th am. Fiction is a very significant term in the English law, expressing a mode by which causes are transferred from their proper forum to another. The court of king's bench has a very extensive jurisdiction, by a supposition that all actions affect the public, and are thus cognizable by the government. On the crown-side, it may take cognizance of all crimes, from high treason down to any trifling misdemeanor; and all indictments for criminal actions may be removed into it from any inferior court, by a *writ of certiorari*, to be tried in the county where the fact happened.<sup>(a)</sup> On the plea-side, it has an original jurisdiction of all trespasses, and other injuries alledged to be committed *vi et armis*<sup>1</sup> which, being a breach of the peace, favour of a criminal nature, although the action is brought for a civil remedy; and for which the defendant ought, in strictness, to pay a fine to the king, as well as damages to the injured party. By a *fiction* yet more extraordinary, this court also holds plea of all personal actions whatsoever, it being surmised, that the defendant is arrested for a supposed trespass, which he never has committed.<sup>(b)</sup> By a similar fiction, all kinds of personal suits may be prosecuted in the court of exchequer; it being suggested by the plaintiff, that he is the king's debtor, and is become less able to pay his demands, from the injury done by the defendant.<sup>(c)</sup>

This mode of proceeding is not, in fact, so absurd as it at first must appear; it is also deemed beneficial, in certain respects, by the Civilian just quoted, as a means of shortening law-suits, &c. It is, however, at best, a confusion in the judicial system, and may, in some cases, give the crown an improper influence, as he admits. But, however justifiable it may be in one consolidated empire, it would be highly absurd in the United States. Such *fiction* would, indeed, realize the fears of the minority, and enable the federal courts to swallow up the state jurisdictions. But it is needless to guard against such imaginary encroachments. It is evident, that the federal judiciary power cannot conquer the dominions of the state jurisdictions, before the federal legislative power has annihilated the state governments; because these powers are co-ordinate. What probability is there, for example, that a federal court will assume the cognizance of a civil action between

two citizens of Pennsylvania, by the suggestion that both, as paying federal taxes, are debtors to the United States? Or that two persons in Georgia, who box each others ears, shall be amenable to the supreme federal court in Philadelphia or New-York, as disturbers of the peace in the union? *Collusion* between the federal courts and individuals, to make these prosecute private wrongs as public injuries, is not then practicable by the means of such *fiction*. So far as it might be practised within the precincts of the federal jurisdiction, it is guarded against by those English laws which are in full force here. Thus, accusation of any capital offence must be warranted by the oath of twelve men, before the party is bound to answer it.<sup>(d)</sup>

In the high court of chancery, *fiction* is a mode of proceeding, by which a point of law, or a matter of fact arising in the course of pleadings, is referred to another tribunal. This court, which is in matters of civil property of the greatest consequence, proceeds according to the civil law, and has no power to summon a jury; but to remedy this defect, when any matter of fact is strongly controverted, it is usually directed to be tried at the bar of the court of king's bench upon a *feigned issue*. A question of mere law is also sometimes referred to the judges of that court.<sup>(e)</sup> This species of fiction is a necessary expedient in this and similar courts of equity. The proper object of equity jurisdiction is to give a more effectual relief, than can be had in the courts of common law. It speedily determines questions that must otherwise be tried in a great multiplicity of actions. As in the blended train of many causes, difficult points of law may arise, it is proper to refer them to a superior court, or even to a court of equal rank which is their particular forum. Again, when a matter of fact is doubtful, it is prudent, not to depend entirely on the depositions of witnesses, but direct a trial by jury in some court of common law; when this mode is either not adopted, or not practicable in such court of equity. By these means, all *interlocutory* issues are settled, and this court is enabled to give a summary, yet equitable, decision in very complex and important causes.

If the above amendment alludes to this kind of fiction, it means in general, that no federal court shall take up any cause, which it cannot finish without the help of another. This prohibition would maim the whole judicial system, the kindred parts of which should co-operate for the public good. If an inferior court can obtain instruction from a superior on a difficult point of law, which may arise in the course of debate, it will be enabled to give a satisfactory decision of the cause; otherwise a flaw in this point will make the general judgment wrong, and compel the injured party to an expensive, troublesome appeal. The supreme court must be stationary in the centre of a vast jurisdiction, and a multiplicity of great affairs. It must, therefore, when requisite, direct every issue of fact to be tried in the proper place, either by the inferior courts, or by others appointed for the purpose, similar to that of assize and *nisi prius*,<sup>2</sup> which is collateral and auxiliary to the superior courts in England.<sup>(f)</sup> Waving the dispute about appeals as to fact, the mere original jurisdiction of the supreme court requires these expedients. Should public conveniency render two or three intermediate superior courts necessary, these remarks may be applicable to them.

To conclude this subject, whatever is practicable and salutary in these amendments on the judicial department, may be constitutionally adopted by Congress: as concurrent jurisdiction between the federal and state courts in some cases: appeal both as to law and fact with proper exceptions: trial by jury in civil cases in the mode and extent most beneficial. Enthusiastic attachment to the forms of common law, and indiscriminate censure of the civil law system, will be corrected by an impartial estimation of their advantages and defects; a judicious mixture of

both would introduce one very excellent.<sup>(g)</sup> As to equity jurisdiction, it is in the English constitution perplexed with accidental additions; it should be confined to the original design, which is relief in extraordinary cases. So reformed, it ought still to be vested in the inferior courts to a certain degree; but beyond this in the superior exclusively, because it implies in fact a power to judge without law.

(a) *Blackstone's Comm. 4th vol. p. 265.*

(b) *Ditto, 3d vol. p. 42.*

(c) *Ditto, 3d vol. p. 45.*

(d) *Blackstone, 4th vol. p. 309–16.*

(e) *Blackstone, 3d vol. p. 452.*

(f) *Blackstone, 3d vol. page 57.*

(g) *See Blackstone, on the defects of trial by jury and the remedies proposed; also on the proceedings in the courts of equity—Comm. 3d vol. p. 382, 426, &c.*

1. Latin: with force and arms.

2. Latin: unless before. In law, it means the court of original jurisdiction, where the cause is tried by a jury, as distinguished from the appellate court.

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