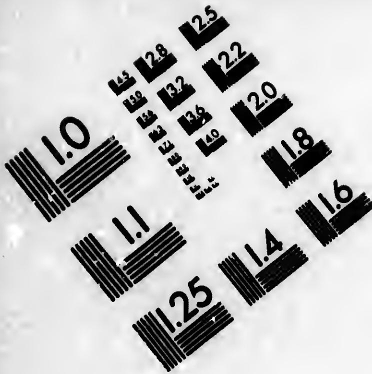
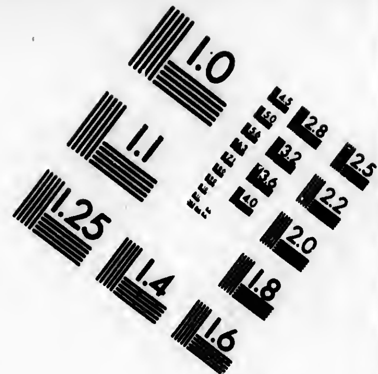

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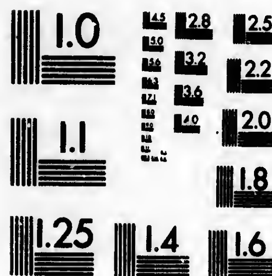
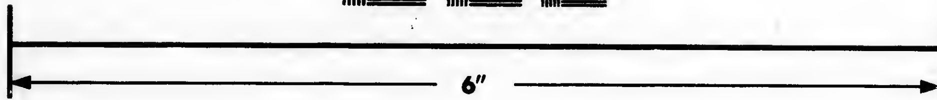

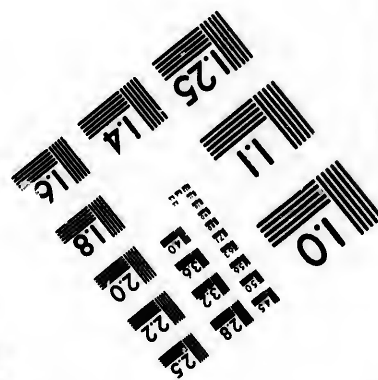

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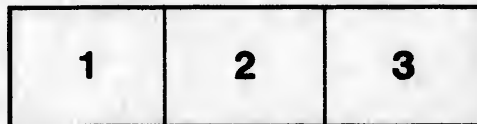

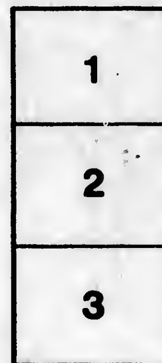

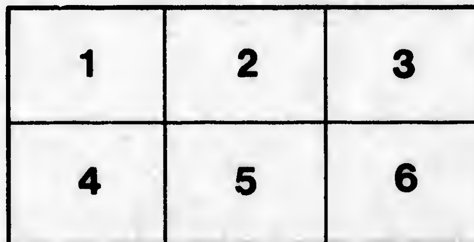

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THE

SUPREMACY OF GREAT BRITAIN

NOT INCONSISTENT WITH

SELF-GOVERNMENT FOR THE COLONIES.

"I look, I say, on the imperial rights of Great Britain, and the privileges which the Colonists ought to enjoy under these rights, to be just the most reconcileable things in the world. The parliament of Great Britain sits at the head of her extensive empire in two capacities: one, as the local legislature of this island, providing for all things at home, immediately, and by no other instrument than the executive power; the other, and I think her nobler capacity, is what I call her imperial character,—in which, as from the throne of heaven, she superintends all the several inferior legislatures, and guides and controls them all, without annihilating any. As all these provincial legislatures are only co-ordinate with each other, they ought all to be subordinate to her; else they can neither preserve mutual peace, nor hope for mutual justice, nor effectually afford mutual assistance."

Mr. Burke—*Speech on American Taxation.*

THE SUPREMACY

OF

GREAT BRITAIN

NOT INCONSISTENT WITH

SELF-GOVERNMENT

FOR

THE COLONIES.

BY

HENRY THRING.

PUBLISHED FOR THE SOCIETY FOR THE REFORM OF COLONIAL GOVERNMENT.

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THE

SUPREMACY OF GREAT BRITAIN

NOT INCONSISTENT WITH

SELF-GOVERNMENT FOR THE COLONIES.*

A COLONY is a portion of the population of a country, which settles on distant lands, with the intention of forming a dependent political community.

The leading characteristics of a colony, when viewed in relation to a scheme of colonial government, are three: identity of race; distance from; and dependency upon the mother country. If any of these be wanting, a community, although it may fall within the strict definition of a colony, does not come within the scope of this treatise. The first part of the definition excludes Ceylon, the East Indies, Malta, the Ionian Islands, and similar dependencies. In these, the greater part of the cultivators and proprietors are not Englishmen, nor do those who are English reside there with the intention of founding a new community, but for purposes of trade or government. Distance also necessarily forms an element in the conception of a colony; for if a community be settled so near the supreme government, as

* Throughout these pages the reader is supposed to be acquainted with the provisions of the Colonial Bill printed in the appendix. These provisions were brought forward last year by Sir William Molesworth, in the shape of amendments on the 'Australian Colonies Bill,' and have not been substantially altered.

to be directly subject to its control, there is no necessity for the interposition of a subordinate government; the nature of which alone forms the subject of this treatise. For example, a settlement such as that of the English under Cromwell in Ulster is excluded from any scheme of colonial government: which embraces only such communities, as being in other respects qualified, are situated so far from the supreme government, that they cannot, in the nature of things, be made immediately subject to its action. Lastly, dependence enters necessarily into the description of a colony; for if a body of men emigrate with the intention of setting up an independent government, or of submitting to a foreign country, they renounce the mother country, and form no part of her political system.

This description of the characteristics of a colony, will lead to the consideration of the relationship between it and the mother country. Now, a system of communities, one of which is supreme, and the other subordinate, is sometimes styled an empire, and, in that sense of the word, I shall speak of Great Britain and her Colonies, as an empire; calling the rights of the mother country over the colonies 'imperial' rights, and the rights of the colonies, as contradistinguished from those of the mother country, 'colonial' rights, and the nature of these two classes of rights will form the first subject for consideration. To begin with colonial rights: on this point, the language of the law of England is very explicit. In 2 P. Wms. 75, it is stated, 'that if there be a new and uninhabited country found out by English subjects, as the law is the birthright of every subject, so wherever they go, they carry their laws with them, and therefore such new found country is to be governed by the laws of England.' This general statement was somewhat qualified by Lord

Mansfield, in Campbell and Hall; Howell's 'State Trials,' vol. xx. p. 289,—but without any diminution of the rights of the colonists; he thus expresses himself: 'It is absurd that in the colonies they should carry *all* the laws of England with them; they carry only such as are applicable to their situation!'

Another authority says, 'Let an Englishman go where he will he carries as much of law and liberty with him as the nature of things will bear.'—Chalmers' Opinions, 195, quoted in Clark's Colonial Law. These English authorities are in accordance with Vattel, i. 19, 21. 'Lorsqu'une nation s'empare d'un pays éloigné, et y établit une colonie, ce pays, quoique séparé de l'établissement principal, fait naturellement partie de l'état, tout comme ses anciennes possessions.' The conclusion to be deduced from these authorities is, that a colonist is entitled to all the privileges of an Englishman, so far as is consistent with his position as a colonist, or, in other words, so far as is consistent with the unity of the empire, and the due subordination of its various parts. This follows so directly from the very definition of a colony, that any reference to authorities would appear almost to render doubtful what is already clear: for as distance alone constitutes the difference between an English county and an English colony, no reason can be suggested why the privileges enjoyed by an inhabitant of the one should be withholden from an inhabitant of the other. What would Lancashire or Yorkshire say, if the other counties of England were to combine to deprive them of the right of representation, and subject them to the government of an irresponsible Viceroy and an irresponsible Council? Yet a Lancastrian or Yorkshireman need only go to New Zealand to suffer this injustice at the hands of his countrymen.

How keenly this is felt by a colonist, appears from the following picture drawn by Mr. Martin, a late member of the Legislative Council of New Zealand: He says, 'the 'British colonist is, politically speaking, a serf, or rather a 'slave; for the feudal system, however barbarous it may have 'been, was in many respects preferable to the system of 'colonial government. It is true that the serf worked for his 'feudal lord; but his labour and attachment were rewarded by 'a certain amount of kindness and protection, which the colo-'nist has never yet experienced at the hands of his self-'constituted masters—he is the slave in the hands of the 'overseer. To persons in England especially, if they are 'unacquainted with colonial matters, it may appear strange 'that a colonist should be spoken of in this manner: they 'cannot understand how persons, whom they have been 'accustomed to regard as enterprising and independent, can 'be represented in this unhappy light; but it is, nevertheless, 'true, as every man finds to his cost, when he arrives in a new 'colony. An Englishman cannot sell his birthright, but he 'may be deprived of the best part of it by his government. 'He will be looked after, claimed, and taxed as a British sub-'ject wherever he may be found; but if he should determine 'upon leaving the united kingdom for any of the British pos-'sessions abroad, let him not deceive himself by imagining 'that he will carry with him any of his political rights to the 'colony to which he may emigrate. A slave becomes a free 'man if he be fortunate enough to touch English ground; but 'an Englishman, if he settle in an English colony, becomes 'politically a slave.

'The Government of England is called a mixed govern-'ment; the power is equally divided between the monarch, the 'barons, and the people; of these three estates the monarchy

'alone is extended to the colonies: it is usually vested in a
'viceroy or governor, in whose hands it generally degenerates
'into the purest and most absolute despotism.'*

Resentment at this deprivation of constitutional rights has lately been expressed by New Zealand; but is so far from being confined to that colony, England's youngest, most favoured, and fairest child, that it is shared by almost every dependency of the Colonial-office. New South Wales has already expressed her gratitude to Lord Grey for his legislation last year, by electing the demagogue Dr. Lang member for Sydney; and the indignation of the Cape at her deceitful gift of freedom has found a constitutional vent by sending a deputation to England to lay her grievances at the foot of the throne.

It is clear, therefore, that the colonies are dissatisfied with the present form of colonial government; yet allowing this to be true, it may be said that such evils are necessary incidents to the relationship between a mother country and her colonies, and must be taken as a counterpoise to the corresponding advantages. Now, if it be true, that a colonist cannot enjoy all the liberties of an Englishman without throwing off his allegiance to the English Crown, instead of advocating any change, I should not hesitate to uphold the present system; for such a system, defective though it be, is surely better than that which would hand over our colonies to a foreign power. On the other hand, 'if the imperial rights
'of Great Britain, and the privileges which the colonists
'ought to enjoy under these rights be,' (as Mr. Burke says they are,†) 'just the most reconcileable things in the world,' no expression can be too strong for the condemnation of a

* *New Zealand*, by D. Martin, Esq., M.D. 12mo.
† See extract at the beginning of the pamphlet.

government department, which, greedy of power, and covetous of patronage, regards the colonies as a sphere for the exercise of the legislative fancies of a colonial minister, and the appointments of the colonial government as a provision for such members of the aristocracy as are too ignorant or too idle to obtain promotion at home.

True it is that these facts may be disgraceful to the Colonial-office; and that imperial may be *in theory* compatible with colonial rights: but this is not enough. The proposer of a new scheme of colonial government is certainly bound to describe the framework of the constitution he proposes, and to explain the mode of its operation, as illustrated by practical examples. It appears, therefore, that two abstract questions must be determined—first, what are the rights of a colonist? and secondly, assuming that Great Britain and the Colonies ought to form one United Empire, what rights of supremacy must be reserved to Great Britain to maintain that union? or, in other words, what are imperial rights?

Having determined these two questions, the greater difficulty remains of adjusting these two classes of rights on a certain basis, by means of a written constitution, and protecting such constitution from being invaded by the ignorance, or petulance, of the colonies. The first of the above propositions need not detain us now. A distinct principle has been shown to be laid down in the English law for our guidance in ascertaining the rights of the colonist; and it will be more convenient to postpone the consideration of them till we have determined the nature of the powers to which they are to be subordinate. By treating the subject in this order, I hope to show that after vesting in Great Britain all powers that are necessary to maintain her as the supreme

head of the empire, there still remain to be assigned to each colony such legislative and administrative functions as will leave the colonist little cause to complain that he has left any of his liberties behind him in the mother country. With respect to the second inquiry, the definition of imperial rights, greater difficulty exists; as the imperial power is confessedly supreme, there is no rule of law to limit its extent, and arguments derived from considerations of political expediency are always vague and unsatisfactory. This objection applies with ten-fold weight to any attempt to frame a *written* constitution, as it is notorious that schemes of government, devised by the wisest men, have lamentably failed in practice. All these difficulties, however, vanish at once if a precedent can be found suited to the present case; for there can be no rashness in adopting a form of government which has already received the sanction of experience; and little danger can be feared of misinterpreting a law which has frequently been discussed by competent judicial tribunals.

No precedent, however, can be found *exactly* to meet a proposed case; it may be useful, therefore, before producing the precedent which I intend presently to apply, to consider the points of similarity which it is essential such a precedent should possess, in order that we may be able to distinguish those circumstances on which success depends from those which are merely accidental. Now, bearing in mind the definition that has been given above of an empire and of a colony, the precedent must at all events go far enough to prove the possibility of a system of communities, one of which is supreme and the others subordinate, being consolidated into one nation, without the sacrifice of the liberties of the subordinate communities or of the supremacy of the governing power. From this proof nothing will be detracted

if in the precedent the subordinate communities enjoy larger powers of government than will satisfy the claims of the communities for which the new scheme is formed, as it follows necessarily that if such a union be consistent with a less degree of subordination in the inferior communities, it must be maintainable with a greater. Still less will the force of the example be weakened, if in the precedent the central power be vested in functionaries selected by the several communities themselves, instead of in one dominant community, or in other words, if the precedent be a federal system of states, and the proposed scheme an imperial system of colonies. In the former case, the union of the whole body depends on the co-operation of all or the greater part of the members, whilst in the latter the power of a dominant community is ever ready to reduce to obedience any member of the system that may interfere with the welfare of the rest.

Now the precedent I propose to adduce is the constitution of the United States of America, and I have selected it as an example, not only because it is framed in the English language and based on the English law, but because it combines more completely than any government with which I am acquainted unity of the whole with a separate organization of the parts. This combination has been effected by making the constitution of the United States a government over individuals and not over communities, or, in other words, by creating a national and not a federal supreme government. This distinction between a national and federal government seems to require a fuller explanation. Suppose a number of independent states to form an association for the purposes of common protection, and to vest certain rights of supremacy over all the members

of the confederation in some body of persons chosen by themselves. The government thus created is a federal government, and it differs from a national government principally in this, that it carries down its decrees not to individuals, but to the states in their corporate capacity alone; for example, if an individual transgress a federal law he is punished by the state to which he belongs, and not directly by the federal power; if a state disobey, the federal power does not act of itself, but calls on the other states to assist in punishing the refractory member. On the other hand a national government recognises no communities, but addresses itself to individuals alone as its subjects, and makes its power felt by them through the agency of the ordinary ministers of justice. Now, the constitution of the United States being, as has been stated, national in its character though federal in name, has individuals and not states for its subjects, and exercises the same jurisdiction in matters of federal cognizance throughout all the states of the Union that a state government exercises within its own precincts in matters of state cognizance. It follows, therefore, that every American has a two-fold citizenship—he is a citizen of the United States and a citizen of his own particular state, in the same way as a colonist is a member of a colonial community, and also a subject of Great Britain. The United States, in fact, is but another name for one vast empire, ruled by a supreme head, but made up of separate communities, enjoying large subordinate powers of government. The resemblance which such a state of things bears to a well-constituted colonial empire is evident, and I shall endeavour to show that, by substituting a monarchical for a federal power, and by creating in each colony a local government analogous in form to that of England in the

stead of a democracy, a relationship will be established between the mother country and the colonies as intimate as that between the several members of the American Union, and less liable in its nature to disruption.

Having thus stated the general principle pervading the American Constitution, which makes it so apt a model for our imitation, the next step is to examine the provisions by which that principle is carried out in practice. In making this examination, the course I shall pursue is, in the first place, to state, in the words of the constitution, the whole mass of powers vested in the federal government, and then to point out in detail the nature of such powers, and the method of adapting them to a colonial constitution. The enumeration of the powers would not be complete without at the same time adding the prohibitions imposed on the separate states, as, in many cases, the negation of a privilege to the one jurisdiction amounts in fact to conferring it on the other. The prohibitions, therefore, will follow the powers, and be treated of in immediate connexion with them. Now, in order to understand the clauses relating to the federal powers, it is only necessary to add, that the government in whom they are vested is composed of a president, and two houses of parliament, called Congress. The powers themselves are by the 8th section of the Constitution vested in Congress, and are in the following words :—

The Congress shall have power—

1. To levy and collect taxes, duties, imposts, and excises, to pay the debts and provide for the common defence and general welfare of the United States; but all duties, imposts, and excises, shall be general throughout the United States.

2. To borrow money on the credit of the United States.

3. To regulate commerce with foreign nations, and among the several states, and with the Indian tribes.

4. To establish an uniform rule of naturalisation, and uniform laws on the subject of bankruptcies throughout the United States.

5. To coin money, regulate the value thereof, and of foreign coin, and fix the standard of weights and measures.

6. To provide for the punishment of counterfeiting the securities and current coin of the United States.

7. To establish post-offices, and post-roads.

8. To promote the progress of science and useful arts, by securing for limited times, to authors and inventors, the exclusive right to their respective writings and discoveries.

9. To constitute tribunals inferior to the Supreme Court.

10. To define and punish felonies committed on the high seas, and offences against the law of nations.

11. To declare war, grant letters of marque and reprisal, and make rules concerning captures on land and water.

12. To raise and support armies, but no appropriation of money to that use shall be for a longer term than two years.

13. To provide and maintain a navy.

14. To make rules for the government and regulation of the land and naval forces.

15. To provide for calling forth the militia to execute the laws of the Union, suppress insurrections, and repel invasion.

16. To provide for organizing, arming, and disciplining the militia, and for governing such part of them as may be employed in the service of the United States, reserving to the States respectively the appointment of the officers, and the

authority of training the militia according to the discipline prescribed by Congress.

17. To exercise exclusive legislation in all cases whatsoever over such district, not exceeding ten miles square, as may by cession of particular States, and the acceptance of Congress, become the seat of the Government of the United States; and to exercise like authority over all places purchased by the consent of the Legislature of the State in which the same shall be for the erection of forts, magazines, arsenals, dockyards, and other needful buildings.

18. To make all laws which shall be necessary and proper for carrying into execution the foregoing powers, and all other powers vested by the Constitution in the Government of the United States, or in any department or offices thereof.

The next section places some limitations on the Congress, which are not material, and the Constitution then proceeds, in section 10, to place certain restrictions on the States.

Art. I.—No state shall enter into any treaty, alliance, or confederation, grant letters of marque and reprisal, coin money, emit bills of credit, make anything but gold and silver coin a tender in payment of debts, pass any bill of attainder, *ex post facto* law, or law impairing the obligation of contracts, or grant any title of nobility.

Art. II.—No state shall, without the consent of Congress lay any imposts or duties on imports or exports, except what may be absolutely necessary for executing its inspection laws, and the net produce of all duties and imposts laid by any state on imports or exports shall be for the use of the treasury of the United States, and all such laws shall be subject to the revision and control of the Congress. No state

shall, without the consent of Congress, lay any duty of tonnage, keep troops, or ships of war in time of peace, enter into any agreement or compact with another state, or with a foreign power, or engage in war, unless actually invaded, or in such imminent danger as will not admit of delay.

Such then are the provisions, consisting partly of powers and partly of restrictions, under which twenty-six republics have, some for the last sixty years, been incorporated into one nation, without losing their individuality or separate organization. The fact of this incorporation having succeeded for so long a period, proves to demonstration the *possibility* of combining, under a *federal* head, a number of republican communities. And it has been already remarked, that the same means must be still more effectual to secure union in an empire or system of communities, one of which is supreme, and the others subordinate. The determination therefore of imperial rights becomes a matter of certainty; it is only necessary to analyse the above clauses, and, excluding such as are unessential to unity, to transfer the residue to the colonial bill, distributing the powers amongst such functionaries of the mother country as are entitled by law to receive them, and imposing the restrictions on the colonies instead of the states.

The unity of the empire being thus secured, the constitution would be complete if the colonies were intended to be no more dependent on the mother country than the states are on the federal power. Such a degree of independence would however be destructive to the welfare of the colonist, and inconsistent with English law, the admitted standard of his privileges; restrictions must therefore be added, to secure to the colonies the advantages of a monarchical form of government.

This being done, nothing will remain to complete the scheme but to create in each colony a local government, resembling as nearly as circumstances will allow the government in England, with power for the colonists, within certain limits, to mould and adapt it according to their real or fancied wants.

Before commencing the analysis which is to afford the materials on which a colonial bill is to be grounded, it may be well to mention a circumstance resulting from the very nature of a colony that is in favour of the proposed colonial scheme, as compared with the American constitution. In America the constitution was framed by the members of sovereign states; all powers, therefore, granted to the federal* government were so much subtracted from the states, and, as a consequence, the states retained their original powers unimpaired, except in so far as they were delegated to the federal government.

The government, then, of the United States can claim no powers which are not granted to it by the constitution, and the powers actually granted must be such as are expressly given, or given by necessary implication. The result of this has been, that the most difficult questions that have arisen on the American constitution, have been questions as to the ability of Congress to do particular acts essential to the existence of an organized government, not as to the constitutional character of the acts done by the incorporated states. The distinction between the two classes of defects in reference to the existence of the body politic, is as great as the difference

* After what has been said on the *national* character of the government of the United States, the use here of the term 'federal' is inaccurate. It has been adopted, however, in deference to common usage, and for the sake of distinguishing the supreme government from the state governments.

between paralysis of the heart, or the disease of an extremity, would be in reference to the health of the natural body; any material defect in the federal government, would destroy the whole system, and resolve the United States into their separate elements; on the other hand, any unconstitutionality on the part of a state might lead to a partial disarrangement of the harmony of the government, but would admit of easy cure if the central power were possessed of sufficient energy.

Now, in a colonial scheme, the first class of questions can never occur; a colonial government is the creation of the dominant community, and the same power that has constructed the fabric, may at any time amend its defects, or destroy it altogether. The occurrence of the second class of questions is contemplated by the constitution, and the same means are provided for settling them peaceably, as have been effectual in America in maintaining harmony amidst the difficulties caused by the necessity of deciding on both classes of questions. Turning then from this digression to an analysis of the above-mentioned powers and restrictions, we shall find that the powers will be found naturally to fall under four heads:

1st. Powers required to be vested in the supreme government by reason of local circumstances.

2nd. Powers relating to the intercourse of the United States with foreign nations.

3rd. Powers regulating the intercourse of the states amongst themselves.

4th. Powers relating to subjects on which uniformity of legislation throughout the states was considered desirable.

In a similar manner, the prohibitions divide themselves into two heads:

1st. Prohibitions necessary to give effect to the above powers.

2nd. Prohibitions derived from the obligations of natural law.

The powers that may be classed as local are the power to levy and collect taxes, and pay the debts of the United States. The power to borrow money on the credit of the United States. The power to establish post-offices and post-roads. The exclusive power of legislation in all cases whatever over such district, not exceeding ten miles square, as may by cession of particular states, and the acceptance of Congress, become the seat of the government of the United States.

These powers appear to be called with propriety local, as their necessity arises from the local position of the seat of the federal government, in the centre of the dependent states, without reference to its characteristic as the bond of union between numerous communities, and they may, therefore, as I have said before, be dismissed from our consideration in framing a colonial constitution.

The next class of powers are the foreign powers, which may shortly be described as powers of making peace and war, and regulating commerce. Some of these powers have, by the American Constitution, been allotted to the President, and it will be convenient, therefore, to introduce here the clauses relating to them, in order that there may be brought under our view at the same time the aggregate number of powers which regulate the intercourse of the American people as one nation with foreign countries. The provision is as follows:—'The President shall have power, by and with the advice and consent of the senate, to make treaties, provided two-thirds of the senators present concur, and he shall nominate and, by and with the advice and consent of the senate, shall appoint ambassadors and other public ministers and consuls.'

Now taking all these powers together the federal government have power—

'To regulate commerce with foreign nations.

'To make treaties.

'To declare war.'

And as subsidiary to the general power of making war, they have power to grant letters of marque and reprisal, to make rules concerning captures by land and water, to maintain and regulate an army and navy, to organize and, in some cases, govern the militia, and, with the consent of the legislature of the state, to purchase such places as may be necessary for enabling them to take military possession of the country.

In a like manner, the power to define and punish piracies and felonies committed on the high seas, and offences against the law of nations, may be considered as necessarily incidental to a power to regulate commerce; and the nomination and appointment of ambassadors and consuls, to a power of making treaties.

These powers are the *jura summi imperii*—the very insignia of supremacy—and must obviously be exercised by the mother country, if any link at all be intended to subsist between the mother country and her colonies, or the former to have any powers at all over the latter for the common good, the common protection, or common action. Before however introducing them into the colonial bill, it is necessary to decide in what department of the state they must be vested, and on turning to the records of the English law for authority on this point, we discover at once the source from whence they were derived by the Americans, and ascertain in whom they should reside consistently with English law.

Mr. Justice Blackstone, in enumerating the prerogatives of the Crown, says, with regard to foreign affairs, 'the sovereign is the delegate of the people; the sovereign has the sole power of sending ambassadors to foreign states and receiving ambassadors at home.' 'It is also the sovereign's prerogative to make treaties, leagues, and alliances with foreign states.' Again, 'Upon the same principle, the sovereign has also the sole prerogative of making peace and war, for it is held by all the writers on the law of nature and nations that the right of making war, which by nature subsisted in every individual, is given up by all private persons that enter into society and is vested in the sovereign power.' A little further on he says, 'But as the delay of making war may sometimes be detrimental to individuals who have suffered by depredations from foreign potentates, our laws have in some respect armed the subject with powers to impel the prerogative, by directing the ministers of the crown to issue letters of marque and reprisal upon due demand, the prerogative of granting which is nearly related to, and plainly derived from, that of making war.' He then proceeds: 'That the prerogative of granting safe conducts stands exactly upon the same ground;' and concludes by stating, 'That such are the principal prerogatives of the sovereign respecting the nation's intercourse with foreign nations, in all of which he is considered as the delegate or representative of his people.'

Now, comparing the foreign powers of the American constitution with the above prerogatives, their resemblance strikes the attention at once, and the idea immediately suggests itself that the authors of the federal government having taken upon themselves the task of creating a republican empire out of the debris of the British constitution,

transferred the prerogatives of the crown almost in the words of Blackstone to their new federal head. Such was, in truth, the obvious course for men to take who were versed in the principles of English law; they were aware that as English colonists they had never been entitled to interfere with the prerogatives of the crown: in legislating therefore, for a system of subordinate republics with a paramount republican head, they were naturally led to treat the states as they had been treated as colonies, and to clothe the republican head with those powers which had previously been exercised by the government in England.

The proof of this is complete, when on coming to the next head of American powers, namely, powers regulating the intercourse of the states amongst themselves, it is found to contain the power to coin money, regulate the value thereof, and of foreign coin, and fix the standard of weights and measures; with the subsidiary power of providing for the punishment of counterfeiting the securities and the coin of the United States; for this power of coining money, and regulating weights and measures, are both classed by Mr. Justice Blackstone as amongst the prerogatives of the Crown as arbiter of domestic commerce.

These powers have, of course, been given to the Crown in the colonial bill, and it may be remarked here, that the powers enumerated under the two last heads are the peculiar attributes of sovereignty, which, under the name of 'prerogatives,' 'imperial rights,' or 'federal powers,' every state or system of states, delegates to the supreme authority.

The last head of powers, namely, powers on which uniformity of legislation throughout the states was considered desirable, comprises the power to promote the progress of science and useful arts, by securing, for limited times, to

authors and inventors the exclusive right to their respective writings and discoveries, and the power to establish an uniform rule of naturalization, and uniform laws on the subject of bankruptcies throughout the United States.

The danger intended to be provided against by vesting the two first of these powers in congress is obviated in the colonial bill, by a restriction preventing the colonial parliament from conferring any privilege or immunity on the inhabitants of the colony, that is not equally conferred on the other subjects of her Majesty. The power of establishing uniform laws on the subject of bankruptcies has been omitted, as the propriety of its insertion depends upon local circumstances.

The importance of identifying the imperial rights with the prerogatives of the crown will not be fully understood, without recurring to what was stated at the outset, as to the rights of a colonist, and the necessity of making them the basis of a colonial constitution. It was there laid down as a principle of English law that a colonist is entitled to all the privileges of an Englishman, *so far as is consistent with the unity of the empire*,—implying by the limitation a certain antagonism between English privileges and imperial rights, calculated to give rise to great difficulty in constructing a scheme for their adjustment.

This difficulty, however, would be removed, if it appeared on investigation, that imperial rights were a class of political rights, from any interference with which an Englishman was debarred; for in that event the limitation would be needless, and as no conflict would exist between English privileges and imperial rights, there would be no necessity for any adjustment of them.

Now this is the point which has been proved by the

establishment of the identity between the imperial rights and the prerogatives; for, as it is a settled rule of English law that no subject may interfere with the prerogatives, a colonist cannot complain of being placed under a like restriction as respects imperial rights. On the other hand, as the prerogatives are the only political rights of which the exercise is denied to an Englishman, it will be seen that in the colonial constitution none but imperial rights have been placed out of the reach of the colonist.

Passing from the powers to the prohibitions, the first head has been already considered in treating of the corresponding powers, the second head—namely, prohibitions derived from the obligations of natural law—forbids the states from passing any bill of attainder, *ex post facto* law, or law impairing the obligation of contracts.

Of prohibitions coming under the second head, the first only—namely, that relating to bills of attainder, has been introduced into the colonial restrictions, and as an explanation of its meaning will be found in its proper place, it is needless to notice it here.

The success which attended the Americans in making a republican empire, out of the fragments of the British constitution, affords reasonable ground for hoping that a restoration of the colonial edifice promises at least equal advantages. To accomplish this, it is only necessary to retrace the steps taken by the Americans. They stripped the monarch of his crown to place it on a federal head. They converted monarchical colonies into republican states, with scarcely any increase in their real powers of government. We must reserve to the Crown its rights, and give to the colonies the same powers which were enjoyed by the American colonies before their conversion into states.

This has been accomplished by the 26th section of the

Colonial Bill, which reserves to the Queen as prerogatives the powers vested by the American constitution in the federal head. The clause is as follows:—

That there shall be reserved to her Majesty the several powers and prerogatives following.

1. The power of sending and receiving ambassadors to and from, and of making treaties, leagues, and alliances with any foreign state or power.

2. The power of making peace and war.

3. The power of granting letters of marque, and reprisal during peace or war, and of granting safe conducts in time of war.

4. The power of confiscating the property of alien enemies, and of laying an embargo on shipping.

5. The power of keeping any land or naval forces in the said colony or on the coasts thereof.

6. The power of enlisting men in the said colony for the supply of such forces.

7. The command at all times of all regular military and naval forces, employed in or about the said colony, and the command of the militia in time of war.

8. The power of erecting forts, magazines, arsenals, dockyards, and other buildings for military or naval purposes.

9. The exercise of exclusive jurisdiction within the limits of any place occupied for such purposes.

10. The power of taking any waste land, and likewise, on making due compensation, any other land for the purpose of erecting thereon such forts, magazines, arsenals, dockyards, and other buildings as aforesaid: and for any other military or naval purposes.

11. The power of determining all cases brought before her Majesty, on appeal from the courts of the said colony.

12. The power of establishing prize courts.

13. The power of coining money, and of regulating the value of foreign coin.

14. The power of granting letters of nobility.

15. The power of regulating the transmission of letters by sea between the said colony and other places.

And all powers necessary for giving effect to the above powers and prerogatives.

The reader will perceive that in the enumeration of powers, the language of Mr. Justice Blackstone in defining the prerogatives of the Crown has been adopted in preference to the language of the framers of the American constitution in declaring the powers of the federal government, as being more in conformity with English law. The difference, however, in language even is very slight, and as the same argument will apply to both sets of powers, it is unnecessary to repeat them here.

In section 28th of the Colonial Bill will be found the restrictions on the power of the colonial parliament, and as they are more numerous than the prohibitions in the American constitution, they will require a more extended notice. The clause is as follows:—The parliament of the colony shall not have power to do any of the following things. That is to say—

1. To pass any law affecting or derogating from the powers and prerogatives so reserved to her Majesty as aforesaid.

2. To alter the mode of the appointment of the governor.

3. To control his power of calling together and proroguing the Houses of Parliament, or of dissolving the House of Assembly, or of assenting to or dissenting from bills passed by the said two Houses, or to take from him the power of granting reprieves and pardons.

4. To pass any law altering the succession to, or affecting the style or dignities of the Crown of Great Britain and Ireland, or relating to the appointment of a Regent.

5. To absolve any person from his allegiance.

6. To define treason, or alter the law relating thereto.

7. To pass any act of attainder.

8. To pass any law containing anything contrary to the law of nations, as received and administered in the Courts of Great Britain.

9. To define piracies and felonies on the high seas.

10. To pass any law respecting captures by land or water.

11. To pass any law affecting the command, regulation, discipline, or enlistment of her Majesty's military or naval forces.

12. To lay any duty on supplies for her Majesty's military or naval forces.

13. To make anything but gold and silver a legal tender.

14. To make any judge's tenure of office dependent on anything but good behaviour, or to diminish his salary during his continuance in office.

15. To lay any differential duty on exports or imports to or from any part of her Majesty's dominions, or any duty inconsistent with any treaty that already has been, or may hereafter be entered into between her Majesty and any foreign country.

16. To confer any privilege or immunity on the inhabitants of the colony that is not equally conferred on the other subjects of her Majesty.

17. To establish slavery.

18. To repeal or alter any of the provisions of this act, except those expressed to be subject to alteration by the

parliament of the colony; and any enactment of the parliament of the colony containing anything in contravention of this clause, shall be void.

It would far exceed the limits of the present work to enter into a detailed explanation of the above restrictions, or to defend the introduction of each article. I shall confine myself therefore to pointing out in a general way the object of each class of restrictions, leaving the reader to form his own opinion as to the separate articles.

The first article performs the same office as the first head of American prohibitions, viz. that of giving perfect efficiency to the powers and prerogatives specified in the preceding clause.

By the next two articles the colonies are prohibited from making such material alterations in their local constitution as would convert it from a monarchical into a republican dependency. The 4th, 5th, and 6th articles require no comment, as any violation of them would, even in the absence of an express provision, amount to an act of rebellion.

An act of attainder is a special act of the legislature, by which capital punishment is inflicted on persons supposed to be guilty of high offences, such as treason and felony, without any conviction in the ordinary course of judicial proceedings. This prohibition forms part of the American constitution, and, together with the 17th restriction, may be considered as dictated by natural law.

The restrictions 8 and 9 constitute the 10th power conferred on the American Congress, and were considered by the American legislatures as necessary adjuncts to the power of regulating commerce. The next three restrictions must be taken in connexion with the prerogatives reserved to her Majesty of making war, and providing force for the defence of

the colony. To allow the colony to interfere with the regulation of the troops, or to enrich themselves at the expense of the mother country, by the imposition of duties on supplies for the forces, is so unreasonable that it is needless to reason out the propriety of these restrictions.

The 14th restriction is essential to the dignity and independence of any judiciary, and is found in the British statute-book, as well as in the American constitution.* The 13th, 15th, and 16th restrictions are questions of political economy, and any discussion of them here would be out of place.

The last restriction explains itself; without it, the colonies would be independent, and the provisions of the constitution possess neither force nor validity.

Assuming, then, the constitution to have defined with sufficient accuracy colonial and imperial rights, the next requisite is to provide adequate means of protecting it from infringement by the colonists. Now, in the ordinary case of a supreme government legislating for its immediate subjects, no difficulty can arise; a legislator makes a law, affixes a penalty, and leaves the ordinary judicial tribunals to punish the transgressor. In the case, however, of the mother country legislating for a colony, a difference has been supposed to exist, and it has been conceived that the only effectual way of controlling the colonists is to vest an absolute veto in an irresponsible department, such as the Colonial-office. This in effect annihilates all legislative authority in the colony; for as a colonial minister is subject to none of those influences which render the Crown in England responsible to the people, a colonial parliament, passing bills subject to the disallowance of a colonial

* See Art. iii. Sect. 1, of the American Constitution.

minister, possesses no more legislative power, than a mere conveyancer instructed to draw a bill has legislative power in England.

There is, however, no true ground of difference in the two cases, for an infraction of a constitutional law may, as regards the supreme authority, be considered either as a crime committed by the subordinate state, through its members as agents, or it may be treated as a violation of the law by the individual transgressors. This may be rendered clearer by an example. Suppose in the United States a state were to pass a law* making paper-money a legal tender for the payment of debts, and a state court were to decree a debt satisfied, by a tender in paper-money of the amount due. Here there may be a double crime. The state may be said to have violated the constitution by passing the law, and the suitor to have been wronged, as a subject of the supreme government, by having lost his action, in which he ought to have succeeded.

The double nature of the offence creates two modes of redress; the supreme government might issue a mandate to the state to repeal the state law, or it might leave the suitor to appeal in the ordinary way to the supreme courts, who would render justice to him by decreeing the debt to be due, and the state law making notes a legal tender void.

So long as the state were obedient, the effect would be the same, whatever department exercised the supreme authority; the only difference would be, that in the one instance justice would be administered by the *supreme government* compelling the state to repeal its own law; in the other, *the supreme court* would itself act on the individuals composing the state.

* This is forbidden by the American Constitution.

Suppose, however, a case of resistance on the part of the state, and the danger of the supreme government issuing its decrees to a state in its collective capacity is evident, for as legal process must from its nature be ineffectual against a community in case of disobedience, military force is the only means of coercion that can be employed, and every transgression of the supreme law involves a rebellion.

The importance of this distinction as to the redress of constitutional grievances has been incidentally pointed out in describing the nationality of the government of the United States, and it is this which makes the American constitution so apt a model for a colonial scheme.

The most decisive testimony, however, is given by Mr. Chancellor Kent, who, after describing the failure of the American confederation, by reason of its having acted on states in their collective capacity and not on individuals, goes so far as to say,* 'Most of the federal constitutions in the world have degenerated or perished in the same way, and by the same means. They are to be classed among the most defective political institutions which have been erected by mankind for their security. The great and incurable defect in all former federal governments, such as the Amphictyonic, the Achæan, and Lycian confederacies, in ancient Greece; and the Germanic, the Helvetic, the Hanseatic, and the Dutch republics in modern history; is, that they were sovereignties over sovereigns, and legislations—not for private individuals, but for communities in their political capacity. The only coercion for disobedience was physical force, instead of the decree and the pacific arm of the civil magistrate. The inevitable consequence, in every case in which a member of

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* Kent's Commentaries, vol. i. p. 216.

such a confederacy chooses to be disobedient, is either a civil war, or an annihilation of national authority.'

Now, the application of these principles to the present condition of our colonial empire, can hardly be mistaken; the American confederation perished, because having legislated for states in their collective capacity, it failed in power to carry its decrees into effect; the colonial system is in danger of perishing, because, legislating for colonies in their collective capacity, the Colonial-office alienates its subjects by a galling and uncertain despotism.

Unlike the Colonial-office, the Americans saw the causes of the failure of their confederation, and created a supreme federal judiciary as the arbiter of their constitution; investing it with a federal jurisdiction, co-extensive with the federal power of the supreme government, and giving to it the same powers for carrying its decrees into effect against individual members of the state, through the ordinary ministers of justice, as were possessed and exercised by the governments of the particular states.

This system has now been in operation sixty years; and though the state courts have in more than one instance refused to obey the judgment of the supreme court, the latter has peaceably asserted its authority, and carried its decrees into execution by its own officers.

There is little difficulty in accounting for the ease with which two apparently hostile systems of judicature work together, as the question of the constitutionality of a law always arises in a particular case, one or the other of the litigant parties is always interested in having the decision of the state court reversed. The affections, therefore, of one party are always on the side of the federal power; and a state law decided to be unconstitutional law drops into

oblivion without exciting resistance, and in many cases without even attracting attention, except from the lawyers.

If these observations be admitted to be conclusive in favour of a judicial department, as the exponent of the constitution, the next step is to inquire in what tribunals the authority should be vested. In a colonial scheme, unless some alteration be made in the present courts of justice, no difficulty can arise on the point; as all judicial authority emanates from the Queen, the courts of the colony are of necessity imperial courts, and in addition to this the Queen has appellate jurisdiction over all cases decided in the colony. So far, therefore, there is no place for the creation of a new judiciary armed with a special jurisdiction over cases of a constitutional character.

The bill, however, contemplates leaving the appointment of the colonial judges to the governor, who will naturally promote to that office members of the colony, and thus in some degree deprive the colonial courts of their exclusively imperial character.

Under these circumstances, it seemed advisable to make some provisions for withdrawing, if necessary, altogether from the courts of the colony, cases involving the reserved powers, and cases likely to embroil the peace of the colony.

With this view the bill gives the Queen original jurisdiction as contradistinguished from her inherent appellate jurisdiction over all cases arising under the provisions of the act, whereby powers and prerogatives are reserved to her Majesty, or whereby the authority of the colonial parliament is restricted, and also in all cases wherein the boundaries of the colony are called in question.

This provision meets any objection that may be urged, as to the impolicy of subjecting imperial rights to the deci-

sion of a colonial tribunal, or of leaving the colonists to litigate amongst themselves questions which involve the interest and disturb the peace of neighbouring communities; but the manner of exerting this original jurisdiction, and, in fact, the propriety of exerting it at all, must depend on the local circumstances of each colony. If a colony be large, or if a number of colonies can be combined into one system, an imperial court may be created, having exclusive jurisdiction over imperial questions, and carrying its decrees into effect through its own officers. On the other hand, if a colony be small, such cases may be safely left to the decision of the colonial judges, either sitting alone or with the governor as an assessor, subject, of course, on appeal by the parties, to the revision of the Privy Council in England.

These contingencies are provided for by the bill, which gives her Majesty power to assign any part of her original jurisdiction, or remit any case to the courts of the colony.

Before concluding the subject, it may be well to observe that, whatever courts be established, very few cases will probably arise to test their jurisdiction. This is proved by the American reports; there the federal courts have jurisdiction over the legislative acts of twenty-six republican states; yet, in searching for examples in illustration of the Colonial Bill, cases arising on the constitutionality of the state laws were found scattered, at great intervals, amidst numberless cases arising on the local powers, which have been excluded from the colonial scheme.

I am conscious that these remarks will not satisfy the objections of those persons who, admitting the advantages of a judicial tribunal as an exponent of the constitution, deny the possibility of drawing a distinct line between the colonial and imperial jurisdiction, or of inventing any

form which will satisfactorily submit constitutional questions to the decision of a court of justice.

As the Queen possesses appellate jurisdiction over every case, the first objection is of very secondary importance. It sounds, however, strangely from the lips of English lawyers who are familiar with the separation between the jurisdiction of the common law courts and courts of equity, and between cases requiring to be tried in the superior courts, and cases removed by statute to the jurisdiction of the county courts.

Now, there is no more difficulty in distinguishing between colonial and imperial cases than there is in partitioning off the jurisdiction of the county courts from that of the superior courts, and the same remedies which are available to confine a county court judge within his proper limits are equally adapted to confine a colonial judge within his jurisdiction.

The true answer, however, to both these objections is, that the Americans have completely succeeded in both points.

They have enumerated the cases* which form the subject of federal cognizance, and they have found the various methods of appeal provided by the English law quite as effectual in bringing constitutional questions before a federal tribunal, as they were in bringing a case from one state tribunal to another.

The Americans, moreover, had to encounter obstacles, which do not stand in the way of a colonial scheme; for whilst, on the one hand, the imperial government has inherent appellate jurisdiction over all cases, on the other hand

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* See the long list in Art. iii. Sect. 2, of the American Constitution.

the federal judiciary of the United States has only such power as is specifically granted to it. So that, in the proposed constitution, there cannot be any transgression of the constitutional law without a remedy by appeal to the Queen in council. But in the American constitution, if there be any transgression of constitutional law unprovided for, there is no possible remedy.

The fact, therefore, that the Americans, in working out the details of their complicated system, were satisfied with the English forms of law as a medium for applying the judicial power to the control of their constitution, will convince a lawyer that no difficulty can arise on that respect in the simpler plan proposed by the colonial bill.

These pages, however, may meet the eye of persons interested in colonial matters, but little conversant with the forms of English law. It may be well, therefore, even at the risk of being tedious, to point out by example the exact method in which constitutional questions may be submitted to a judicial tribunal. The examples quoted will be cases taken from the reports of the American federal courts, and they will, it is hoped, tend to illustrate the principles of colonial legislation, as well as the forms in which such legislation will be carried out in practice.

The inquiry to be instituted is one of technicalities; and in order to render it intelligible, some general observations must be premised as to the nature of the legal proceedings in use both in the courts of England and America.

I may begin, then, by remarking, that in every description of legal proceeding, in whatever court instituted, the parties are required to state in writing the subject of difference between them. The complainant declares the injury he has sustained: the defendant, by way of defence, denies

that the complainant has, according to his own statement, sustained any injury,—or denies that he, the defendant, has committed such injury,—or justifies its commission by other circumstances. This written statement is copied on a roll upon which the transactions of a court are entered by its officers, and is called the record.

So far the principles of the courts of common law and equity (and the ecclesiastical courts may, for this purpose, be considered as courts of equity are the same), but the manner of proceeding in the two descriptions of courts is very different. At common law, the complainant must not state his case with all its attendant facts, but must eliminate the point to be decided, and bring forward oral evidence to substantiate that point; in other words, he must, in technical language, plead issuably, and no departure will be allowed from the several issues. On the other hand, in the courts of equity, the complainant details his case of complaint with all its attendant circumstances. He then examines witnesses in writing, and on the trial, the whole facts of the case, including the examination of the witnesses, form part of the record.

The consideration of these differences, in the form of legal proceedings, is only material in the present case, because they give rise to a different mode of bringing cases before an appellate tribunal. In equity cases, it is clear that any process which will place the whole record before the superior court, will necessarily subject to its revision every question that may have been raised before the inferior court, whether arising on the pleadings, the evidence given, or on the decision of the judge. At common law, however, the case is different. The record only contains a short technical history of the proceedings up to the time of trial, to which is after-

wards added the verdict of the jury. It is clear, therefore, that if the record only be brought before the court, errors only in point of law, appearing on the face of the proceedings, will be brought before the court, and the more common faults of a judge misdirecting the jury, or admitting improper evidence, will escape revision altogether. In reality, however, this is not the case, for if the counsel of either party be dissatisfied with the direction of the judge trying the cause in point of law, or with his rejection or admission of evidence, he may state his objections in writing, and tender them to the judge, who, if they are truly stated, is bound to fix his seal to the document. These objections, called 'a bill of exceptions,' are added to the record, and may then be carried into a court of appeal, and the questions arising thereon determined. Sometimes, however, difficult matters of law may arise during the course of the trial, independent of the conduct of the judge, and then the course is adopted of finding a special verdict, *i. e.*, the jury state the naked facts as they find them to be, concluding conditionally—'That if upon the whole matter, the court shall be of opinion that the issue ought to be found for the plaintiff, they then find for the plaintiff, and assess the damages accordingly, if otherwise, then for the defendant.' This is entered at length on the record, and afterwards determined in the superior court. A general verdict,* subject to a special case, differs little except in technicalities, from a special verdict: the jury find a verdict generally, but subject, nevertheless, to the opinion of the court, upon a special case, stated by the

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* In America a verdict subject to a special case is the same, for the purposes of appeal, as a special verdict, though this is not the case in England, the special case forming no part of the record.

counsel, on both sides, and containing a statement of facts mutually agreed upon.

Having thus explained the meaning of a bill of exceptions, special case, and special verdict, it remains only to add, that the process by which at common law the whole record is brought before the court, is called a writ of error, and the account of the various methods of appealing in a common law case will be concluded. In equity cases a simple appeal brings up the record, and consequently the whole case.

It is obvious that these processes would be sufficient to protect the constitution from invasion by the colonial courts, but as the proposed colonial bill provides that in certain cases original jurisdiction shall be vested in her Majesty, some method is required by which a defendant to a suit in the colonial courts may decline its jurisdiction before proceeding to trial. For this difficulty the law of England provides two remedies. The defendant may either apply to the superior court for a writ of prohibition, directed to the judge and parties to a suit in any inferior court, commanding them to cease from the prosecution thereof, on a surmise either that the cause originally, or in consequence of some collateral matter arising incidentally does not belong to that jurisdiction; or, he may put in a plea in the court below, called 'a plea to the jurisdiction,' showing that by reason of some matter therein stated, the case is not within the jurisdiction of the court. If the first of these means be resorted to, the case is taken at once out of the cognizance of the inferior court; if the latter, the question of jurisdiction is first submitted to the decision of the inferior court, but is subject to be reversed on appeal to the court above. To recapitulate shortly what has been said—the law of England provides an appeal in every question of *law* which can arise in a trial, either at law or in

equity. In equity it provides an appeal for every question, as well of *law* as of *fact*. In addition to this, if an inferior court exceed its jurisdiction by taking cognizance of a case, not belonging to it, a party to the suit may oust the inferior court altogether, by moving for a writ of prohibition, or he may plead to the jurisdiction, and if the judge of the inferior court assert his jurisdiction, raise the question on appeal before the court above.

The English law therefore supplies all the machinery necessary to the perfect working of the colonial constitution, and nothing further is required but an imperial court clothed with appellate and original jurisdiction in certain cases, and provided with proper officers to execute its decrees.

In illustrating these remarks by cases decided in the American courts, it will be convenient to follow the natural order of things, and to begin by a writ of prohibition; which as has been remarked above, stops a case at the outset if the inferior court have no jurisdiction. Now, in order to understand the case about to be quoted, it is only necessary to premise that the district court in America is an inferior federal court, and under the constitution, has jurisdiction in maritime cases. The case then of the United States *v.* Richard Peters, district judge, reported in 'Dallas's Reports of the Cases adjudged in the united Courts of the United States,' was this:—James Yard, the complainant, presented his libel, or complaint, to the district court, stating that his schooner, the 'William Lindsey,' had been illegally seized and carried into a French port by Samuel Davis, the commander of the 'Cassius,' an armed corvette, in the service of the French republic, and requiring the district court to detain the 'Cassius,' which was then lying in the port of

Philadelphia, and her commander, till restitution had been made for the alleged seizure of his vessel. Upon this complaint, process issued out of the district court detaining the 'Cassius,' and ordering the commander to appear before the district court, and answer James Yard's complaint.

In this state of circumstances, the commander, Samuel Davis, thinking that the district court had no right to detain his ship, or try the question, determined not to enter upon his defence, but to apply to the supreme court for a writ of prohibition, directing the district judge to release the ship, and prohibiting him from entertaining the suit at all.

The ground on which he made the application was that the 'Cassius' was a French corvette, and that the property seized was, at the time of the seizure, and also at the time of his making the application, within the jurisdiction of the French Admiralty. The supreme court was of that opinion, and granted the prohibition, which begins as follows:—

United States.

'The President of the United States to the Honourable Richard Peters, Esquire, Judge of the District Court of the United States in and for the Pennsylvanian district.' It then goes on to show, in formal language, that by the law of nations and the treaties between the United States and France, the question whether vessels taken in the manner that the 'William Lindsay' was taken were or not prize, was determinable only by the French court. It then details the illegal detention and seizure of the 'Cassius' and her commander, and concludes in the following emphatic language:— 'Wherefore, the said S. B. Davis, the aid of the said Supreme Court most respectfully requesting, hath prayed remedy, by a writ of prohibition to be issued out of the said Supreme Court to you, to be directed to prohibit you

from holding the plea aforesaid, the premises aforesaid in anywise concerning, further before you. You therefore are hereby prohibited, that you no further hold the plea aforesaid, the premises aforesaid in anywise touching, before you; nor anything in the said District Court, attempt nor procure to be done, which may be in anywise to the prejudice of the said S. B. Davis or the said corvette or vessel of war called the 'Cassius,' or in contempt of the laws of the United States. And also, that from all proceedings therein, you do, without delay, release the said S. B. Davis, and the said corvette or vessel of war called the 'Cassius,' at your peril.

'Witness—the Honourable John Rutledge, Esquire, Chief-Justice of the said Supreme Court at Philadelphia, this the 24th day of August, in the year of our Lord, one thousand seven hundred and ninety-five, and of the independence of the United States the twentieth.'

Now, the application of this writ to a colony is obvious. Suppose the colonial court of Sydney were to issue a writ commanding a French vessel to be detained, on the ground of the illegal seizure of an Australian schooner, the Frenchman might apply to the imperial court for a writ of prohibition and a writ headed Victoria R. to the judge of the court in the colony of New South Wales would issue, directing him to release the vessel and to cease from entertaining the suit.

In some cases, however, it is more convenient for the defendant not to go at once to the superior court for a writ of prohibition, but to subject the question of jurisdiction to the inferior court itself.

In such an event he may, as has been already remarked, plead to the jurisdiction; or put in a defence stating that the court has no jurisdiction of this an example is given in the case of Postmaster *v.* Early. *Wheaton* 12—136.

In this case an action was brought in the circuit * court for the district of Georgia by the Postmaster-General of the United States against the defendants, who had executed a bond to guarantee the payment to the Postmaster-General of all monies received by the district Postmaster. The declaration or statement of the complaint set out the bond, and alleged that the district postmaster had not regularly paid the money which he had received, and which he ought to have paid over to the Postmaster-General.

The defence of the defendants was set out in their plea, which was a plea to the jurisdiction; it alleged, 'that this was not a suit in which the United States were a party, nor was the debt declared on, one contracted, authorized, or arising under a law of the United States, and over which jurisdiction has been given to this honourable court,' and the defendant prayed judgment if the court would, or ought to have further cognizance of the plea aforesaid.

It then became incumbent on the court to determine whether the circuit court for the district of Georgia had jurisdiction, by referring to the terms in which the constitution defines the extent of that jurisdiction, and to the acts of the legislature which point out the tribunal for trying questions as to the Post-office.

In like manner under the proposed constitution, in which the jurisdiction of the colonial courts would be defined, if the defendant on action brought, should think that the colonial court had not jurisdiction to entertain any particular question; he might show in his plea, that the question proposed for decision involved an inquiry into facts which were

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* The Circuit Court is one of the federal courts. The American constitution gives to the federal courts jurisdiction over 'controversies of which the United States shall be a party.' See Art. iii. Sect. 2

not under the cognizance of the colonial court, and so stop further proceedings in that court.

The next case, the trustees of Dartmouth College *v.* Woodward,* will supply an example, both of a special verdict and bill of exceptions. This was an action brought by the Trustees of Dartmouth College against William H. Woodward in the State Court of New Hampshire, for the recovery of certain books of record, the corporate seal, and other corporate property, to which the plaintiffs alleged they were entitled.

The defendant pleaded the general issue, that is, denied in general terms that the property belonged to the plaintiffs.

From the evidence given on the trial, it appeared that Dartmouth College was a corporation founded by a charter of George III., of which the plaintiffs were trustees under the charter. That the title of the defendant was founded on certain acts of the State of New Hampshire altering the charter, without the consent of the corporation, and vesting the property in the books &c. in the parties who were represented by the defendant as their then secretary.

The real question, therefore, between the parties was, whether the acts of the State of New Hampshire were valid or not. If they were invalid, the plaintiffs were entitled to the books and other articles claimed; if they were valid, the defendant, as secretary of the parties claiming under the acts of the State, had a right to retain them. The ground on which the plaintiffs contended for the invalidity of the acts of the State was, that a charter was a contract within the meaning of the clause of the constitution of the United States, which declares, 'that no state shall make any law impairing the obligation of contracts;'

* 4 Wheaton, 518.

and consequently that the acts of the State impairing the obligation of the charter were void.

Under these circumstances, the parties determined that a special verdict should be found, for the purpose of bringing the constitutionality of the acts first before the State Court, and then before the Supreme Court of the United States.

In order to understand the form of the special verdict, it should be recollected, that the record contains a history of the action up to the time of trial, including the names of the jurors, and the fact of their having been sworn. To this record the special verdict is appended; and it begins the narration of each fact with the words, 'The said jurors upon their oath say.' And the facts so authenticated are said to be the finding of the jury, and, together with the conclusion which is hereafter given *verbatim*, constitute the special verdict. Now in the case before us, the special verdict found the original charter of Dartmouth college; the organization of the corporation; and the fact that the plaintiffs were possessed of the property claimed by the defendant, unless their title was rendered invalid by the acts of the States of New Hampshire thereinafter mentioned.

The verdict then set out the acts of the State of New Hampshire, the fact that the plaintiffs had never assented to such acts, that they had demanded possession of the goods from the defendant, and that the defendant had refused to deliver them, and had converted them to his own use; that is to say, had illegally detained them, supposing the plaintiffs after the passing of the State acts could lawfully demand the same, and if the defendant was not entitled to retain them.

This completed the title of the plaintiffs. The verdict then proceeds to find the fact, that the defendant was duly

appointed secretary by the parties claiming under the acts of the State, and concludes in the following terms:—

'But whether upon the whole matter aforesaid, by the jurors aforesaid, in manner and form aforesaid found, the said acts of the 27th of June, 18th and 26th of December, A.D. 1816, (that is to say, the acts of the State above referred to) are valid in law, and binding on the said trustees of Dartmouth College, without acceptance thereof and assent thereunto by them, so as to render the plaintiffs incapable of maintaining this action, or whether the same acts are repugnant to the constitution of the United States, and so void, the said jurors are wholly ignorant, and pray the advice of the court upon the premises. And if upon the said matter it shall seem to the court here that the said acts last mentioned are valid in law, and binding on the said trustees of Dartmouth College, without acceptance thereof and assent thereto by them, so as to render the plaintiffs incapable of maintaining this action, and are not repugnant to the constitution of the United States, then the said jurors upon their oath say, that the said William H. Woodward is not guilty of the premises above laid to his charge by the declaration aforesaid, as the said W. H. Woodward hath above in pleading alleged. But if on the whole matter aforesaid it shall seem to the court here that the said acts last mentioned are not valid in law, and are not binding on the said trustees of the Dartmouth College without acceptance thereof and assent thereto by them, so as to render them incapable of maintaining this action, and that the said acts are repugnant to the constitution of the United States and void, then the said jurors upon their oath say, that the said W. H. Woodward is guilty of the premises above laid to his charge by the declaration aforesaid; and in that case

they assessed the damages of them the said trustees of Dartmouth College by occasion thereof at twenty thousand dollars.'

The superior court of judicature* of New Hampshire rendered a judgment upon this verdict for the defendant, thus affirming the validity of the State acts. This judgment having been brought before the superior court of the United States, was reversed, and judgment rendered for the plaintiff, and it was ordered 'that a special mandate do go from this court to the said superior court of judicature to carry this judgment into execution.'

Now, if in the case of Dartmouth College the judge had, at the trial, told the jury that the acts of the state legislature were not repugnant to the constitution of the United States, and that therefore they must find for the defendant, and if, upon such directions being given to the jury, the counsel for the plaintiff had objected to the direction of the judge, and had questioned its correctness in law, then it would have been competent for the plaintiff's counsel to state his objection in writing, and to call upon the judge to put his seal to such writing, and such a writing would have formed a bill of exception. This bill of exception would have been annexed to the record, and might then, as in the case of a special verdict, be brought under the review of the superior court.

The last example I shall quote is that of a simple writ of error, which, it has been already remarked, is the process by which the record is removed from an inferior to a superior court, where the judgment is reviewed.

In all the cases, therefore, that have been cited, with the exception of the writ of prohibition, a writ of error was

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* The Superior Court of Judicature is the highest state court in New Hampshire.

sued out; for a bill of exceptions and special verdict, after they have been allowed or settled, are annexed to and form part of the record no less than a plea to the jurisdiction, and are removable with it.

In the case, however, that I shall now cite, the writ of error which forms the subject matter of the case was issued to the court of appeals* of Virginia on an unusual occasion—namely, to bring up a judgment of that court wherein they refused to obey a mandate of the supreme court of the United States. This should be recollected, as there are two writs of error mentioned in the case, and some confusion may thus arise as to the particular one intended to be produced as an example.

The nature of the case of Martin *v.* Hunter's lessee,† was this. The original suit was an action of ejectment brought to recover land in Virginia formerly belonging to Lord Fairfax. The plaintiff's title was founded on a patent dated in 1789, by which the State of Virginia had granted the land to him as property that had escheated to the state. The defendant, on the other hand, as devisee of Lord Fairfax, resisted the claim, contending that the land had not escheated to the state, but was protected by the definitive treaty of peace made in 1783 between the United States and Great Britain. Thus the validity of the patent, as against the treaty, formed the whole question between the parties in the original suit. This question was embodied in the form of a special verdict, and having been brought before the court of appeals, the highest court of law of Virginia, judgment was given in favour of the plaintiff. Upon this judgment the defendant appealed, by writ of error, to the

* The Court of Appeals is the highest state court in Virginia.

† Wheaton—304.

supreme court of the United States, who, in February 1813, reversed the judgment of the court of appeals, and issued a mandate to them to carry the judgment of the supreme court into execution.

Here, in the usual course of things, the matter would have ended, but the court of appeals, instead of obeying the mandate, gave judgment in the following manner:—

'The court is unanimously of opinion that the appellate power of the supreme court of the United States does not extend to this court under a sound construction of the constitution of the United States; that so much of the 25th section of the act of Congress to establish the judicial courts of the United States as extends the appellate jurisdiction of the supreme court to this court is not in pursuance of the constitution of the United States; that the writ of error in this cause was improvidently allowed under the authority of that act; that the proceedings thereon in the supreme court were *coram non judice* in relation to this court, and that obedience to its mandate be declined by the court.'

Upon this the defendant again appealed to the supreme court, who issued a writ of error to the court of appeal to bring up the above judgment, and, having decided that it was erroneous, directed execution by its own officers in preference to again remanding the case to the state court. It is this last writ of error which makes this case so remarkable an example, as showing the manner in which a supreme court may carry its decrees into effect without coming into direct conflict with the inferior court.

In the previous case of the Trustees of Dartmouth College *v.* Woodward, great interests were at stake. A state legislature had passed an unconstitutional law; a state court had decided that it was constitutional—it was a delicate office for the supreme court to reverse that judgment, and

thus at once to declare that the state legislature had exceeded its powers, and that the state court had misunderstood them. Yet the supreme court did not shrink from its responsibility, and was quietly obeyed. In the case last quoted, however, a still greater difficulty was involved. The state court set the federal power at defiance, and declared itself the sole judge of its own powers. Any hesitation on the part of the supreme court would have been fatal to the constitution, and have prostrated the federal power at the foot of the states. In this dilemma, the supreme court avoided the conflict which would have ensued, if a second mandate had been sent to the state court, by availing itself of its powers of issuing a writ of error, and of awarding execution on its own judgment, thus saving the dignity of the state court without compromising its own powers.

The application of the forms of legal process adopted in these cases to the colonial constitution, may safely be left to the imagination of the reader, as a change of names only is necessary to convert an American into a colonial case.

The citation of cases from the American reports illustrative of the colonial bill, might be extended almost to every question of practice, or of law, that can arise on the imperial powers. Enough, however, has been done to show the practical working of the scheme, if not to prove what on further examination will be found to be the case,—that in construing the new constitution, a colonist may call in aid one of the greatest desiderata of a lawyer; viz., a series of judicial decision sdeclaring the meaning of its clauses on all points which experience has shown to come most frequently into dispute.

Having advanced thus far, the reader will be surprised that no mention has been made of what would appear the

chief object of a scheme of colonial government; namely the particular form of the local institutions intended to be established in each colony.

This omission has not arisen from my undervaluing of the importance of such institutions, but from the difficulty of treating the subject within the limits allotted to these pages. The object here has been to separate, as far as was possible, the question as to the legal practicability of a scheme from any question as to its political expediency, and to confine these remarks to the former of these questions. In carrying out this object, the advantage of uniting the mother country and all her colonies into a consolidated empire has been assumed, and the whole argument has been directed to show how such an union may be effected in practice; viz., by defining colonial and imperial rights, and adjusting any conflict that may arise between them by means of a supreme judicial department.

Now, a form of local government requires a different treatment; each clause gives rise to a question of expediency, not of law, and must be tested by an investigation of the principles of government and social institutions. To do this would amount to a lengthened treatise, and is the less required, as the materials for forming a decision on such points lie more readily within the compass of ordinary readers than the details of the American constitution, which has formed the model for the proposed colonial *system*, as contradistinguished from the enactments relating to the form of local government.

For the convenience, however, of such readers as may prefer a short analysis of an act to the necessity of wading through its separate provisions, I shall conclude by giving a brief sketch of the local provisions of the colonial bill, point-

ing out in the notes the authorities which support the most material clauses.

The first clause of the bill declares the general division of the colonial legislature into a governor, and two houses; to be called, the legislative council, and house of assembly, and together to be called the parliament of the colony. The bill then divides itself into four leading heads, which treat successively of the governor, the legislative council, the house of assembly, and both houses, assigning to each department their general powers and duties; and concludes, with what forms the keystone in subordination to which the whole scheme is formed, namely, the limitation of imperial and colonial rights.

To begin with the governor; he is appointed by the crown, and has vested in him the supreme executive power in the colony. His remaining duties are to assent to, or dissent from, bills passed by the two houses of parliament, and to call together and dissolve the parliament. He has the power of appointing to all civil offices in the colony, and of granting pardons. To prevent any interference of the colonial office with his discretion as a member of the legislature of the colony, it is declared that no instructions are to be given him except in relation to the reserved powers of the crown, and for the same reason it is made obligatory on him to declare his assent to, or dissent from, bills passed by the Colonial-parliament before the close of the session. Lastly, a power is given the colony to rid themselves of an obnoxious governor, by a clause which enacts that upon an address of two-thirds of both houses of parliament, praying for the removal of a governor, being presented to her Majesty, such governor shall thereupon be removed, and another appointed in his place.

The legislative council* is a permanent body, formed on the model of the American senate.

The members are divided into three classes, and go out in rotation, each class vacating its seats at the end of every third year, so that no member holds his seat without a re-election, more than nine years.

The number of members, and their pecuniary qualifications, are left to the determination of the existing colonial legislature, with the proviso that the number is not to exceed one half the members of the house of assembly, and that the maximum of qualification† is to be 4000*l.* gross value, or 200*l.* annual value, and the minimum a sum not less than double the amount required for a member of the house of assembly.

A legislative counsellor must be a natural born, or naturalized subject of her Majesty, and with a view of securing greater information and stability of character, he is required to be of the age of thirty years.

In the case of the house of assembly, as in that of the senate, the present legislature has power to determine the number of its members, and their pecuniary qualifications, but must not create a higher qualification than one-half the qualification of members of the legislative council.

The duration of the house of assembly is fixed at five years, and every natural born, or naturalized subject of her Majesty, who has attained his majority, and possesses the requisite pecuniary qualification, is eligible to a seat.

The fifth head presents nothing requiring observation. It treats of the qualifications of the electors of both houses,

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* On the subject of two Houses of Parliament, see Story's *Commentaries on the Constitution of the United States.*

† The qualification will vary according to circumstances.

the writs and conduct of elections, the oath of allegiance, the power of each house over its own members, the election of a Speaker, and the introduction of revenue bills by the House of Assembly. On these points it may be stated generally, that the election of both Houses requires the same qualifications in the electors.

That to entitle a man to a vote he must be either a freeholder, leaseholder, or occupier of a dwelling-house, but the amount of value is to be fixed by the existing colonial legislature, with the limitation that no qualification in respect of a freehold or leasehold estate is to exceed 200*l.* of gross value, or in respect of a dwelling-house 20*l.* of annual value.

Each house of parliament is to elect its own Speaker and punish its own members; and in order to make more apparent the resemblance between the House of Assembly and the English House of Commons, it is enacted that all revenue bills shall originate in the House of Assembly.

It is now time to close these remarks; but it may be well to add a word in conclusion, on the essential distinction between this and all recent colonial constitutions.

This scheme is grounded on the conviction that tranquillity in the colonies cannot be hoped for unless an end be put to the interference of the Colonial-office in colonial legislation.

That can only be done by defining the amount of legislative authority intended to be entrusted to the colonies, and then leaving them to the uncontrolled exercise of that authority.

The whole object of these pages, therefore, is to prove from the analogy of the American constitution the possibility of giving a definite legislative authority to a subordinate

state, and of keeping such state within its authority by means of a judicial tribunal.

The principle of all recent colonial legislation has been utterly at variance with this plan. Free *forms* of government have been created, but the *substance* has been utterly wanting, as all colonial bills have alike been subjected to the disallowance of the Colonial-office.

The two plans are essentially different, and the difference is here insisted on, with a view of forestalling any objections that may be made to the details of the present scheme.

The question is one of principle, and not of detail; and in order to defeat the proposed scheme, it is not sufficient to show that it would be beneficial to add one power, or take away another, to increase the power of the governor, or diminish the qualification of the members of the legislature; but it must be shown, that to define colonial and imperial rights, and to keep a colony within the boundaries so defined, is either absurd in theory, or impossible in practice.

February, 1851.

APPENDIX.

SKETCH OF A COLONIAL BILL.

I. PARLIAMENT.

Constitution of Parliament.

1. That the legislature of the colony shall consist of a Governor, and, subject to any alteration to be made by the Colonial Parliament, of two Houses, to be called respectively the 'Legislative Council' and 'House of Assembly'; and such Governor and two Houses together shall be called the 'Parliament of the Colony.'

II. GOVERNOR.

Governor how appointed and paid.

2. That the Governor shall be appointed by her Majesty by Letters Patent under the Great Seal of Great Britain and Ireland, and shall receive his salary from the Treasury of the United Kingdom; and the supreme executive power in the colony shall be vested in such Governor.

Manner of supplying vacancy in the office of Governor.

3. That, subject to any alteration to be made by the parliament of the colony, during any vacancy of the office of Governor the Speaker of the Legislative Council, or, if there be then no Speaker of the Legislative Council, the Speaker of the House of Assembly, or, if there be then no Speaker of the House of Assembly, the Chief Justice of the supreme court in the said colony, shall exercise such office; and whenever the Speaker of the House of Legislative Council or of the House of Assembly shall so exercise the said office, his duties as Speaker shall be suspended, and the Legislative Council or House of Assembly (as the case may require) shall fill the vacancy until his duties as Governor cease.

Governor to be removed on address of two-thirds of the members of both Houses.

4. That if at any time an address passed by two-thirds of the whole number of the members of each House of Parliament of the colony be presented to her Majesty praying for the removal of any Governor from his office, such Governor shall thereupon be removed and another appointed in his place.

Governor to forward addresses.

5. That the Governor shall without delay forward to her Majesty's principal Secretary of State for presentation to her

Majesty all addresses passed by a majority of either of the two Houses of the Parliament of the colony.

Waste lands, &c., to be disposed of by the Governor, according to Acts of Colonial Parliament.

6. That the Governor shall dispose of the waste lands of the colony, including minerals of every description, and all fines, forfeitures, and other royalties, according to any acts which the Colonial Parliament may pass for the purpose, reserving to the persons entitled thereto the benefits of all grants of land, and of all contracts for grants of land, made or entered into previously to the passing of any act affecting such land.

Assent of Governor to Bills.

7. That no Bill shall become law without the assent of the Governor, and that he shall declare his assent to or dissent from every Bill presented to him before the close of the session.

Power to call together, prorogue, and dissolve.

8. That the Governor shall have power, from time to time, to call together the said Houses of Parliament, to fix their place of meeting, and to prorogue them; and shall also have power to dissolve the House of Assembly when he may think expedient.

Parliament to be called together once in every year.

9. That, subject to any alteration to be made by the Colonial Parliament, the Governor shall hold a session of the said parliament once in every year, the first of such sessions to be holden at some time not later than months after the proclamation of this act in the colony.

Governor to appoint to civil offices.

10. That, subject to any alteration to be made by the Colonial Parliament, the Governor shall appoint to all civil offices in the said colony.

Governor to grant pardons.

11. that the Governor shall have power to grant reprieves and pardons for all offences committed in the said colony.

Instructions to Governor.

12. That no instructions shall be given to any Governor except in relation to the powers and prerogatives hereinafter reserved.

III. LEGISLATIVE COUNCIL.

13. That, subject to any alteration to be made by the Colonial Parliament, the Legislative Council shall consist of such number of members, not exceeding one-half of the number of members of the House of Assembly, as the Legislature now by law established in the said colony may think fit; and for the purpose of constituting the Legislative Council, the Legislature now by law established in the said colony, shall, within three calendar months after the proclamation of this Act, divide the colony into provinces, and determine the number of members to be returned for each province.

Qualification of members of the

14. That, subject to any alteration to be made by the Colonial Parliament, no person shall be elected a member of the Legis-

Legislative Council.

lative Council unless he be of the age of thirty years, a natural born or naturalized subject of her Majesty, and legally or equitably seised or entitled for his own use in possession of or to a freehold estate in the colony of such gross or yearly value as the Legislature now by law established in the said colony shall fix as a sufficient qualification, with this limitation, that such qualification shall not be fixed at a greater sum than four thousand pounds of gross value, or two hundred pounds of yearly value, nor at a less sum than double the amount required for the qualification of a member of the House of Assembly.

Succession of members of the Legislative Council.

15. That, subject to any alteration to be made by the Colonial Parliament, the said Legislative Council shall immediately upon assembling together after its first election be divided by lot into three classes, each class to be as nearly as may be equal in numbers, and the seats of the first class shall be vacated at the end of the third year from the date of the issuing of the writs for the first election of the said Council; the seats of the second class shall be vacated at the end of the sixth year from such date as aforesaid; and the seats of the third class at the end of the ninth year from such date as aforesaid; and all members elected to fill the seats so vacated, shall hold their seats for the term of nine years: Provided, nevertheless, That, whenever a casual vacancy occurs in the seat of a legislative councillor, the person elected in his stead shall hold his seat for such period only as the member in whose stead he is elected would have held his seat if the same had not been so vacated.

IV.
HOUSE OF ASSEMBLY.

Constitution of House of Assembly.

16. That, subject to any alteration to be made by the Colonial Parliament, the House of Assembly shall consist of such number of members, not exceeding [*sixteen*], as the Legislature now by law established in the said colony may think fit, and for the purpose of constituting the House of Assembly the Legislature now by law established in the said colony shall within three calendar months after the proclamation of this Act divide the colony into electoral districts, and determine the number of members to be returned for each district.

Qualification of members of the House of Assembly.

17. That, subject to any alteration to be made by the Colonial Parliament, no person shall be capable of being elected a member of the said House of Assembly unless he be of the age of twenty-one years, a natural born or naturalized subject of her Majesty, and be legally or equitably seised or entitled for his own use in possession of or to a freehold estate in the colony of such gross or yearly value as the Legislature now by law established in the said colony, may fix as a sufficient qualifi-

cation; with this limitation, that such qualification shall not be f.:ed at a greater sum than two thousand pounds of gross value, or one hundred pounds of yearly value.

Duration of House of Assembly.

18. That, subject to .y alteration to be made by the Colonial Parliament, the said House of Assembly, unless sooner dissolved by the Governor, shall continue for five years from the day of the return of the writs for calling together the same, and no longer.

V. BOTH HOUSES.

Qualifications of electors of both Houses.

19. That, subject to any alteration to be made by the Colonial Parliament, every man, if duly registered, shall be entitled to vote at the election of a member of the Legislative Council and House of Assembly, who is of the age of twenty-one years, a natural born or naturalized subject of her Majesty, or a legal denizen of the colony, and who has for six calendar months before the last previous registration of electors been legally or equitably seised or entitled for his own use in possession of, or to a freehold or leasehold estate, or has for such period as aforesaid occupied a dwelling house, such estate or dwelling house to be situate within the province or district for which his vote is to be given, and to be respectively of such gross or yearly value as the Legislature now by law established in the said colony may fix as a sufficient qualification, with this limitation, that the qualification in respect of a freehold or leasehold estate, shall be fixed at some gross value not exceeding two hundred pounds, and in respect of a dwelling-house at some yearly value not exceeding twenty pounds: Provided, That no man shall be entitled to vote who has been attainted or convicted of treason, felony, or other infamous offence in any part of her Majesty's dominions, unless he have received a free pardon or pardon conditional on not leaving the colony for such offence, or have undergone the sentence passed on him for such offence.

Writs and conduct of elections.

20. That, subject to any alteration to be made by the Colonial Parliament, the Legislature now by law established in the said colony shall, within three calendar months after the proclamation of this Act, make all necessary provisions for the registration of all persons qualified to vote at the election of members of the Legislative Council and House of Assembly, and for the appointment of returning officers, and for the issuing, executing, and returning the necessary writs for such elections, and for taking the poll thereat, and otherwise for ensuring the orderly, effective, and impartial conduct of such elections.

Writ to be

21. That, subject to any alteration to be made by the Colo-

nial Parliament, whenever a representation is made by the Speaker of the Legislative Council or House of Assembly to the Governor, that a vacancy has occurred in the seat of a member of the House of which he is Speaker, the Governor shall forthwith issue his writ for the election of a member to fill such vacancy.

issued by Governor on vacancy occurring.

22. That no member of the Legislative Council or House of Assembly shall be entitled to take his seat or vote until he has in the presence of the governor, or some person authorized by him, made oath, or if a person authorized by law to make an affirmation instead of an oath made an affirmation, in the following form:—

Oath of allegiance.

> I do sincerely promise and swear [or, *as the case may be*, affirm] that I will be faithful and bear true allegiance to her Majesty Queen Victoria as lawful sovereign of the United Kingdom of Great Britain and Ireland, and of this colony, dependent on and belonging to the said United Kingdom; and that I will defend her, to the utmost of my power, against all traitorous conspiracies and attempts whatsoever which shall be made against her person, crown, and dignity; and that I will do my utmost endeavour to disclose and make known to her Majesty, her heirs, and successors, all treasons and traitorous conspiracies and attempts which I shall know to be against her or any of them; and all this I do swear, without any equivocation, mental evasion, or secret reservation, and renouncing all pardons and dispensations from any person or persons whatever to the contrary.
>
> So help me God.

23. That, subject to any alteration to be made by the Colonial Parliament, each House shall be the judge of the elections and qualifications of its own members, and may compel the attendance of absent members, and, with the concurrence of two-thirds of the whole number of members, expel a member.

Power of each House over its own members.

24. That each House may elect its own Speaker, and determine the rules of its own proceedings.

Each House to elect its Speaker, &c.

25. That, subject to any alteration to be made by the Colonial Parliament, all Bills for raising and appropriating the revenue shall originate in the House of Assembly, but the Legislative Council may propose amendments, as on other Bills.

Revenue Bills

VI. LIMITS OF IMPERIAL AND COLONIAL POWERS.

Reservation of imperial powers.

26. That there shall be reserved to her Majesty the several powers and prerogatives following, that is to say:—

1. The power of sending and receiving ambassadors to and from, and of making treaties, leagues, and alliances with, any foreign state or prince:
2. The power of making peace and war:
3. The power of granting letters of marque and reprisal during peace or war, and of granting safe conducts in time of war:
4. The power of confiscating the property of alien enemies, and of laying an embargo on shipping:
5. The power of keeping any land or naval forces in the said colony, or on the coasts thereof:
6. The power of enlisting men within the said colony for the supply of such forces:
7. The command at all times of all regular military and naval forces employed in or about the said colony, and the command of the militia in time of war:
8. The power of erecting forts, magazines, arsenals, dock-yards, and other buildings for military or naval purposes:
9. The exercise of exclusive jurisdiction within the limits of any place occupied for such purposes:
10. The power of taking any waste land, and likewise on making due compensation any other land, for the purpose of erecting thereon such forts, magazines, arsenals, dock-yards, and other buildings as aforesaid, and for any other military or naval purpose:
11. The power of determining all cases brought before her Majesty on appeal from the courts of the said colony:
12. The power of establishing prize courts:
13. The power of coining money, and of regulating the value of foreign corn:
14. The power of granting titles of nobility:
15. The power of regulating the transmission of letters by sea between the said colony and any other place:

And all powers necessary for giving effect to the above powers and prerogatives.

Reserved powers may be vested in the Governor by

27. That her Majesty may, by letters patent under the Great Seal of Great Britain and Ireland, vest in the Governor all or any of the powers and prerogatives hereinbefore reserved, and the Governor shall conform to such instructions as her Majesty shall

convey to him for his guidance in the exercise of such powers and prerogatives.

letters patent.

Restrictions on the power of the Colonial Parliament.

28. That the Colonial Parliament shall not have power to do any of the following things, that is to say—

1. To pass any law affecting or derogating from the powers and prerogatives so reserved to her Majesty as aforesaid:
2. To alter the mode of the appointment of the Governor:
3. To control his power of calling together and proroguing the Houses of Parliament, or of dissolving the House of Assembly, of assenting to or dissenting from bills passed by the said two Houses; or to take from him the power of granting reprieves and pardons:
4. To pass any law altering the succession to or affecting the style or dignity of the Crown of Great Britain or Ireland, or relating to the appointment of a Regent:
5. To absolve any person from his allegiance:
6. To define treason, or to alter the law relating thereto:
7. To pass any act of attainder:
8. To pass any law containing anything contrary to the law of nations as received and administered in the Courts of Great Britain:
9. To define piracies and felonies on the high seas:
10. To pass any law respecting captures by land or water:
11. To pass any law affecting the command, regulation, discipline, or enlistment, of her Majesty's military or naval forces:
12. To lay any duty on supplies for her Majesty's military or naval forces:
13. To make anything but gold and silver coin a legal tender:
14. To make any judge's tenure of office dependent on anything but good behaviour, or to diminish his salary during his continuance in office:
15. To lay any differential duty on exports or imports to or from any part of her Majesty's dominions, or any duty inconsistent with any treaty that already has been, or may hereafter be, entered into between her Majesty and any foreign country:
16. To confer any privilege or immunity on the inhabitants of the Colony that is not equally conferred on the other subjects of Her Majesty:

17. To establish slavery:
18. To repeal or alter any of the provisions of this Act, except those expressed to be subject to alteration by the Colonial Parliament:

And any enactment of the Colonial Parliament containing anything in contravention of this clause shall be void.

Original jurisdiction of the Queen in Council in certain cases.

29. That her Majesty in Council shall have original jurisdiction in all cases arising under any provision of this Act, whereby powers and prerogatives are reserved to her Majesty, or whereby the power of the Colonial Parliament is restricted, and also in all cases wherein the boundaries of the colony are brought in question, with power to assign any part of such jurisdiction or remit any case to the courts of the colony, or to any court which her Majesty may establish in the colony for the purpose.

Appellate jurisdiction of the Queen in Council.

30. That her Majesty in Council shall have appellate jurisdiction in all cases whatever arising within the said colony, and may, by Order in Council, limit and regulate the exercise of such jurisdiction.

Alterations in the Act how to be made.

31. That no alteration shall be made in any of the provisions of this Act herein expressed to be subject to alteration unless notice of such intended alteration have been published four times in one of the principal newspapers of the colony, at intervals of three calendar months, the first of such publications to be made with the assent of at least two-thirds of the whole number of the members of each House previously thereunto given, and a year at least before the bringing in of any Bill containing such alteration; and no such Bill shall be considered as passed by either House unless two-thirds of the whole number of the members of such House concur therein.

General legislative power of the Colonial Parliament.

32. That, with the reservations, and subject to the restrictions, hereinbefore mentioned, the Colonial Parliament shall have power to repeal or alter any law, charter, or letters patent in force within the said colony, including such of the provisions of this Act as are expressed to be subject to alteration by the Colonial Parliament, and to make new laws for the government of the said colony, as fully as the United Parliament of Great Britain and Ireland have power to repeal or alter any laws in force within the realms of Great Britain and Ireland, and to make new laws for the government thereof.

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