REPORT

OF THE

JOINT COMMITTEE OF BOTH HOUSES

OF

THE GENERAL ASSEMBLY OF OHIO,

ON THE COMMUNICATION OF THE

AUDITOR OF STATE

Upon the subject of the proceedings

OF THE

BANK OF THE UNITED STATES,

AGAINST

THE OFFICERS OF STATE,

IN THE UNITED STATES' CIRCUIT COURT.

COMMUNICATED

BY THE

Governor of Ohio, for the consideration

OF THE

NEW-HAMPSHIRE LEGISLATURE.

CONCORD:

PRINTED BY HILL AND MOORE,

JUNE, 1821.

REPORT.

From the papers submitted to the committee, it appears, that in the month of September 1819, the Bank of the United States exhibited a bill in chancery, before the circuit court of the U. S. then sitting at Chillicothe, against Ralph Osborn, Auditor of the state of Ohio, and obtained, in that court an order of injunction against him, prohibiting him as Auditor from performing the duties enjoined upon him by the "Act to levy and collect a tax from all banks and individuals and companies and associations of individuals, that may transact banking business in this state, without being authorised to do so by the laws thereof."

It further appears, that the Auditor not being satisfied, before the time appointed by law for him to act, that an injunction had been ordered, issued his warrant in conformity to the law, under which the tax imposed by law was collected and paid into the state treasury.

It further appears, that the circuit court of the U. States, at their last term, adjudged that this act of official duty was a contempt of court, for committing which they awarded a writ of attachment against the Auditor, returnable to Jan. term next.

It appears, also, that at the September term last, upon the application of the bank of the Uni-

ted States, an order was made, allowing them to file an amended and supplemental bill, making Samuel Sullivan, the Treasurer of state, a defendant, "*as present Treasurer of Ohio, and in his private and individual character;*" and also making Hiram Mirick Curry, late Treasurer, and John L. Harper, the officer that collected the tax, defendants. Upon the filing of which amended and supplementary bill, a further order of injunction was made, prohibiting the Treasurer of state from "negotiating, delivering over, or in any manner parting with or disposing of" the money collected for tax, and paid into the state treasury according to law. And it further appears, that besides these proceedings, an action of trespass at the suit of the Bank of the United States, was commenced and made returnable to the last September term of the same circuit court, against Ralph Osborn, John L. Harper, Thomas Orr, James M'Collister, John C. Wright and Charles Hammond, in which the plaintiffs have filed a declaration, charging, among other things, the taking and carrying away the same sum of money in the proceedings in chancery specified, under color and pretence of the law of Ohio.

Whatever attempt may be made to characterise this proceeding as a controversy between individuals, it is evident that its practical effect is to make the state a defendant before the circuit court of the United States. In every thing but the name, the state is the actual defendant. No

other interest but that of the state is involved. In every stage of the enquiry, the rights, interests and powers of the state only are presented for adjudication. The final process must operate direct upon the state, and, if effectual, must derange totally the official accounts both in the Auditor's and Treasurer's departments; for if there be a specific decree, as prayed for in the supplemental bill, a specific execution may be sent into the state treasury, to carry that decree specifically into effect.

Nor is it only in its practical effect, that the real character of this proceeding is to be perceived. It is distinctly avowed in the body of the bill, both by naming the General Assembly of Ohio, as the offending party, and by calling on the court to restrain the Auditor of state from performing official acts in his official character. And, in fact, it would seem, from the foundation upon which the injunction was allowed, both on the first and second application, that the court must have regarded it as substantially a proceeding against the state.

All judicial proceedings are founded upon facts established judicially. The transactions of individuals are verified by testimony judicially taken. But the proceedings of states and governments are regarded as of public notoriety, to be received upon the evidence of general history. When an individual applies for an injunction against another individual, his application is never regarded, unless the matter alleged in his petition be established

by his own affidavit, or that of others. The court never restrains an individual in the exercise of his supposed rights, upon the naked suggestion of another. The law of Virginia, of Kentucky and of Ohio alike requires, that before any injunction shall be granted, the judge or court granting it, shall be satisfied by affidavit, at the foot of the bill, or by other means, that the allegations in the bill are true. The practice of the federal court, and federal judges in Ohio, has been to require proof. No injunction has been granted upon mere suggestion, until that against Ralph Osborn, Auditor of state: no other injunction has been granted upon mere suggestion, but that against Samuel Sullivan, Treasurer of state. Both these injunctions were granted instantly, upon application by bill alone without any proof being offered or required, that one single allegation contained in the bill, was true. This departure from the common course of proceeding can be accounted for and vindicated upon but one ground: that the party substantially a defendant was a sovereign state, all of whose proceedings were matters of public notoriety, of which the court was informed without proof in the ordinary mode.

By the original provisions of the constitution of the United States, the federal judiciary were empowered to take cognizance of controversies between a state and citizens of another state: but by the same instrument this jurisdiction was vested exclusively in the supreme court. A state nev-

er could be held to answer or made amenable before a circuit court of the United States. By the eleventh amendment to the constitution, this power to call a state to answer before the supreme court, at the suit of a citizen was wholly taken from the federal judiciary.—It is perfectly clear that before this amendment to the constitution was made, the circuit court of the United States could not have entertained jurisdiction of a suit in equity, enjoining the state officers from executing the state laws, in a case of the direct action of the state sovereignty, like that for the collection of taxes. The principal, and not the ministerial agent is always the proper defendant in such a suit. That principal, being directly and personally amenable in the supreme court, his case could not be drawn to a tribunal that had no jurisdiction over the principal, by instituting a suit against the agent alone. The state, before the amendment, could be sued in equity before the supreme court of the United States, and could, in a proper case, be there enjoined. In that court only, could a state be prohibited from carrying her laws into operation. For that very reason her officer could not be enjoined in a circuit court. It would be to subject the interest and rights of the state to the decision of a tribunal that had no jurisdiction to decide upon them, and where the state could not be admitted a defendant to defend them. It is therefore a strange doctrine, to maintain that an amendment to the constitution, expressly forbidding the

judges so to construe the constitution, as to call states before the supreme courts as defendants, at the suit of individuals, is to operate as vesting the circuit courts with power to do that indirectly, which they never had any direct power to do. The amendment was intended to protect the states from a direct responsibility, upon process before the supreme court; the only tribunal before which they were then liable to be called to answer. By the construction now attempted, this amendment is made to vest the circuit court with a jurisdiction equally effective against the state, though indirect in its form of proceeding. It effects nothing but the degradation and humiliation of the states. Instead of the distinction of being called to defend its rights before the highest judicial tribunal of the nation, the state is reduced to the level of the most ordinary citizen, and made answerable in an inferior tribunal. Instead of enjoying the privilege of managing directly its own interests, and absolutely controling its own defence, the state must submit to the consequence of blending its interests, with the timidity or treachery of others, and must be concluded by a decision made, in a case, which it is in the power of others to manage as they please. The committee are persuaded that such was not the object of the amendment, and that such is not the correct construction of the constitution.

It is asserted, that this is an individual proceeding against the persons named as defendants; that

although the state cannot be sued, yet persons remain responsible, and may be made subject to every proper process. It has heretofore been deemed a sound maxim in ethics, that whatever could not be lawfully done directly, could not be justly effected by indirect means. If this maxim be regarded, as the state never could be directly proceeded against in the circuit court, without a violation of the constitution; every indirect mode of proceeding ought to be considered inadmissible; but in fact, and substantially, this is not a proceeding against individuals.

A court of chancery proceeds against the person, and against the subject: in technical language, *in personam and in rem.* The proceeding in this case, is not against Ralph Osborn, and Samuel Sullivan, for any matter in which they have an individual or personal concern. It is only in the performance of official duties, that the process of the court interferes to control them; it was not for himself, or upon his individual account, that Ralph Osborn, issued his warrant, to collect a tax from the bank of the United States. It was for the state and in his character as Auditor, that he acted; it is not in the transaction of individual business, or upon his own contracts, that Samuel Sullivan is forbid to *dispose of, or part with,* particular funds. He is inhibited from paying away money received by him as treasurer, held by him as such, and for the disbursement of which he is officially responsible to the state.

A state in the abstract is an intangible entity like a corporation; in substance, it is a community of individuals; it can only act by individual agents, and its power of action is completely destroyed, when these agents are restrained from acting. It is solemn trifling to admit that a state cannot be sued in the circuit court, and at the same time insist, that every agent that the state employs may be controlled and restrained from performing his official functions, by the same circuit court.

The auditor of state is a ministerial agent in the executive department of the government; it is his duty to superintend the collection of the revenue; he acts direct for the whole people upon each; in every one of his official acts, he exercises a portion of the sovereign power; and when he is restrained from acting officially, it is the sovereign power of the state that is restrained.

Injunctions to stay proceedings in the courts of law, are founded upon a different principle. They act upon the party and not upon the court, and call in question the conduct of the party, not the justice, or integrity of the judges. The people, too frequently called the government, never intend that one individual shall use their power to do injustice to another. Courts of chancery are instituted, not to control the courts of law, but to control individuals, who may have obtained unconscionable advantages in the law courts. The proceedings of the chancery courts, is the act of the people; but it does not operate upon the people

themselves, in and through the courts of law. It only withdraws the subject from the judgment of the people in their law court, to their judgment in their court of chancery, upon the principle that adequate justice cannot be administered elsewhere.

This injunction operates through the Auditor, upon the whole people of the state. He is their agent; his acts are their acts; he proceeds under their direction, and for their sole benefit. They are responsible for his errors, and are bound to protect him from unjust responsibility.

If the injunction was intended, and did in fact, operate upon Ralph Osborn alone, his resignation or removal from office, would render it unavailing. His successor in office, would be at liberty to act, notwithstanding the injunction. But that this was not the intention, and is understood not to be the effect of this injunction, is placed beyond all doubt. The bill prayed not only, that Ralph Osborn, *Auditor of state*, but that all others whom it concerned, should be enjoined—and so the order of injunction was made. The court have judicially declared, that this order did not extend to Ralph Osborn and his agent alone; but to all who might act upon the subject. By resigning his office, after notice of an application for the injunction, Ralph Osborn would have ceased to have any concern in the subject of it. Yet we are distinctly given to understand, that his successor in office was

enjoined, as well as every other agent or officer whom the law might appoint to perform any duty connected with the collection prohibited. This fact, alone, would seem decisive, that the proceeding is not personal against Ralph Osborn, but is direct against the Auditor of state.

It is charged in the supplementary bill, that the money collected was delivered to Hiram Mirrick Currey, to keep upon deposit, and by him delivered to Samuel Sullivan, to keep in like manner; it is also charged, that at the time of receiving the money, Currey was treasurer of the state of Ohio, and at the time of delivering it to Sullivan, he was the successor of Currey; and the bill prays that Currey, as late treasurer, and Sullivan, as present treasurer, and also in their individual capacities, may be made defendants; the bill also prays, that Sullivan may be enjoined from disposing of the specific monies, received by him upon account of the tax. This injunction too, is granted upon the suggestions contained in the bill without any evidence that the money was paid to Sullivan, as alleged.

This proceeding is not merely personal against the treasurer, it is direct against the subject; and that subject is money in the state treasury, received by the treasurer as revenue of the state; receipted for as such, and as such carried into his official accounts. But this is not a proceeding against the state; because the complaints allege, that the 'nature and character of the whole trans-

action, forbids the supposition that the money was received by the defendants, in the capacity of Treasurer.' Thus the court are called to determine the whole transaction, to be illegal; and then to invest themselves with jurisdiction to reach the specific funds, by shutting their eyes to the real facts of the case, and supposing a state of things that never did exist.

When a state was liable to be sued before the supreme court, the process issued against the state, and the court directed a service to be made upon the governor, for the time being. If the proceedings in the present case are correct, it is now sufficient to issue process against the person who may happen to be treasurer, and name him both as treasurer and as an individual, and upon such process, at the mere suggestion of a complaint, prohibit him from using, for the benefit of the state, any moneys paid to him officially, which it may be alleged were collected illegally. In due season a decree may be passed, for the specific restitution of the money thus claimed, and this decree will bind the treasurer, that may be in office when it is pronounced, and subject him to the responsibilities of a defendant. If he refuse to pay the money, the court may attach him for a contempt; if he does pay it without a legislative appropriation, he is liable upon his bond, and subject to impeachment. Such might have been the consequence of a judgment against a state, in the supreme court; and it was no doubt an apprehension of such result,

that induced the amendment to the constitution, forbidding the federal courts to call a state before them as a defendant, at the suit of an individual.

It is evident that the principle of the proceeding secures to the federal tribunals every power supposed to be taken from them by the amendment. If the Auditor of state can be enjoined from acting officially; if the treasurer can be decreed to pay back money received as revenue, upon the doctrine that the court consider them wrong doers, there is no case of the exercise of state power that may not be completely controlled. The legislature levy a tax. The federal court are called upon, and upon motion, adjudge it to be contrary to the constitution of the United States: they regard the collector as a wrong doer, and enjoin him from collecting it. The tax is collected and paid into the state treasury; the federal court are applied to: they pronounce the tax unconstitutional: the collection a trespass: the state Treasurer a bailee for the claimant, and decree a restitution of the amount. The Legislature of the state enact a law for the punishment of crimes: an individual is convicted under its provisions, and imprisoned in the penitentiary. He complains that the law under which he is convicted, is repugnant to the constitution of the United States. He calls upon the federal court for redress. The court decide the law to be unconstitutional, the conviction illegal, the keeper of the penitentiary a trespasser, and order the prisoner to be discharged.

In such a proceeding they keep the state entirely out of view, and regard it as a mere personal matter. They shut their eyes to the real state of facts, and assert 'that the nature and character of the whole transaction forbid the supposition' that the state could have had any agency or concern in the imprisonment. In this manner the states may be placed at the foot of the federal judiciary, as well in its administration of criminal justice, as in its fiscal concerns.

In granting an injunction against the Auditor of state in the first instance, and in awarding an attachment against him for disobedience to that injunction, the federal circuit court in Ohio, have unequivocally asserted a jurisdiction over the state and its officers, in the collection of revenue. The circumstances, under which the attachment was ordered, admonish us that the jurisdiction thus asserted, will be without reluctance enforced. The Auditor will be fined or imprisoned, or both, for executing his official duty; and the state must either acquiesce in the correctness of the proceeding, and avert the consequence by retracing their steps; or, regarding it as an encroachment upon their just authority, must prepare to take such a stand against it, as the constitution and a just regard to their rights may warrant.

The committee conceive that the proceeding in this case by bill in chancery and injunction against the Auditor and Treasurer, is to every substantial purpose a process against the state. The Auditor

and Treasurer are defendants in name and in form only, and can only be made and regarded as defendants to evade the provisions of the constitution. From the view they have taken of the subject, the conclusion seems inevitable, that the federal court have asserted a jurisdiction which a just construction of the constitution does not warrant. And the committee conceive, that to acquiesce in such an encroachment upon the privileges and authority of the state, without an effort to defend them, would be an act of treachery to the state itself, and to all the states that compose the American Union.

The committee are aware of the doctrine, that the federal courts are exclusively vested with jurisdiction to declare, in the last resort, the true interpretation of the constitution of the United States. To this doctrine, in the latitude contended for, they never can give their assent.

Every court of justice where they have jurisdiction over the parties to the suit, and the subject of controversy, are of necessity invested with power to decide every question upon which the rights of the parties depend. And their decision is conclusive, unless a superior court be invested with jurisdiction to review it. On this subject the powers of the federal and of the state judiciary are precisely the same. These powers are not founded upon any express constitutional provision; but result from the very nature of written constitutions, and judicial duty.

Among other things, the constitution of the United States declares, that 'no state shall pass any bill of attainder, *ex post facto* law, or law impairing the obligation of contracts.' A defendant prosecuted for a crime before a state court, may insist that the law upon which he is accused is ex post facto. If the state court decide in his favor, it is conclusive; because there is no law authorising the federal court to review it. If the decision be against him, it is for the same reason conclusive. No person can be criminally prosecuted before the federal courts for the violation of a state law. No appeal or writ of error from the decision of a state court, in a state prosecution, lies to the federal court. The interpretation of that provision of the constitution of the United States, which declares that no state shall pass an *ex post facto* law, is now exclusively vested in the state courts. Nor can the federal courts ever be vested, under the constitution, as it now stands, with effective jurisdiction to interpret and enforce this provision. They cannot be empowered to take the administration of criminal justice from before the state courts, in the incipient stages of a prosecution. And a writ of error after judgment, would clearly be a *suit at law*, in which the state must be defendant, and would come directly within the terms of the amendment.

In this case, then, the federal courts cannot now pronounce an effective judicial decision. They cannot possess themselves of jurisdiction over the

parties, upon whom any decision they might make, could operate. Yet individuals may contrive some feigned action, or make some feigned issue, and present to the federal court for decision a case, calling upon them, and thus empowering them to decide that upon a particular state of facts, the operation of a state law would be *ex post facto* within the meaning of the provision of the constitution of the United States. A decision thus obtained, would be entitled to respect, as the opinion of eminent men, but never could be regarded as a judicial declaration of the law of the land.

By an express provision of the constitution of the United States, a provision introduced purposely to effect that object, the states, in any controversies they may have with individuals, are placed beyond the jurisdiction of the federal courts. It would seem incontrovertible, that the amendatory article placed the states, and the United States, in a relation to each other, different from that in which they stood under the original constitution. Different in this, that, in all cases, where the states could not be called to answer, in the federal courts, these courts ceased to be a constitutional tribunal to investigate and determine their power and authority, under the constitution of the United States. The duty of the courts to declare the law, terminated with their authority to execute it.

The committee conceive, that such is the true and that such is the settled construction of the

constitution; settled by an authority, paramount to all others, and from which there can be no appeal; the authority of the people themselves.

So early as the year 1798, the states, and the people, were called to declare their opinions upon the question involving the relative rights and powers of the government of the United States, and of the governments of the separate states. In the month of November, of that year, the state of Kentucky resolved:

"That the several states composing the United "States of America, are not united on the princi- "ple of unlimited submission to their general gov- "ernment; but, that by compact under the style "and title of a constitution for the United States, "and amendments thereto, they constituted a gen- "eral government for special purposes, delegated "to that government certain definite powers, re- "serving each state to itself, the residuary mass of "right to their own self government: and that "whensoever the general government assumes un- "delegated powers, its acts are unauthoritative, "void and of no force; that to this compact, each "state acceded as a state, and is an integral party, "its co-states forming, as to itself, the other party; "that the government created by this compact "was not made the exclusive or final judge of the "extent of the powers delegated to itself, since "that would have made its discretion, and not the "constitution, the measure of its power. But "that as in all other cases of compact among par-

"ties having no common judge, each party has an "equal right to judge for itself, as well of infrac- "tions, as of the mode and measure of redress."

In the month of December, of the same year, 1798, the legislature of Virginia resolved:

"That this assembly doth explicitly and per- "emptorily declare, that it views the powers of "the federal government, as resulting from the "compact to which the states are parties, as lim- "ited by the plain sense and intention of the in- "strument constituting that compact; as no far- "ther valid than they are authorized by the grants "enumerated in that compact; and that in case "of deliberate, palpable, and dangerous exercise "of other powers, not granted by the said com- "pact, the states who are parties thereto, have "the right, and are in duty bound, to interpose, "for arresting the progress of the evil and for "maintaining within their respective limits, the "authorities, rights, and liberties appertaining to "them."

It cannot be forgotten, that these resolves, and others connected with them, were occasioned by the acts of congress commonly called the alien and sedition laws, and by certain decisions in the federal circuit courts recognizing the obligatory force of the common law, as applicable to federal jurisprudence.

The resolutions of Virginia were submitted to the legislatures of the different states—Delaware, Rhode-Island, Massachusetts, the senate of New-

York, Connecticut, New-Hampshire and Vermont, returned answers to them, strongly reprobating their principle, and all but Delaware and Connecticut, asserting, that the federal judiciary were exclusively the expositors of the federal constitution. In the Virginia legislature these answers were submitted to a committee, of which Mr. Madison was chairman, and in January, 1800, this committee made a report, which has ever since been considered the true text book of republican principles.

In that report, the claim that the federal judiciary is the exclusive expositor of the federal constitution is taken up and examined. The committee say :

"But it is objected that judicial authority is to "be regarded as the sole expositor of the consti- "tution, in the last resort ; and it may be asked "for what reason the declaration by the general "assembly, supposing it to be theoretically true, "could be required at the present day, and in so "solemn a manner.

"On this objection it might be observed, first ; "that there may be instances of usurped power, "which the forms of the constitution would never "draw within the control of the judicial depart- "ment ; secondly, that if the decision of the ju- "diciary be raised above the authority of the sove- "reign parties to the constitution, the decisions of "the other departments, not carried by the forms "of the constitution before the judiciary, must be

"equally authoritative and final, with the decisions
" of that department. But the proper answer to
" the objection is, that the resolution of the Gener-
" al Assembly relates to those great and extraor-
" dinary cases in which all the forms of the con-
" stitution may prove ineffectual against infractions
" dangerous to the essential rights of the parties
" to it. The resolution supposes, that dangerous
" powers not delegated, may not only be usurped
" and executed by the other departments, but that
" the *judicial departments also may exercise or sanc-*
" *tion dangerous powers beyond the grant of the con-*
" *stitution; and* CONSEQUENTLY THAT THE ULTIMATE
" RIGHT OF THE PARTIES TO THE CONSTITUTION, TO
" JUDGE WHETHER THE COMPACT HAS BEEN DANGER-
" OUSLY VIOLATED, MUST EXTEND TO VIOLATIONS BY ONE
" DELEGATED AUTHORITY AS WELL AS BY ANOTHER, BY
" THE JUDICIARY AS WELL AS BY THE EXECUTIVE OR
" LEGISLATIVE."

"However true, therefore, it may be that the
" judicial department is, in all questions submitted
" to it by the forms of the constitution, to decide
" in the last resort; this resort must necessarily be
" deemed the last in relation to the authorities of
" the other departments of the government; not in
" relation to the rights of the parties to the con-
" stitutional compact, from which the judicial as
" well as the other departments hold their dele-
" gated trusts. On any other hypothesis, the dele-
" gation of judicial power, would annul the author-
" ity delegating it; and the concurrence of this

"department with the others in usurped powers, "might subvert forever, and beyond the possible "reach of any rightful remedy, the very consti- "tution, which all were instituted to preserve."

The resolutions of Kentucky and Virginia, and of Massachusetts, Rhode-Island, the senate of New-York, New-Hampshire and Vermont, in reply, and the answer to these replies by the legislature of Virginia, were a direct and constitutional appeal to the states and to the people, upon the great question at issue. The appeal was decided by the presidential and other elections of 1800. The states and the people recognized and affirmed the doctrines of Kentucky and Virginia, by affecting a total change in the administration of the federal government. In the pardon of Callender, convicted under the sedition law, and in the remittance of his fine, the new administration unequivocally recognized the decision and the authority of the states, and of the people. Thus has the question, whether the federal courts are the sole expositors of the constitution of the United States in the last resort, or whether the states, "as in all other cases, of compact among parties having no common judge," have an equal right to interpret that constitution for themselves, where their sovereign rights are involved, been decided against the pretention of the federal judges by the people themselves, the true source of all legitimate power.

In the opinion of the committee, the high au-

thority of this precedent, as well as the clear right of the case, imposes a duty upon the state, from which it cannot shrink without dishonor. So long as one single constitutional effort can be made to save them, the state ought not to surrender its rights, to the encroaching pretentions of the circuit court.

But justice should ever be held sacred. Pride and resentment are alike poor apologies for perseverance in error. If it were admitted that the proceedings of the federal court against the state, through its officers, are not warranted by the constitution, still, if the state has commenced in error, it should abandon the controversy. Before, therefore, we determine upon the course we ought to pursue, it is necessary to review and examine the ground upon which we stand.

The bank of the United States established an office of discount and deposit, at Cincinnati, in this state, which commenced banking in the spring of the year 1817. The legislature met in December following, and upon the 13th day of December, a resolution was proposed in the House of Representatives, and adopted, appointing a committee to enquire into the expediency of taxing such branches, as were, or might be established within this state. The committee reported against the expediency of levying such a tax; but the house of representatives, reversed their report by a majority of 37 to 22. A substitute for their report was then offered, asserting the right of the state to levy such a tax,

and the expediency of doing it at that time. The constitutional right of the state to levy such a tax, was carried by 48 to 12, and the expediency of proceeding to levy the tax, by 33 to 27. A bill assessing a tax, was reported to the house, and passed to be engrossed for a third reading and final passage, and upon the third reading, was postponed to the second Monday of December, 1818.

After this solemn assertion of the right to tax, and when a bill for that purpose was pending before the house of representatives, the bank proceeded to organize a second office of discount and deposit, at Chillicothe in this state, which commenced banking in the spring of the year 1818. In January 1819, the legislature enacted the law levying the tax, and postponed its execution until the September following, that the bank might have abundant time so to arrange their business, as not to come within the provisions of the taxing law.

At the period of adopting these measures, the constitutional right of the state, to levy the tax, was doubted by none, but those interested in the bank, or those who expected to derive pecuniary advantages, for themselves or their friends, by the location of branches. It seemed impossible that a rational, disinterested and independent mind could doubt. During the existence of the old bank of the United States, the state of Georgia had asserted this right of taxation, and actually collected the tax. The bank brought a suit, to recover back the money, in the federal circuit

court of Georgia. This suit was brought before the supreme court, upon a question not directly involving the power of taxation. The supreme court decided the point before them, in favor of the bank, but upon such grounds, that the suit was abandoned and the tax submitted to. When the charter of the present bank was enacted, it was known that the states claimed, and had practically asserted the power of taxing it, yet no exemption from the operation of the power is stipulated by Congress. The natural inference from the silence of the charter upon this point, would seem to be, that the power of the states was recognized, and that Congress were not disposed to interfere with it.

The Constitution of the United States had distinctly expressed, in what cases the taxing power of the states should be restrained. No maxim of legal construction is better settled, and more universally acknowledged, than, that express limitations of power, either in constitutions or in statutes, are distinct admissions that the power exists, and may be exercised in every other case, than those expressly limited. With a knowledge of these facts and doctrines in their minds, that a confidence in the power of the state, to levy this tax, should be almost universal, is what every intelligent man would expect. But after the law was enacted, that levied the tax, and before the time of its taking effect, the Supreme Court of the U. S. in the case of Maryland and M'Colloch, decided, that

the states were debarred by the constitution of the United States, from assessing or levying any such tax. And upon the promulgation of this decision it is maintained that it became the duty of the state and its officers to acquiesce, and treat the act of the legislature as a dead letter. The committee have considered this position, and are not satisfied that it is a correct one.

It has been already shewn, that since the 11th amendment to the constitution, the separate states, as parties to the compact of union, are not subject to the jurisdiction of the federal courts, upon questions involving their power and authority as sovereign states. Not being subject to their jurisdiction, no state can be concluded by the opinions of these tribunals: but these are questions, in respect to which there is no common judge, and therefore the state has a right to judge for itself. If by the management of a party, and through the inadvertence or connivance of a state, a case be made, presenting to the supreme court of the United States for decision, important and interesting questions of state power, and state authority, upon no just principle, ought the states to be concluded, by any decision had upon such a case. The committee are clearly of opinion, that such is the true character of the case, passed upon the world by the title of M'Colloch vs. Maryland.

It was once remarked, by a most profound politician, that *words are things;* and the observation is most unquestionably a correct one. This case, dig-

nified with the important and high sounding title of "*M'Colloch vs. the state of Maryland*," when looked into, is found to be an ordinary *qui tam* action of debt, brought by a common informer, of the name of John James; and it is throughout an agreed case, made expressly for the purpose of obtaining the opinion of the supreme court of the United States, upon the question, whether the states could constitutionally levy a tax upon the bank of the United States. This agreed case was manufactured in the summer of the year 1818, and passed through the county court of Baltimore county, and the court of appeals of the state of Maryland, in the same season so as to be got upon the docket of the supreme court of the United States, for adjudication, at their February term, 1819. It is only by the management and concurrence of parties, that causes can be thus expeditiously brought to a final hearing in the supreme court.

It must be remembered, that through the extravagant and fraudulent speculations, of those entrusted with conducting the concerns of the bank, it stood at the close of the year 1818, upon the very brink of destruction. At this critical juncture of its affairs, it was a manoeuvre of consummate policy to draw from the supreme court of the United States a decision, that the institution itself, was constitutionally created; and that it was exempt from the taxing power of the states. This decision served to prop its sinking credit; and if it inflicted a dangerous wound upon the authority

of the states, both with the bank, and with John James this might be but a minor consideration. It is truly an alarming circumstance, if it be in the power of an aspiring corporation, and an unknown and obscure individual, thus to elicit opinions, compromiting the vital interests of the states that compose the American Union.

It is not however either in theory or in practice the necessary consequence of a decision of the supreme court, that all, who claim rights of the same nature with those decided by the court, are required to acquiesce. There are cases, in which the decisions of that tribunal have been followed by no effective consequence.

In the case of Marbury *vs.* Madison, the supreme court of the United States decided, that William Marbury was entitled to his commission as a justice of the peace for the District of Columbia; that the withholding of this commission by President Jefferson, was violative of the legal vested right of Mr. Marbury. Notwithstanding this decision, Mr. Marbury never did obtain his commission: the person appointed in his place continued to act: his acts were admitted to be valid, and President Jefferson retained his standing in the estimation of the American people. The decision of the supreme court proved to be totally impotent and unavailing.

So, in the case of Fletcher *vs.* Peck, the supreme court decided, that the Yazoo purchasers from the state of Georgia, were entitled to the

lands. But the decision availed them nothing, unless as a make-weight in effecting a compromise.

These two cases are evidence, that in great questions of political rights, and political powers, a decision of the supreme court of the U. States, is not conclusive of the rights decided by it. If the United States stand justified, in withholding a commission, when the court adjudged it to be the party's right; if the United States might, without reprehension, retain possession of the Yazoo lands, after the supreme court decided that they were the property of the purchasers from Georgia, surely the state of Ohio ought not to be condemned because she did not abandon her solemn legislative acts, as a dead letter, upon the promulgation of an opinion of that tribunal.

This opinion is now before us, and the committee conceive that it is the duty of this General Assembly, calmly to examine the principles and reasoning upon which it is founded. Much deference is due to the respectable individuals by whom it was formed; and more to the high station they occupy in the government. Although their opinion is not admitted to have the force of absolute authority, yet a course of proceeding pronounced by such eminent statesmen and lawyers to be unconstitutional, ought not to be lightly and unadvisedly adopted.

It is not perceived, that the power of the state to tax the officers of the bank of the United States established within their jurisdiction, is necessarily

connected with the question, whether congress have, or have not, the constitutional power to create a corporation. This power may safely be admitted, if, at the time of making this admission, we clearly comprehend the principles upon which the corporation is to be instituted.

"A corporation," says chief justice Marshall, in the case of Dartmouth College, "is an artificial "being; invisible, intangible, and existing only in "contemplation of law. Being the mere creature "of law, it possesses only those properties, which "the charter of its creation confers upon it, either "expressly, or as incidental to its very existence. "These are such as are supposed best calculated "to effect the objects for which it was created. "Among the most important, are immortality, and, "if the expression may be allowed, individuality: "properties by which a perpetual succession of "many persons are considered as the same, and "may act as a single individual. They enable a "corporation to manage its own affairs, and to hold "property without the perplexing intricacies, the "hazardous and endless necessity of perpetual con- "veyances for the purpose of transmitting it from "hand to hand. It is chiefly for the purpose of "clothing bodies of men, in succession, with these "qualities and capacities, that corporations are in- "vented and are in use. By these means a per- "petual succession of individuals are capable of "acting for the promotion of the particular object, "like one immortal being. But this being does

"not share in the civil government of the country, "unless that be the purpose for which it was cre- "ated. Its immortality no more confers on it "political power, or a political character, than im- "mortality would confer such power, or charter, "upon a natural person. It is no more a state in- "strument than a natural person exercising the "same powers would be."

To this definition of a corporation, the committee see no reason to object: and when the true character of a private banking company is correctly understood, there seems to be no cogent reason why it may not be incorporated by congress upon the principles here defined.

Banking, where the capital is owned by an association of individuals, is a private trade, carried on by the individuals constituting the company, for their own profit. A mercantile company trade in produce and merchandize: a banking company trade in money, promissory notes and bills of exchange. Both may carry on their trade without a charter of incorporation: the trade of both may be regulated by the law of the state, in which they are located; and a charter of incorporation may be conferred upon either, without changing the character of their business, or clothing them with any portion of political power.

It is competent for the government of the United States to make contracts with an association of individuals, as well as with a single person. The Secretary of the treasury may be authorised to

employ an unincorporated banking company, to take charge of, and transmit from place to place, the public revenue. For the performance of this service, he may stipulate a compensation; but he cannot be authorised to barter a privilege inconsistent with the laws of the state, where the company is located, by way of compensation for services to be performed. If such banking association be prohibited by the laws of the state, a contract with the general government cannot suspend the operation of those laws. If such banking association be subject to state taxation, they cannot be exempted from their responsibility by a contract with the United States. But a capacity to transact its associate concerns in a legal and artificial name; a capacity to exist by perpetual succession, notwithstanding the natural death of the individuals; a capacity to sue, and a liability to be sued, without abatement, by the death of any one of the parties; an exemption from personal responsibility for the company debts, and conferring a separate character upon the company funds, so as to preserve them distinct from the individual property of the members of the company, are not privileges incompatible with state laws. And if investing a private company with these privileges, may conduce to the public convenience and the public safety, in making contracts to receive and transmit the public monies; conceding that congress are empowered, under the constitution, to confer these privileges, as a consideration for the

performance of the services agreed upon, and for the purposes of public good, cannot possibly compromit the safety of the states. If their charter of incorporation confer upon the Bank of the United States no other privileges, than are here enumerated, it is manifest, that in every other respect, their property and business stand upon the same footing with that of other individuals.

It was in this light, that a charter incorporating a bank, was contemplated by the first founders of the Bank of the United States. The power of establishing themselves where they pleased, without respect to the state authority, was not claimed by the old bank, nor did they arrogate to themselves any federal character or any privilege, which did not appertain to them as individual citizens. No new or extended privileges are conferred, by its charter, upon the present institution. It is created a private corporation of trade, "as much so as if the franchises were invested in a single person." But it has received its chartered privileges from the government of the United States, and therefore it is, that it is exempt from state taxation.

If the committee have been able to understand the opinion of the supreme court, this consequence is deduced from the five following propositions;

First—The government of the Union, though limited in its powers, is supreme within its sphere of action.

Second—It is of the very essence of supremacy, to remove all obstacles to its action within its own sphere, and so to modify every power vested in subordinate governments, as to exempt its own operations from their influence.

Third—A power to create, implies a power to preserve.

Fourth—A power to destroy, if wielded by a different hand, is hostile to, and incompatible with, these powers to create and to preserve.

Fifth—Where this repugnancy exists, that authority which is supreme must control,not yield to that over which it is supreme.

These propositions are plausible and imposing: but when carefully examined, and applied to the subject under consideration, it is conceived, that no one of them can be sustained, to the extent here laid down.

At the threshold of the enquiry, we demand, what is meant by the assertion, that "the government of the Union is supreme within its sphere of action?" If this observation is applied to a subject, where no question of conflicting power arises, its truth may be safely admitted; and the proposition is equally applicable to the states. In the same sense, each state is equally 'supreme within its sphere of action.' In regulating our foreign trade, the government of the Union is supreme, and in establishing the modes of conveyance and the canons of descent, each state is equally supreme.

But this proves nothing upon either side, when the relative powers and authorities of the general and state governments are drawn into discussion.

The power to establish light houses, beacons, buoys and public piers, is within the sphere of action of the government of the Union: but, in practice, this power has never been considered supreme. It has always been exercised with the assent of the states, and within cessions of territory made by them.

The Cumberland road was laid out and constructed by the government of the Union; consequently the power to do it, is considered within their sphere of action. Yet this power was not claimed as supreme. It was only exercised with the assent and approbation of the states through which the road was made.

Murder is an offence against all government: yet the government of the U. States cannot punish murder, unless it be committed in the army or navy, upon the high seas, or within their forts and arsenals, or other places where they exercise exclusive jurisdiction. Except in the cases specified, the murder of an officer of the United States cannot be distinguished from an ordinary homicide. A judge of the federal courts, a marshal, a collector of the revenue, a post master, a member of either house of congress, the President or Vice-President, may be murdered, and if the respective states refuse to interpose their authority to punish the perpetrator, he must escape with impunity.

This government, though supreme within its sphere of action, cannot protect the lives of its public functionaries, by the punishment of those who may assail them. It can assert no jurisdiction, unless violence be offered to them in their official characters, and in the performance of official duties.

It may be answered to this, that the punishment of murder is not within their sphere of action. True. But how futile is it to talk of a government being supreme; which is not invested with this, the most common and ordinary mode of preserving its existence. It is supreme over individuals, in cases entirely subject to federal cognizance. But is it supreme over the states? It cannot coerce them either to elect senators in congress, or electors of President and Vice-President. A combination between one half of the states, comprising one third of the people only, possess the power of disorganizing the federal government, in all its majesty of supremacy, without a single act of violence. It is expressly inhibited by the constitution, from which this supremacy is derived, from calling the states as defendants before its courts. It cannot save from punishment one single citizen whom the state authorities have condemned. It is neither supreme to save, or to punish; in what, then, does this supremacy consist, in which the separate states are not also supreme? In one thing only; and that is, the exercise, by the federal courts, of appellative jurisdiction, in cases, and between parties, made subject to their jurisdiction, by the constitu-

tion. But the states, as parties, are not subject to their jurisdiction; but are expressly exempt from it, and, therefore, over the states and upon questions involving the extent of their powers and authority, the government of the Union is not supreme. It cannot according to the hypothesis of the second proposition, remove all obstacles to its action, and so modify the powers of the state governments, as to exempt its own operations from their influence.

Is this second proposition sustainable upon any acknowledged principle of constitutional law? It is certainly a doctrine of portentous import, when connected, as it necessarily must be, with the proposition that precedes it: It claims, as an attribute of the government of the Union, a power to MODIFY every power vested in the state governments, so as to remove all obstacles to its own action, and exempt its own operations from their influence.

According to this doctrine, the states are not coparties to the compact of union, as asserted in 1798 by the states of Kentucky and Virginia, and established in 1800, by the American people. The rights, powers and authorities of the states are not immutably established by constitutional provisions; but are subject to modification, in order to give scope for the action of the government of the Union.

The two propositions stand in a perfectly natural and logical connection, though not thus arranged in the opinion:

"The government of the Union, though limited, in its powers, is supreme within its sphere of action."

"It is of the very essence of supremacy to *remove* all obstacles to its action within its own sphere, and so to *modify* every power vested in *subordinate* governments, as to exempt its own operations from their influence."

Therefore, we may very properly add the consequent, it is competent for the government of the union, to remove all obstacles to its action, by so modifying the powers of the state governments, as to exempt its own operations, from their influence. If the postulates be admitted, this consequent is inevitable.

This result will hardly be contended for in explicit terms; it asserts a supremacy no where recognized in the constitution. The powers retained by the states, cannot be *modified* by the government of the union. To modify, is to change, or give a new shape, to the power modified; and if the government of the union can give a new character to the powers reserved by the states, for the purpose of removing obstacles to their own power of action, there must soon be an end to the state governments. The government of the union asserts, an exclusive authority in itself to determine its own sphere of action. On this point it is as supreme, as upon any other. So soon as it has resolved that the exercise of any power appertains to it, that power assumes the character of supremacy,

and removes by modification, puts down before its march, every power previously supposed to be vested in the states, that may present any obstacle to its action. Thus the government of the union, may, and undoubtedly will progressively draw all the powers of government into the vortex of its own authority. Against these doctrines, the committee conceive, that it is the duty of the states to enter their most solemn protest.

The committee do not admit, that supremacy is an attribute, either of the government of the union, or of the state governments. Supremacy is an attribute of the people, and an attribute of the laws. In relation to the governments, the people are supreme, and the laws supreme over individuals. Government is but the medium through which the supreme power acts: the government of the union is the medium through which the American people act, upon particular subjects, that concern their interests and their welfare: the governments of the states are the medium, through which the same people act, upon other subjects, equally interesting and important to them; these two mediums of action, are only brought into collision by the usurpations of one or the other. Neither is invested with power to render its encroachments permanent, by a modification of the powers of the other. While moving within its proper limits, neither can present an obstacle to the action of the other: both must proceed harmoniously. In respect to each other, neither is supreme, neither

subordinate. The government of the union, and the governments of the separate states, are alike the property and the agencies of the whole American people. This principle is the base and bond of the American Union.

The third proposition is, "that a power to create, implies a power to preserve."

As applicable to the government of the union and the incorporation of the bank of the United States, this proposition, in the broad sense of its expression, is considered totally inadmissible.

The committee have already attempted to demonstrate, that the bank of the United States is a mere private corporation of trade. Their charter confers upon them neither political character, nor political power; it gives them corporate capacity, and nothing more. The provision that the bank may establish branches in the states and territories, when fairly construed, can only be regarded as giving corporate capacity to do so: and this is the only provision of the charter, that by any colorable interpretation, can be understood to vest them with a semblance of political power.

The legal faculty and capacity conferred by the charter, if constitutionally created, are preserved in existence by the very law that originates them. They become private vested rights, and are preserved by the same universal law, that protects individual rights, and individual contracts.

But the trade and business of the bank and the franchises conferred to aid in carrying them on, are

separate and distinct matters. To lend money and drive a trade in bills of exchange, and gold and silver bullion, are not corporate franchises. These trades exist, independent of the charter, and may be pursued by individuals, without an act of incorporation. It is not the business itself, but the particular method of conducting it, that is created by the act of Congress, incorporating the bank of the United States.

Natural persons are clothed with an original, inherent capacity, to make contracts, and to acquire property. In a corporation, this capacity is artificial. In other respects, natural persons and corporations or legal persons, stand upon the same principles. The power of making contracts, enjoyed by individuals, is subject to the regulations of law; the property acquired by individuals is liable to taxation for the support of those laws, that originate and protect it; private corporations of trade, upon every maxim of justice and common sense, are subject to the same regulations and exactions.

The employments, professions, business and trade of natural persons may be taxed as such, and laws for this purpose, are not considered as violative of individual rights, or as incompatible with the existence and preservation of trade, business and employments. No just principle is perceived, upon which these laws should receive a different interpretation, in their application to the trade and business of a private corporation.

According to the definition of corporation heretofore given, the corporate franchises of the bank

of the United States, invest the stockholders with immortality and individuality, with a capacity to act like one immortal being, to perpetuate their existence; to manage their own affairs, to hold property, and transmit it from hand to hand as a natural person could. These franchises are conferred by the government of the Union, to enable the company to conduct the business of lending money, and the trade in bills of exchange, and gold and silver bullion, with convenience and security; but the business and trade to be conducted, are not corporate franchises, and are not created by an act of congress. A tax assessed upon the business of the company, does not touch their corporate franchises, however it may affect their convenience or their profit. This power to preserve, as asserted by the court, and applied to the subject before them, is not asserted for maintaining and preserving the corporate franchises of the bank; but for the purpose of giving to these corporate franchises action and employment every where, independent of state laws, and beyond the control of state legislation. When fairly traced to its consequences, the doctrine asserted amounts to this; that a corporation created by the government of the Union is clothed with supreme authority, to conduct its business, without respect to the existing laws of the states and free from any apprehension of those that may be enacted.

A most serious objection to this doctrine, is, that it asserts the power to preserve, not as pertaining

to the government of the union, to be employed or not at the discretion of congress, but as incidental to the charter, and to be secured to the company by the judicial power alone.

The committee conceive that the power to create a corporation, and the power to preserve it, by special privileges and exemptions, are powers of the same class and description; both are legislative powers to be conferred or withheld at the discretion of the legislature, and where a charter of incorporation stipulates no special privileges and exemptions, none can be supposed to exist "Being the mere creature of law, it possesses only those properties conferred upon it, either expressly or as incidental to its very existence."

Had congress intended to exempt the bank from the taxing power of the state, as a means of preserving its existence, a provision for that purpose should have been introduced into the charter. The power to make this provision would have been examined before the charter was created, and the intention of congress would have been manifested. The people and the states would have been apprised of the pretensions of the bank before it got foot hold among them, and before it had established a monied influence to support itself. Every privilege claimed by the company when inserted in the charter, has received the sanction of the legislative authority, and is open to the examination of all. But to invest them with unknown and latent privileges, to any extent that

the supreme court may deem convenient, to preserve, not only their corporate franchises, but the most beneficial use of them, is undoubtedly a new doctrine, as applied to corporations, and as dangerous as it is novel.

This company have claimed that the states cannot tax their corporate operations, or the profits arising from them: and the supreme court have sustained their claim as a privilege necessary to preserve their existence. By their charter, they are authorised to employ officers, clerks, and *servants*. Should the company claim to send slaves into Ohio, and employ them in their branches, as *servants*, the committee would conceive the claim as well founded, and as likely to be sustained, as the exemption from taxation. It stands upon the same principle. If the states may control the company, in the employment of *servants*, they may embarrass its operations, and impede a free and unrestrained exercise and enjoyment of their corporate faculties. By the laws of Ohio, a promise to pay the debt of another is not obligatory unless made in writing: but the charter of this company is silent as to the mode of binding parties that contract with them; they may claim that this law of contracts applied to individuals only, and cannot touch them without narrowing the beneficial use of the faculty conferred upon them by congress; who shall say that this claim may not be sustained? In short, who can undertake, with any hope of success, to enumerate the privileges and exemp-

tions to which, upon this doctrine, the bank are entitled?

It is important to glance at the train of implications with which this doctrine is connected. The power to create the bank, implies the power to preserve it. This power to create is, itself, derived by implication. It is found among the subsidiary powers, as incident to the choice of means for the administration of the government. This implied power to create, is made the foundation for further implication; it implies the power to preserve; and again, of necessity, the power to preserve, implies a choice in selecting the means of preservation; and upon the doctrine of the court, all these powers are supreme, to the operations of which, the constitutions and laws of the states can oppose no obstacle. It is certainly difficult to see the point where these implications terminate, or to name the power which they leave to the states unimpaired.

The government of the union have no authority, by the express provisions of the constitution, to interfere with the law of contracts. They have found authority to institute a Bank, or in other words to create a private corporation of trade, and with the power to create, they have possessed themselves of power to preserve, not the corporation they have created, but the business in which the corporation have engaged. This business extends over the whole region of contract, either direct in negociating loans of money, and purchasing

and selling bills of exchange, and gold and silver bullion, or indirect in receiving and disposing of merchandize and real estate, pledged or mortgaged for debts previously contracted. From the aid of this corporation, the states may withdraw their law of conveyances, or, as applied to their dealings, the states may introduce provisions regulating contracts, which the corporation may deem obstructions to the enjoyment of their corporate trade. From this doctrine, that the power to create, implies the power to preserve, congress may derive a power to frame a new law of contracts, and devise a new system of conveyances, suitable to the beneficial enjoyment of the trade of this corporation; and this new system in the supremacy of its action may disregard both fundamental laws, and establish maxims of jurisprudence.

The government of the union was not instituted to protect individual rights, or to redress individual wrongs; but this power to preserve the trade, business and property of a corporation created by themselves, invests them with power to frame a code of criminal law, for the punishment of those who violate the property of the bank, and thus draw into the federal courts, the ordinary administration of criminal justice. This is already attempted in the provision for punishing those who counterfeit the notes of the bank, and upon the doctrine asserted, may be extended to cases of larceny, burglary, or robbery upon their corporate property. No doctrine has ever yet been advan-

ced that draws to the government of the union such a host of powers: none that contains such potency for "rending into shreds" the authority of the states. Those who claim for the government of the union, the power of creating corporations, hold that "one may be created in relation to the collection of the taxes, or to the trade with foreign countries, *or between the states*, or with the Indian tribes; because it is the province of the general government to regulate those objects, and because it is incident to a *general* sovereign or legislative power to regulate a thing to employ all the means which relate to its regulation to the best advantage." The power to create all these corporations, upon the principle asserted, implies the power to preserve them. And the power to preserve, implies a power in the government of the union to bargain with companies for monopolies of trade and exemptions from taxation: to place such companies above the power of the states, as means employed by themselves, which they have a right to use to the best advantage.

In the discussion of this subject, an extraordinary, and the most miraculous efficacy, is given to the terms "*employment of means.*" And it is worthy of remark that no effort is made to explain their true import, or the sense in which they are used. We are told that the collection of taxes, and the safe keeping of, and transmission of money from place to place, is an end, or object of government, and that the bank is a convenient means of attaining this end; but it is not the charter or corporate

franchise that is used or employed for this purpose; it is the individuals that compose the company, as an aggregate body, that are thus used, and the corporate franchise bestowed upon them by the government is conferred to enable them to transact their own business, and perform this service for the government, with greater security and convenience. At this moment the government of the union employs the Franklin Bank of Columbus, to receive and pay out the public monies, and while thus employed, this bank is used as a means of government, but being thus used, is not supposed to invest it with any privilege peculiar to the public functionaries.

The government, all its machinery and officers, are but the means of the people for attaining the great ends declared in the preamble to the constitution. Every person employed under the constitution, from the President of the United States to the post-boy that carries the mail, partakes of this character of means: the law that the President is bound to see faithfully executed, and the horse that the post-boy rides, are alike, in a certain sense, means of the government: but in respect to privileges and exemptions, no man ever supposed them to stand upon the same footing. Those who hold offices direct under government, may be regarded as principal means; those who are employed by contract, as incidental or subsidiary. The first class compose, as it were, a part of the government direct; are entrusted with the exer-

cise of some portion of political power, and are clothed with privileges and exemptions attached to their official stations. Those engaged by contract to perform services, have no official character, and consequently cannot claim the exemptions attached to public office. Thus a deputy post-master is an officer under the government, invested with privileges, and subject to disabilities attached to his office: but a contractor to carry the mail, has no such character; yet both are means used by government under the constitutional authority, "to establish post offices and post roads."

The bank of the United States is not *a mean* of the government of the union, in the same sense with the mint and the post office; but in the same sense with contractors to supply public stores, or to carry the mail. The director, assayer, chief coiner, engraver, treasurer, melter and refiner of the mint are public officers, so are the postmaster general, and deputy postmasters. They cannot hold their offices and seats in congress at the same time; they are appointed to, and take an oath of office. But the workmen employed in the mint, like contractors to carry the mail, and the drivers and riders they employ, are not public officers, nevertheless, they are necessary means in the employment of government. The stockholders in the bank of the United States, the president and directors of that institution, are not public officers, even the directors appointed by the government, are destitute of public character. They are

eligible to seats in congress, which is conclusive evidence upon this point: and it is a monstrous doctrine to maintain, that corporations created by the government of the union, in point of privilege and exemption, are principal means of government, not to be distinguished from the officers of the mint, and the post office, while every member and officer of such corporations are eligible to seats, both in the congress of the union, and the legislatures of the several states. By this doctrine, the great principle of separating the departments of government is completely broken down. Collectors of revenue, officers of the customs, Indian agents, receivers of public monies under the government of the union, may become legislators and judges in their own case, both in the general and state governments. This consequence alone would seem sufficient to expose the unsoundness of the doctrine asserted.

It is singular, that in the very elaborate opinion which the committee have been engaged in examining, no definition should be given of the true character of the bank: but that, like the terms "employment of means," it should be left to doubtful and various interpretations. It is a public institution, or a private corporation of trade. If the former, with the privileges of office, the corporators must be subject to the disabilities of office. If the latter, like any other individual, or bank, employed by the government of the union, its trade and business must be regulated by state laws, and sub-

ject to state exactions. In support of their position, that it is a private corporation of trade, the committee can adduce a judicial opinion delivered in the supreme court itself. "For instance, says Mr. Justice Story, a bank created by the government for its own uses whose stock is exclusively owned by the government, is, in the strictest sense, a public corporation. So is an hospital, created and endowed by the government for general charity. *But a bank whose stock is owned by private persons, is a private corporation, although it is erected by the government and its objects and operations partake of a public nature.* The same doctrine may be affirmed of insurance, canal, bridge, and turnpike companies. In all these cases, the uses may, in a certain sense, be called public, *but the corporations are private : as much so indeed as if the franchises were vested in a single person.*"

We have seen that by the employment of natural persons or state banks, to perform those services stipulated to be performed by the bank of the United States, they become to a certain extent, *means employed* by the government, and yet have never been regarded as public officers, privileged from the operation of state laws. May we not, therefore, paraphrase the language of the chief justice, and ask, "if then a natural person or "state bank, employed by the government of the "union, to receive, keep, and pay out of the public "monies would not become a public officer, or be "considered as a member of the civil government,

"how is it that this artificial being, created by law, "for the purpose of being employed by the same "government, for the same purposes, should be- "come a part of the civil government of the coun- "try? Is it because its existence, its capacities, its "powers, are given by law? Because the govern- "ment has given it the power to take and to hold "property, in a particular form, and for particular "purposes, has the government a consequent right, as "over all members of the civil government it must "have, substantially to change that form, or to va- "ry the purposes to which the property is to be "applied? *This principle has never been asserted or "recognized, and is supported by no authority.*"

Thus reasoned the judges of the supreme court, upon the 2d February 1819. The case of M'Culloch vs. Maryland, had not then been argued or decided. And the doctrine that the government, by chartering a private corporation of trade, placed the association upon the same foundation with the mint and the post office, had then never been recognized in a court of law, and was "*supported by no authority.*" If the public character of the bank of the United States, stands upon other foundation than that expressly negatived in these quotations, the committee have been unable to discover it: it is not explained or developed in the opinion that places them on a level with the mint and the post-office, and gives to their trade, in bills of exchange, and gold and silver bullion, the same character as to the process of the federal courts.

When the committee deny that, "a power to create, implies a power to preserve," they are to be understood as denying the application of this principle, only by the case of creating corporations. A power to create a public office, necessarily implies a power to preserve that office: but a power to bestow a corporate franchise to carry on a private trade, is totally different from creating a public office; a distinction between the corporate franchise, and the business to be conducted under it, must be always borne in mind; the power that creates a corporate franchise, for private purposes, not only cannot preserve such franchise, but cannot new-model or impair it; its corporate character and existence, are as secure as the existence and personal rights of a natural person: but its trade and business, like the employments of natural persons, remain subject to regulation, by the local authorities, where it seeks to locate them. Thus a power in the states to tax, or even to prohibit a trade in bills of exchange, and gold and silver bullion, is not a power to destroy the corporate franchises of the bank of the United States. These corporate franchises remain, notwithstanding the exercise of this power, just as the existence and rights of an individual remain, though his business is taxed, or he is forbid to engage in certain employments. The government of the union have conferred upon the bank certain capacities, for engaging in trade: but it has not and cannot confer an absolute right and power to drive this trade, in

contempt of state laws. It is made capable, but not sovereign; its capacity must be examined, not with a single eye, to the supremacy of the power that created it; but with a whole view, of what that power could confer, and what it has conferred.

If the committee have succeeded in shewing, that the power which created the bank of the U. States, is not supreme, in the sense of the two first propositions; but is limited in its powers and means of preserving the bank, so as to render the third proposition untenable, the fourth and fifth propositions, which are founded upon, and consequences derived from the other three, must necessarily be given up: As applied to the question under discussion, however, it has been shewn, that a power to tax their trade, is not a power to *destroy* the corporation. It is not perceived how a power to diminish the profits of labor and capital, by exacting a portion of their proceeds, for the support of government, can be construed into a power to destroy human life, and annihilate capital. The power of taxing the bank is denied, because it might be so used, as to prevent the corporation from deriving a profitable trade, and this is deemed a power to destroy the charter, which did not originate the trade, but merely created a facility for conducting it.—But what is most singular is this, that after arriving at this conclusion, an admission is made, that at once demolishes the whole doctrine upon which it is founded.

It is conceded, that each state may tax the

stock owned by its citizens in this bank. Then it is not a public institution, exempt from state taxation, upon the great principle, that the states cannot tax the offices, institutions and operations of the government of the union. It is not that the states have no power to tax the bank; but that this power exists only over its capital, and does not extend to its operations. What then becomes of all the labored doctrines of the opinion? The government of the union, though supreme within its sphere of action, removing all obstacles, and so modifying all powers, vested in subordinate governments as to exempt its own operations from their influence, cannot after all, preserve what it can create. Those who advance this pretension, are compelled to admit, that, upon their own principles, a power to destroy, may be wielded by the state governments.

In its utmost extent, a state tax, upon the operations of the bank, can produce no other injury, than a suspension of its business. By ceasing to trade, a tax upon business can always be avoided. Not so a tax upon capital. Should the states of Pennsylvania, New-York and Massachusetts combine to tax the stock in the bank of the United States, owned by their citizens, to an amount that must consume the annual profits, and encroach upon the capital advanced, the destruction of the bank must be inevitable: for this tax upon capital may be exacted, whether it be productive or not. The power of the states to tax the business of the

bank, is denied upon the broad ground, that the power to levy such a tax is tantamount to a power to destroy the bank, and is incompatible with a power of the government of the union to create it. Yet this power to tax the capital, though incontestibly of greater potency to destroy the institution, is admitted to exist. Between the point decided and the point conceded, there is a palpable contradiction, to which sound argument and just conclusions are never subject.

Another very absurd consequence results from the decision and admission, when connected together as they are, in the opinion under consideration. A state tax upon the stock, or actual capital invested by its citizens in the bank, cannot reach or affect the stock owned by foreigners, or by the other states: but a tax upon the business, operates alike upon all the stockholders. Should Massachusetts tax the stock of her citizens, stock in the bank must be worth less in Massachusetts than elsewhere. Should all the states tax the stock owned by their citizens, stock held by foreigners must be most valuable. Should one state tax the stock so as to exhaust the capital, the citizens of that state must sell out to citizens of other states, or to foreigners. Should all the states assess such a tax, the whole stock must be transferred to foreigners, or the bank annihilated. One consequence, therefore, of this admission, may be to throw the institution into the hands of foreigners; when our government will exhibit the strange spec-

tacle of a company of foreign bankers regarded as a national institution, and as such, protected by the constitution of the Union, from any of the burthens to which citizens are subject.

It may be said, that this admission was unwarily made, and upon further consideration, would be retracted as inconsistent with what had been previously decided. But the committee conceive, that this explanation is quite unsatisfactory. It has been already stated, that the constitution does, in express terms, declare what subjects shall be exempt from the taxing power of the states. It was felt, that, indirectly to exempt other subjects, was unwarrantable upon all established principles of interpreting laws and constitutions. This argument was pressed, and to escape its force, the admission was made, so that evidently it is part of the decision, and as such sweeps away the grand pillar upon which the whole decision rested.

If the committee have taken a correct view of the subject, it would seem manifest, that in denying to the states a power to tax private corporations of trade, incorporated by the government of the Union, where no doubt exists of the power to create the corporation, it becomes necessary to maintain many doctrines of very doubtful character, and dangerous tendency; while conceding to them this power, involves nothing either doubtful or dangerous. It strips such corporations of all pretensions to be regarded as instruments of government, in the same sense as the mint and the post office.

But it preserves untouched their corporate franchises, and concedes them every right and privilege which a natural person is entitled to claim. It presents no obstruction to the legitimate action of the government of the Union; but places it, in the establishment of private corporations of trade, upon the same foundation, as in erecting light houses and constructing roads.

It is in nothing derogatory to this corporation, called the Bank of the United States, nor to the government of the Union that created it, to place its trade upon the same footing with that of a private citizen employed by the government. The contractor, to transport the mail, must use horses and carriages; without them he cannot comply with his contract. They are means, or instruments employed by government; but they are subject to state taxation as other property of the same description. This has been an universal practice, and has never been deemed any obstruction to the action of the government of the Union. The State cannot tax the transportation of the mail, without obstructing the action of the government: but were an association incorporated to transport the mail, all over the union, with capacity to trade in live stock and agricultural products, there can be no doubt but that their private trade and property would be subject to state taxation.

The committee have not deemed it necessary to examine any argument founded upon a supposed abuse of power by the states. As between states every argument of this sort is inadmissible, because it may be urged with equal force against the exercise of any power by either, and concludes to the destruction of all authority. There can be no doubt, but that the states will, at all times, be ready to encourage rather than repress the introduction and employment of capital within their dominion, where it may probably be of any general

advantage. Of this, the state authorities are much more competent judges than capitalists or their agents at a distance can be. It must always be unwise to force capital into a country, against the sense of those who administer the government. That the bank has sustained great losses, by sending branches into this state, is now notorious; that their trade and loans have been highly injurious to all the best interests of the state, cannot be disputed. This loss on one hand, and injury on the other, would have been avoided, had the bank consulted the authorities of the state, instead of holding counsel with money jobbers and speculators.

The committee have carefully examined the subject, and without pretending to present it in all the views of which it is susceptible, have urged only those which appear to them most prominent. The result of their deliberations is that the Bank of the United States is, in their opinion, a mere private corporation of trade, and as such, its trade and business must be subject to the taxing power of the state.

In considering what course the committee should recommend as proper to adopt at this time, one point of difficulty has presented itself. It is urged by many, that the tax levied and collected, is enormous in amount, and therefore unequal and unjust. It is readily admitted, that this allegation is not entirely unfounded, and all must agree, that it does not comport with the character of a state to afford any color to accuse her of injustice. Even in the assertion of a right, it is highly derogatory for a state to act oppressively, and all injustice is oppression. It cannot be doubted, but that the tax was levied as a penalty, and that it was not supposed the bank would venture to incur it. It was an act of temerity in them to do so, and although in this view the tax was justly, and in the opinion of the committee, legally collected, yet under all

the circumstances of the case, the committee conceive that the state ought to be satisfied with effecting the objects for which the law was enacted.

At this time the bank can have little object in continuing its branches except to maintain the point of right, which may not be definitely settled by the controversy. The state having refused to use the money collected, has no interest but that of character, and an assertion of the right. If an accommodation can be effected without prejudice to the right upon either side, it would seem to be desirable to all parties. With this view, as well as with a view to remove all improper impressions, the committee recommend, that a proposition of compromise be made by law, making provision, that upon the bank discontinuing the suits now prosecuted against the public officers, and giving assurance that the branches shall be withdrawn, and only an agency left to settle its business and collect its debts, the amount collected for tax shall be paid without interest.

But the committee conceive, that the General Assembly ought not to stop here. The reputation of the state has been assailed throughout the United States, and the nature of the controversy, and her true course of conduct have alike been very much misunderstood. It behoves the General Assembly, even if a compromise be effected, to take measures for vindicating the character of the state, and also for awakening the attention of the separate states, to the consequence that may result from the doctrines of the federal courts, upon the questions that have arisen. And besides, as it is possible that the proposition of compromise may not be accepted, it is the duty of the General Assembly to take ulterior measures for asserting and maintaining the rights of the state, by all constitutional means within their power.

In general, partial legislation is objectionable.

But this is no ordinary case; and may therefore call for, and warrant extraordinary measures.—Since the exemptions claimed by the bank are sustained, upon the proposition that the power that created it must have the power to preserve it, there would seem to be a strict propriety in putting the creating power to the exercise of this preserving power, and thus ascertaining distinctly, whether the executive and legislative departments of the government of the union, will recognize, sustain and enforce the doctrine of the judicial department.

For this purpose, the committee recommend, that provision be made by law, forbidding the keepers of our jails from receiving into their custody, any person committed at the suit of the bank of the United States, or for any injury done to them; prohibiting our judicial officers from taking acknowledgments of conveyances, where the bank is a party, or when made for their use, and our recorders from receiving or recording such conveyances; forbidding our courts, justices of the peace, judges and grand juries, from taking any cognizance of any wrong, alleged to have been committed upon any species of property, owned by the bank, or upon any of its corporate rights or privileges, and prohibiting our notaries public from protesting any notes or bills, held by the bank or their agents, or made payable to them.

The adoption of these measures, will leave the bank exclusively, to the protection of the federal government, and its constitutional power to preserve it in the sense maintained by the supreme court, may thus be fairly, peaceably and constitutionally tested. Congress must be called to provide a criminal code, to punish wrongs committed upon it, and to devise a system of conveyances, to enable it to receive and transmit estates; and being thus called to act, the national legislature must

be drawn to the serious consideration of a subject, which the committee believe demands much more attention than it has excited. The measures proposed are peaceable and constitutional; conceived in no spirit of hostility to the government of the union, but intended to bring fairly before the nation great and important questions, which must one day be discussed, and which may now be very safely investigated.

The committee conclude, by recommending the adoption of the following resolutions:

Resolved by the General Assembly of the state of Ohio, That in respect to the powers of the governments of the several states, that compose the American Union, and the powers of the federal government, this general assembly do recognize, and approve the doctrines asserted by the legislatures of Kentucky and Virginia in their resolutions of November and December, 1798, and January 1800, and do consider that their principles have been recognized and adopted, by a majority of the American people.

Resolved further, That this General Assembly do protest against the doctrines of the federal circuit court, sitting in this state, avowed and maintained in their proceedings against the officers of state upon account of their official acts, as being in direct violation of the 11th amendment to the constitution of the United States.

Resolved further, That this General Assembly do assert, and will maintain, by all legal and constitutional means, the right of the states to tax the business and property of any private corporation of trade, incorporated by the congress of the United States, and located to transact its corporate business within any state.

Resolved further, That the bank of the United

States, is a private corporation of trade, the capital and business of which, may be legally taxed in any state where they may be found.

Resolved further, That this General Assembly do protest against the doctrine, that the political rights of the separate states, that compose the American union, and their powers as sovereign states, may be settled and determined in the supreme court of the United States, so as to conclude and bind them, in cases contrived between individuals, and where they are no one of them, parties direct.

Resolved further, That the Governor transmit the governors of the several states, a copy of the foregoing report and resolutions, to be laid before their respective legislatures, with a request from this General Assembly, that the legislature of each state may express their opinion upon the matters therein contained.

Resolved further, That the Governor transmit a copy of the foregoing report and resolutions to the President of the United States, and to the President of the Senate, and Speaker of the House of Representatives of the United States, to be laid before their respective Houses, that the principles upon which this state has, and does proceed, may be fairly and distinctly understood.

House of Representatives, Dec. 28, 1820.

The foregoing report was approved and the resolutions adopted :

Attest, WM. DOUGHERTY,
Clerk House Rep.

In Senate, January 3, 1821.

Report approved and resolutions adopted.

Attest, RICHARD COLLINS,
Clerk Senate.