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ART. I.—*The Signs of the Times: a Series of Discourses delivered in the Second Presbyterian Church, Philadelphia.* By Cornelius C. Cuyler, D.D., Pastor of the Church. Philadelphia: William S. Martien. 1839. pp. 319. 12mo.

WE have already expressed our favourable opinion of these excellent Discourses. We now recur to them again, that we may make the subject discussed in the fourth lecture, entitled "God's frowns against Covetousness," the foundation of some remarks that seem to us adapted to the existing state of things. We have nothing to say in the way of objection to the views presented by Dr. Cuyler. His leading position is, that the pecuniary distress which pervades our country is a judgment upon the people for their covetousness. But in maintaining this position, he avoids the presumption of those who, "taking upon themselves the mystery of things, as if they were God's spies," pronounce with all confidence upon the final cause of every dispensation of providence, and invade, with unhallowed tread, even the sacred privacy of domestic sorrow, that they may make every individual calamity the occasion of impeachment against the character of the sufferer. His interpretations of divine providence are suffi-

acknowledge the authority of Colloquies or Synods in matters of discipline and order, and that they settle their dwellings in this kingdom, a thing of great and dangerous consequence, if not in time carefully prevented: Now this assembly, fearing lest the contagion of their poison should diffuse itself insensibly, and bring with it a world of disorders and confusions upon us; and judging the said sect of *Independentism* not only prejudicial to the church of God, (because as much as in it lieth, it doth usher in confusion, and openeth a door to all kinds of singularities, irregularities, and extravagances, and barreth the use of those means, which would most effectually prevent them,) but also is very dangerous unto the civil state; for in case it should prevail and gain ground among us, it would form as many religions as there be parishes and distinct particular assemblies among us:"* therefore, &c. &c. This is strong language; too strong, we are persuaded, to be subscribed by any Presbyterian even of our harsh communion, but very decisive as to the historical question, in reference to which alone we cite it. There were many points of French Presbyterianism which are not agreeable to our views, chiefly those which were caused by the political relations of the Huguenot party. But the history of these churches is so rich in suggestions respecting polity, discipline, and doctrine, that we feel surprised at the neglect into which it has been allowed to fall.

ART. V.—*Report of the Presbyterian Church Case: the Commonwealth of Pennsylvania, at the suggestion of James Todd and others, vs. Ashbel Green and others.* By Samuel Miller, Jun., a Member of the Philadelphia Bar. Philadelphia: William S. Martien, 8vo. pp. 596.†

THE parties that so lately convulsed the Presbyterian church in the United States now form two distinct and inde-

* Quick, ii. 467.

† In publishing the following article, the conductors of the Princeton Review have been led to depart from their usual rule of publishing nothing which does not express in all respects their own opinions. This article, which they have received from a member of the Bar, embraces the discussion of legal questions, in relation to some of which there exists much diversity of opinion; and were it possible so to modify it as to make it express entirely the views of the conductors of this work, it would not be just to the author thus to destroy the entireness of his argument and mar the ingenuity and force of his reasoning.

pendent religious societies. Whatever may be the issue of their controversy in the civil courts, to which it has been referred for judgment, the separation is complete, and, unless a voluntary re-union should take place, must be final. The knowledge of this fact has no doubt had a most happy influence in quieting the excitement and soothing the ardent feelings, which the ecclesiastical perhaps more than the civil controversy had aroused; and which the anticipation of further strife in the deliberative assemblies of the church, as much as actual collision, warmed and animated. A calm has settled over the scene of recent agitation: whether the subsidence of the troubled waves is decisive of peace among the elements, or promises but a respite, certainly to human sight, the crisis seems to have passed;—the storm has spent its violence, though it may yet again ruffle the waters. The season of repose should not go by unimproved. Though but the commencement of long continued and unbroken peace, we may with great profit look back upon the momentous struggle, review our own conduct therein, and examine well the ground on which we now stand. Thus the lesson of experience may be impressed more deeply, and we may be the better able to bear an enlightened testimony, before all the world, of the principles which we hold, and the consistency of our conduct with those principles. And if the day of trial has not yet finally passed away, much more need have we of all the lessons of experience; much more important is it that we should understand fully our present position; that we should estimate aright its exigencies, and our own strength.

Of the different questions involved in this controversy, that which its introduction into the civil court has perhaps rendered the most prominent and engrossing, regards the *legal* rights of the respective parties. No duty is more plainly inculcated in the word of God than that of obedience to civil authority—to the public laws under which we live; and some have invoked that sanction from the belief that the legal question is of paramount importance; as if the party against which the courts of justice should determine must be considered as violators of the law. But this arises from a mistaken view of the subject. Our condemnation at a civil bar would not necessarily have proved us contemners of the law, or even unwillingly obedient to its mandate. Had the highest tribunal, before which the case could be brought, decided against us, any resistance to the execution of its decree

would have been a clear violation of the divine command. But if that portion of the Presbyterian church to which we belong had thought a division absolutely essential to the maintenance of sound doctrine and good order, yet aware that the law did not permit them to separate themselves, without the forfeiture of certain civil rights, which must remain in the possession of the opposite party; no one can for a moment doubt that we might properly have effected the division, if, at the same time, we had renounced the rights mentioned. And so, if we had persisted in the exercise and enjoyment of certain rights after the separation, from a conviction that we were still entitled to them, or from a reasonable doubt as to the party in which the title was really vested, all that the most rigid interpretation of the Bible command could have required, would have been implicit obedience to the decision of any competent and supreme tribunal, adjudicating the case when properly presented for its judgment. The importance of the legal question, then, so far as the Presbyterian church is interested in the immediate result of the present controversy, may be measured by the value of the *civil rights* involved; and no one can hesitate to pronounce it of very small moment, when compared with the purely ecclesiastical questions that are joined with it in the issue. We by no means intend, however, to undervalue the character of the legal controversy, even as to its immediate results. Thus considered, it is well worthy of serious attention and study. And when we take into view the magnitude and probable future importance of the great principles of jurisprudence which it involves, and the weight of authority which an established legal precedent may carry with it to all later times;—a rule to be reverentially obeyed, though sometimes the reason of it do not manifestly appear, or though it may seem to be against reason;—we cannot but feel that on the decision of the law in this case most momentous interests are staked.

To the review of the whole case, as brought before the Supreme Court of Pennsylvania, and as exhibited in this report—its facts, its principles, its history—we propose devoting a few pages. The subject is extensive, but we will endeavour to bring its leading points within as narrow a compass as possible. Our main object is to give a concise view of the civil rights, duties, and liabilities of ecclesiastical associations, under the laws of Pennsylvania, as illustrated by the recent events in our church. Most of the doctrines,

however, which we shall seek to establish, are by no means peculiar, as will be plainly seen, to the state of Pennsylvania, or in their application to Presbyterians. In all parts of the Union, the same great principles of religious liberty and civil obligation are recognised as applicable alike to every ecclesiastical denomination. Certainly, such investigations may more worthily occupy our attention, than the unsatisfying and fruitless inquiries at present so engrossing in many minds: "What will those who have separated from us do next? Will they continue to contest at the bar of that tribunal before which we have already been arraigned; or will they renew it before another civil court?" Instead of spending our time in auguring about the future, let us look well to the ground on which we stand, and carefully estimate the duties thence arising.

At the very threshhold of the subject, we are met by the inquiry, whether any civil court has the power, under the constitution of the United States and Pennsylvania, to review the ecclesiastical acts and proceedings of regularly organised church assemblies, and pronounce them void; whether, for example, after such an assembly has adjudicated a question of church membership, its judgment may be set aside, or treated as a nullity, for any purpose, by a court of law; or must be referred to and taken as conclusive whenever the same question arises in a civil case. Some strenuously contend, that if such a power exists, our religious liberties are but a name; our boasted rights of conscience, a mockery. We maintain, that if it did not exist, as it most clearly does, our liberty would very soon run into licentiousness of a most dangerous and disorganising character. The first article of the Amendment of the Constitution of the United States contains the only provision in that instrument at all applicable to the subject, and is not so comprehensive as the third section of the Declaration of Rights, which forms a part of the Constitution of Pennsylvania, and is in these words:

"That all men have a natural and indefeasible right to worship Almighty God according to the dictates of their own consciences; that no man can of right be compelled to attend, erect, or support any place of worship, or to maintain any ministry against his consent; that no human authority can, in any case whatever, control or interfere with the rights of conscience; and that no preference shall ever be given by law to any religious establishments or modes of worship."—Article IX. *Sect.* 3.

This contains all that is to be found in the article first mentioned, and a great deal more: to it, therefore, our attention may be confined. In nearly all the states similar constitutional provisions have been framed, and there is scarcely one of them in which every principle of law that may hereafter be laid down, and applied to the case in hand, does not prevail with the full force here asserted.

We maintain that a civil court may set aside ecclesiastical acts and decisions; that is, declare them void and inoperative, whenever they contravene the established law of the ecclesiastical association which passed them, so far as those acts interfere with *civil rights*. This doctrine we shall endeavour to illustrate and enforce, in the application of it to the details of a particular case; that of the exclusion of one or more members of a religious society from its communion; the case that most frequently comes before a court of justice, and the consideration of which will throw most light upon our whole subject.

The constitution of every voluntary association, is to be regarded as a contract by which the members bind themselves; and in the absence of any special law of the land relating thereto, those who have assented to its provisions are governed in all the relations which it creates by the general law of contracts. There can be no difference in this respect between ecclesiastical associations and others—partnerships, trades-unions, or temperance societies—unless such difference is expressly established by some positive enactment. Men unite and form associations of various kinds, governed, too, according to their respective natures by very different codes. Some of these are formed voluntarily; some by compulsion. Now we may illustrate the law of union to which the former are subject, by the consideration of that which binds together the latter. Whatever may have been the origin of civil society—whether it originated in the consent of its first members or not; certainly after a government is once regularly constituted, no man who lives within its limits can outlaw himself, be independent of the community in which he moves, connected with others by none of its ties, bound by no obligation which its laws have created. He may, indeed, forsake the country over which that government extends, and thus be freed from its requirements; but only to bring himself under new social obligations in another land, or to dwell in the wilderness apart from all society. Numerous instances of compulsory associations subordinate to this

great one—civil society—might be mentioned. The militia systems of several of the states, and of the United States, may be referred to for examples. And there is no reason why laws should not be enacted, providing for many more such associations. In each of these several cases any member withdrawing himself, is or might be made liable, not merely to punishment, but also to process compelling his return and submission to the requirements of the law. There are also some instances of associations quite voluntary in their commencement, which the law makes compulsory as to their continuance. As one of these, we may mention the relation of husband and wife. But to whatever extent the legislature might go in compelling the formation of societies, certainly at one point its course would be arrested by the above quoted constitutional provision; it has no right to enact any law intended to force people into association for purposes of religion: to force them to remain together when already thus associated; or to force them to contribute to the maintenance of any church establishment. And, as no such law can be enacted, so it seems that under the Constitution, none can be construed to effect any of these results. All ecclesiastical societies then must be purely voluntary: both their creation and continuance must depend solely upon the will of the parties. But except that they are excluded from legislative action, and from the operation of civil law, so far as the connection of the parts is concerned, by the express words of a paramount authority, they are, as to the point here considered like all other voluntary associations. The latter, so long as no positive enactment controls them, in matters in respect to which the former are placed beyond control, differ from these in no wise as to civil rights and liabilities. Such bodies cannot any of them, as the law now stands, be held together by compulsion. To take the case of a partnership—though partners expressly agree that their connexion shall continue for a fixed length of time, each may at any moment withdraw from his companions, and no power can prevent. True, his liability as a partner may not cease, though of this there would seem to be some doubt; and most certainly damages could, in certain supposable cases, be recovered by the other partners; but first they must show, that they have suffered a positive civil injury by the breach of contract.

The further consideration of this doctrine is, however, unnecessary, because the constitutions of all ecclesiastical socie-

ties in this country, recognise, as indeed do those of almost all voluntary associations, the right of members to withdraw from their communion at pleasure. This leads us to remark that the rights and privileges belonging to such associations, or rather to the members of which they are composed, are of two distinct kinds; those which depend entirely for their existence on the existence of the body, as, for example, the right of deliberating and voting on matters which in no way involve the disposition or management of property, which may be styled personal rights; and those that might, or certainly would survive the dissolution of the body, and may be transferred from one to another, all which may pass under the denomination of *rights of property*. Both these classes of rights depend on contract or agreement, but the former on a contract without any legal consideration, for which reason they cannot be enforced by process of law. Any member may be wrongfully deprived of them by exclusion, partial or complete, from the society, without the power of redress. He might have withdrawn from the rest whenever he saw fit: why may not they withdraw from him? for into their withdrawing, the exclusion resolves itself, when not accompanied with personal violence; which is a distinct cause of action where it is chargeable—and even then solely so far as the rights depending on the union are concerned. Of course, when they withdraw, they necessarily carry with them all those rights that cannot survive the existence of the society.

The case of the rights of property, that may belong to the members of a voluntary association is very different. We speak of the rights of the members; for the body cannot, as such, have any rights. Corporations are expressly endowed by law with a peculiar capacity in this respect—the capacity of natural persons. Other societies cannot hold property, cannot sue or be sued. What are familiarly called their rights, technically speaking, are only the aggregated rights of the members. They have, indeed, a certain kind of legal existence. The law recognises them as exercising certain powers, though capable of possessing no rights; or, perhaps, more properly, as instruments or machines, through the medium of which power is transmitted. But as they are not the creatures of the law, it has not the same jurisdiction over them that it has over corporations, which are its creatures. The latter, by wrongful acts, may forfeit their privileges, and by legal process be annihilated. Their existence depends

on certain fixed rules, the violation of which may be their destruction. On the other hand, the existence of a voluntary association depends solely on the will of its members: so long as that remains unchanged the body endures. Still the law may take from its members the civil rights exercised through its instrumentality; may confer them all upon another body, declaring the attribute of legal succession to be in the latter. This, however, would not deprive the other of any particle of its capacity: the machine would remain the same.

Suppose an individual were to withdraw from an ecclesiastical society, taking with him the whole of its funds—funds in which he had only an equal interest with each other member—could any one doubt whether a court of justice would compel him to make restitution of all, at least excepting his own share? Would the objection that such an exercise of power might prevent persons withdrawing themselves, though they could not conscientiously remain, avail anything to the delinquent? Well, suppose one member of the same society is excluded by the rest: in other words, that they withdraw from him, and that they take with them the whole of the funds—his share as well as theirs. Cannot the law now compel restitution to him? It is contended by some that this is a very different case from the former. But wherein does it differ? We had a right to exclude him from our communion; no one can call that in question. But did the right to exclude him comprehend the right to take from him his *property*, or to retain that portion of it which he had confided to your keeping? Yes, it is replied, for he had agreed that his title to this property should depend on the continuance of his membership. But was it not a condition of this agreement, that he should not be excluded unless by a certain prescribed process? Yes, it was. Was that process adopted in his case? No; yet he was legally excluded, for no court of justice has the power to force us to take him back: that would be an interference with our rights of conscience. But though the specific performance of your contract, in all its parts, cannot be enforced, may not a civil court make you pay him damages for the loss he has sustained, or restore the civil rights themselves, of which he has been deprived, where that is possible? But it may be said, no court has a right to determine whether we adopted the prescribed method of process or not: this is a question which no such tribunal can pretend to adjudicate. Why so? Be-

cause it is impossible for it rightly to expound ecclesiastical laws: the church itself is alone competent to that task; and, besides, the contract provided that every question of this sort should be decided by the church: no other tribunal was mentioned. But can a civil court refuse to consider a case, proper in every other respect for its consideration, because it is a very difficult one; because the judges feel incompetent to the undertaking? Such a refusal would be a new thing under the sun. Courts of justice have sometimes been compelled to search into all the mysteries of religious creeds, into the remotest regions of theological lore, in order to settle questions of *civil right:* they have done it without daring to shrink from the task. If it was expressly agreed that the decision of the church should, in all such cases, be final and conclusive, that is a valid plea; without such express agreement, the objection evidently can avail nothing. But a court's having the power to award damages or restitution to the excluded member, might often prevent our separating from him: we might be induced to do violence to our consciences, rather than lose a portion of our funds. We supposed him to offer the same plea in the case first mentioned: its absurdity is too manifest to need exposure. Suppose a company of persons to associate together, agreeing to be governed, in their intercourse and dealings with each other, by fixed rules, which, among other things, provide for the expulsion of members for certain offences, by a prescribed process; that they all contribute to a fund, for building a place of meeting; and that then one portion expel the rest contrary to the mutual agreement, but retain in their possession the whole fund. Will any one contend, that the law cannot interfere to redress the grievance, simply because the house, when built, was to be a church, and the company were associated together for the worship of God?

The principles which govern the cases thus presented must rule every question that arises in regard to those rights of property which belong to the members of ecclesiastical bodies. We will apply them to one that may present difficulties to some minds. The right to vote in the election of trustees, whether incoporated or unincorporated, who are to manage church funds, is clearly a right of the kind just mentioned. A person who is unconstitutionally excluded from the church, and in consequence thereof, from participation in the choice of trustees, may undoubtedly recover damages, or even the actual enjoyment of the privilege in question. But

his right of suffrage, it is said, cannot be restored, unless he be also forced back into the communion from which he has been expelled. This is not exactly true. If the civil authority decrees restitution of his privilege, he must indeed be allowed to vote in the election of trustees, but is restored to membership for no other purpose. In such case, however, the other members, if they cannot remain joint tenants with him of a mere civil right, must either proceed to expel him in a constitutional manner, or, if that be not possible, must pay him his price for voluntary secession, or relinquish altogether the right in dispute. At most they will have to settle only a question between conscience and worldly interest.

Suppose several members excluded from an ecclesiastical or other voluntary association. Each one that feels himself injured may appeal to the laws of the land for redress. But there is another case to be considered. If these members alone, or together with those opposed to their exclusion, who are willing to co-operate with them, are sufficient in number, according to the law of the society, to meet and exercise all its functions; if circumstances admit of their meeting, and they do so meet, claiming to be themselves the true association and vested with all its rights, the laws must decide in which of the two parts the succession is really preserved; and this will depend upon the question, which is formed in accordance with the original contract? Both cannot be so formed. And to the one decreed the rightful body, or to its legal representative, will be adjudged all the civil rights appertaining to the original association, or damages in lieu thereof. If neither body be constituted according to agreement, of course the one in possession has the best right, and the law will not deprive it of any portion of that right at the suit of the other.

In all cases, then, in which it is alleged that one or more persons, forming part of a voluntary society, have broken the contract of association, or, in other words, have violated its conventional law, and that damage has thereby accrued to *civil rights*, the question whether a civil injury has been sustained is a proper one for a court of justice to determine. The decision, too, must depend on that of the question whether a valid contract has been broken; to decide which it is necessary to examine into the constitution and rules of the society, and by them to measure the acts complained of, whether performed by persons in their individual capacity, or by a quorum of the body when regularly convened and

organized. The acts and proceedings of ecclesiastical assemblies are, therefore, subject to examination and review in a court of law, and, if they have violated the mutual compact, must, whenever so examined, be pronounced utterly void, though *only* as regards the *civil rights* immediately involved in the suit.

Some have seemed to suppose that the fact of a charter being granted to a voluntary association, incorporating a body of trustees, distinct from the association itself, whether appointed by it or not, makes an essential difference in its legal liability. This is a mistake. The grant only adds to the number of its civil rights the corporate privileges bestowed, and to the list of remedies for a violation of the conventional law of the society sundry forms of proceeding against it through the medium of the corporation. The trustees in such cases stand in the same relation to the society, as if the latter had itself created their office. An incorporated body of trustees is a more convenient instrument, than one of equal number unincorporated, and through the former the association may be reached by a writ of *quo warranto*, to which the other would not be liable.

We shall now endeavour to apply the rules above explained to the Presbyterian church, and so far as they are applicable to the particular case before us.

"The radical principles of Presbyterian church government and discipline"—to adopt the language of a note to Chap. XII. of the form of government, are, "That the several different congregations of believers, taken collectively, constitute one church of Christ, called emphatically *the church;*—that a larger part of *the church*, or a representation of it, should govern a smaller, or determine matters of controversy which arise therein;—that, in like manner, a representation of the whole should govern and determine in regard to every part and to all the parts united, that is, that *a majority shall govern:* and consequently that appeals may be carried from lower to higher judicatories, till they be finally decided by the collected wisdom and united voice of *the whole church.*" This theory of government may be illustrated more fully by tracing the natural progress of a Presbyterian church, from its origin in a new settlement, to the formation of a judicatory corresponding in rank to the present General Assembly. The sketch will be found to agree in all important particulars with the history of the actual rise and progress of the Presbyterian church in the United States.

We may picture to ourselves, in the first place, a single congregation, formed of scanty and scarcely homogeneous materials, and while struggling into life bearing hardly any well defined organic shape. The whole church being as yet but a single worshipping assembly, the governing majority of the church is the majority of the session,—the only ecclesiastical court in existence;—the pastor presiding over the representatives of his flock. In this condition of things the principles of church government, if the embryo organization be perfect, is the same as ever afterwards, operating however through a machinery less complicated than that of regularly connected congregational, presbyterial, synodical and general assemblies. Then other congregations of a similar kind spring up, shoots diverging from the parent trunk first planted, or as if from seeds scattered by birds of passage in the soil. As soon as these several congregations are sufficiently organized, and confirmed in their strength, for the concert, which, from the first, may have existed between them, or their pastors, to grow into regular ecclesiastical deliberation and action, a presbytery is the result;—a body consisting of all the ministers, and one ruling elder from each congregation —the former sitting in their own right, as a distinct estate, and the latter as the representatives of the people. Now the governing majority of the church is the majority of the presbytery, to which of course appeals lie from the several subordinate judicatories—the sessions. But in process of time this presbytery becomes too large for frequent meeting, and the convenient despatch of its business, and therefore is divided into two or more parts, each becoming a perfectly organized and distinct court. Now the decision of no one of these parts is the decision of a majority of the whole church; there must therefore be some new body created in which the whole may be represented. This new body is the Synod, formed after the model of the presbytery, from which appeals lie to its judgment. So, also, is created a still larger judicatory—a General Assembly—when the exigencies of the church require its establishment: as before, in the case of the Synod, the object being to obtain, in a convenient manmea, the sense of the majority of the whole body ecclesiastical. This General Assembly, according to the present constitution of the Presbyterian church in the United States, is the highest judicatory, representing in one body all the particular churches of the denomination, not directly, but as representatives of the presbyteries, themselves being represen-

tative bodies. This, however, differs from both them and the synods, in that the clergy as well as the laity appear there only by representation. Here then we have the organization complete, and still the decision of the majority is alone final.

According to the constitution of the church in this country, a church session consists of the pastor or pastors and ruling elders of a particular congregation; a presbytery of all the ministers, and one ruling elder from each congregation within a certain district, which district must contain at least three ministers; a synod of all the ministers and one ruling elder from each congregation within a larger district, including at least three presbyteries; and the highest judicatory—the General Assembly—of an equal delegation of ministers and elders from each presbytery, in a certain fixed proportion.

Such are the outlines of the structure of this church, and the general principles of its form of government. We have as yet said nothing, and shall have occasion to say but little hereafter, in regard to the character and extent of the particular powers vested by its constitution in the several judicatories. We come now to consider the nature of the *civil rights* which, under or by virtue of the contract of association, may belong to them respectively, or rather to their ultimate constituents; for, as already explained, to a General Assembly, a synod, a presbytery or a session, as such, no such rights can properly be said to belong: the law does not recognise any capacity in these bodies to enjoy civil rights;—but solely the capacity of their members. The only civil rights that can appertain to the members of the whole Presbyterian church, by virtue of membership, seem to be the right of appointing trustees, both incorporated and unincorporated, and managing, through them, the temporal concerns of the church, in the manner prescribed by the constitution; and the right of each to receive any personal advantage, profit, or emolument, to which membership, or any office depending thereon, may entitle him. The members of a single synod, presbytery, or session, may also have rights of the same kind, distinct from those which they enjoy as constituents of the whole church, and depending only on membership in the inferior body. Thus to synods and presbyteries, charters incorporating trustees, similar to those of the General Assembly, have sometimes been granted. Particular individuals may also be entitled to peculiar rights. A member may have contributed funds under such conditions as entitle him to some extraor-

dinary share in the management of them; to some profit arising from them, or to a certain or contingent reversionary estate. If any of these might be destroyed or injuriously affected by an ecclesiastical act, which is conclusive so far as the authority of the church extends, the question for a court of justice to determine, when the case is presented to it for adjudication, is simply whether the act complained of has violated the contract of association;—whether it was unconstitutional. If decided to be so, it must evidently be pronounced void as regards its operation upon *civil* rights. The very process employed by the party aggrieved must recognise its nullity. He cannot bring suit of any kind against the body itself: its legal representatives are alone responsible to the law; and his suit against them must be founded in the supposition, that, in attempting to carry out a void act, they have proceeded without any authority at all.

Here occurs the inquiry, can a civil court review the judgments of all the judicatories of the Presbyterian church, differing from each other in rank, and connected together in the regular subordination of the inferior to the superior, or only the judgment of the highest and supreme assembly? If the act of a subordinate judicatory operate directly and solely upon civil rights, enjoyed by virtue of membership in that body alone, it is evident that such act may be reviewed in a court of justice; but, as regards church authority, it is conclusive: it cannot be examined into by a higher judicatory. For example, if a presbytery deprive one of its members of a stipend, to which he is entitled, not as a member of the church generally, but by virtue of a special agreement between the members of that presbytery, an appeal cannot be taken to the synod, which has no jurisdiction in the case. The only object of successive appeals is to obtain the judgment of the whole church, in regard to matters in which the whole is interested. Where but a portion is interested, a majority of that portion must finally decide. But if the deprivation of civil, is merely the consequence of a deprivation of ecclesiastical right, as if a presbytery exclude a person from church membership, whereby he loses whatever depends thereupon, the decision of the inferior judicatory is not conclusive; and until the judgment of the whole church, represented in its supreme assembly, has been taken, the exclusion or deprivation is incomplete. But until the act complained of is complete, no cause of action accrues—that, according to the constitution, is the ecclesiastical contract.

This leads us to remark, that when a civil court reviews an ecclesiastical proceeding, two questions arise:—First, had the church assembly the right to do the thing complained of at all, in any manner? and, if so, then, secondly, could it be done in the manner pursued? Another principle should be recollected;—the court is to decide merely whether the contract of association has been violated, and therefore cannot look into matters confided by that contract entirely to the judgment of the church. Suppose, then, a session or a presbytery excludes a member from the church: if he feels aggrieved he must appeal to the presbytery, or the synod, or, finally to the General Assembly. Suppose the Assembly confirm the decision: this act is conclusive as to his ecclesiastical privileges. But, if still unwilling to yield the civil rights dependent on these, he must refer the dispute to a court of justice. The court will inquire, does the presbyterian constitution provide for expulsion on account of the offence here alleged? Yes, it may be said; but he is not guilty. That may be true; but this fact the court cannot decide. Your agreement provides a tribunal for the decision of it, which has already passed judgment thereupon. But the synod did not proceed constitutionally to try the fact. That matter the court cannot examine into: your agreement provides that the General Assembly shall have exclusive cognizance of it, and the Assembly has exercised the power thus granted. Well, but the Assembly confirmed the decision without a hearing. If so, in this *it* violated the agreement. Here at last the court has jurisdiction, and it will decide the case, no matter what the difficulty of the investigation, or the incompetency of the judge may be. Whether the constitution give any right at all to expel, is of course to be decided by the same court in the outset.

We have thus endeavoured to establish and illustrate certain principles which we consider incontrovertible, and which seem to lie at the foundation of our subject. We have also attempted to give a general outline of the structure of Presbyterian church government. Next we enter upon the consideration of the church case, in form, still pending in the supreme court of Pennsylvania, though, in fact, conclusively decided. It will be understood that in reviewing its history, in commenting on the ecclesiastical proceedings in which it originated, we shall speak only of their *legal operation* and *effect*. With questions of church policy, or of Christian conduct in this case, we *here* have nothing to

do. We review it as a *law case.* That branch of the subject which we have chosen is sufficiently extensive to fill all the space which we can conveniently devote to it. The prominent facts of the case are so well known to our readers that we shall but briefly state them as we go along. In the year 1801, the General Assembly adopted what is called "*A plan of union between Presbyterians and Congregationalists in the new settlements.*" The preamble, if we may so call it, of the act, is in these words:"—

"The report of the committee appointed to consider and digest a plan of government for the churches in the new settlements, was taken up and considered; and after mature deliberation on the same, approved as follows:"

"Regulations adopted by the General Assembly of the Presbyterian Church in America, and by the General Association of the State of Connecticut, (provided said Association agree to them,) with a view to prevent alienation, and promote union and harmony, in those new settlements which are composed of inhabitants from these bodies."

Thus the act is denominated "a plan of union," "a plan of government," and "regulations to prevent alienation and promote union and harmony;" but we cannot understand its real character without examining its several provisions. The object to be accomplished by it evidently was the building up of churches, and the spread of the preached gospel, in a region thinly populated, where immigrants of the two denominations mentioned—denominations agreeing in doctrine, though differing in respect to ecclesiastical government—were settling cotemporaneously, but not in sufficient numbers for either to establish and support separate churches, and maintain its own ministry. The first section enjoins mutual forbearance and accommodation between the two denominations. The second provides that a Presbyterian minister may preach to a Congregational church, and that difficulties between them shall be referred to his presbytery, provided both parties agree; if not, to a council, consisting partly of each denomination. The third, that a Presbyterian church may settle a Congregational minister, and that difficulties between them shall be tried by his Association, if both agree to it; otherwise by a council, as provided in the former case. The fourth runs thus:

"If any congregation consist partly of those who hold the Congregational form of discipline, and partly of those who hold the Presbyterian form; we recommend to both parties

that this be no objection to their uniting in one church and settling a minister: and that in this case, the church choose a standing committee from the communicants of said church, whose business it shall be to call to account every member of the church, who shall conduct himself inconsistently with the laws of Christianity, and to give judgment on such conduct: and if the person condemned by their judgment, be a Presbyterian, he shall have liberty to appeal to the Presbytery; if a Congregationalist, he shall have liberty to appeal to the body of the male communicants of the church. In the former case, the determination of the Presbytery shall be final, unless the church consent to a further appeal to the Synod, or to the General Assembly; and, in the latter case, if the party condemned shall wish for a trial by a mutual council, the cause shall be referred to such council. And provided the said standing committee of any church, shall depute one of themselves to attend the Presbytery, he may have the same right to sit and act in the Presbytery, as a ruling elder of the Presbyterian church."

Now we take for granted, what is almost self-evident, that the agreement in point of doctrine between these two denominations matters nothing, so far as the legal question is concerned, however much influence it might have in settling a question of ecclesiastical policy, since they differ essentially in their principles of church government. The agreement would have been no less valid in law, if made with Roman Catholics, than it was when made with Congregationalists. Peculiarity of government is a feature to be regarded no less than peculiarity of faith, in determining a church's identity. The law can take cognizance of either only as they enter into the terms of a contract affecting civil rights. "A particular church," says the Form of Government, "consists of a number of professing Christians, with their offspring, voluntarily associated together, for divine worship and godly living, agreeably to the Holy Scriptures; *and submitting to a certain form of government.*"—*Ch.* ii. *sec.* 4. And again: "*It is absolutely necessnry that the government of the church be exercised under some certain and definite form.*"—*Ch.* viii. *sec.* 1. By the contract of association, then, doctrine and government are placed upon the same footing as those things which are necessary, not indeed to salvation, but to the individuality of the very subject of contract—the Presbyterian church. No court, therefore,

can make a difference between the two as to their relative importance.

We shall not pretend to enumerate all the evils which this plan of union introduced into the administration of our ecclesiastical government, much less the evils of another kind which followed in their train. The former have been detailed at some length in previous pages of the Repertory. (*See vol.* ix.—1837—pp. 419, 420, 426, 427.) At present we desire to direct the reader's attention to one point—the provisions contained in the plan for allowing Congregationalists, while remaining such, and Congregational assemblies, to participate in the administration of Presbyterian government. It is not disputed, we believe, that the third section of the act authorizes a Congregational minister, as pastor of a Presbyterian church, though still adhering to Congregational principles, and belonging to an association, to act as moderator of the session of that church, so that by his casting vote he may influence the choice of delegates to the presbytery or Synod. Some have attempted to deny that the fourth section, above quoted, authorizes the standing committee of a mixed church, composed of unordained men, to depute one of their number to sit and act in the presbytery as a ruling elder; contending that the last clause of the section provides only for the case of appeal previously mentioned, from the standing committee to the presbytery; that it allows a committee-man to sit and act as a ruling elder at no other time than while such appeal is pending. That the clause provides for the constant representation of the standing committees of mixed churches in presbytery, a very few remarks will suffice to demonstrate. It is evident that every mixed church was to be connected with some presbytery, else to what judicatory could the appeal provided for lie? As the reader well knows presbyteries are set off not by geographical metes and bounds, but by the designation of the churches of which they are to be composed. The appeal would lie to the presbytery of the pastor, it may be urged. But suppose the pastor a Congregationalist, what appellate court would have jurisdiction? Our construction of the act affords the the only plausible solution of the difficulty. Again, the last clause is by no means so restricted in its application as some would pretend. It authorizes a committee-man, say they, to sit and act as a ruling elder—only while an appeal from the committee deputing him is under trial. But it is an established principle of Presbyterian government, that "mem-

bers of judicatories appealed from, cannot be allowed to vote in the superior judicatory, on any question connected with the appeal;" and "that after all the parties shall have been fully heard, and all the information gained by the members of the superior judicatory, from those of the inferior, which shall be deemed requisite, the original parties, and all the members of the inferior judicatory shall withdraw."—(*Book of Discipline*, Ch. vii. sect. iii. § 9, 12.) Now, if *acting* means, or necessarily includes voting, the clause, according to the construction which we repudiate, may be fairly paraphrased thus: he (the committee-man deputed) may have the *same right* to sit and act in the presbytery as a ruling elder; that is, the right to sit and act when an elder could not; or, he may have the *same right* to sit and act as an elder; that is, no right at all. If it be said, that acting means only giving the information spoken of in the passage above quoted, and otherwise performing the part which properly belongs to members of the inferior judicatory, during the hearing of an appeal, we ask why the Assembly departed herein from another principle of the constitution, viz: that the appellate tribunal shall hear, not merely a representative of the lower court, but any of its members, in explanation of the grounds of their decision, or of their dissent from it"—(ib. § 8.)—explanations very important, and which a representative of the whole body could not possibly make? And why is it not rather provided, that such delegate shall sit and act "as a member of a judicatory appealed from," instead of "as a ruling elder of the Presbyterian church." Though the effect of either form of words might be the same, the use of the latter seems plainly to indicate that the peculiar idea which it conveys, was uppermost in the minds of those who framed the act. Is it said that all the members of the inferior body were to be permitted to give information and explain their reasons, but that the person specially deputed was to sit and act as the elder specially delegated by a session? But such elder performs no duty pending the appeal, which each member of the session may not perform. He is specially appointed, because the presbytery is to transact other business beside what pertains to the appeal. According to this idea, the provision would be at best useless. And, after all, there is not the least reason for such a restriction of the sense as is thus contended for, unless in the principle, that an instrument shall be construed according to the powers of the person who executes it, and its meaning mea-

sured thereby; that he shall be supposed to have intended granting only what he might lawfully grant. This might be a strong reason in favour of a presbytery against a party claiming admission under the plan, if, indeed, in such a case any reason were needed. But here we wish to arrive at an understanding of the real, not the constructive, intention of the Assembly, to determine whether that was not in accordance with the subsequent operation of the plan, as exhibited in some of the evils complained of. Indeed the practice under the act—and what that was we shall show hereafter—is of itself a ground of argument in favour of the most liberal construction. In the case of *Weckerly* v. *Geyer*, 11 *Serg. & Rawle's (Penn.) Rep.* 38, Chief Justice Tilghman said, "that on points not clearly expressed in the charter," (incorporating a church,) "the understanding of the congregation, *evidenced by their practice*, was a circumstance entitled to some consideration." We may here notice the fact, that on the floor of the Assembly, in 1837, the excluded commissioners, and their friends, boldly appealed to the act of 1801, as a justification; nay, more, an express sanction of the irregularities complained of.

If the plan of union was intended to provide for a mixture of Congregational with Presbyterian forms of government, it was clearly unconstitutional. The constitution asserts, in one of the passages already quoted, that *a certain and definite form is absolutely necessary*, and then goes on to provide such a form, thereby excluding all others. And the Assembly cannot amend or alter this instrument without the approbation of at least a majority of the presbyteries. Being unconstitutional, then, the plan was, according to the plainest rules of construction, utterly void. But it is urged that the assent of the presbyteries thereto is to be inferred from their silence in regard to it, and so called acquiescence, for thirty-six years. If, however, the act was void in its commencement, there was nothing on which consent could afterwards operate. Is it meant that the practice or custom resulting from or following the adoption of the plan was acquiesced in until it acquired the force of a constitutional rule? That usage can annul the express words of any constitution is a doctrine so monstrous, that if our argument depended on its refutation, we should hardly think it worthy of serious thought; but it is enough for our purpose that no one can pretend that usage may alter a constitution which provides a different mode of effecting alterations, to the exclusion of all

other modes. "Before any overtures or regulations proposed by the Assembly to be established as constitutional rules, shall be obligatory on the churches, it shall be necessary to transmit them to all the presbyteries, and to receive the returns of at least a majority of them, *in writing*, approving thereof." *Form of Gov. ch.* xii. *sect.* 6. This must decide the case, unless there be force in the objection, that the provision of one mode of amendment does not exclude all others; and that the plan has been ratified, not as a proposition coming from the Assembly, but, when already founded on custom, by the independent action of the presbyteries. Will any one contend that the states of our Union can, without the intervention of Congress, amend the constitution of the United States? They certainly cannot, unless by revolution. Yet there can be no reason for this, excepting that a method by which they can do it is not provided, or that the mention of two modes of making amendments is an exclusion of all others. The constitution of our church provides one method and only one.

Furthermore; the implied approbation of the presbyteries cannot effect what their express approval, in writing, could not; and we deny that they have the power to make such essential changes in the principles of Presbyterian church government, as we have endeavoured to show that the plan of union contemplated. This argument has the greater force the more narrow the limits assigned to the powers of our judicatories. Above all, those who admit that the Assembly had a right to abrogate the plan, must allow that it had not acquired the force of constitutional law: if it had, the consent of the presbyteries would have been necessary to its abrogation.

It is urged that the re-adoption of the constitution, as amended in 1821, was a formal adoption of the plan of union and all its fruits, because no objection to it appears to have been made at that time. If, however, the presbyteries had not the power, which we have just said they lack, there is an end of this pretence. The argument above used, founded on the constitutional provision in regard to amendments, seems also conclusive here. And, before silence can be construed into consent, it must be shown that the question was fairly put. Now it is notorious that the very existence of the plan had been forgotten, and that its fruits were little dreamed of, by a large part of the church, in 1821. Besides, the constitution of that year does positively annul the act of

1801. Like its predecessor it declares, as already shown, that a *certain* and *definite* form of church government is *absolutely necessary*, and afterwards prescribes a form. A provision utterly inconsistent with that act, and repugnant to it, must have equal force with an express abrogation thereof. But look at the principle contended for in itself. It leads necessarily to the absurd position, that every law enacted under a constitution, however repugnant thereto, acquires validity from the circumstance of that constitution being amended and re-adopted, without particular mention being made of such law, although, more repugnant, it may be, to the new instrument than to the old. This is certainly a principle which our legislators have yet to learn.

But it matters very little to our argument, whether the plan of union introduced irregularities into the Presbyterian structure, or not—whether it was unconstitutional, and therefore void, or not. That gross irregularities did exist in the four exscinded synods, and other portions of the church, has been conclusively established. The proof is found in the testimony of Mr. Squier (*Miller's Rep.* 71, 72);* in statements and admissions made by the new school on the floor of the Assembly in 1837; in other statements coming directly from the most authentic sources, and in the fact, that no serious attempt has yet been made to disprove the allegations of the old school as to this point. The evidence is exhibited at greater length than is consistent with our present limits, in the Repertory for July, 1837, (Vol. IX.) pp. 427, n. 429, 430, 431, 434, 455, 465, 471, 472, 473. We shall content ourselves with briefly enumerating the chief of these irregularities. In church sessions regularly connected with presbyteries, and represented therein, Congregational pastors presided. Mixed churches, formed after the model exhibited in the plan of union, and governed by unordained committee-men, the standing committee being composed sometimes of a select number, and sometimes of the whole body of male communicants, sent lay delegates to the presbyteries, who were received and allowed to sit and act, in all respects, and in all cases, as ruling elders. Even many churches purely Congregational were thus continually represented in presbytery; and the synods were constituted of the same materials. In 1837 was ascertained the astounding fact, that of one hun-

* Judge Rogers excluded all the testimony on this point offered by the defendants, on the ground of impertinence.

dred and thirty-nine churches, connected with the synod of the Western Reserve, about one hundred and nine were either mixed, or purely Congregational; and that two-fifths of those connected with the synods of Utica, Geneva, and Genesee were of the same character. As commissioners were annually sent to the General Assembly from the presbyteries belonging to these synods, of course that body was composed in part of the representatives of Congregationalists, and, in some cases, even those representatives were mere laymen. Not the least remarkable feature of this whole system was the concealment practised, which kept other portions of the church so long ignorant of these irregularities. In the reports sent up, year by year, to the Assembly, little if any trace of Congregationalism was to be found. All the churches connected with the presbyteries, and therein treated as Presbyterian, were so called in the reports. Even the laymen that appeared in the Assembly brought with them and presented, in many, perhaps most instances, the commission of regularly ordained elders. Such, in character at least, if not in extent, were some of the abuses complained of and substantiated in 1837. Their real extent is perhaps of little consequence in a legal point of view, though important as a guide to ecclesiastical policy; and of still less consequence is it whether the plan of union did or did not lie at the foundation of these evils.

If it did authorize them, it was unconstitutional and void, and Congregationalism plainly entered without law. Still more palpable is the latter fact, if the plan is conceded to have given no such authority.

The fact then appears to be, that certain members of the Presbyterian church, without any authority whatever, and in direct violation of their constitutional agreement, associated with themselves a large number of Congregationalists, whom they admitted to full communion in all their ecclesiastical rights, without, however, requiring of them an adherence to the principles of Presbyterian government. That not merely one, or two, or twenty, or a hundred were thus brought in, but that a regular system was adopted for the admission of an indefinite number; and that under this system presbyteries and synods were formed on an entirely new plan, constituted and governed in a manner utterly inconsistent with Presbyterianism. Let us suppose this change to have been effected suddenly, as in the space of a month, or in the period intevening between two consecutive sessions of

the General Assembly. What would have been the position of these synods and presbyteries, and their members? Clearly, they would have been no longer part of the Presbyterian church: they must have been considered to have exercised the right which every member enjoys, of separating therefrom, of relinquishing all their interest therein. This separation may take place without the member declaring any intention to withdraw—indeed, though he declares that he has no such intention. Though he claims his old rights, and no formal ecclesiastical act has determined his membership, he must submit to the adjudication of his claim by a reasonable construction of his own acts. This has been expressly decided in the Pennsylvania case already referred to—*Weckerly* v. *Geyer*, 11 *Serg. & Rawle's Rep.* 35. The defendant in error, Geyer, once clearly entitled to a vote, as a communicant of an incorporated church, had, with certain other members of the same, formed a distinct society for certain purposes, though all claimed still to adhere to the old body, and they had not been formally disfranchised according to the church regulations. At a corporate election, held more than three years subsequently, Geyer claimed a vote, but the inspectors and judges refused to allow it, exercising their own discretion in deciding on his right. He commenced an action against them for this refusal, and on a writ of error the case was brought before the supreme court, then consisting of Chief Justice Tilghman, and Judges Gibson* and Duncan, whose opinion was delivered by the chief justice. He says, "It is certain that a man may separate himself from a religious congregation at pleasure. And he may declare his intention so openly and unequivocally, that there can be no doubt of it. And this is often done. It frequently happens that men change their religious opinions and principles, and declare that they can no longer, with a good conscience, remain members of the church to which they belong. Now suppose this should be the case with one of the members of the *Lutheran church;* would not the inspectors have a right, and would it not be their duty to take notice of it, and refuse the vote of such person if he offered it? To be a *member of the church* is a necessary qualification, and how can he be a member who has disavowed his membership? So, whether he disavowed it or not, he would lose his membership if he united himself to another church, whose articles of faith

* The present Chief Justice.

differed substantially from the *Lutheran.* As to a disfranchisement, by a proceeding under the church regulations, it will be found in reference to these regulations, that they apply only to cases of delinquency, and not to a voluntary separation. So that the district court certainly went too far, in saying, that a man could not lose his membership, or at least that the inspectors could not take notice of it, unless he had been proceeded against, and disfranchised according to the church regulations."

Now the position of the four exscinded synods, and their presbyteries, according to the supposition above made, would have been very similar to that of Geyer, and must have been governed by the rules of law laid down in the opinion quoted. They were at liberty to separate from the church, which they might have done, plainly declaring their intention so to do: or they might have done certain acts, without really intending to separate, which, nevertheless, the law would have adjudged equivalent to a separation. As one of such acts, the learned judge mentions, uniting with another church whose articles of faith are substantially different. Is it said that these judicatories did not join another church? We answer, they did the same thing—united with members of another, and formed ecclesiastical bodies of an anomalous character—neither Presbyterian nor Congregational—but differing substantially from both in their articles of faith; for Presbyterian government is as much a matter of faith as Presbyterian doctrine. He who does not believe in the divine appointment of the order of ruling elders, rejects an important article of our faith. Or even if the judge intended difference in doctrine merely, as distinguished from difference in government and discipline, he was but giving an example. A departure in doctrine infers separation, only because it is a violation of the mutual contract; and a violation of one substantial part thereof is no more inconsistent with membership, than the violation of another substantial part. If, then, as supposed, the changes in the structure of these bodies had been effected, during the period between the meetings of the Assembly of 1836 and that of 1837, and to the latter Assembly, commissioners had been sent from the presbyteries connected with the four synods, the clerks of the body might, in the exercise of a sound discretion, and without any formal act of exclusion or excision, have refused to receive their commissions, or to call their names; and their refusal would have been as effectual in law, and, if sus-

tained by the body, as effectual in fact, as a sentence of expulsion. Nor would it have made any difference that some of the presbyteries were, as regarded their own organization, purely Presbyterian: their voluntary connexion with synods of the kind mentioned, or their neglect to separate from them, and disavow their measures, would have destroyed their own rights.

Here, then, occurs the question, whether the members of these anomalous bodies, have in their gradual formation, and by the so called recognition of them, acquired any new rights. All our arguments on this head will apply with peculiar force to the question, whether the Congregationalists admitted can claim any vested rights at all, as against the church at large; for we do not deny that they may have acquired such, as against the members of the inferior judicatories, with which they were immediately connected—congregational, presbyterial, and synodical rights: that matter these gentlemen must settle among themselves. The exscinded or disowned presbyteries had undoubtedly been represented in the Assembly, many of them for a long series of years: it is, however, a great mistake to claim for all their members—Congregationalists among the rest—a prescription dating from 1801. We had no evidence in 1837, nor has any since been given, that thirty-six years had passed over any of the relations which had grown up between the two denominations. Be this, however, as it may, will prescription avail any thing here? All the rights of the members, as such, of a voluntary association, must arise from contract: so, originally, they accrued; and each individual afterwards joining the body, enters into the contract as a new party. Now consent, on both sides, is of the very essence of a contract: the consent, therefore, express or implied, of the whole church, must be proved, or those who at one time had no rights of membership, cannot now claim by prescription, which in this case can mean nothing more than consent implied from lapse of time and other circumstances. But even if a clear majority, or nearly the whole, of the church had expressly and formally contracted with the members of these anomalous judicatories, the new contract would have been a violation of the original one, and any individuals who chose to dissent therefrom, and were sufficiently numerous for ecclesiastical organization, would have been declared the true Presbyterian church, and entitled to all its immunities. Especially could not an Assembly representing this

mixed association, justly claim the franchise granted in 1799, by the legislature of Pennsylvania, to "the ministers and elders forming the General Assembly of the Presbyterian Church," as against any other body in possession; even though such body was composed exclusively of persons who had expressly assented to the admission of Congregationalists; for they could show no title to the appellation of "The General Assembly of the Presbyterian Church." Some, indeed, have urged, in opposition to this view of the case, that in 1799, Congregationalists were actually to be found sitting and voting in the General Assembly. This may be true; but they did not claim seats as the representatives of any part of the Presbyterian church, or by virtue of any vested rights. They were admitted merely in token of courtesy and good feeling. At any rate they took nothing by the charter, for it was granted to the *ministers* and *elders* only of the body.

But consent cannot be implied, until a knowledge of the facts sufficient for rational acquiescence is conclusively proved. Was the anomalous character of the four synods and their presbyteries notorious, or at least well known to those whose acquiescence was to be so effectual? If in the case above cited from 11 Serg. & Rawle's Reports, it had been proved by Geyer that he had been permitted to vote frequently, after his connexion with the other body, that his continued right had thus been recognized; and if then it had been shown, on the other hand, that the formation of the new society had been kept secret until just before the election at which his vote was refused, would such proof of recognition have availed him any thing? The evidence that a large part of the church remained until a very late period in utter ignorance of the irregularities complained of, is conclusive. We have before spoken of the deception practised by the four synods. Their reports did not show the prevalence of Congregationalism; so far from this, they almost uniformly represented it, where it existed, as true Presbyterianism. Is it said that the plan of union adopted by the Assembly, whether constitutionally or not, was sufficient notice? A void act can have no effect whatever. No person is bound to be aware of its existence: of course, it cannot be construed as even notice. Besides, some of the most grievous of the irregularities enumerated cannot be shown to have had any connexion with the plan. The most important ingredient of consent was, therefore, entirely wanting.

We are told, that many of the exscinded presbyteries were in existence in 1821, when a new constitution was formed; that to this they were parties, and therefore stand on the same footing as do all other presbyteries. Now, it is not true that a new constitution was framed in 1821. The old instrument was revised and amended: that was all. And one thing is too plain to be disputed, that neither by the device of framing a new constitution—a new contract—nor by any device whatever, could others than Presbyterians be lawfully admitted to the benefits of the charter of 1799, granted, as it was, to the Presbyterian church as then constituted, and to none else. It will be recollected, that the franchise bestowed by this charter, is the particular right now in dispute before the Supreme Court of Pennsylvania. The constitution of that state has lately been amended, just as the constitution of our church was in 1821. The old constitution of Pennsylvania made a residence of two years necessary to citizenship; the new one requires only one year's residence. But suppose that when the latter was presented to the citizens for their approbation, a man having resided only one day in the state, by some fraud or accident had been allowed to vote, would this at once have established his right to citizenship? The idea is utterly preposterous. Much less could a particular state's having allowed foreigners to be represented in a convention called to pass upon amendments to the constitution of the United States—and the case of such foreigners is just the case of the Congregationalists wrongfully admitted—that is making them good citizens of our Union, without the aid of any naturalization law.

If then, supposing the irregularities mentioned to have been suddenly introduced into the exscinded bodies, they must have ceased to belong to the church, and if lapse of time, and the so called recognition of them by the rest of the body ecclesiastical, under the circumstances of the present case, could have had no restorative virtue, it is clear that, in 1837, they actually could not lay just claim to any Presbyterian rights whatever, by virtue of membership in the church at large. Though these rights may not have been lost in the course of a single month or year, still, as the lapse of time supplied no defect, they had clearly passed away. And the proof of this which has been exhibited bears with peculiar force, as already said, on the case of the Congregational portion of those bodies. Here we may remark, that as it has been shown that if the

plan of union, or the practice under it had acquired the force of constitutional law, the Assembly had no power to abrogate it, without the consent of the presbyteries, so now it appears that if the doctrine of vested rights under consideration, be tenable, the evil of Congregationalism was fastened forever against us; that even with the consent of the presbyteries it could not in any way be removed. It is said, we might have tried all whom we believed Congregationalists, and on promise that they were such, expelled them by a judicial sentence? No member may be expelled from a voluntary association, unless for an offence made so by the terms of his contract, that is, assent to the Presbyterian constitution: if there was any valid contract, either express or implied, made with them, it recognised them as Congregationalists, and provided expressly for their continuing such. Congregationalism, therefore, in them, was neither heresy or schism: for what could they have been tried.

But suppose the Presbyterian portions of the exscinded presbyteries to have been still entitled to all their ecclesiastical rights, it being admitted, as we think no one can hesitate to admit, that the Congregational portions never had acquired any rights as members of the church at large. Here may be applied another established principle to work their exclusion, under certain conditions. It is well settled—Mr. Wood in his argument established the doctrine conclusively—that a lawful Assembly could not be in session unless every person entitled to a vote had full liberty to participate in the proceedings; and that if any were denied this right, they might, if sufficient in number to form a quorum, assemble as best they could, giving all the others ample opportunity to join with them, and would be adjudged the true body. Now the case would be the same, if instead of a number of votes being unlawfully excluded, they were only not allowed to have their just proportionate influence; as if twenty votes were counted as nineteen. The Assembly organized on such a principle would be unlawful. And again, if persons not entitled to votes were admitted, and their votes counted, this, having the effect just mentioned—that of diminishing the value of the legal votes—would make the body an unlawful one. But the whole Presbyterian church, resolved into its ultimate constituents, is to be regarded as one large assembly, and when one portion of it, viz. the Presbyterians belonging to the excluded presbyteries, endeavoured to force into that assembly a large number of illegal voters, we were justifiable

in separating from them, and forming a lawful body, not indeed to their exclusion—we shall hereafter show that we have excluded none of them—but giving all clearly entitled an opportunity to act with us. Of course they could not be allowed to enter in among us, after the new organization, still bringing with them their Congregational friends; and places for these they have never yet ceased to demand. Of course it matters nothing that we happened to be in the majority and they in the minority; that we happened to have possession of the funds. These circumstances only give us our rights in the first instance, without our being put to the trouble of a suit. In this matter too we might act by representation in the General Assembly, as well as in person, as members of the body at large. And as the representatives from the exscinded presbyteries were chosen by bodies composed in part of Congregationalists, the only way in which the influence of these last could be annulled, was by refusing, through our own representation, to unite with them, while at the same time acknowledging the right of the purely Presbyterian portions of those presbyteries, if sufficient, according to the constitution, for presbyterial organization, to send commissioners. If the commissioners from any pure presbytery had through mistake or design been thus excluded, they might justly have considered themselves aggrieved. But throughout this controversy no claim has been exhibited on the part of any such presbytery; the exscinded bodies, composed as they are of the most heterogeneous materials, have shown a determination to hang together, have preferred all their claims as the claims of the whole association. Such claims certainly cannot for one moment be admitted.

Now under every view of the case which we have yet taken, evidence as to the constitution of the four synods and the inferior judicatories within their bounds, was clearly admissible, and plainly essential to the case; and Judge Rogers' decision (*Miller's Rep.* 184) as plainly wrong. These views, however, were not fully presented, if presented at all, at the trial, and under an aspect of the case, which was then exhibited, his decision was undoubtedly right. But if it had been contended that even without the exscinding acts the excluded bodies had no Presbyterian rights, or at least that their commissioners were not entitled to seats, then the question would have arisen, why they had not any such right or title. And the plaintiffs having shown, as they did, a *prima facie* right, it would have been necessary for the defendants

to show the actual constitution of those bodies, as the only possible justification of their course.

But, at any rate, the Assembly had a right to dissolve the four synods. The history of its proceedings is full of instances of such dissolutions: we need give only one example. This we take from the Minutes of 1834, p. 37.

"The report on Overture No. 8, and the petitions for the erection of a new synod, was taken up and adopted, and is as follows, viz. *Resolved*,

"1. That the synod of the Chesapeake be, and the same is hereby dissolved.

"2. That the presbytery of East Hanover be, and the same is hereby restored to the synod of Virginia.

"3. That the presbyteries of Baltimore and the District of Columbia be, and the same are hereby restored to the synod of Philadelphia.

"4. That the second presbytery of Philadelphia, and the presbyteries of Wilmington and Lewes be, and the same are hereby erected into a new synod, to be called the synod of Delaware, &c."

It seems to be admitted that the Assembly may dissolve a synod, but it is contended, that all the parts must be specifically attached to other synods. Suppose, however, that it is impossible to do the latter, will this necessarily defeat the right to do the former? We contend, however, that if we regard the acts of 1837 as mere acts of dissolution, they did effect substantially both the objects mentioned. Here we still maintain, as under the last head, that no Congregationalist had the shadow of a right. Well take the case of the synod of the Western Reserve, where Congregationalism chiefly flourished. Suppose the Assembly had determined to dissolve it: this difficulty was presented: We know, said the members of that body, that all, or nearly all the presbyteries connected with the synod, are composed in part of Congregationalists, who have no manner of presbyterial right. We know not whether any of them, when purged of this foreign matter, will possess the capacity for separate existence, according to our constitution; and even if they have, the history of the past admonishes us that we cannot depend on them to effect the necessary expurgation. If we unite them as they are to other synods, we may be considered as acquiescing in the claims of these Congregationalists. What is to be done? If we cannot dissolve them now, when can we? Is there no remedy whatever? This we can do without af-

fecting any man's valid rights. We will tell the regular members of all those bodies which are not purely Presbyterian, and which of course cannot be allowed to participate in the government of the church, so long as Congregationalists are mixed up with them, that they must apply for admission to "those presbyteries belonging to our connexion which are most convenient to their respective locations," an arrangement that will secure a strictly constitutional disposition of these various parts, if they are scrupulously careful to carry out the plainly expressed will of the Assembly. And any irregularities that may occur we can correct hereafter: they cannot be as great as those which now exist. As to any presbyteries that may be purely Presbyterian, or that can make themselves so, let them appoint commissioners and apply to the next Assembly, which will receive them, and annex them to the proper synods, on proof of their purity. It is singular that the former provision should appear unwarranted to those who have so strenuously contended for the principle of "elective affinity:" if applied and carried out in the most unhappy manner possible, its worst effect would be but the legitimate consequence of that doctrine. If the latter provision had seemed unconstitutional and destructive of right, any pure presbytery might have complained of it, might have appointed commissioners to the next Assembly, and claimed an immediate representation therein. But, as before remarked, this was not done. The presbyteries of the four synods chose to come in a body, the impure—we are speaking of purity in church order—as well as the pure, the Congregationalist as well as the Presbyterian: they were all to be received, or none.

The Assembly has a clear right to dissolve synods, which can in no way be affected by the obligation, supposing it to exist, to establish new connexions for the dissolved parts. The decree of dissolution must take effect, but of course any subsequent neglect would be a substantial ground of complaint. Here, however, the dissolved bodies, if we may so consider them, instead of claiming the rights consequent on attachment to new synods, choose to nullify a decree which the Assembly had an undoubted right to make and enforce. We may here observe that if the acts of 1837 wese to be regarded merely as acts of dissolution, and if such was the operation claimed for them, Judge Rogers was clearly right in excluding testimony offered to prove the composition of the four synods, for the reasons which he gave.

Now, let us look at those acts and measure them by the doctrines already laid down. Our opponents admit that the plan of union might lawfully be abrogated. If, as we have endeavoured to show, it was void, no abrogation was necessary, though a declarative act was proper as notice of the views entertained respecting it. The reasons given for the act passed* were, as we think has been already proved, conclusive of the plan's entire nullity. We would here remark, however, that reasons thus spread out upon the face of an act may be utterly futile, and the act nevertheless be valid. It is plain that if a deliberative body adopts a measure clearly within its prescribed powers, the fact that none of the members thought it so, or that they based its legality on a wrong foundation, cannot destroy its force. This principle should be remembered and applied throughout the inquiry.

On Thursday morning, June the 1st, 1837, the Assembly passed the following resolution:

"*Resolved*, That by the operation of the abrogation of the Plan of Union of 1801, the Synod of the Western Reserve is, and is hereby declared to be no longer a part of the Presbyterian Church in the United States of America."

And on Monday afternoon, June 5th, it was resolved:

"1. That in consequence of the abrogation, by this Assembly, of the Plan of Union of 1801, between it and the General Association of Connecticut, as utterly unconstitutional, and therefore null and void from the beginning, the Synods of Utica, Geneva, and Genesee, which were formed and attached to this body under and in execution of said 'Plan of Union,' be, and are hereby declared to be out of the ecclesiastical connexion of the Presbyterian Church of the United States of America, and that they are not in form nor in fact an integral portion of said church.

"2. That the solicitude of this Assembly on the whole subject, and its urgency for the immediate decision of it, are greatly increased by reason of the gross disorders which are

* It is in these words: "But as the 'plan of union' adopted for the new settlements in 1801, was originally an unconstitutional act on the part of that Assembly—these important standing rules having never been submitted to the Presbyteries—and as they were totally destitute of authority as proceeding from the General Association of Connecticut, which is invested with no power to legislate in such cases, and especially to enact laws to regulate churches not within her limits; and as much confusion and irregularity have arisen from this unnatural and unconstitutional system of union, therefore, it is resolved that the Act of the Assembly of 1801, entitled a 'Plan of Union,' be, and the same is hereby abrogated." See Digest, pp. 297-299.

ascertained to have prevailed in those synods, (as well as that of the Western Reserve, against which a declarative resolution, similar to the first of these, has been passed during our present session,) it being made clear to us, that even the Plan of Union itself was never consistently carried into effect by those professing to act under it.

"3. That the General Assembly has no intention, by these resolutions, or by that passed in the case of the Synod of the Western Reserve, to affect in any way the ministerial standing of any members of either of said synods: nor to disturb the pastoral relation in any church; nor to interfere with the duties or relations of the private Christians in their respective congregations; but only to declare and determine according to the truth and necessity of the case, and by virtue of the full authority existing in it for that purpose, the relation of all said synods, and all their constituent parts, to this body, and to the Presbyterian Church in the United States.

"4. That inasmuch as there are reported to be several churches and ministers, if not one or two presbyteries, now in connexion with one or more of said synods, which are strictly Presbyterian in doctrine and order, be it, therefore, further resolved, that all such churches and ministers as wish to unite with us, are hereby directed to apply for admission unto those presbyteries belonging to our connexion which are most convenient to their respective locations, and that any such presbytery as aforesaid, being strictly Presbyterian in doctrine and order, and now in connexion with either of said synods, as may desire to unite with us, are hereby directed to make application, with a full statement of their cases, to the next General Assembly, which will take proper order thereon."

If, as we think, it has been already proved, that the exscinded bodies—we use the word exscinded merely as a convenient term of description, without intending by it to characterise the acts of 1837—that these bodies had no Presbyterian rights; that they were to be regarded as no part of the church: a formal act of exclusion was unnecessary, though, as just now remarked in regard to the plan of union, a declarative act was proper, as notice of the Assembly's views. The same thing is otherwise evident, if there be force in our argument, that though the strictly Presbyterian portions of those bodies still retained certain rights, they were attempting to create an unlawful assembly, and we were justifiable in separating from them in order to effect a legal organiza-

tion. In either case, if the resolutions had produced only the physical result of excluding the commissioners not entitled to seats from the floor, and the effect of notice to all the church of the exclusion, every thing would have been done that was essential or of much importance.

But suppose it granted, that the excision was wrongful, unless we depend entirely on the acts of 1837, and can show that they were merely such a dissolution of the synods as we have described, would not any court construe them, if that construction were necessary to their validity, as decrees of dissolution? The rules of law allow great latitude of interpretation in order to give reasonable force to statutes and other instruments. It has been said that these resolutions are bungling and incongruous. This, if it be true, does not necessarily render them ineffectual. Such a rule would nullify half the legislation in the United States. A large proportion of the time of all our courts is spent in endeavours to extract sense out of ill-contrived and worse penned statutes, and to reconcile obstinate inconsistencies therein. The principles of construction to be applied here are familiar to every lawyer. It must be made upon the entire instrument, one part being construed by another, that the whole may, if possible, stand. *Ex antecedentibus et consequentibus fit optima interpretatio. Verba debent intelligi cum effectu, ut res magis valeat quam pereat.* The business of the judge is to reconcile incongruities, not to hunt after and exaggerate them. Another principle, not less undoubted, is, that instruments are, if possible, to be construed according to the powers of the person or body executing them, and that if their actual operation extend not beyond these powers, the effect produced shall decide their character, rather than the intention, real or supposed, of the party. If, for example, the actual effect of the acts under consideration, could only be such as might have been lawfully produced by dissolving the bodies, a court will construe them mere decrees of dissolution.

The act relative to the Western Reserve Synod is, therefore, to be taken in connexion with the other four, and interpreted by them. It has been contended, that declaring a synod no part of the church, can effect nothing more than the destruction or dissolution of that body, and does not, in any way, influence the ecclesiastical relations of its presbyteries, or their members. If this be true, no one can pretend that the so called acts of excision did more than dissolve the four

synods, for language by far the strongest that is used, to infer a complete separation of all the parts, is contained in the first two resolutions, which make mention of the synods only. But we are willing to admit that those resolutions, taken alone, could hardly be construed otherwise than as a clear declaration, that both the bodies so mentioned, and all their constituent parts, were no longer integral portions of the Presbyterian church. Afterwards, however, come provisions intended to apply to all four of the synods, which plainly modify the operation of the others, and, as we have said, make the actual effect of the whole only what might have lawfully been produced, according to the views above presented, by decrees of dissolution.

But it is said that the Assembly, at an earlier period of its session, (*See Min.* 1837. p. 429.) had passed an act rendering it "imperative on presbyteries to examine all who make application for admission into their bodies, at least on experimental religion, didactic and polemic theology, and church government." Mr. Wood particularly dwelt on this point, contending that all those members of the dissolved or excluded bodies that applied to others for admission, must be first examined and found strictly Presbyterian, and under pretence of their not coming up to the standard might be rejected. Now it is clear that such examinations were peculiarly proper in this case, when Congregationalists, who had no shadow of right, might claim admission. But such an order of the Assembly could not change the nature of the subsequent acts, and destroy their virtue. Even if it was unconstitutional, no one could complain of injury to his civil rights therefrom, until he had actually suffered wrong by its operation. Each act was to be judged by itself, and every evil that might arise be referred to its immediate cause. It is preposterous to contend, that though the Assembly had a right to make the decree of dissolution, in itself considered, it was unconstitutional, because its operation might in some way be connected with the operation of an unconstitutional act or order.

But how did the dissolution of the four synods affect the rights of the commissioners actually on the floor, and work their exclusion? We answer, that the very same state of things which made a peculiar arrangement in regard to the future connexion of the dissolved parts necessary, made their appointment irregular. Their constituents were many of them Congregationalists, who had no right of representation. If the commissioners of any presbyteries pure in doctrine

and order were excluded, the fact is not known to us. All of them chose to make their cause common, and depend, not on individual cases of wrong, of which with much greater plausibility they might have complained, but on the allegation of injury inflicted upon the four synods and their constituent presbyteries collectively. Here we are considering the case as it was actually brought before the supreme court of Pennsylvania. It may be remarked, however, that if at any stage of its proceedings, the Assembly excluded commissioners rightfully entitled to seats, it became an unlawful assembly; and if those wrongfully excluded, being sufficient by themselves or with others who chose to join them, to form a quorum, had met, they would have been declared to hold the true succession. If however they had united with some having no title, this would have made their body also unlawful: both assemblies, in that case, would have been in the same predicament; and, as before remarked, both being unlawful, the one in possession would not have been disturbed at the suit of the other.

But the Assembly did not adopt similar measures in regard to all the synods that were chargeable with the same disorders. By no means; there were questions of expediency, of church policy, to be regarded, as well as questions of strict law. A remedy fully adequate in one case, may effect nothing in another that is more difficult, or, perhaps, desperate. But if the synods of New-Jersey and Albany were, in fact, no part of the church, did not the circumstance of their commissioners' sitting make it an unlawful assembly? Certainly it did; but the evil was not so great as before, when all the commissioners from the four synods, afterwards excluded, were sitting; and, besides, no lawful body was organized, which could take advantage of the irregularity. But will the irregularity ever cease? Will those two synods ever belong of right to the body ecclesiastical? This question involves the power of the Assembly to form coalitions between our church and other Presbyterian bodies—as, for example, the union with the synod of the Associate Reformed church in 1821. This, in an ecclesiastical point of view, was a measure of undoubted propriety: the body admitted conformed substantially, nay, almost completely, to our standards. As a matter of comity, it was to be regarded as a coalition; as a matter of law, involving question of the Assembly's rights and powers, as the erection of a new synod from entirely new materials. Can the Assembly do this?

Suppose the synod of Philadelphia should, to-day, by an unanimous vote, declare itself thereby separated from the Presbyterian Church, its members herein exercising an undoubted right, and to-morrow should come back asking readmisson: could the prayer be granted? We think it could; and if so the union with the Associate Reformed church was constitutional: there is no material difference between the two cases. And the synods of Albany and New Jersey, after compliance with the directions of the Assembly, stand precisely in the same position; and if the power to receive them exist, the reception of their commissioners is a sufficient act of admission.

If, in 1837, the excluded commissioners had united, immediately after their exclusion, and formed an Assembly in the best way they could, refusing admission to none entitled to seats, they might have appointed trustees, and commenced an action of *quo warranto*, as they did afterwards; and then the sole question to be tried would have been the lawfulness of the excision. So, any individuals of their number might have commenced actions, as did Mr. Squier, Judge Brown and Mr. Hay, in 1838, against the clerk, and moderator, and such other persons as it appeared might be joined with these, or against any of them, for preventing their exercising some civil right—as that of voting for trustees. Thus too the same question would have been raised. As before mentioned, a voluntary association can be reached only through its agents or trustees—those who carry, or seek to carry, its resolutions into effect.

In 1838 a new Assembly met, and the excluded presbyteries sent up commissioners as had been their wont. We shall here endeavour to ascertain the true character of this body, particularly whether its several sessions have any organic connexion with each other. In this respect it is certainly anomalous. While the form prescribed by the constitution, and always adopted in practice, for putting an end to each meeting, appears to be that of a dissolution, there are many considerations which, taken by themselves, would seem to countenance the idea of its being a perpetual or always existing body. The church is governed by Congregational, Presbyterial, and Synodical assemblies, the object of erecting the superior courts being, as already explained, simply that no question may be finally decided, unless "by the collected wisdom and united voice of the whole church." Now, reasoning *a priori* it might be supposed that all the different

assemblies were alike in respect to the connexion between their successive meetings, since, so far as any settled principle is concerned, their respective powers are of the same general nature, only exercised within spheres differing in extent. The presbytery is, without doubt, a perpetual body, and so is the synod. All the constitutional provisions in regard to them, taken together, establish this point most conclusively. Both meet on their own adjournments—the former as required by the constitution, the latter according to general usage; and where the law is doubtful, such a custom is conclusive. Reasoning from analogy we might be led to suppose that the General Assembly was like the others in this respect; but there are evident points of difference. The members of the latter are all appointed for one meeting only, and with the close of that their commissions expire. The same is the case with only a part of the members of the synod and presbytery, viz. the ruling elders. The Form of Government provides, that

"Each session of the Assembly shall be opened and closed with prayer. And the whole business of the Assembly being finished, and the vote taken for dissolving the present Assembly, the moderator shall say from the chair,—'By virtue of the authority delegated to me by the church, let this General Assembly be dissolved, and I do hereby dissolve it, and require another General Assembly, chosen in the same manner, to meet at on the day of A.D. '—after which he shall pray and return thanks and pronounce on those present the apostolic benediction." *Chap.* xii. *sect.* 8.

A dissolution of a parliamentary body does certainly destroy its existence. But we think it very evident, from several provisions in the Form of Government and Book of Discipline, that the framers of them intended that the Assembly should have, or considered it as having, some striking characteristics of a perpetual body. Without an express constitutional law, one Assembly, if all subsequent ones were quite distinct from it, could not, having commenced a proceeding, impose upon another the duty of completing it. Any business which the former had entered upon, but not finished, could not be taken up by the latter at the point where it was left, and merely concluded. On a dissolution of parliament, such bills as are only begun and not perfected must be abandoned; and, if resumed at all at a subsequent session, must be resumed as entirely new ones; whereas after

an adjournment, "all things continue in the same state as at the time of the adjournment made, and may be proceeded on without any fresh commencement."* The state of an impeachment, indeed, is not affected by a dissolution, and appeals and writs of error remain, and are to be proceeded in as they stood at the last session. The latter rules, however, depend on the peculiar constitution and office of the house of lords. It seems that the proceedings in an impeachment, under the constitution of the United States, must be commenced and perfected during the life of a single congress. Now, if the constitution of our church expressly directed that one Assembly should perfect any particular business which another might have entered into, but not completed, that would not necessarily make a difference in the relation between the two; but its recognising, without any positive direction, this overlaying authority certainly is evidence of some weight, that those who formed it held the doctrine which we impute to them. As instances of such recognition we may mention the rule already quoted in regard to amendments of the constitution, and the last paragraph of section sixth, chapter seventh, of the Book of Discipline.

The Form of Government, chapter twentieth, provides that "Every judicatory shall choose a clerk to record their transactions, whose continuance shall be during pleasure." But the power of an officer appointed to continue during pleasure cannot usually survive the existence of the appointing body: without, however, directing that the clerk shall always act until he is superseded by the choice of another, the constitution evidently contemplates this arrangement, and recognises the fact that the clerk of the Assembly constantly exists. This appears not only from the duties allotted to him in the twentieth chapter, of which we have just quoted a part, but still more evidently from the provision that no commissioner shall deliberate or vote, until his name shall have been enrolled *by the clerk*. So, too, the moderator is recognised as a perpetual officer. It may be said that the rule expressly directing him to preside in the next meeting, until a new moderator shall be chosen, makes against this position; that, however, is evidently intended merely as a sort of proviso to another rule, with which in one section it is found immediately connected, viz. that "The moderator of the synod, and of the General Assembly, shall be chosen at each meet-

* 1 Blackstone's Comm. 186.

ing." But the moderator of every judicatory is expressly "empowered, on any extraordinary emergency, to convene the judicatory, by his circular letter, before the ordinary time of meeting." *Form of Gov. ch.* xix. *sect.* 2. This provision shows that he is considered as remaining in office until actually deposed or superseded.

At least, the constitution leaves this matter doubtful, and that is enough for our purpose. We have before referred to the case of *Weckerly* v. *Geyer*, for the doctrine there established, that *on points not clearly expressed in the instrument*, the understanding of the Assembly, evidenced by their practice, is to be taken into consideration; of course, in the absence of other collateral evidence to the contrary, it must be taken as conclusive. The doctrine is there applied to a charter of incorporation: it certainly loses no force in our application of it. Let it be understood that we do not here attribute to practice the power of making law, but only of interpreting doubtful language. Now the practice of the Assembly has certainly sanctioned the idea of there being a sort of connexion subsisting between the different sessions, especially as to standing rules. It has made them not only for the organization, but for the subsequent proceedings of each meeting, and these have uniformly been treated as of some authority, until formally set aside. In 1791 it adopted such rules for the induction of new moderators, as it had, in 1789, general ones "for regulating the proceedings of the Assembly." And these general rules, from time to time altered and amended as occasion required, seem to have governed the body, without being annually re-adopted, and without objection, until a few years ago, when, as one of the witnesses at the trial said, it was determined to adopt rules at the commencement of each session, but with a proviso, that the old ones should be considered as remaining in force until the new were framed. It appears also that the Assembly has frequently taken up the unfinished business of the last year, and carried it through from the point where it was left, to completion. Certainly these anomalous features of the Assembly seem to favour the idea that one may lay down rules for the proceedings of its successor which shall have a peculiar force.

But suppose that each Assembly is entirely independent of every other, we deny that it follows as a consequence, that one cannot provide authoritatively for the organization of its successor. Such a doctrine seems directly at variance with

the best established principles of parliamentary law. This body itself appears to have construed its powers in a different manner. In 1826, when the provisions to which we shall refer directly, were made, it was resolved "that so soon as the alteration proposed in the 7th item above enumerated, shall appear to have been constitutionally adopted by the presbyteries, the following *rules of the Assembly shall be in force.*" *Min.* 1826, p. 40. *Miller's Rep.* 156. At least —and this is all sufficient for our argument—custom makes such rules authoritative; not a part of the constitution, for then the Assembly could not, of itself, alter them; but of binding efficacy, until repealed by actual vote, or superseded by an express enactment. When once sanctioned by custom they necessarily acquire the force of law, if only for the reason, that the disregard of them evidently places the body in a far worse position than if no rules had ever been adopted, and may be a source of great injustice. But beyond all question —and even this covers the whole ground in dispute—when an Assembly has commenced its organization in the usual manner, as provided for by standing rules, this virtual recognition of them is as potent as a formal act of adoption: they become acknowledged orders of the new house. Indeed the mere constitutional provisions on this subject utterly condemn the course pursued by the new school in 1838. These latter we shall now first exhibit at length.

"Any fourteen or more of these commissioners, one half of whom shall be ministers, being met on the day, and at the place appointed, shall be a quorum for the transaction of business." *Form of Gov. Ch.* xii. *Sec.* 3.

"The General Assembly shall meet at least once in every year. On the day appointed for that purpose, the moderator of the last Assembly, if present, or, in case of his absence, some other minister, shall open the meeting with a sermon, and preside until a new moderator be chosen. No commissioner shall have a right to deliberate or vote in the Assembly, until his name shall have been enrolled by the clerk, and his commission examined, and filed among the papers of the Assembly." *Id. Sect.* 7.

The mediate clause of this section is substantially repeated in another chapter.

"The moderator of the presbytery shall be chosen from year to year, or at every meeting of the presbytery, as the presbytery may think best. The moderator of the synod, and of the General Assembly, shall be chosen at each meeting of

those judicatories: and the moderator, or, in case of his absence, another member appointed for the purpose, shall open the next meeting with a sermon, and shall hold the chair till a new moderator be chosen."

These seem to be all the constitutional rules in regard to the organization. No commissioner is to deliberate or vote, until his commission shall have been examined and filed, and his name enrolled, unless in the appointment of a presiding officer and clerk, when this may be absolutely necessary. The word "appointed," used in the last section quoted, perhaps of doubtful import in itself, would seem, from the construction put upon it by the Assembly, in its second "general rule for judicatories," to complete a nomination made before the meeting of the body, which that rule accordingly makes.

"If a quorum be assembled at the hour appointed, and the moderator be absent, the last moderator present shall be requested to take his place without delay." *Append. to Const.*

Still it is evident that emergency may arise requiring an appointment by the members present, as also in the case of the clerk. It seems clear, however, that the constitution contemplates the old clerk's acting until another is elected. The *choosing* of a new moderator is certainly an act in which none but commissioners entitled to vote can participate. The Assembly's present rules on the subject of the organization, except the one just recited, were adopted in 1826, and, as amended in 1829, may be stated as follows.

1. The permanent and stated clerks shall be a standing *committee of commissions;* and the commissioners to future Assemblies shall hand their commissions to said committee, in the room in which the Assembly shall hold its sessions, on the morning of the day on which the Assembly opens, previous to 11 o'clock; and all commissions which may be presented during the sessions of the Assembly, shall be examined by said committee and reported to the Assembly. The person presenting each commission shall state whether the principal or alternate is present.

2. Immediately after each Assembly shall be constituted with prayer, the committee of commissions shall report the names of all whose commissions shall appear to be regular and constitutional, and the persons whose names shall be thus reported, shall immediately take their seats and proceed to business.

3. The first act of the Assembly, when thus ready for business, shall be the appointment of a *committee of elections*, whose duty it shall be to examine all informal and unconstitutional commissions, and report on the same as soon as practicable. *Min.* 1836, p. 40. *Min.* 1839, p. 384. *Miller's Rep.* 156.

We may remark, that in the argument of the case before the supreme court, the counsel for the relators seem to have admitted the binding force of these rules: their endeavour was to show, first, that they had been substantially complied with by the gentlemen of the new school; and, secondly, that such an extreme emergency would have warranted a much greater departure from them than was chargeable in this case, or even a total disregard of their provisions.

The clerks are in the habit of meeting, as a committee of commissions, not only on the morning of the day appointed for the meeting of the Assembly, but also on the previous afternoon. So they met on the 16th and 17th of May, 1838. About one hundred and twenty commissions were received at their first sitting, on Wednesday afternoon, the most of them, if not all, from old school members. The next morning near a hundred more were received, and those belonging to the commissioners from the excluded presbyteries were presented, and a formal demand made that the names taken therefrom should be enrolled. This the clerks refused to do, referring the case to the Assembly for decision. Were they right in thus refusing? A most preposterous doctrine was contended for by the counsel for the relators—that the clerks should have received the commissions, and put their names on the list of doubtful cases, to be referred to the committee of elections: such a list they are accustomed to make, though the rules do not require it. Suppose a delegate from a Jewish synagogue had presented a commission, were they bound to receive it? Certainly not. The reception was, in each case, so far as the authority of the clerks went, a decision that the member came from a rightful constituency. That decision was all that was necessary to give the rejected commissioners a title to enrolment: their commissions were regular and constitutional. The office of the committee was not ministerial, but judicial: they were to exercise their own discretion, and if they did this conscientiously, were responsible to no human authority for the course taken. These commissioners might have commenced an action against them for the refusal. The court would have asked, first, whether

the committee were wrong in their judgment; and, if so, next, whether they acted maliciously. A judicial officer is accountable for his judgment only when malice is proved. For this doctrine we refer again to *Weckerly* v. *Geyer*. A mere ministerial officer, it seems, is responsible for the consequences of attempting to execute or carry into effect a void act, though not chargeable with malicious intent.

Let us suppose that these commissioners were rightfully entitled to their seats; that they had come from an undoubted constituency, with commissions perfectly regular and constitutional; that the committee had rejected them, and referred them to the Assembly itself. If they had waited patiently for the decision of the latter, and it also had been against their claim, then they might have organized an assembly, composed of themselves and such others as chose to join them, no one having a right to sit being excluded, and they certainly would have been pronounced the true General Assembly of the Presbyterian church, even though from the circumstances of the case, they had not been able to effect the organization in a perfectly regular manner. The proceeding, indeed, would have been a revolution; but as revolutions in states are often sanctioned by the laws of nature and of God, so revolutions in these subordinate societies may be adjudged rightful by the laws of the land. Its legality, however, would have depended on the exclusion of the commissioners by a vote of the body, or by the actual violence of at least all the others, excepting a smaller number than is necessary to constitute a quorum. The mere misconduct of a moderator or clerk, of a few, or even a majority of the members, would not have been a sufficient reason for such a revolution. If an officer does not perform his duty, the evil is to be remedied by his deposition. If a quorum of a deliberative assembly remains sitting in an orderly manner, the disorder of other members cannot affect its rights: as regards the title of the quorum to be considered the true body, the others would be adjudged absent. So, the best evidence that could be produced of how the body would have voted, plainly would not be equivalent to an actual vote. There may perhaps be circumstances under which neither a vote, or actual violence of the kind described, would be required to justify the new organization. The rule seems to be that absolute necessity alone is a sufficient justification; that the revolutionary members must have been excluded beyond all possibility of obtaining admission. The course which we have pointed out

was undoubtedly that which the gentlemen of the new school *intended* to pursue. What course they *actually took* we shall see directly.

The commissioners of each party assembled in convention, before the meeting of the judicatory, to devise measures such as the emergency seemed to require. The old school convention was held in the Seventh Presbyterian Church, and the new school in the First Church—Mr. Barnes's. The notice calling the latter was general, inviting all the commissioners to attend. It is said to have been attended by some who afterwards remained with the old school body;* certainly, however, but few such, if any, took part in the proceedings. Of course, the acts passed by either convention, were the acts of those only who took part. The new school commissioners passed certain resolutions respecting a pacific adjustment of the difficulty, which they communicated as a proposal to the other meeting—in their own words (*Pastoral letter, new school*, 1838, *Min.* 663, *Miller's Rep.* 191,)—"to a large number of commissioners to the Assembly met in another place." But before this proposal was sent, it was resolved,

"That should a portion of the commissioners to the next General Assembly attempt to organize the Assembly, without admitting to their seats commissioners from all the presbyteries recognized in the organization of the General Assembly of 1837, it will then be the duty of the commissioners present to organize the General Assembly of 1838, in all respects according to the constitution, and to transact all other necessary business consequent upon such organization."—*Ib.*

The commissioners present in the new school convention, then resolved to organize the Assembly for themselves, if a certain other portion of the commissioners, evidently those of the old school—should attempt what was considered by the former an unlawful organization. This resolution plainly contemplated some action on the part, not merely of a moderator or clerk, but of the whole old school body: and also the counter-action of the whole new school as a distinct mass. Dr. Hill says, in his testimony, (*Miller's Rep.* 212,) "I may state here, that I had opposed *the separate organization.*" He had opposed it, probably in the new school convention,

* See Dr. Patton's testimony.—*Miller's Rep.* 56.

certainly when some or all of his brethren were deliberating upon the subject; and he gives this as a reason why he voted on none of the questions and identified himself with neither party. Does not this mean, that he knew a *separate organization* was to be attempted—had been resolved upon?

The evidence given at the trial in regard to the events connected with the organization of the two rival Assemblies, in the Seventh Presbyterian Church, May the 17th, 1838, was to some extent contradictory, though not more so than might have been expected, the nature of those events being taken into account. In making out a general and brief statement of them we shall endeavour to weigh the evidence impartially, preferring, in cases of doubt, to take the testimony of the new school witnesses. One thing, however, should be remembered, both in estimating the comparative credibility of the witnesses, and probabilities in regard to facts. The old school had been formally apprized, while sitting in convention, of the intentions of the other party, not only by the resolution above quoted, but also by verbal communication, and had deliberated on the course which they ought to pursue in the emergency. It had been strongly recommended, by influential members, that should the proceedings be interrupted by the new school, and an attempt to organization be made and persisted in by them, after their being called to order by the moderator, the old school members should remain during the interruption *sitting* and *silent.* This course had been opposed: the subsequent events seem to show that, though the opposition of some continued, by far the greater part settled down in the conviction that that would be a better course, and acted accordingly. The facts we have stated appear from Dr. Nott's deposition, the chief part of which was rejected by Judge Rogers, as incompetent or irrelevant. At least the old school were likely to be more calm and collected than their brethren of the new, who, after receiving the minutest instructions that counsel could furnish, must have felt that they had a new, a difficult, and a hazardous part to perform. Several of the witnesses testified that Mr. Cleveland showed signs of great agitation; and Dr. Hill informs us, (*Miller's Rep.* 212,) that he expected a riot would ensue.

After the constituting prayer had been offered by Dr. Elliot, the moderator of the preceding year, Dr. Patton rose and addressing him by his official title, stated that he wished to offer certain resolutions which he held in his hand. The mode-

rator told him he was out of order, as the first business was the report of the clerks upon the roll. Dr. Patton replied, that his resolutions related to the formation of the roll, and that he would present them without comment. Being still declared out of order, he appealed from the decision: but his appeal also was pronounced out of order, and he took his seat. The clerks then reported the roll which they had made out, and also four or five informal commissions which had been received, the names of those to whom they belonged not having been enrolled, on account of their informality. Their report being completed, Dr. Elliot announced, "that the persons whose names had been thus reported, were to be considered members of the house, and that if any other commissioners were present, from presbyteries in connexion with the Presbyterian church, who were not enrolled, and had not had an opportunity of presenting their commissions, they would now have an opportunity of doing so, and of being enrolled."* Dr. Mason immediately rose and stated, that he held in his hand certain commissions which had been presented to the clerks, and by them rejected, and moved that the roll should be completed, by adding the names of the commissioners from presbyteries within bounds of the synods of Utica, Geneva, Genesee, and the Western Reserve. The moderator asked him, whether they were from presbyteries connected with the church at the close of the Assembly of 1837. He repeated his former designation of them. The moderator then told him he was out of order, or out of order at that time—both phrases plainly signifying the same thing. Dr. Mason appealed. His appeal was declared out of order; upon which he also seems to have resumed his seat. Next Mr. Squier rose, and addressing the moderator, stated that his commission had been rejected, and demanded his seat and the enrolment of his name. The moderator asked from what presbytery he came, and learning that he was from that of Geneva, within the bounds of the synod of Geneva, replied, "We do not know you, sir." This silenced

* The quotation is from Dr. Elliott's own testimony.—*Miller's Rep.* 197, 198. Dr. Patton says, the announcement was, "that if there were any commissioners whose names had not been reported, then was the time for them to present their commissions."—*Id.* 52. The weight of testimony is in favour of Dr. Elliott's statement. It is evident, too, that the commissions he called for were to be presented to the clerks for examination, according to the rules: those, therefore, which had been already rejected by the clerks were not such as he intended. Dr. Mason did not propose that the clerks should examine them, but *moved* that the names should be added to the roll. He himself says the moderator called for commissions *that had not been presented.*—*Id.* 88.

Mr. Squier: or his subsequent remarks, if he made any, were not heard: for Mr. Cleveland immediately took the floor.* He, without addressing the moderator. commenced reading a paper, which, as some of the witnesses allege, he interlarded with extemporaneous remarks. What he said was not certainly proved. We take the version contained in the new school minutes. "That as the commissioners to the General Assembly for 1838, from a large number of presbyteries, had been refused their seats; and as we had been advised by counsel learned in the law, that a constitutional organization of the Assembly must be secured at this time and in this place, he trusted it would not be considered an act of discourtesy, but merely as a matter of necessity, if we now proceed to organize the General Assembly for 1838, in the fewest words, the shortest time, and with the least interruption practicable." *Miller's Rep.* 223. Some of the new school witnesses testified that he alluded directly to the so called misconduct of the officers. Mr. Gilbert was one of these (*Id.* 80), but he afterwards read what we have quoted, and added, "I did not hear the word 'interruption,' and some others. He said, in addition to what is there recorded, that it is no matter in what part of the house the moderator stood. I don't recollect any other additional words. He had a paper from which he read, and he interspersed the reading with parenthetical remarks. I understood him to read the whole paper. This is the paper in substance. It contains every main idea of his speech, so far as I recollect." *Id.* 101. On the same page he says, that a committee appointed for the purpose prepared the minute, and it was adopted. Certainly a solemn statement of facts made out and adopted by these gentlemen immediately after the events had occurred, is more credible than their recollection given a year afterwards. Both Dr. Miller and Mr. I. V. Brown say that Mr. Cleveland spoke of organizing a "*new body.*" *Id.* 173, 174.

After reading this paper, or making these remarks, he moved that Dr. Beman should take the chair, or be moderator. The motion was seconded, he put it, and it was carried by the voices of the new school. Dr. Beman took his stand in the aisle, midway from the pulpit to the door, and successive motions were made, seconded, put, and carried in the

* Some of the witnesses testify that a motion was made to appoint a committee of elections, before he rose. This makes our case still stronger, but we shall not insist upon it.

same manner, appointing Dr. Mason and Mr. Gilbert clerks, *pro tempore*, Dr. Fisher moderator, and Dr. Mason and Mr. Gilbert permanent and stated clerks; and, finally, adjourning the Assembly to meet forthwith in the First Presbyterian Church. The new school witnesses assert that the question was reversed on each motion: the old school deny this, some positively, others saying merely that they heard no reversal. Mr. Walter Lowrie, who has had twenty-four years experience in legislative bodies, testifies, in regard to the motion, that Dr. Beman shall be moderator, "I would say, and say distinctly, that the reverse was not put. It might have been put in a lower tone of voice, and I not have heard it from my position. But the proceedings which immediately followed did not leave time for it to be put even in a whisper. The want of time is sufficient proof, else I would not swear to a negative." *Rep.* 180. This is something more than negative evidence, but we are willing to take Dr. Hill's statement as correct. "Mr. Cleveland, as from the first he had intended to do all in the shortest time possible, reversed the question very quickly: *I don't know that all the scattering ayes had ceased when he reversed it.*" *Id.* 212.

The new school witnesses charge most of the disorder that took place on our party. They say there were calls to order from the moderator and the gentlemen in his vicinity, and stamping, coughing, scraping and hissing in the part of the house where the old school sat. Also, that some noes came from the same quarter on several of the questions. As to the latter charge it is not a very serious one: certain it is that the old school generally voted neither one way or the other. But all the noes may be accounted for by reference to the statement of Mr. Lathrop (*Rep.* 217), that he voted in the negative, and of Mr. Evans (*Id.* 186), who was in the south-west gallery, immediately over the great body of the old school, that a young man who sat by him voted no, and that there were other votes from the gallery. All the witnesses who speak on the subject agree that there were clapping, stamping, scraping, hissing, and various other noises in the same region,* while the old school witnesses, with one accord, deny that any such sounds came from among them. The moderator did call to order repeatedly after Mr. Cleveland rose, and so did some in his vicinity: one or two said

* Dr. Patton says (*Rep.* 53), "This noise consisted of clapping, expressive of approbation, intermingled with some hisses, *making the light and shadow of the picture!*"

"Shame! shame!" and another, "Let them go on." These calls were loudest immediately after Mr. Cleveland took the floor. And from the whole testimony it appears evident that they almost or quite ceased before he finished reading. It is clearly proved too that the old school members generally kept their seats. On the other hand, it appears that most of the new school rose and crowded round their new officers; that many of them stood on the seats, and some on the backs of the pews; and Dr. Hill acknowledges, what is clearly proved by others, that the ayes most of them arose in a simultaneous burst, and that some of them were indecorously and offensively loud. *Rep.* 212. Dr. Mitchell tells us (*Id.* 203) that one member in front of him "yelled to it:" that his "aye!" "was more like the yell of an Indian than a white man." Judge Brown of the new school says (*Id.* 215) there was a man near him (perhaps the same mentioned by Dr. Mitchell) that voted aye twice as loud as any other in the house. "I twice took hold of him by the arm, and said he must not hollow so loud." This was Mr. Foster, a commissioner from the presbytery of Montrose. There is much more testimony of the same kind which we need not repeat. All the old school witnesses declare that the proceedings of the other party were most noisy and tumultuous. The spirit manifested by the latter appears in the proclamation shouted forth at three or four of the doors of the building, after they had withdrawn, that "The General Assembly of the Presbyterian church in the United States of America had adjourned to meet forthwith in Mr. Barnes's church."

It is certain that few of the old school did or could hear the most of the motions made and questions put, so as to have voted intelligibly thereon. This is a very important fact. All the witnesses examined on our side, the greater part of whom were members, declare that they heard no reversal of any question. Some heard the motion in regard to Dr. Beman; others did not. Most of them did not know of Dr. Fisher having been chosen as moderator, until the afternoon or next morning.

Such was this extraordinary scene: any one who will carefully read the whole testimony, and much more any impartial spectator, must be convinced that we have done full justice neither to the forbearance and moderation of the old school, or to the disorder and tumult of the new.

A few words more in regard to the *original plan* of the latter. We have already shown what they contemplated,

and every thing actually done confirms our view of the matter. Dr. Patton wished to offer certain *resolutions*—he aimed at obtaining *a vote of the house.* He appealed—another attempt to accomplish the same thing. Dr. Mason *moved* that certain names should be added to the roll, and he likewise appealed. The refusal of the moderator was not anticipated: all these gentlemen tell us, that they had never before heard of a refusal to put an appeal; that it was an unparalleled outrage. It is clear that some decisive action, on the part of the house, was looked for and desired, as a foundation for their subsequent measures.

But the case which the counsel for the relators attempted to make out, was very different indeed from that which the prosecution of such a plan as we have exhibited would have presented. They contended that the object of Mr. Cleveland's motion—the clearly expressed object—was simply the removal of the moderator and clerks, who, by their misconduct, were impeding the progress of the organization; and the choice of others to occupy their places: that this was effected by a nearly unanimous vote, the law construing the silence of the old school as assent to the measure. All the extraordinary features of their proceeding were shaped, it was said, by the necessities of the case, which also legalized them. Now, it is important to have a right understanding of the exact difference between these two measures—that which has been called a *separate organization,* though the term does not convey the precise idea intended, and the mere removal of the officers of the body. And, first, wherein are they alike? The similarity is much greater than some might imagine. The one involves the deposition of the moderator and clerks as well as the other; for if the new Assembly is the true one, the officers of the true Assembly have been changed. The one embraces all the commissioners, as well as the other: its legality depends on the admission of every one who is entitled to a seat, and chooses to sit; and the law supposes all present. Either may result in two distinct organizations; for after the moderator and clerks are removed by a major vote, the dissentients may agree to remain under their government, forming a separate body. But the points of difference are well defined, and easily to be recognised. In the one case the officers are not, in form, deposed: merely considered as no longer holding office, because acting in an unlawful assembly: a vacancy is supposed to exist which in the other must be created, and that is supplied. The one is

a new organization; a re-construction from the original elements; a distinct thing from that already before commenced, which is supposed to have some radical defect, that makes it unlawful, and even useless as a link in the chain of succession; while the other is but a continuation of what has already been in part accomplished. This is merely a step aside to a more easy and certain path: that is a return to the place of starting, after pursuing a wrong road. If, as suggested, on the mere removal of one or more officers, the dissentients choose still to remain under their government, they form a new body: the others continue the old. Though, in the former case, none entitled to seats are excluded, yet the votes of those engaged in constituting an unlawful assembly, if opposed to the new organization, must of course, in the first instance, be disregarded, else if they are the majority, the object in view cannot be accomplished. In the latter case, every vote given must have its proportionate influence, and the reform party can do nothing unless they have a majority.

It is very evident that Judge Rogers was not made clearly to understand, at the trial, what the counsel for the defendants meant by a *separate organization.* He charged the jury on this point, thus:

"But the respondents further object, that the design of the new school brethren was not to organize a General Assembly according to the forms prescribed by the constitution, but that they intended, and it was so understood by them, to effect an *ex parte* organization, with a view to a peaceable separation of the church. If this was the intention, and was so understood at the time, the house which assembled in the First Presbyterian Church, cannot be recognised as the General Assembly, competent to appoint trustees under the charter. Having chosen voluntarily to leave the church, they can no longer be permitted to participate in its advantages and privileges. If a member, or a number of individuals, choose to abandon their church, they must at the same time be content to relinquish all its benefits." *Rep.* 480, 481.

As we have already shown, the former course could not be lawfully adopted, until there had been some action on the part of the house. So long as the moderator and clerks only were in fault, they alone could be punished: the organized body could lose its rights only for its own offence. But did not the old school uphold the conduct of the moderator? They did no act which could possibly be construed into giving him support, unless the calls to order, a few cries of

"Shame! shame!" &c. were such, and it must be remembered that these came only from a few individuals, and, therefore, though they might have been a sufficient ground for prosecuting them, as conspirators with the moderator and clerks, could not affect the rights of others; and, furthermore, that these calls, &c., did not commence until after the new school began their proceedings, of which, consequently, they could not be considered a justification.

We have shown what the plan of the new school was up to the time when the moderator refused to put the question on Dr. Mason's appeal. This matter of previous intention was not gone into at much length, or at all systematically at the trial. Judge Rogers refused to hear evidence on this point, whenever it was objected to. *Rep.* 86, 87, &c. Mr. Preston asked Mr. Gilbert, as appears on the page last mentioned, "If a majority had voted against you, what would you have done then?" The judge decided that this was not a proper question; but it is evident that had Mr. Gilbert answered, "We should have disregarded their votes," the relators would have had no ground left on which to stand. This question, however, covered both the original and the subsequent intention: of the former only we are now speaking. It is clear that the concert of a plan is strong presumptive evidence of the nature of an act done, in the emergency for which that plan was contrived, by those who formed it; and that it must have great weight wherever the nature of such an act is doubtful; and of doubt, as to matter of fact, it was not for the court to decide.

But what was the intention of the new school at the time —what did they regard their own proceedings as accomplishing? It is hardly probable that, having formed a plan carefully and under the advice of "counsel learned in the law;" having considered it and conned it over for months; having assigned to each person that was to take a part his appropriate place, and having committed to writing the speech that was to be made at the critical juncture, these gentlemen, suddenly—in the space of much less than five minutes—concocted an entirely new plan, suited to an unexpected emergency, embracing as actors the whole body, instead of the minority first contemplated. It is much more probable, that in the excitement and agitation of the moment, they forgot one step in the prescribed route—the securing a vote of the house—that they leaped hastily to their conclusion, forgetting to establish the premises. The proof—and

certainly it is conclusive—that they intended a new organization, appears in the following facts:

1. Such was their original plan.

2. The paper which Mr. Cleveland read, and on which the whole thing depended, was prepared beforehand, and when, according to their own statement, they did not anticipate the emergency, on which immediately they acted. Some of the witnesses, indeed, say that he interspersed parenthetical remarks: of this we shall speak directly.

3. Dr. Hill, one of the most influential men among them, evidently considered it as a "separate organization." *Rep.* 212. He also says, speaking of the motion for the appointment of Dr. Beman, "When Mr. Cleveland was about to put that question, in my estimation it was the most critical moment in the whole proceeding, because it was the *incipient step* in the organization." *Id.* 211, 212. That is, it was the *incipient step* in the *separate* organization, which they had *determined upon*, and which he *supposed* they were trying to effect.

4. The new school rose and huddled together round Mr. Cleveland, and subsequently round their officers, so that these gentlemen were entirely shut out from the view of the others, as if they were the only ones interested in the result.

5. Mr. Cleveland's remarks, both written and extemporaneous, as contained in the new school minutes, suit exactly the case under consideration and no other, and might all have been prepared beforehand. In addition to what we have already said as to the credibility of that version, the reader may be reminded that the statement, if not prepared by Mr. Cleveland himself, was at least adopted by a body of which he was a prominent and active member. 1st. These remarks make no allusion to any misconduct on the part of either the moderator or clerks. 2d. He says, "—and as *we* have been advised by counsel learned in the law that a constitutional organization must be secured at this time and in this place" —a senseless remark if only a change of officers was contemplated, which must, in the nature of things, be effected at that place, if at all. "He trusted it would not be considered as an act of discourtesy." To whom could an act of the whole house be discourtesy? It may be said he meant discourtesy to the moderator. It would be rather strange to tell an officer, who has so grossly misbehaved himself that he must be degraded, that no *discourtesy* is meant!—"but merely as a matter of necessity." We shall show, hereafter, that though

their plan contemplated a real necessity, none had arisen.—"If *we*"—who were "*we* ?" Plainly "*we*" who had been advised by counsel—"if *we*"—we the new school, acting as a distinct body—"now proceed"—to do what?—"to *organize* the General Assembly for 1838"—of course the organization, so far as it had gone, was to pass for nothing: the whole was to be done by them—"in the fewest words, and in the shortest time"—and why was this? The degradation of a moderator was not a thing to be done hastily, without consideration or debate—"and the least *interruption* practicable." "Interruption?" Of whom, but the old school party, who were considered fully occupied with their own affairs ? "Interruption?" He hardly craved indulgence for the whole house, for interrupting the proceedings of the house, promising that they should be interrupted as little as possible. If he and his new school brethren were acting as a distinct body, they might well talk of interruption, and of meaning no discourtesy. 3d. Mr. Gilbert, in a passage already quoted (*Rep.* 101), tells us Mr. Cleveland said in addition that it was no matter in what part of the house the moderator stood; and, accordingly, he and Dr. Beman, and Dr. Fisher, stood about the middle of the church, behind the majority of the members—nearly all the old school, and each of them, or certainly the two latter, sideways to their backs. Certainly a house is not bound to follow its speaker into whatever corner his caprice leads him, or all the members to face about whenever he chooses to walk to the end opposite the speaker's chair. This advice, coming from intelligent men, could mean only that no particular spot was essential to the legality of a separate organization of the new school.

6. Dr. Fisher says, (*Rep.* 104,) that Dr. Beman addressed the *preliminary meeting*. There were also clerks appointed *pro tempore*—that is, for the same preliminary meeting. Now, it must be remembered, that Dr. M'Dowell and Mr. Krebs were both permanent officers: why were temporary ones put in their place? The whole proceeding was evidently that for reducing the mere elements of corporate action into organic shape. This process had already been almost completed under the superintendence of Dr. Elliott and the clerks; but by the new school, was commenced *de novo*.

7. It was evidently intended that all the new school commissioners, as well those who had not been enrolled as those who had, should vote. This is apparent from the testimony

of Dr. Mason (*Rep.* 92), and Mr. Phelps, (*Id.* 119.) The commissioners from the exscinded presbyteries did actually vote. *Judge Brown's testimony*, *Id.* 215. An evident disregard of the partial organization already effected, and a resolution of the house back to its original elements.

8. The motion to adjourn was suggested by a resolution of the trustees of the Seventh Church, that the General Assembly organized under the direction of the moderator and clerks of 1837, should have the exclusive use of that church. Now if, as is contended, their proceeding only effected a change of officers, and that by a vote of the whole house, when the organization was all but completed, why should they think that this resolution made an adjournment necessary?

9. And to crown all, the new school Assembly tell us in the most express terms, that they had intended to do and actually accomplished, what we have here exhibited. We have already referred to their Pastoral Letter. *Rep.* 190, 191. Throughout this document the pronoun *we* is employed in a manner that leaves no shadow of doubt, that they considered the new school as having alone participated in all their proceedings. They say, "In these circumstances, apprised by counsel of the unconstitutionality of the disfranchising act, and advised of a constitutional mode of organization, *we* did in a meeting for consultation and prayer, on the 15th of May 1838, send the following proposal to a large number of commissioners to the Assembly met in another place." Then comes the proposal, the spirit of which is, that "*we* are ready to co-operate" with the other body of commissioners in efforts for pacification. Then, the resolution that in a certain emergency "it will be the duty of the commissioners present" (in the new school convention) "to *organize* the General Assembly of 1838." Then, "To our communication *we* received the following answer, &c." And, finally,

"By this answer, all prospect of conciliation or an amicable division being forclosed, *we* did, after mature consideration and fervent prayer, proceed, at a proper time and place, to *organize*, in a constitutional manner, the General Assembly of 1838."

These various points must be taken in connection with the previously explained points of difference between the two measures described. If we have not established our position, we must ever doubt whether any truth can be demonstrated.

It is very evident that the gentlemen of the new school, or

their learned counsel, soon discovered the great blunder which had been committed, and began to cast about for some means of escape from its consequences. "Though we intended a separate organization," asked they, "and thought we were effecting one, may we not have accomplished something, by legal construction very different?" In this emergency they bethought themselves of a rule of the Assembly, agreeing with a principle of the common law, that "silent members, unless excused from voting, must be considered as acquiescing with the majority." *Append. to Const. Rule* 30. They remembered that when Mr. Cleveland put his motion all the old school had remained silent: this most evidently was to be construed as acquiescence! And the motion itself, that Dr. Beman should be moderator, certainly might be made to appear a motion to degrade Dr. Elliott and put Dr. Beman in his place. Under this new light they began strenuously to contend, that the result of their proceeding had been merely a change of officers: that the resolution for this purpose had been properly and fairly put to the whole Assembly; that the silence of the old school had been equivalent to voting in the affirmative; that the meeting had been regularly adjourned to the First Presbyterian Church, and that those who had not followed the new officers thither were to be regarded merely as absentees. Even supposing they intended all this—that it was not a mere afterthought—they did not accomplish it. This we now proceed to show, confining our remarks to Mr. Cleveland's motion, though without meaning to admit, that if that effected all that is ascribed to it, the other proceedings of the new school were regular and effectual. If, however, we can show that Mr. Cleveland accomplished nothing, unless it were a separate organization, we need go no farther.

And first we say that the removal of the moderator at all would have violated the constitution—would have been a revolutionary measure, and as such justifiable only on the ground of extreme necessity. We agree that the measure, though unconstitutional, may be resorted to where the very existence of the house depended on it; but those choosing to remain under the old officers must always be declared the true body, unless such absolute necessity be shown. It is said that the old moderator is to preside only until a new one is chosen, and that Dr. Beman having been chosen, of course supeseded Dr. Elliott. The provision is, that the moderator of the General Assembly shall be chosen at each

meeting; and "the moderator, or, in case of his absence, another member appointed for the purpose, shall open the next meeting with a sermon, and shall hold the chair till a new moderator be chosen." By a new moderator is plainly meant, not a temporary officer, but a moderator for the meeting or session, one who cannot be elected until the house is organized by the enrolment of the members, and under the rules of the Assembly, not until a committee of elections has been appointed. Dr. Beman was confessedly called to preside only until a permanent officer could be chosen: he was not moderator for the session, but occupied a position similar to Dr. Elliott's. The question then is, whether Dr. Elliott, being present and in the chair, another person could be appointed to preside until the choice of a new moderator. This would evidently be a violation of the constitutional rule quoted. The question of necessity we reserve for subsequent consideration.

We are told that a moderator, though in the chair, if he refuses to do his duty, is to be considered absent. Then it cannot ever be necessary formally to remove a presiding officer for misconduct. If so, the new school, in 1838, made a grand discovery—that all the usual parliamentary rules on this subject are arrant folly; that legislators have occupied whole days in deliberating on the degradation of a presiding officer, from sheer want of perception, the chair being all the time vacant, and their action taking effect on no real subject. As soon as a moderator refuses to do his duty, as for example, if he declares an appeal out of order, and will not put it, *eoinstanti* his place is vacant. The absurdity of this doctrine is stamped upon its very face. And, if undisputed, it would avail nothing to our opponents. It is a standing rule that in the moderator's absence, "the last moderator present shall be requested to take his place without delay." *Append. to Const. Rep.* 2. Dr. Beman, it is clearly proved, was not the last present.

This leads us to remark, that the appointment of a new presiding officer does not of itself remove the former one. A distinct motion must be made for his removal. Dr. Beman could not be put into the chair until it was made vacant by the degradation of Dr. Elliott. We could cite many undoubted precedents under this head, but shall content ourselves with one found in the history of the General Assembly itself. In 1835, Dr. Beman, in the absence of the moderator, was called to preside until a new moderator should be chosen; but after-

wards, his appointment being thought a violation of the rules, Dr. M'Dowell was put in his place; not, however, until Dr. Beman had been formally removed. *Rep.* 78.

Next, we say that Mr. Cleveland could not put the question on Dr. Elliott's removal. It is admitted that he could not in ordinary cases; here, however, necessity is urged as a justification. First, was it absolutely necessary that he should be removed; and, secondly, was it absolutely necessary that Mr. Cleveland should act as moderator while the motion for his removal was before the house? We take for granted here, the doctrine already advanced, that a constitutional provision, such as that the moderator "is to propose to the judicatory every subject of deliberation that comes before them," (*Form of Gov. ch.* xix. *sect.* 2,) cannot he violated, unless to save the body from destruction—as a means of self-preservation. Affix any wider limits to the power of nullifying that instrument, and you destroy its binding force. Gross misconduct is charged against the moderator. Had he been guilty of any offence? Even Judge Rogers decided that he was right in declaring Dr. Patton's motion and appeal out of order, adding, indeed, "if the reason assigned was the true one." Did he mean to say, that Dr. Elliott's private reasons could, in law, alter the essential nature of an act performed by him as moderator; that though there was a good reason why Dr. Patton's motion was out of order, it was in order if the moderator did not know of that reason, or was not actuated by it? We are at a loss to understand the meaning of this qualification. Of his decision, in regard to Mr. Squier, we need not speak particularly: it is admitted, on all hands, that that also was correct. Dr. Mason's motion was clearly out of order, under the standing rules, which prescribe that "the first act of the Assembly, when thus ready for business, shall be the appointment of a *committee of elections*." But it is said, the Assembly was not yet ready for business: the thing required by the previous rule had not been done. That rule provides, that "the committee of commissions shall report the names of all those whose commissions shall *appear* to be regular and constitutional. *Appear*—to whom? To that committee. The moderator is not authorized to review their decisions. This is still more evident from the following words:—"and the persons whose names shall be thus reported shall immediately take their seats and proceed to business." The report of the committee must certainly be taken as conclusive in the first instance. Why is the matter refer-

red to their judgment, if, after all, the Assembly must judge? Those actually reported, if but fourteen in number, must take their seats and proceed to business, and, as their first business, to the appointment of a *committee of elections.*

Again it is said that Dr. Mason's motion involved a question of privilege, and therefore must take precedence of all business depending merely on orders of the house. First, we answer, that the right of a member to sit is not a privilege of the house. The right to sit in the Assembly is a very different thing from the privilege enjoyed by virtue of a seat. The former is a matter in which the house has no interest—only the member and his constituents: the latter is the privilege of the house itself, and no member may waive it. The necessary consequence of an opposite doctrine, taken in connexion with the idea that any member may force a question of privilege on the attention of a deliberate body, would often be, that every case of contested election to come before it, must be decided previously to the transaction of any other business. And the motion that any resolution offered which involves a question of privilege must have precedence, is entirely erroneous. Mr. Sergeant has explained this matter quite clearly. "Parliamentary privilege," he says, "is not the privilege of the member; it is the privilege of the house, ... the house punishes the breach. Great solemnity too is required in the infliction of punishment for a breach of privilege. The first thing is to determine that it *is* a breach of privilege. Then the question arises whether the house will agree to take it into consideration. Then, if it is so agreed, the question of privilege has precedence." We may remark, that the only *question of privilege* known to parliamentary proceedings is this *question of breach of privilege.* It is plain that Dr. Mason's motion could claim no preference, no priority. It was therefore out of order.

He, however, appealed from the moderator's decision. Had he the right to appeal, or was the moderator right in declaring the appeal also disorderly? This we confess is a difficult question, and its full discussion would require a much wider range than our present limits admit. For the sake of argument we will agree that Dr. Elliott was wrong. What was the nature of his offence? It was not a breach of privilege as some have pretended. "It is a *breach of order* for the speaker to refuse to put a question which is in order." *Sutherland's Manual*, 95. The chair is not rendered vacant, but the moderator is guilty of a mere *breach of order,*

for which the house may punish him by deposition or otherwise. But even if it had been a breach of privilege, a question of breach of privilege was never proposed to the house. This is very evident, after the explanations above made in regard to such questions. Here we are considering, whether the punishment of this breach of order by Dr. Elliott's removal, was necessary to the existence of the house. Certainly not, so far as Dr. Mason personally was concerned. For suppose the house, on a resolution being offered, had refused even to call the decision a breach of order; this would not have destroyed its being. Was the admission of the members whose commissions the committee had rejected, essential to the Assembly's existence? If it was, this fact would avail nothing here; for we have shown conclusively that Dr. Elliott's original decision was right, and, therefore, the house, had the appeal been submitted to it, must have decided, if it decided rightly, in favour of the moderator. Besides, a deliberative body is perfectly competent to do business, though all the members legally entitled are not admitted to seats. In the case of a contested election, the rightful members may remain out of doors, and to increase the evil, wrongful members may occupy their places, for a great length of time, and yet the capacity of the body not be impaired thereby. An Assembly becomes unlawful, and even its being so does not destroy its existence—only when it has excluded by vote, or actual force, members entitled to seats. The most that Dr. Mason's motion could have effected would have been the admission of the commissioners from the presbyteries belonging to the four synods. Now this, if accomplished before the choice of a committee of elections, would have been disorderly. Dr. Elliott, then, had done nothing, even supposing him wrong, which endangered the Assembly's existence. The new school themselves did not consider the admission of these men essential to the judicatory's being: for they admitted them only after their body had been organized, a moderator for the session chosen, and the meeting adjourned to the First Presbyterian Church.

But supposing Dr. Elliott's removal essential, was it absolutely necessary that Mr. Cleveland should put the question thereon. The constitution, as already shown, orders that the moderator shall put *every* question. It is said that a presiding officer cannot put a question on his own case. Though such be the parliamentary rule, it can avail nothing against

an express constitutional provision opposed to it. We are told that, in 1835, Dr. Beman did not put the question, when his removal was proposed. That proceeding was peculiar. Dr. Ely, the stated clerk, presided while Dr. Beman was appointed; then, when the error was discovered, it was moved to reconsider the resolution appointing him; and, also, that the stated clerk should preside, as he naturally would have done, during the reconsideration; and this motion, Dr. Beman himself appears to have proposed to the house. Afterwards, Dr. Ely, as stated clerk, said, "All who are in favour of sustaining the resolution passed in the morning, by which Dr. Beman was called to the chair, will signify it by saying Aye, &c." But if the moderator could not properly put the question, the clerk should have put it. This doctrine is supported by all parliamentary precedent, and by the case of the Assembly of 1835, just referred to. The position of the clerk makes him the proper person to preside when the moderator cannot. It is urged, however, that both the moderator and clerk were implicated in a conspiracy to exclude these commissioners whose recognition was demanded. Admit that they were—though there is no evidence whatever of anything of the kind; it appears only that they concurred in thinking—conscientiously believing—that the commissioners mentioned were not entitled to seats. Admit that they were implicated, and still this does not show that they would have refused to put the proposed question. Because a man is doing wrong, and is actuated by wrong motives, is it to be taken for granted that he will do nothing right? Even though the measure was revolutionary, Mr. Cleveland was bound to suppose that the moderator and clerks, or one of them at least, would do his duty: at any rate he was bound to wait until he had expressly refused, before venturing to usurp the moderator's place. The law will take for granted, since the trial was not made, that they would, any one of them, have put the question, if it was proper to be put.

But even if it has been shown, that there was an absolute necessity, both that the moderator should be removed, and that Mr. Cleveland should put the question, a heavy burden of proof still rests on the new school party. If a regularly appointed speaker propose any thing to the house, the presumption of the law is that every member hears and understands, and therefore acts intelligently. Yet, even this presumption is but *prima facie;* and if it can be shown that

extraordinary circumstances prevented hearing and understanding, the vote taken is not conclusive. The reason of this presumption is evident. The members are all bound to look at the speaker, and listen to what he says: they are not bound to be constantly looking over the house, to catch the eye, and the words, of any one of their number who may choose suddenly to rise and propose a question—a duty quite inconsistent with the former. If circumstances make it proper that an unauthorized member should put a question, afterwards the burden of proof that all heard and understood, lies on him and those who claim for the vote taken by him a binding efficacy. The relators, then, were to prove that the old school actually heard and understood Mr. Cleveland's motion, before they could claim the right of construing our silence into consent. Their counsel seemed aware of the necessity, but so far from their making out their case in this respect, what the law would, without proof, have presumed against the relators, the respondents fully established by irrefragable testimony. On the part of the relators it was deposed that Mr. Cleveland had spoken in a loud voice, so as to be heard all over the house, and some few persons, who had stood in remote parts of the building, declared that they had actually heard him. The fact that the old school, had they wished, could not have voted intelligently, appears from the following particulars:—

1. The resolution passed by the new school convention had led them to believe that these brethren intended, not the removal of the moderator, but a separate organization.

2. Mr. Cleveland's remarks did not allude to the misconduct of the officers, or directly propose their degradation. We have already shown that they were calculated to confirm the belief already existing in our minds, that a new organization was contemplated. If any thing else was really designed, a studied concealment was practised throughout—the transaction was fraudulent.

3. A large number of the old school commissioners could not hear even the motion: this is fully proved. If the so-called disorder of some among their own number, of the moderator and a clique around him, had been the cause, as it was not, of their being unable to hear, this would not have affected the rights of the multitude, who had not in any way been implicated in that disorder. No one of them who was examined heard the reversal of the question: of course, they had no chance to vote in the negative. If the reverse was

put at all, it was put, as Dr. Hill said, *before the scattering ayes had ceased.* Was there not in this circumstance a sufficient reason for our not hearing it? The new school members rose and crowded round their officers: the same cause that shut the latter up from our view, must have obstructed the transmission of sound. The extreme haste, which Dr. Hill tells us was intentional, and which induced a reversal of the question before all the ayes had ceased, must have rendered what was done in a great degree indistinct and confused.

No opportunity whatever was allowed for considering and debating this most extraordinary resolution, which, according to the testimony of the new school, neither Mr. Cleveland himself nor his immediate coadjutors had much reflected upon, having brought it forward in an unexpected emergency. We would not have debated it, say they, if an opportunity had been given. But is the presiding officer to judge of that, and because he thinks there will be no debate, omit to ask whether the house is ready for the question? How could any one make known his wish to debate in the hurry and impetuous precipitance of such a proceeding? Only by calling, "Order!" a call which every presiding officer is bound to regard. This fact alone, that the old school were denied all chance of discussing the resolution, would be sufficient to condemn the whole proceeding in any court of justice.

We have thus gone over the subject, touching only its prominent points, and continually reminded of the comparatively small space that we can at present devote to its consideration. A careful examination of the manner in which the suit was conducted, and of its leading incidents; of the various decisions of Judge Rogers on points of evidence; of his charge to the jury, and of the opinion of the court in bank, might be interesting to many, and not without its use; but we have already trespassed too long on the reader's patience. In conclusion, we would briefly allude to a matter that perhaps scarcely deserves notice, yet is apparently considered by some persons of vast importance. No sooner was the opinion of the court known, than those who, in anticipation, had triumphantly claimed it for themselves, but were utterly disappointed, began to denounce in no very measured terms, that portion of the bench from which it had emanated; most indecently to assert, that the associate judge, who had declined sitting in the case, and had heard no part of the evi-

dence or argument, had formed and expressed a decided opinion, in their favour; and confidently to set up that opinion with the charge of Judge Rogers, and the decision of "*twelve enlightened and impartial jurymen*," against the solemnly pronounced judgment of the court. It so happens, that the decision of the jury was merely the effect of the charge of the learned judge, and is not to be taken as an independent concurring opinion. We have conversed with one of the most intelligent of their number, who has distinctly informed us, that he had made up his mind that the Assembly had a perfect right to cut off the four synods, though he thought it a harsh measure; that three or four of his companions, the only ones with whom he talked on the subject, were of the same opinion; but that they considered it their duty to yield to the decided judgment of the court, and gave their voices accordingly. So much for the support of *twelve enlightened and impartial jurymen!*

NOTE.

In reviewing Mr. Malcom's travels, we exercised the right which is conceded to all critics, of exhibiting the subject rather than the book, and in so doing, may have done him injustice, by making the particulars, in which we differed from him, disproportionately prominent. Indeed we rather took for granted some acquaintance with the merits of the work, upon our reader's part, than undertook to give them an idea of its character. If in so doing we have failed to make them understand, that we regard the work as highly creditable to its author, and likely to be highly useful to the cause of missions, we are happy to be able to supply such a deficiency by the insertion of the author's own remarks, which we may do without relinquishing our own views as to any of the controverted points, and yet with every feeling of respect and kindness to the author.

Notice of a Review of Malcom's Travels in South Eastern Asia, in the number of the Repertory for October 1839.

Of this review, which occupies fifteen pages, the author begs opportunity to take a respectful notice, which he will compress within much smaller limits.