

Western Carolinian.

It is wiser to abstain from laws, which however wise and good in themselves, have the semblance of inequality which find no response in the heart of the citizen, and which will be evaded with little remorse.

Dr. Channing.

BY JOHN BEARD, JR.]

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TERMS.

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POLITICAL.

FROM THE NORFOLK HERALD. PRESIDENT'S PROCLAMATION. No. 11.

In my last number, I endeavored to prove, that by their several ratifications of the Constitution of the United States, the Sovereign States of the Union thereby established, entered into a Covenant with each other, to support this Constitution; and that for the observance of this Covenant, each State pledged its faith to co-States, and that this faith must be kept by all. I endeavored to prove further, that none could violate the faith pledged, by the Covenant, save one of the sovereign parties thereto; but that they ought to do so, either directly, by their own acts or omissions, or indirectly, by adopting as their own the acts or omissions of any others over whom they might lawfully exercise control. I am thus brought to enquire, what is the course that may be rightfully pursued by any State, should its co-State break their faith pledged to it, by doing directly an act in violation of that pledge, or by adopting as theirs, any such act, done by others amenable to their authority?

I present the question in this abstract form, purposely; because, I wish to avoid for the present, the investigation of any other matter not necessarily involved in the inquiry immediately before me. Hence, instead of stopping to examine whether any particular act is or is not a violation of the Constitution—or what is or is not the adoption by a State of such an act, when not done directly by itself—or whether the agents by whom the act has been performed are or are not under its control.—I have assumed, that the act done is a violation of the Constitution—that it is done by a State directly, or when done by another, is adopted by it as its own act—and that the act adopted as its own act, is done by such as are amenable to its authority. Thus the question of *mere right* comes naked before us, and so presented must have a direct answer.

As to the general answer to this question, I had supposed, until recently, that no man could doubt. But as opinions upon this subject very different from mine, have been uttered of late, and from many and high authorities too, although my former confidence in my own opinions is in no degree shaken, yet I feel compelled while reflecting thereon, to endeavor to establish them by arguments, which but a few weeks since, I should have thought as unnecessary as the attempt to prove any axiomatic truth.—In the case of mere individuals, if a contract is made between them wherein the performance of one party, is the consideration for the performance of the other, no lawyer, no man can doubt, that if one of the parties does not comply with such a contract, he has no shadow of right to ask or to expect the observance of it by the other party.—The failure to comply by either, leaves the other party, the privilege of avoiding and vacating the contract altogether; or of tendering performance on his part, claiming a compliance from the other party, and if that is then refused, of demanding compensation for injury sustained by a breach of the agreement.

So too in the case of nations absolutely independent of each other, if a contract is entered into by them, the failure to comply with any of the provisions of the contracting parties, leaves the other at liberty, to vacate and annul the whole contract as to itself; or while affirming its readiness on its part to continue its observance of the obligations, to require of the other party a like compliance. In illustration of this doctrine, I need but refer to the well known principles. The act of July 7, 1793, declared, "that the United States are of right freed and exonerated from the stipulations of the Treaties, and of the Consular Convention, heretofore concluded between the United States and France; and that the same shall not henceforth be regarded as legally obligatory upon the government or citizens of the United States." The reason assigned for this declaration, in the preamble of the act itself, is that "these Treaties have been repeatedly violated on the part of the French government." But for this act of violation on the part of France, Congress could have had no authority to enact this

statute, because, by the Constitution, these Treaties had been expressly made the supreme law of the land. Therefore the Statute does not profess to repeal them by any enactment, but, declares simply, that they were no longer obligatory upon us "of right," because they had been previously and repeatedly violated by France. So showing, conclusively, that the violation of a contract by one of the Sovereign parties to it, is sufficient to absolve the other party from all its obligations, if this latter party chooses to adopt that course.

Now, surely no one will contend, that what every individual does, and may of right do, in regard to his contracts; what every State has done, and has done rightfully, in regard to their arguments, is forbidden to be done by any of these Sovereign States, in reference to their covenant with their co-States. It may be denied, as the author of this Proclamation does deny, that any of these States is a Sovereign. It may be denied that they have entered into any Covenant with each other; or that the Constitution of the United States is such a Covenant. It may be denied that this covenant has ever been broken; or that any State is responsible to any other for any breach of it. But if all these things be granted, (and in the question propounded they are all assumed,) it follows, necessarily, that a violation of the Covenant by any of the States leaves every other State who is a party, at liberty, to vacate the Covenant as to itself also.

Nor can the exercise by a State of this right of declaring a broken Covenant no longer obligatory upon itself or its citizens, be ascribed, with any propriety, to the high and indefeasible right of Revolution, which abides with every people. This last is a mere individual right; it stands upon the great maxim, *Silva populi est suprema lex*; it is the right of self-defence, which man cannot alienate, although he may forbear to exert it. This high right resides over all others, whatever they may be. All claims to legitimate dominion, the sovereignty of States, the severance of Empires, the dissolution of ancient Societies, the breach of allegiance, and even of faith itself. Cut the right of declaring a Covenant broken by one of the parties no longer obligatory upon another, is the very reverse of all this. It constitutes the foundation of all Society; to secure it, all governments of all kinds were instituted, and upon its preservation depends Sovereignty itself. Upon it rests the efficacy even of this holy right of Revolution; for unless men can confide in his fellow, resistance of power would be vain; nor can any one confide in another, if their mutual pledges may be broken by one, and remain obligatory upon the other, against his will.

The assertion by a State, of this right of declaring a broken Covenant no longer obligatory upon itself or its people, does not necessarily produce any other effect, than their absolution from all the obligations formerly imposed upon them by the Covenant while it subsisted as such. It leaves them, in the same plight, as to the matter of the Covenant, in which they were before it was entered into; in the same predicament in which they would have been if it had never existed. The Covenant, as to the party making such a declaration, becomes a mere nullity, without even any moral obligation upon that party, who, in declaring its exemption from all the former obligations of the Covenant, so abandons thereafter, all shadow of claim to any privilege, right or benefit, to which, it might have been entitled under it. The assertion, involves no breach of faith on the part of the State declaring the Covenant broken by the other parties.—So far from it, it affirms a breach of faith by them; and, as in the case of France, it so justifies the act declaring its absolution from obligations already violated by others. It disturbs no relations subsisting between any others independent of itself, but leaves to them the full and free exercise of all the rights and privileges which the party vacating the Covenant has claimed and exercised for itself alone. If they are content to abide by the broken Covenant still, they are free to do so, whether they think it has been violated or not. If they choose to follow the example set, they have the same right to do so, as was exercised by those who set the example.

To the Moralist or the Jurist, or the Politician, these well settled propositions need no illustration by any example. To others, I will give only one, found in our own history. The thirteenth of the old Articles of this Confederation shall be invariably observed by every State, and the Union shall be perpetual; nor shall any alteration at any time hereafter be made in any of them, unless such alteration be agreed to in Congress of the United States, and be afterwards confirmed by the Legislature of every State." Yet did eleven only of the thirteen States, in opposition to the will of the two others, after that solemn Covenant by the present Constitution of the United States; and according to the provisions of this latter instrument, nine States only might have done so, as to themselves, as legitimately, as did the eleven. From whence was such a power, which all concede to have been rightfully exercised, derived? Certainly not from the Articles of Confederation themselves, for by this

very article, the consent of "every State" was necessary, to make any alteration whatever in that instrument. Not from the fact that nine States then constituted a majority of all the States. If so, seven States would have been sufficient; and moreover, the old Articles of Confederation might have been put into operation in the year 1778, when they were agreed to by a majority of the States, three years before they went into actual operation by the agreement of all the States.—The power was derived in this way. The old Articles of Confederation had been violated in various modes, by the refusal or neglect of several of the States, to comply with the requisitions and recommendations of Congress, made in pursuance of that Covenant. These repeated violations of it, had given every party to it, the perfect right to declare that it was no longer obligatory upon them. But although this was their clear right, prudence and policy dictated, that they should not exert this right, until they had provided a substitute for the old Covenant; and until this substitute should have received the concurrence of at least nine of the States. This being done, their right of vacating the old instrument, which had been perfect before, was then prudently exercised. So that this very Federal Constitution, grows out of the conceded right of a State, to declare the obligations of a Covenant no longer obligatory upon itself, when that Covenant has been broken by other parties to it.

It must be said, that the Articles of Confederation were the act of the State Legislatures, and the new Constitution the act of the people of the several States; and that the latter abrogated the former, because it proceeded from a superior power. The People of the several States, by a very long acquaintance, had adopted the Articles of Confederation as their own act.—Under these Articles many Treaties had been concluded, many other engagements had been entered into, war had been carried on, and peace made, in their name, and with their approbation. All these, were acts, that could only have been done by acknowledged agents and Representatives of the Sovereignty, which has been shown, then abided in the people of the several States, in their corporate character as States, and was specially reserved to them as such in this instrument. Therefore, the change of this Covenant, made in a manner directly in opposition to one of its provisions, and against the will of some of the parties, cannot be justified upon this ground; but must be referred to the others. If, as asserted, the reason of that provision of the present Constitution, which confined its operation "to the States ratifying the same," even after it might be ratified by some States is obvious. The old Covenant being annulled, the States were reinitiated to their former condition, and could not then be bound by any new Covenant to which they were not parties.

The example will illustrate, what a priori reasoning had established, that a Covenant broken by one party, may by any other party be rightfully declared no longer obligatory upon itself, and so practically annulled, as to itself, by the party making this declaration.—If this was not so in the case of States, who can foresee the consequences? Two States agree to exchange different portions of their territory; as by one of them return that which it has agreed to give, and rightfully demand of the other the delivery of what was the equivalent? Commercial advantages to be received by itself; is one bound to give, and not entitled to receive? It seems monstrous to affirm these things; but yet such are the inevitable consequences of the proposition, that a broken Covenant is still obligatory upon the faith of the party by whom it has not been violated.—It will not do to say, that a party injured by a breach of a Covenant, may rightfully enforce performance from the other.—This is true only where the innocent party is desirous to continue the obligations of the Covenant, but does not apply where he is content to take the other remedy of declaring the broken Covenant no longer obligatory upon him. Either mode of redress may be rightfully resorted to by the injured party, and his policy or discretion must decide which he will adopt; but he cannot rightfully take both.—If this was not so, the question of mere right, would necessarily be converted into one of brute force, and right and power would soon become the same.

The conclusions from these premises is, that when a Covenant entered into between a State and its co-States, is violated by any of the parties to that Covenant, any State may of right declare the Covenant broken, and so no longer obligatory upon itself. In this view of the subject, it is of no moment, whether the government of the United States be considered as a party to the Covenant or not. Because, if the government is a party, then the principle applies in terms; and if not a party, but only the agent of the parties who approve and sanction its acts, the act of violating the Constitution, becomes by adoption the act of all the principals who approve and sanction it, and so the same consequences follow, in either case. This right of a State, to declare a Covenant broken by some of the other parties no longer obligatory upon itself, when one of the objects of the broken Covenant is "to form a more perfect Union," is the right of Secession; neither more nor less.

He who denies this right, must contend that a majority of the States, containing a majority of the people, may break this Constitution at their will; and that the minority of the States and people, is bound in good faith and of right, still to observe it on their part. For if an unconstitutional law be once passed, the Sedition law for example, it can never be repealed without the concurrence of both Houses of Congress, that is to say, without the concurrence of a majority of the States in the Senate, and of a majority of the people in the House of Representatives. Nay, this is not all, for to amendment of the Constitution can be made to redress the grievance, however great that may be; for if seven only of these States refuse to ratify the amendment, the other seventeen not constituting three fourths of all the States, cannot make the amendment valid. There remains then, no relief for an oppressed minority, however great that may be, however cruel and unrighteous and wanton may be the oppression, but to appeal to the God of battles, and to assert their rights in arms.

And was it for this that our forefathers fought and bled? Was it for this that the wisest and the best were convened, to frame and adopt a Constitution stuffed with checks and limitations of power in every line? Who ever would any guarantee of the right of Revolution? That exists always, it is inherent in and unalienable by man. Compact neither gives or can take it away.—Free government, is but a device to prevent the necessity of recurring to this natural right. The Constitution of the United States, in separating the sovereignty from the government, making government rest upon a Covenant between the sovereign states themselves, to which Covenant the government created by it is no party, but a mere agent of the parties, and in thus constituting each party the Judge of the observance of this Covenant, with the right of declaring it no longer obligatory upon itself, when broken directly or indirectly by any other party, was a proud monument of human wisdom. Rob it of these qualities, and it becomes a simple institution by which all power is transferred to the majority, who may rule the minority according to the unchecked will of the majority, without account to any other than itself.—The threshold garment of ancient days, long since cast off, because it was always found worthless to shelter right against power—may, so sure as effects follow their causes, make a hard military despotism speedily succeed to such a government, in such a country as this.

I will close this number with this remark. Wherever the object of the Covenant is to establish Union or Association for any purpose, between different parties, desirous to preserve their separate existence under the Covenant, after it is made, Secession is one of the remedies that may always be resorted to by any of these parties, for a breach of this Covenant by any other; and is nothing more than a declaration of that fact. In 1788, eleven States seceded from the Union established by the old Articles of Confederation, and established the present Constitution for all the States who might choose to ratify the same. In 1793, the United States seceded from the alliance established by their Treaty with France. In either case, the act proceeded from the same cause. In neither case, did this act produce any other consequence than it was designed to produce by those who adopted it: a mere dissolution of the former bond of Union or Association as to themselves. Nor in any case, can any other consequences rightfully result from it, on the part of the State declaring its secession, although it is possible that other effects may flow from the course of the other party. These effects shall constitute the subject of my next number.

A VIRGINIAN.

No. 12.

While seeking to establish the right of a State, to secede from an Union formed by a Covenant, the terms of which have been broken by other parties, I was not unaware of the objections that have been urged against the existence of such a right, not only by the author of the Proclamation, but by others of the School of Constitutionalists. But I did not choose to break the thread of the argument, by replying to these objections at that time. Therefore, I assumed all the facts necessary to present the naked question of mere right. Having established this, I will now attend to these suggestions. Many of them have been before noticed and answered; and I will not here repeat these answers. But there is one which has not yet been presented; and to the examination of this, I propose to dedicate my number.

This objection is, that no State rightfully assumes as a fact, that a Covenant has been broken by any of the States, or act upon such an act, without violating its own faith, the Covenant itself has provided for to decide all such questions.

be bound. This arbiiter is said to be the Supreme Court of the United States. To this objection, which is founded upon the supposed existence of a common arbiiter, authorized and capable to decide all infractions of the Constitution, of which any State may have cause to complain, many answers may be given, all equally conclusive to show, that no such arbiiter, clothed with such authority, either does, or ought to be expected to exist.

The first of these answers is, that according to no legal possibility, could the case supposed to exist, ever be presented to the Supreme Court for its decision, even if the Sovereign parties were content to abide by that decision. The Judges of the Supreme Court, like all other Judges, are appointed to decide 'cases,' and not to assume themselves to edify mankind (as the President seeks to do in this Proclamation) with *edicta dicta*, or with public lectures, communicating the results of their lucubrations upon mere questions of law, of politics, or of any other art or science.—These cases too, according to the very terms of the Constitution, must be "cases in law and equity;" and we have the authority of this Court itself, for saying that there cannot exist any case in law or equity, but one presented to a Court by the representation of parties. The law professor in every College, may, the very under graduates of his class, may deliver theses and dissertations upon questions of Sovereignty, of politics, or of law, and in my amuse and improve themselves by imagining suits brought by John Donvers Richard Roe; to try these questions. But it would be a high contempt of every Court, to attempt to steal from it an opinion, upon any question presented in a case brought by such imaginary parties; and not a less contempt of public justice, if a Judge should wander out of the case before him, to prejudice some other or to determine any mere abstract proposition not necessary to the decision of the matter submitted for his determination. Now, the case supposed to exist, is the case of a Covenant of Union, believed by one of the parties to be violated by the Government of the United States, the agent of all the parties. In such a case, the act complained of being already done by the government, the United States would have no need to become actors, or to go before any Court to assert the power that has been already exerted; and it would be difficult to find the authority under which any one, as an actor, may impound the U. States in their own courts.

But here it may be said, perhaps, as is often said, that the government of the United States can only act by individuals, and upon individuals; and as the courts are always open to such parties, all questions of constitutional right may so readily be brought before the Supreme Court.—To this common place assertion, I oppose a flat denial. The evil complained of, may not be the consequence of any act whatever, but of a willful omission to act, on the part of the government. In such a case, it cannot be pretended, that there is any individual, to whom the aggrieved sufferer may resort for redress, by a suit in Court. Or the evil complained of, may be an act, which, although palpably wrong, may not require the agency of any individual; or although wantonly oppressive and cruelly unjust, upon all the inhabitants of a State, may nevertheless, like every common nuisance, be injurious to no one of them in particular, and therefore would be an act not to be redressed in any private suit. Suppose for example, Congress should pass a law giving a preference to the ports of one State over those of another, which they are expressly forbidden to do in the very terms of the Constitution itself; what individual could sue, or what individual might be impleaded, for the perpetration of an act so ruinous to the injured State?

Even in cases where the Courts might take cognizance of the act done, because done by some individual, the judgment in such a case could bind none but the parties to the suit. It would not repeal the unconstitutional act; and might not even furnish any compensation to the individual injured. Some agent of the law-makers, in execution of their orders, which are in direct violation of the Constitution, does me a great injury. I sue him. The Court agrees with me, that the act was lawless and unauthorized. The Jury awards an amount of damages to me as a just compensation for the wrong I have sustained. The Court gives me a judgment against him for that sum.—But the agent is insolvent or runs away, and I cannot get the intended compensation. Will any one say, that the Court can compel those by whose orders the wicked deed was done, and to test whose authority for directing it to be done, the suit was brought to me? Certainly not. I may petition the arm of the Judiciary is impotent to obtain for me the relief to which the Court itself has said I was entitled.

at prove efficacious in preventing the similar outrage upon me next day, under the same law, but declares himself no defence to the particular case brought by the parties then lit-

gant therein. So that until the Legislature will be graciously pleased to repeal their law, every individual in the State, may be compelled to go through the same tedious and expensive proceedings, and to incur the same hazards, in order to obtain relief against an act of the Government which has been already decided by the arbiiter, to be an unauthorized usurpation of lawless power. Now what a strange arbiiter must be he whose decision, in favor of one of the parties, is binding and obligatory, but if made against that party, is of no avail to terminate the subject of difference.

The next answer to this objection is this. Where a case in law or equity is properly brought before the Court, by actual suitors, if in the progress of this suit, it is found to involve a question of the mere discreet exercise of political power, confessedly granted, the Judges themselves acknowledge, that this question they are incompetent to decide, but as to all such matter, they are bound *jurare per verba magistrati*; and, to say, as Judges, that whatever is, is right, although as individuals, every one of them may know that it is not so. While doubt exists, whether the political power exercised is granted or not, the Court may give an opinion upon the subject. But let it be once conceded, that the power has been granted by the Constitution, and the Court is then compelled to say, that it has nothing to do with the question of policy, not is authorized to ask, why much power has been exerted. If Congress declare a war, although for the most odious purpose for which war ever was declared by the wisest tyrant that ever disgraced a throne, the Judiciary must apply the sanctions of the law, to all acts done contrary to the wicked will of the Legislature. If the President and Senate make Treaties, supplanting the very foundations of the Constitution, the Judiciary cannot declare them void, or prevent their execution by the Executive. If Congress wantonly levy duties and imposts for any purpose whatever, the Judiciary power is helpless to afford relief. They cannot enjoin the marching of armies, the sailing of fleets, the slaughter of innocent men, the levy of taxes, or the execution of treaties. Yet it is precisely in such cases, that the interposition of the Sovereign parties to the Covenant, will, probably, ever be necessary. It is idle, then, to say, that they may not interpose even in these cases, at least for the reason given. For the very signification of the objection to such interposition is, that as there is a common arbiiter appointed to decide the case, the parties may not rightfully assume to decide it, each for itself.

The next answer to this objection is, that the evil complained of may be the act of the Judiciary itself, the enforcement of the Sedition Law for example, or the application of the common Law of England, as a criminal code, to the citizens of the U. States.—Both these cases have occurred. Here, it would be monstrous, to refer to the Judiciary, to decide whether the Judiciary itself had done right; and yet the objection applies equally to all cases.

Another answer is, that in this government, composed as it is of co-ordinate departments, there exists no reason why more respect should be paid to the acts of one of these departments, than to those of any other; and if it is admitted, that neither of these departments is bound by the acts of its co-ordinate, it would be strange indeed to say, that the Sovereign of all was bound by such an act. Now, the objection itself asserts, that the Judiciary is not bound by the acts of the Legislature or of the Executive; and no one, it is believed, will contend that either of the other departments is bound by the judgments of the Judiciary, however obligatory these may be upon the parties. I speak not of courtesy and respect, but of obligation merely.—Should the Judiciary declare an act of the Legislature void, such a declaration, as I have already said, cannot repeal the law, although it may prevent its application to the particular case and justice. Congress may establish other courts or other Judges to execute the law; or the President and Senate, in execution of such laws, may appoint additional Judges of the Supreme Court, who may differ from their associates, and over-rule the past decision in the first new case that comes before the Courts. Nay the House of Representatives may impeach, and the Senate condemn the Judges, for this very decision given in violation of the law enacted by them.—I do not mean to say, that any of these things would be right; but when reasoning upon the case of a violated Constitution, I have a right to suppose, that all the legal means would be employed by the violators; to make their violation effectual, and so to prove, that the Judiciary cannot bind the Legislature. We have the authority of the President himself for saying, that he feels himself as much bound by his oath to support the Constitution, as any one else can do; and therefore, if his agency is required, whether by the Legislature or the Judiciary, to do any act which he believes unconstitutional, he will not be made to sin against his own conscience and to violate his oath. His new partisan case brought to ensure him victory in this question; but yet he never made out