North-Carolina Free Press.

Whole No. 356. *Tarborough, (Edgecombe County, N. C.) Tuesday, June 21, 1831.* ***Vol. VII—No. 44.***

The "North-Carolina Free Press,"
BY GEORGE HOWARD,

Is published weekly, at *Two Dollars and Fifty Cents* per year, if paid in advance—or, *Three Dollars*, at the expiration of the year. For any period less than a year, *Twenty-five Cents* per month. Subscribers are at liberty to discontinue at any time, on giving notice thereof and paying arrears—those residing at a distance must invariably pay in advance, or give a responsible reference in this vicinity.

Advertisements, not exceeding 16 lines, will be inserted at 50 cents the first insertion, and 25 cents each continuance. Longer ones at that rate for every 16 lines. Advertisements must be marked the number of insertions required, or they will be continued until otherwise ordered. ☞Letters addressed to the Editor must be post paid, or they may not be attended to.

CIRCULAR.

To the Citizens of the 3d Congressional District of N. C.

FELLOW-CITIZENS:

It will be recollected that at the close of a Circular, submitted to your consideration a short time since, I promised to resume the Judicial question which was but slightly touched then, for reasons stated at the time. In my last Circular I mentioned what seems to be admitted: that the two governments, the General and the State governments, are distinct and separate agencies established by the people for different purposes. This principle seems to be fairly drawn from the 6th article of the Constitution, and the 9th and 10th amendments. This opinion is also sustained by very high authority: the Supreme Court has, I think, fairly deduced from the authorities here alluded to, that all the powers of the General government are plenary or full powers over the subjects committed to their care. This being the case, all will admit that they must be exclusive powers; and it follows of necessity, that they cannot be concurrent with the powers of the State governments. From the doctrines here laid down, which I think incontrovertible, it will follow that the State governments are equally plenary and exclusive within their proper sphere of agency as the General government. I wish here to be understood that each is plenary and exclusive in relation to the other when acting within its own constitutional sphere, upon subjects appropriately belonging to it. These principles seem to me to furnish a solution to the difficulties in regard to the Judicial act. If all the powers of the Federal government are plenary and exclusive, then it follows necessarily that the *Judicial* power is so. This being so, let me ask how could Congress give this power or any of it concurrently between the State and Federal courts. Yet this has been done without the slightest authority from the Constitution. There is no greater source of error and often of real evil, than the misuse or abuse of words: the word concurrent, in its proper signification means running together, acting in conjunction, concomitant in agency, &c. It must then be very plain, that the powers of the Federal and State governments, being as they are admitted to be, separate and distinct, cannot be concurrent—cannot be joint agents over any given subject, participating in its management. If there is any meaning in human language, they cannot be both separate and distinct, and yet conjoint or concurrent in their action over the subjects committed to their care and managoment. The Constitution says:

"The Judicial power of the United States shall be vested in one Supreme Court, and in such inferior courts as Congress may from time to time ordain and establish."

What Judicial power is here meant? It must be Federal Judicial power, because it is vested by the Constitution in Federal courts, to be exercised by Federal Judges. And what part of this power is thus vested by the Constitution? Is it all, or is it only a part? No one can doubt a moment. The words must mean all the Judicial power granted by the people through the Constitution to the Federal government, constituting entirely one of its three departments—the legislative, executive, and *Judicial*. The Constitution itself vests, and that too in the same language, all three of these powers; and evidently, of all three, vests the whole—which investiture Congress cannot in the slightest degree change or alter. If it can alter one, or any part of any one of these powers, it may the whole; and completely, in spite of the Constitution which is the written will of the people, subvert or change the government. But has not Congress undertaken in the Judicial act to do precisely this? Most assuredly it has in many instances, and it is this very thing which makes the 9th, 13th, 25th, and other sections objectionable, as containing unconstitutional provisions. A very little examination into the subject will satisfy any one that the whole difficulty in regard to the Judicial act, (which requires alteration and amendment by further legislation,) originated from forming several of its sections, or parts of them, not upon the Constitution, but upon Mr. ALEX. HAMILTON'S doctrine of concurrent powers, laid down in his 82d No. of the Federalist. His doctrines there laid down are such as evidently run into consolidation. He says:

"When in addition to this we consider the State governments and the National government as they truly are, in the light of kindred systems, *and as parts of one whole*, the inference seems to be conclusive, that the State courts would have concurrent jurisdiction in all cases arising under the laws of the Union, where it was not expressly prohibited."

And it is from this very doctrine that he infers immediately after, the right of appeal. He says:

"Here another question occurs: What relation would subsist between the National and State Courts in these instances of concurrent jurisdiction? I answer, that, an appeal would certainly lie from the latter, to the Supreme Court of the United States."

Mr. Hamilton is right as to the consequence, if the jurisdiction is constitutionally concurrent—but here lies the great error. The Constitution grants to Congress all its powers. Congress cannot exercise any others. The Constitution has vested all the Judicial power in Federal courts, and yet by giving concurrent power to the State courts, a part of this same power must have been vested by Congress, or considered so to be, or it could not have been exercised there. And thus came the claim of appellate jurisdiction of the Supreme Court over a State court. I think the whole error lies in this doctrine of concurrent powers, which will be found to be the doctrine of consolidation. If Congress can make the two governments joint or concurrent in any one of their departments, it may in all—this being done, is it not absolute unqualified consolidation, making to all practical purposes one government? And now let me ask, what is the condition of the people of all countries at this time living under governments of this description? It is oppression and slavery from too much government. Will the name of a republican government avail us, if we have to suffer the same evils that flow from a different one? Those who have taken for granted, that in wishing to alter or repeal any part of the Judicial act, I had any desire to lessen the constitutional powers of the Supreme Court, are much mistaken. On the contrary, I think that act, if properly modified by further legislation, would render several parts unnecessary; and but for having granted concurrent jurisdiction to the State courts, most probably the 25th section would not have been passed, because it would have been entirely unnecessary. If the State courts could not take cognizance of any of the cases enumerated in the Constitution, all of which are exclusively vested in Federal courts, of what use would the 25th section be? It might be altogether dispensed with. Suppose for instance, instead of that section the very words of the 2d section of the 3d article had been substituted, would it not have been clear that these cases all belonged originally to Federal cognizance? It certainly appears so to me. In this I am sustained by the opinion of the Supreme Court itself. In the case of Marbury against Madison, the Chief Justice says:

"The Constitution vests the *whole* Judicial power of the United States in one Supreme Court and such inferior courts as Congress shall, from time to time, ordain and establish."

That enumeration contained in the 2d section describes carefully the cases appropriately taken under Federal cognizance, and which it seems unlikely were intended to be equally vested in State courts. Suppose this enumeration, which is beautiful and clear, should be adopted instead of the 25th section—I repeat, of what use would it be? It is evident, that if so cardinal a grant of power, as that giving authority to the Supreme Court to set aside the decisions of the State courts, and with them the laws of a State, had been thought of by the framers of the Constitution, it could scarcely have been overlooked. The beautiful and lucid enumeration alluded to, contains the substance and matter of the whole Judicial power granted by the Constitution, and seems evidently intended to be exclusive in the Federal courts. This not only will appear upon inspection of the 3d article but is shown by the language of the Supreme Court, and is still further sustained by the rule of construing the Constitution, that none but granted powers can be exercised; and if that be the case, Congress is not at liberty to alter that very distribution or location of power made by the instrument itself, because no such power is even hinted at, much less granted. It is quite certain that Congress did not ordain and establish the State courts, nor could it do so of right, or interfere in any way either with their organization or powers. It could not of course give any of the Federal Judicial powers to them. If Congress could ordain or establish or create or alter the Judicial department of a State government, it could do the same with the legislative and executive; and might thus abolish, alter, or make the whole. It is plain, that the alteration of the organization made by the Constitution of any of the departments of the Federal government, would be exercising an usurped power; a power which alone could be exercised by the people, or according to the method prescribed by them in the instrument. Yet this has been done by the very act of giving concurrent powers, or vesting the Judicial power belonging to the Federal government in State courts, as the Judicial act does in several of its sections, and as must evidently have been contemplated by the part of the 25th section, which I think objectionable and ought to be repealed or modified, as I have said, to render appeals unnecessary. My whole object would be to carry out the principle into practice, a principle which I have long since avowed, of making the two departments of power, the Federal and State governments, as distinct and independent of each other, as the departments of either government are, the one from the other. And I will appeal to those who have not been aware of my real views, but which correspond with my doctrines long since avowed and on record, whether the plan would not be practicable, so to illustrate and explain the subject, that each government could be kept to its own proper sphere of action, without interfering with the other. I am aware that some suppose that this would be giving too much power to the Federal government. Whether too much or too little it would be doing precisely what the Constitution requires and prescribes. It appears to me that all difficulty might be removed by instituting if necessary, as Congress has the undoubted right to do, a sub-district court in the districts already existing, for the reception of such minor federal cases as have been permitted to be taken in charge by State courts. And if still there were cases of such doubtful character, as to be not readily distinguished, as belonging either to Federal or State cognizance, being few and not of great importance, give the option to the parties to go either into the Federal or State courts, but the decision to be final. I cannot see what necessity there would then be for this consolidating doctrine of concurrent powers. The definition in the Constitution makes all the more important cases so plain, that I should not suspect any one who had been promoted to a seat on the Bench, of incapacity to discriminate them from those properly belonging to State cognizance; and I cannot see why the State Judges would desire to take in charge more than their appropriate share of business, of which they have a plenty without taking upon themselves the business of others.

Let us now examine some parts of the Judicial act, consisting of thirty-five sections. The 9th section begins, without any direction from the Constitution, to make a part of the Judicial power vested by the Constitution in Federal courts; exclusive of the State courts. And again, without the slightest authority from the instrument, which says not a word on the subject, gives concurrent jurisdiction as to other portions of this same power, all of which has been evidently vested in Federal courts. In this section begins that error which ends in, and is confirmed by that part of the 25th section, which gives to the Supreme Court the right to set aside at its discretion, a decision of a State court whenever it shall please to consider it proper—for the Court is to judge, by a transcript of the record. And what curb, or restriction, is there on their discretion? Does not every one see that if this power is permitted, the result may be, as it has already been, in the Bank cases of Maryland and Ohio, that the Court under this section may abrogate any State laws they may choose to consider proper for their re-examination under the form of decisions of State courts—because the State laws, after being enacted, must be by the Judiciary expounded and applied; and if they are stopped or altered, at this stage, is not this abrogating the law? Suppose, as is believed and admitted by many, that the Bank of the United States is unconstitutional—how will those making this admission reconcile the legality of the decisions of the Supreme Court under the 25th section, in the cases above alluded to? It is admitted, as I understand, by some of the advocates of this appellate power, given, not by the Constitution, but by Congress, that the charter of the Bank of the United States is an unconstitutional act of Congress, and therefore not law. How then can they reconcile the idea of keeping up this pretence for inordinate and unauthorised power, when it is apparently so easy by repealing this objectionable portion, as well as some others; and by further legislation, to define and settle the true limits of power, both of the Federal and State Judiciaries? Surely no one will pass so poor a compliment upon what is sometimes *par excellance*, called the collected wisdom of the nation, as to say Congress has not talent enough to do this.

The 9th section of the Judicial act undertakes to make a distinction between exclusive and concurrent powers, by altering the distribution made by the Constitution itself, vesting a part of that power, all of which has been vested in the Federal Courts, in State courts; placing them thus on a footing with the inferior Federal courts, and submitting them to the same subordination to the Supreme Court, and might as well carry out Mr. A. Hamilton's notion, that there was no impediment to an appeal from State courts to subordinate Federal, or as he calls them, "national tribunals."

If, as the Supreme Court has decided, in the case of Marbury against Madison, it is unconstitutional for Congress to alter the distribution of Judicial power, made by the Constitution between the different Federal courts, how can it be constitutional to alter that distribution by vesting a part of the power in State courts? Any one who will look at the Constitution must see, that this has been done without the least authority, and is surely as great a violation of the Constitution as the other. Independently of this, the 9th section also violates the distribution made by the Constitution, in the case of consuls, by giving a jurisdiction to the District courts which by the Constitution is expressly original with the Supreme Court. The Constitution says:

"In all cases affecting ambassadors, other public ministers and consuls, the Supreme Court shall have original jurisdiction."

But notwithstanding this, the 9th section, in reference to the District courts says:

"And shall also have jurisdiction, exclusively of the Courts of the several States, of *all* suits against consuls or vice-consuls, except for offences of the above description aforesaid."

The 11th section contains also objectionable matter, intermingling the State and Federal authorities.

The 12th and 22d sections are supposed to be so arranged that some alteration might be proper. They place the State courts upon the footing of inferior Federal courts.

(*continued on the last page.*)