RALEIGH REGISTER

AND

NORTH-CAROLINA GAZETTE.

"Ours are the plans of fair, delightful Peace,
"Unwarp'd by party rage, to live like Brothers."

VOL. XIX. | FRIDAY, MAY 1, 1818. | No. 971.

INTERNAL IMPROVEMENT.

Mr. Barbour's Speech concluded.

The next subject which the report discussed, was our right to make roads and canals for commercial purposes, and this was referred, as there was no pretence of a special grant, to the power to regulate commerce amongst the several states; to regulate was to prescribe, to direct. He, therefore, understood the power to regulate commerce amongst the several states, to authorize us to prescribe the terms, manner, and conditions on which that trade should be carried on; such, for example, as establishing ports, granting clearances regulating the coasting trade, &c. The history of the times, upon adverting to it, would shew that the object, in granting this power, was to prevent those feuds and strifes which experience had shewn would arise between the states, in consequence of some being *more* and others *less* advantageously situated for commerce, unless it was referred to some common head to prescribe general regulations in relation to it, which would bear alike on all. He, therefore, could not for a moment entertain the idea, that, under the power to regulate commerce, it was intended to make the way, or to dig the channel, along which it was to pass. To place this subject in a strong point of view, he would observe, that the same clause gives us power to regulate foreign commerce, and that amongst the several states. Now, it was most obvious that, in relation to foreign commerce, the power to regulate did not relate to the creating the channel by which it was to be carried on. That, sir, was done from the creation of the world; it consisted of the unfathomable waters of the great deep. He would leave it to the friends of the resolutions to shew how the very same word, used in a particular clause in relation to two subjects, could be construed to mean one thing as it respected one of them, and a different thing as it respected the other. It had been said, however, that Congress, as incident to the regulation of foreign commerce, had exercised the right of erecting beacons, piers, and light-houses; and that the making roads and canals bore as close a relation to the regulation of domestic commerce, as those did to that of foreign. In the first place, he denied that the relation was as direct as the other. But, upon enquiry, it would be found that the erection of beacons, piers, &c. was not referred by Congress to the regulation of foreign commerce, but to that clause which empowers them to purchase scites for forts, arsenals, &c. he proved this by referring the committee to the 1st volume of United States' Laws, page 666-7, where there was a long list of cessions reported, of scites for these very erections. Let not gentlemen say this clause did not warrant it. If Congress thought so, and legislated under that idea, it destroyed any force which there might be in it, as a legislative construction in relation to their power to regulate foreign commerce. He had already said that such construction ought to have no weight; and he should, in the further progress of his argument, assign his reasons at large, when he came to discuss what gentleman called the weight of precedent.

He had thus far endeavored to prove, that Congress had not the power claimed, to make roads and canals, either expressly or incidentally, without the assent of the states; he came now to another proposition which the report discusses, to wit: that we have the power with the assent of the states. He believed it to be impossible to maintain this position. The argument in support of it, seemed to be this, that though Congress have no right, of their own mere will, to make the proposed improvements—yet, as the soil, say gentlemen, belongs to the several states, it is competent for them to yield their assent, and that, in that event, there cannot be a possible objection. This argument is met at the very threshold, with this question: although one state may consent to have the public money expended within its limits, have the other nineteen consented that *their* money shall be so expended? If they have not, as he should attempt to prove, it scarcely required argument to shew, that the consent of one state to receive the expenditure of the money of the other nineteen, did not justify us in making that expenditure without the consent of the others. But he would pursue this idea of the consent of the states, a little closely. If we have the power given us by the constitution, we do not want their assent; if we have it not, that assent, in the mode proposed, cannot give it to us. He would make a few remarks upon each branch of this proposition. To say that I have the power to do an act, which yet you have a right to say I shall not do, and upon your saying which I must forbear, is equivalent to saying I have the power and yet have it not. The principle is plainly this—every power, unless limited by the terms in which it is granted is absolute; it conveys the ability to effect its object, without consulting the will of any but the person who is to exercise it; nor do the few cases mentioned in the constitution, in which the consent of the states is made necessary, form any exception to this principle; for in those the consent is required only in getting the subject upon which power is to operate; when that is done, the power over them is exercised entirely at the will of Congress. In the whole mass of legislative powers, then, which the 8th section of the 1st article gives to Congress, there is not one, to the exercise of which the assent of the states is necessary, and if it be not necessary to the express powers, it cannot to those which are incidental.

It was a clear principle, that if we have not the power, the assent of the states in the mode proposed, cannot give it to us; the constitution has provided, within itself, the way by which any enlargement of our powers shall be obtained; it is this—Congress shall, whenever two-thirds of both Houses deem it proper, propose amendments, or, on the application of two-thirds of the state legislatures, shall call a convention to propose them, which, when ratified by three-fourths of the states, in either of the modes pointed out in the 6th article, shall be a part of the constitution.

This difference in the mode of proceeding, is not a matter of form; on the contrary, there is the soundest reason in it.—In the first place, it does not leave the question to the will of a few states, but obviates that difficulty by requiring that all should be consulted, and that the power shall not be exercised without the concurrence of three fourths. The propriety of this course depends upon this obvious truth, that the constitution is a compact, and that it is a violation of all correct principles, to permit that compact to be altered in any of its stipulations, at the will of one of the parties to it, without even consulting the others. But there is another most important reason for pursuing this course: the constitution, having been ratified by conventions in the several states, and those conventions having been the immediate representatives of the people of the states, in their highest sovereign characters, whatever provisions it contains have been agreed to by the whole people of the United States; they have then agreed that it may be altered in the manner prescribed; but they have not agreed that it shall be altered in any other manner, even though it should be with the consent of their legislatures. For the state legislatures themselves act under constitutions; they meet in their character, as ordinary legislatures not as a convention, it is not competent then for them in that character to give to the federal government any power over their persons or property, which that government does not possess by the constitution. Their acts would indeed be binding when called on, under the provisions of the 6th article, to decide upon proposed amendments.—He spoke of them now, however as mere legislators, without reference to that state of things. He denied, then, that the legislature of Virginia could transfer to another government any right in or over his soil, other than that which the constitution had authorised them to do. He [illegible] felt that he had now arrived at the conclusion, that, if Congress had not the power in question *ab initio*, they could not have it *with* the assent of the states, except in the constitutional mode.

But another view of this subject had been presented, substantially to this effect: Congress, it is said, is entrusted, by the constitution, with the transportation of the mail; nothing can contribute more effectually to a safe and expeditious transportation of the mail, than good roads; hence, say gentlemen, the power to construct roads is necessary, and, when a state shall give its consent, it is proper also, and, being both necessary and proper, it falls within that clause of the constitution which authorizes us to pass all laws necessary & proper to execute the several powers of the government. To say that the assent of the states was required to make a measure, though necessary, proper within the meaning of this clause, would be at once to destroy the whole force of the provisions—and, he would add, its meaning also: The select committee had, in their report, said, that this clause was only the enactment of a principle of construction, which would have existed without it; namely, that where a power, or right, was granted, every thing necessary to the execution of the one, or the enjoyment of the other, passed with it. According to this rule, whenever a power is expressly given, and another is claimed as an incident, we have only to enquire, whether it be necessary to the execution of the granted one. If it be, it is proper, not because this or that person, or state, consents to it, but because it is necessary. In a word, its necessity constitutes its propriety. Let us see what might be the practical operation of the principle contended for: We wish to make a great turnpike road from north to south—we ask leave of the states—New-Hampshire consents, Vermont refuses; Massachusetts consents, Connecticut refuses, and so on; we would suppose every state in the union, in alternate succession, to consent and refuse. Upon this supposition, every other link in the chain of internal improvement would be broken—for, though it would be necessary in all, yet, according to the doctrine of gentlemen, if some refuse, it would not be proper in all. In those where it might be both necessary and proper, we might go on; but in those where it would be necessary only, we must stay our hands. Gentlemen had complained of his doctrine as subjecting the general government to the will of the states. For his own part, he could not conceive a construction, which would produce a more complete dependance upon that will, than the one which he had just noticed, and, as he hoped, refuted.

Another great principle had been advanced in the course of this debate, which he would now examine: It was, that tho' Congress had no power to make roads & canals, yet they had a right to appropriate money, to aid in the construction of those which should be undertaken by the States. Gentlemen had said, that they disclaimed any use of the words, "common defence and general welfare," as giving any substantial power. It was perfectly indifferent to him, from what words, or what clause they derived it, or by what name they called it—if they possessed the power included in this proposition, the constitution which affected to impose limitations upon us, and to give us a few delegated powers only, was mere paper and pack thread. His idea, as to the construction of that instrument, was this:—That the common defence and general welfare, were the ends proposed to be attained—the enumerated powers which followed, were the means of attaining them; and that money was the instrument as far as it was necessary, by which those powers were to be executed. In support of this construction, he would refer the committee to the 41st number of the Federalist, in which the question is strongly asked, for what purpose could the enumeration of particular powers be inserted, if these, and all others, were meant to be included in the preceding general power? There could be but one answer to this question—that the specification was intended to operate as a limitation of the general words which preceded it. If then the proposition were correct, that we must look to the enumeration of particulars, for the extent of our powers, we must look to the same source, for the extent of our right of appropriation. For why, sir, was the right of raising money, by taxes, given us? He would answer, that money was, to the body politic, what blood was to the natural body. It gave to it its life and vigor, and enabled it to perform its functions. The power of raising it, then, was given to us, as he had already remarked, as the instrument by which we were enabled to execute our other powers. What were they? Those which were enumerated, and the necessary incidents which they involved. To these then, must the power of appropriation, in his opinion, be limited; but, take the principle of an unlimited right of appropriation, and it brings us to this conclusion, that what the government has not a right to *do*, it yet has a right to *cause to be done*, by means of the use of the public money. Thus, sir, suppose Congress had no right to raise armies, yet, upon this doctrine, they might appropriate money to enable the States to do it.—Though Congress had not been authorised to build a navy, yet they might cause one to be built, by advancing money to all, or some of the States for that purpose, & to bring the doctrine home directly to the present question—though it should be admitted, that they had no right to make roads and canals, yet they can effect the same object, by making the state governments the undertakers, and themselves advancing all the necessary funds, and thus any, and every power, to the execution of which money was necessary, (and it is necessary to most) might be acquired in the same way. Unless, then, the application of money shall be construed to extend to the objects of the specified powers, and their necessary incidents only, the constitution will be chargeable with the palpable inconsistency of intending to impose limitations upon us, and at the same time furnishing us, by means of the tax-laying power, with an instrument, by which we may, at pleasure, throw off those very limitations.

The only other view of the subject, he believed, which now remained to be answered, was the reference which had been made by gentlemen to precedent, in support of the grounds which they had taken. If he considered it necessary, he would shew, that many of the precedents which had been cited, rested upon grounds altogether different from what gentlemen would seem to suppose, by the use which they proposed to make of them. The purchase of Louisiana, for example, was effected by the treaty-making power, and therefore, in no point of view, could be applicable as a precedent for this, which is a legislative act. The employment of a chaplain, which had been referred by gentlemen to the power of appropriating money, it would be found rested upon a different principle. As early as 1790, a law was passed fixing the compensation of the officers of the House of Representatives, and, amongst others, of a chaplain. This clearly proves, that the appointment of chaplain was referred by the house to the power of chusing its officers. Now for the purpose of his argument, it was perfectly unimportant, as he had remarked concerning another instance of legislative construction, whether this idea was right or not. For though it should be wrong, yet as that was the principle upon which Congress acted, it destroys its force as a precedent in support of any other principle. But he would go no further with the cases cited; because he denied, that in relation to the construction of the constitution, precedent ought to have any weight. We differ widely in this respect from Great-Britain: Their constitution consists of a series of legislative acts—the fundamental principles of the government are alterable at the will of the legislature. Thus we see a British parliament first annual, then triennial, and then septennial; and the very parliament too, which was elected for 3 years, extending the period of its own existence to 7—presenting, in that act, the monstrous political anomaly, of being both the creator and creature. Let them, if they please, act upon the principle, that what yesterday was fact, to-day is doctrine—let them, if they please, justify their acts, by saying, that their predecessors had set them the example. Our government rests upon a different foundation—upon a written charter, which delineates our powers, and defines their boundaries. If a previous Congress shall have given to this charter a construction which is right, we should follow it, because it is right.—If, on the contrary, they shall have given a wrong construction, we should discard it because it is wrong. Error does not change its nature by repetition---it is error still. And let it not be urged us, that courts of justice submit to the authority of precedent. There is no point of comparison between a court and legislature; but on the contrary, they present a contrast in every aspect in which they can be viewed. The former decides upon a case in which a few individuals are concerned—the latter is called upon to legislate upon a constitution, in the preservation of which, a whole people, and millions yet unborn, are interested. The former decides a mere private controversy between others; the latter decides a principle of construction, upon which depend the number and extent of their own powers. The rule, therefore which courts have adopted, that it is not so material what the law is as that it should be certain, can never be extended to Congress; for surely it will not be said, that it is more material to have a fixed rule of construction, than that the rule should be right; once establish this principle, and the powers of Congress depend not upon the constitution, but their own will. But there was yet a stronger distinction between a court and legislature than any which he had mentioned, to wit—in the nature of their functions; the province of the court is to decide what the law *is*, that of Congress is to determine what the law *shall be*; it is of the very essence of the legislative function, that the acts of every preceding legislature are repealed by every succeeding one; if a court pass a final judgment, no matter how erroneous, it can never reverse it, and, if it be the court of the last resort, the error must perpetually remain. On the contrary, if we pass a law, which proves to be an inexpedient one, either we ourselves, at our next session, or the Congress which succeeds us, can repeal it at pleasure. What, then, are all our amendatory and repealing acts, but so many conclusive arguments against the doctrine of legislative precedent?—Whenever we do so amend or repeal, we decide differently, either in whole or in part, from those who went before us, and in so doing prove, beyond doubt, that we are not bound by precedent. The ordinary grounds of repeal were, that a particular law was inexpedient: for his part, he could not conceive any thing which could be more inexpedient, than a violation of the constitution. If he were told that he ought to decide any question otherwise, because those who had gone before him had done so, he would answer, that he should never sacrifice his opinion or his conscience to those of any man living; he would suppose that they had pursued the best lights of their judgments, and he, acting upon as high a responsibility, would take the liberty of doing the same. But, even take gentlemen upon their own principles, and he would ask, how many precedents will suffice to fix a rule? Will one or two be sufficient, or more? Again—this country had once been divided into two great parties; and though there seemed to be a political calm at present, the same thing might happen again. Let us suppose, then, that one party establishes a precedent; the other party gets into power, and, not liking the source from which it sprang, discards it, and fixes a different one. In the vicissitudes of political events, the first party comes into power again; here then, as far as previous decisions have gone, there is precedent against precedent, and liking the one first set best, they therefore discard the second, and establish the first.—Let us suppose another revolution to take place between those who are *in* and those who are *out* of power, and the same scene would be re-acted; and thus that constitution which intended to be settled upon the firmest foundations, would be subject to be whirled about, the sport of every political gust. He would conclude by expressing his hope, that the resolutions would not pass.

BY AUTHORITY.

Resolution directing the Secretary for the Department of State to prepare an Index to the acts and resolutions of Congress, after the close of every session.

Resolved by the Senate and House of Representatives of the United States of America, in Congress assembled, That after the close of each session of Congress, an alphabetical index of the acts and joint resolutions passed at the preceding session shall be prepared, printed, and distributed therewith, under the direction of the Secretary for the Department of State.

H. CLAY,
Speaker of the House of Representatives.
JOHN GAILLARD,
President of the Senate, pro tempore.
April 3, 1818.—Approved,
JAMES MONROE,

An act declaring the consent of Congress to an act of the State of North Carolina, for the relief of sick and disabled American seamen.

Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled, That the assent of Congress be, and hereby is, granted and declared to an act of the Legislature of the State of North Carolina, entitled "An act for the relief of sick and disabled American seamen," and passed on the 23d day of December last; and the said act is hereby ratified and confirmed.

Sec. 2. *And be it further enacted*, That this act shall be in force for five years, and no longer.

April 4, 1818.—Approved,
JAMES MONROE.

An act concerning the bounty or allowance to fishing vessels in certain cases.

Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled, That where any fishing vessel of the United States has been, since the eighteenth day of February, in the year one thousand eight hundred and fifteen, prevented, by illegal capture or seizure, under authority, or pretence of authority, from any foreign government, from fishing at sea for any part of the term of four months required by law to be employed by such vessel in fishing, in order to entitle the owner of such vessel to the bounty or allowance prescribed by law, the time of the unlawful detention of such vessel shall be computed as a part of the said four months, and such bounty or allowance shall be paid accordingly: *Provided*, that such vessel has in all other respects, complied with the requisites of the laws now in force.

April 4, 1818.—Approved,
JAMES MONROE.

An act to provide for the due execution of the laws of the United States within the State of Mississippi.

Be it enacted by the Senate and House of Representatives of the United States of America, in Congress assembled, That all the laws of the United States, which are not locally inapplicable, shall have the same force and effect within the said State of Mississippi, as elsewhere, within the United States.

Sec. 2. *And be it further enacted*, That the said state shall be one district, and be called the Mississippi district. And a district court shall be held therein, to consist of one judge, who shall reside in the said district, and be called a district judge. He shall hold, at the seat of government of the said state, two sessions annually, on the first Monday in May and December, and he shall, in all things, have and exercise the same jurisdiction and powers which were by law given to the judge of the Kentucky district, under an act, entitled, "an act to establish the judicial courts of the United States." He shall appoint a clerk for the said district, who shall reside and keep the records of the court at the place of holding the same: and shall receive for the services performed by him, the same fees to which the clerk of the Kentucky district is entitled for similar services.

Sec. 3. *And be it further enacted*, That there shall be allowed to the judge of the said district court, the annual compensation of two thousand dollars, to commence from the date of his appointment, to be paid quarter yearly, at the treasury of the United States.

Sec. 4 *And be it further enacted*, That there shall be appointed, in the said district, a person learned in the law, to act as attorney for the United States, who shall, in addition to his stated fees, be paid by the United States, two hundred dollars, as a full compensation for all extra services.

Sec. 5. *And be it further enacted*, That a marshal be appointed for the said district, who shall perform the same duties, be subject to the same regulations and penalties, and be entitled to the same fees, as are prescribed to marshals in other districts, and shall, moreover, be entitled to the sum of two hundred dollars annually, as a compensation for all extra services.

April 3, 1818—Approved.
JAMES MONROE.

BLANKS OF ALL KINDS
may be had at this Office.