Again the question arises: Is a new State so admitted different in its relations to the Union from the other States? Here also the answer is clear.

(*a*) The Ordinance of 1787 and the cession of Virginia provided that new States to be created should be the same in all respects as those previously existing, and the Constitution sanctioned and acted upon that ordinance.

(*b*) Each new State came into the Union as a co-pactor with the others and as a co-delegator of powers to the United States under the Constitution. The tenth amendment has as pertinent application to the last State, Utah, as to Virginia.

(*c*) This was settled by judicial decisions before and since the civil war.[1]

Another point to be noted is the inviolable integrity of a State as to its own territory. Its consent is absolutely necessary in order to its partition or the merger of itself with any other. New States are too apt to feel that they have been *protegés* of the government of the United States, and that they stand in a less independent relation to the Federal government than the older States. This is natural, but is a very erroneous view. They emerge from the wardship to which they have been subject, and enter the Union by which they become subject to the Constitution of the Union, just as the other States and their people. Such a feeling has been induced in many cases by the fact of the passage of an enabling act by Congress prior to the meeting of the convention of the new State, at which a Constitution is adopted and application for admission into the Union is made. But it is interesting to note as a fact that the States of Arkansas, Michigan, Minnesota, Oregon, Idaho and Wyoming were

[1] Before the war: Permoli v. New Orleans, 3 How. 589; Benner v. Porter, 9 id. 235; Atkinson v. Cummins, id. 479; McNulty v. Batty, 10 id. 72; Doe v. Beebe, 13 id. 25; Cross v. Harrison, 16 id. 164; Withers v. Buckley, 20 id. 84. After the war: Texas v. White, 7 Wall. 700; Webber v. Harbor Com'rs, 18 id. 57; United States v. Fox, 94 U. S. 315; Pound v. Turck, 95 id. 459; Huse v. Glover, 119 id. 543; Cardwell v. American Bridge Co., 113 id. 205; St. Louis v. Myers, id. 566; Sands v. Manistee River Mfg. Co., 123 id. 288; Willamette Iron Bridge Co. v. Hatch, 125 id. 1.

admitted under an act of a convention of each of them without an enabling act by Congress.

The Territories have usually been governed by an act to establish and organize a government. This has been done in the case of many of them separately, and in the Compromise of 1850 and of the Kansas-Nebraska act of 1853–54, general provisions were made which affected the government of each of the Territories. The usual form of government included the three departments; the Governor, judges, and other leading officers being appointed by the President with the advice of the Senate, and the powers of legislation being vested in the suffragans of the territory prescribed by the organic act. As the infant State matured, developed and increased in population, the usual plan was to authorize its legislature to call a convention of the people of the territory, who should adopt a constitution as preliminary to admission into the Union. As Congress by the fourth section of the fourth article of the Constitution was required to guarantee to every State a republican form of government, and as the readiness to assume the position of a State in the Union on the part of the people of the territory usually makes it the duty of Congress to admit such State into the Union, only predicating that its Constitution shall be republican in form, the usual mode has been that when the young State has adopted its Constitution, its authorities should apply for admission into the Union, whereupon Congress, upon inspection and finding it to be republican in form, passes the necessary act for that purpose.

As already stated, this more formal method has not been uniformly adopted by the peoples of the Territories, but in many cases, having adopted a Constitution in a manner acceptable to themselves, they have been recognized as organized States, and admitted into the Union without difficulty.

§ **301.** The question has arisen whether Congress can, upon any other ground than lack of a republican form of government, refuse admission to a State formed out of territory of the United States.

That it may do so practically is undoubted; but can it be justified in keeping a territory without representation and sub-

ject to the authority of the government, unless upon grounds which the Constitution makes an objection to its admission? We have seen that the decisions have been uniform that a State admitted into the Union stands in its relations to the government of the Union in no respect different from those which obtain between the old and original States. The authorities are conclusive upon this point.

But another phase of the question has arisen. Can Congress refuse admission to a State on a ground not in the Constitution, or admit a State upon conditions which will deny it powers, privileges or rights which by reservation are secured to the old States of the Union under the Constitution? Can Congress impose such a condition upon a new State as will abridge its powers if it enters the Union upon such condition? It would seem that such a proposition is utterly untenable. The States have confided to the Congress as their agent the admission of a State into the Union under the Constitution. Can this constitutional authority in Congress be construed to vest Congress as an agent with power to impose other conditions upon the new member which the Constitution had not prescribed; and if so, does the new State enter the Union shorn of its power *pro tanto* by the agent authorized to open its doors to the new commonwealth without any such condition? And is the State any the less a State than its sisters in consequence of Congress having divested it of those qualities enjoyed by the other members of the Union? This would make the Union one of unequal members — unequal in the essential qualities which constitute the States of the Union. Judge Story[1] discusses fully the historic Missouri restriction. Congress proposed that Missouri, as a condition of her admission to the Union, should prohibit slavery, and the learned author says the final result of the vote admitting the State "seems to establish the rightful authority of Congress to impose such a restriction." This opinion of Judge Story was afterwards reversed by the Supreme Court in *Dred Scott v. Sanford*, *supra*. Whether this restrictive clause was constitutional may be thus tested. It would be conceded by the

[1] Story on the Constitution, 1315.

learned author that Congress at that time could not abolish slavery in Missouri. Could he maintain that after the State was admitted, with the restriction imposed, Congress could enforce its restriction by abolishing slavery in Missouri? If such an act by Congress would invade the reserved rights of the State of Missouri, as it would unquestionably have invaded that of Virginia, how could Congress have obtained the power to enforce that restriction by the abolition of slavery in Missouri as a granted power under the Constitution of the United States? The better opinion would clearly be that Congress could not impose as an obligation upon a State at the time of its admission into the Union such a restriction as it had no original power to exact or enforce. In the absence of such power, to use the power to admit or exclude as the means of enforcing an unconstitutional power would scarcely find an advocate.

Judge Cooley[1] has mentioned a number of instances of these conditions attached to acts for the admission of States. These were chiefly made since the civil war, and were efforts to condition the admission of the senators and representatives from the seceded States into the halls of Congress to which they were legally elected, upon the submission by those States to political conditions which did not apply to the Northern States. This took a step in advance of admitting a State to the Union upon conditions. For States already in the Union it imposed the condition of a new Constitution to them, and their submission to it, as the only ground upon which they would be admitted to representation in a government of which they were an integral part. This was also done as to the State of Nebraska, just then admitted into the Union. Of course it is undeniable that each State enters the Union subject to the conditions which are involved in the provisions of the Federal Constitution, but to none other. Therefore Judge Cooley, with cautious moderation, expresses a doubt about the validity of all these Congressional efforts at putting the States of the Union into a Union upon a different Constitution.

[1] Cooley's Constitutional Law, pp. 192–195.

§ **302.** A clause is found in the section under consideration in these words: "And nothing in this Constitution shall be so construed as to prejudice any claims of the United States, or of any particular State." This clause has ceased to be of any consequence, as the claims referred to have been long since settled. It had reference to certain vacant lands claimed by the United States as ceded to them by the treaty of peace with Great Britain.[1] Mr. Madison briefly refers to this in the *Federalist*.[2] Whatever the claims were, they appear to have been adjusted, and have left nothing for the clause to operate upon.

Power to Punish Treason.

§ **303.** It will be proper in considering this clause[3] to preface its discussion by a consideration of the English law of treason. In the early history of England the crime of treason was very indefinite in its limitations. "If the crime of treason be indeterminate," says Montesquieu, "this alone is sufficient to make any government degenerate into arbitrary power."[4] In early times great latitude was left to the judges to determine what was treason or what not, whereby these tools of tyrannical princes had opportunity to create an abundance of constructive treasons. To prevent the evils of these constructive treasons, the act of 24 Edward III., chapter 2, was passed defining the crime of treason. That statute provided that "When a man doth compass or imagine the death of our Lord the King," etc., which was the first branch of the definition; the second related to assaults upon the chastity of the king's wife, or the king's eldest unmarried daughter, or the wife of the king's eldest son and heir. These we need not notice, as they have no analogy to our system. The third species of treason was, "If a man do levy war against our lord the King, in his realm." And the fourth was, "If a man by adhering to the King's enemies in his realm, giving them aid and comfort in the realm or elsewhere."[5]

[1] Madison Papers, 1463–66.
[2] No. XLII.
[3] Const. U. S., Art. III, sec. 3.
[4] Spirit of Laws, book 12, ch. 7.
[5] 9 State Trials.

This statute placed a great check on the courts in the abuses which had arisen in trials for treason. In the trial of Algernon Sydney, the illustrious prisoner was convicted upon the evidence of papers found in his closet, which were really merely expressions of speculative opinions. Blackstone, Stephen concurring, says the king "here intended is the king in person, without any respect to his title." For it is held that a king *de facto* and not *de jure*, or, in other words, a usurper that had got possession of the throne, was king within the meaning of the statute, as there was a temporary allegiance due to him for his administration of the government and the security and protection of property. Treasons committed against Henry VI. were punished under Edward IV., though the line of Lancaster had been declared usurpers by act of Parliament; and the most rightful heir of the crown, who had never had plenary possession of the throne, was not a king, within the statute, against whom treason could be committed.

The statute of 1 Henry VIII., chapter 1, which was declaratory of the common law, pronounced all subjects excused from any penalty or forfeiture who had obeyed a king *de facto*. This was the opinion of Hawkins, but the true distinction, according to Blackstone, seems to be that the statute of Henry did not commend but excused the obedience paid to the king *de facto* in opposition to the king *de jure;* and this for the reason stated, that the subject is an imperfect judge of the title, and can only decide upon the *de facto* possession of power and not upon the *de jure* title,[1] which was the English law at the time the Federal Convention sat.

In Pinckney's plan[2] a provision was inserted on the subject of treason, which, upon reference to the Committee of Detail, was reported by that committee in this form: Treason against the United States "shall consist only in levying war against the United States, or any of them, or in adhering to their enemies." This definition of treason was the subject of earnest debate on the 20th of August.[3] This

[1] Stephen's Blackstone, 234–36.
[2] Madison Papers, 741.
[3] Id. 1370–77.

clause was first changed by striking out the words, "or any of them," after the words "United States." This was agreed to *nem. con.* This defined treason as a crime against the United States, leaving to the States the definition of the crime against themselves respectively. Upon the idea that the Constitution had only to provide for treason against the United States, the words "against the United States" were reinstated after the word "treason." The word "or" was substituted for "and" before "adhering to the enemies," and the words "giving aid and comfort" after the word "adhering," because found in the act of Edward III.

Except in immaterial particulars the clause as finally adopted followed, as Mr. Mason said, the statute of Edward III. The purpose of the act of 24 Edward III., we have seen, was to put a check upon constructive treasons by an exact definition of the crime, and that this was the purpose of the Constitution appears from the debate already referred to, and from the language of Mr. Madison in No. 43 of the *Federalist*, quoted with emphatic approval by Judge Story.[1] The language of the *Federalist* thus sanctioned was that "New-fangled and artificial treasons have been the great engines by which violent factions . . . have usually wreaked their alternate malignity on each other." And the "Convention," says Judge Story,[2] "deemed it necessary to interpose an impassable barrier against arbitrary constructions, either by the courts or by Congress, upon the crime of treason. . . . In so doing they have adopted the very words of the statute of treason of Edward III.; and thus by implication, in order to cut off at once all chances of arbitrary constructions, they have recognized the well-settled interpretation of these phrases in the interpretation of criminal law which has prevailed for ages."[3]

§ 304. A brief analysis of the clause will now be made.

(*a*) It defines only treason against the United States. Treason against a State is left to its own definition; and

[1] Story on the Constitution, 1791–1793.

[2] Id. 1799.

[3] In accord: Blackstone's Commentaries, 81–84; Cooley on the Constitution, 287–88.

lest any should doubt whether this was intended, a reference to the subsequent clauses will remove it. Article IV, section 2, clause 2, provides: "A person charged in any State with treason, felony or other crime, who shall flee from justice, and be found in another State," shall be surrendered as a fugitive from justice and "be removed to the State having jurisdiction of the crime." This clearly refers to a treason against a State, of which it alone could have jurisdiction.

(*b*) The treason referred to is against the United States, as "united under this Constitution."

(*c*) It consists of either of two offenses: levying war against *them*, or adhering to *their* enemies, giving them aid and comfort. Either of these could constitute the offense. It is levying war. A mere conspiracy by force to subvert the established government is not treason, but there must be an actual levying of war. The only cases calling for the interpretation of this clause which have come before the Supreme Court have been *Ex parte Bollman*[1] and *United States v. Burr*.[2]

In the first case the Chief Justice said, to constitute this crime, "War must be actually levied against the United States. However flagitious may be the crime of conspiring to subvert by force the government of our country, such conspiracy is not treason. To conspire to levy war, and actually to levy war, are distinct offenses. The first must be brought into open action by the assemblage of men for a purpose treasonable in itself, or the act of levying war cannot have been committed." Again he says: "It is not the intention of the court to say that no individual can be guilty of this crime who has not appeared in arms against his country. On the contrary, if war be actually levied, that is, if a body of men be actually assembled for the purpose of effecting by force a treasonable purpose, all those who perform any part, however minute, or however remote from the scene of action, and who are actually leagued in the general conspiracy, are to be considered as traitors. But there must be an actual assembling of men for the treasonable purpose, to constitute a levying of war."

[1] 4 Cr. 126.

[2] Id. 469.

What is "adhering to their enemies, giving them aid and comfort?"

Both branches of this part of the definition were in the act of Edward III., and both were inserted in the Constitution in order to make the crime more definite, mere adherence not being enough, unless the adherence gave aid and comfort to the enemy. Such aid and comfort are given when the accused furnishes supplies to the enemy, gives them information, and the like.[1] "By enemies are to be understood the subjects of foreign powers with whom we are at open war, and does not apply to rebels; for a rebel is not an enemy within the meaning of this statute."[2] In *United States v. Prior*[3] it was held that coming peaceably from an enemy's ship to procure provisions for him was not treason.

(*d*) No person shall be convicted of treason "unless on the testimony of two witnesses to the same overt act, or on confession in open court." This provision was drafted from British jurisprudence. Confessions of the accused may be ground for a conviction, but these must be strictly guarded. If taken by private persons and reported by them, it is a most suspicious form of testimony, because liable to be obtained by artful promises or menaces, and to be reported without accuracy, and incapable of being discovered or corrected by negative evidence.[4] Therefore a confession to convict a man must be in open court, where, with no extraneous influences of fear or hope, he may confess with no possibility of misrepresentation.[5] If the accused does not make confession in open court, then he can only be convicted on the testimony of two witnesses, not to distinct and independent circumstances which in their concurrence might prove guilt, but two witnesses, each of whom shall support the other as to the same overt or open act of treason, and

[1] 4 Blackstone's Commentaries, 276.

[2] 1 Stephen's Blackstone, 242; Foster, 216, 219; Hawk. P. C., Book 1, ch. 17, sec. 28. *Accord:* Mr. Dana for the United States, Chase's Decisions, 98, citing United States v. Chenoweth, 1 West. L. Mo. 165.

[3] 3 Wash. C. C. 234.

[4] Story's Commentaries, 1796; 4 Blackstone's Commentaries, 356–57.

[5] Wharton's State Trials, 634.

these witnesses must be credible.[1] The discussion of these parts of the clause by Chief Justice Marshall is worthy of diligent study.

§ **305.** The second clause of this section provides for the power of Congress in respect to the offense. The definition of the crime is constitutional. Congress cannot touch or change it. The mode of conviction is fixed by the Constitution; over this Congress has no power. The Constitution intended to place these points beyond the reach of legislative power. The mode of indictment is fixed by the fifth article of the amendment, and is beyond the reach of the power of Congress. The mode of trial, the place, and the rights of the prisoner on trial, in respect to information as to the accusation, to be confronted with the witnesses against him, to compulsory process for his own witnesses, and to the assistance of counsel, are fixed beyond legislative control by article VI of the amendments, and by article III, section 2, clause 3, of the Constitution.

What, then, can Congress do in respect to this crime of treason? That is provided for by the succeeding clause. "The Congress shall have power to declare the punishment of treason, but no attainder of treason shall work corruption of blood, or forfeiture, except during the life of the person attainted."

This gives to Congress only the power to declare the punishment for treason. But in this it is precisely and strictly limited, so that no conviction of treason shall work corruption of blood — that is, obstruct inheritance; "or of forfeiture" — that is, of an estate except during the life of the person attainted. Thus a person may be punished for treason, but the consequence of it shall not affect the inheritable quality of his blood, or forfeit his property except during his life. This, as we shall see, is a radical change from the English law. This last provision limits forfeiture to the life of the person attainted, and was adopted in England by the statute of 3 and 4 Edward IV., chapter 106. This view of this important clause has very striking reference to what has been said

[1] Ex parte Bollman; United States v. Burr, *supra*.

supra as to the proceeding for confiscation of the property of southern citizens *jure belli*, and under the act of July 17, 1862, in connection with the joint resolution suggested by President Lincoln limiting the judgment of forfeiture in such *ex parte* proceedings to the life of the offender. It is not improper to suggest that in respect to that important branch of this clause of the Constitution there was no provision which protected against the forfeiture which by the Constitution could result only from conviction, but a provision which would have prevented conviction until there was an indictment, trial by jury and conviction upon the testimony, as provided in this clause.

In the case of the act for seizing the captured and abandoned property of southern citizens, the allegation of disloyalty, without proof or trial, or conviction, was directly contrary to the spirit and letter of this clause of the Constitution. How the property could be forfeited *in toto*, without any of these, is a question difficult of solution, in view of the monitory language of the *Federalist* and of the eminent Judge Story, holding that this clause was intended to obstruct the invention of constructive treasons by the courts or by Congress.

Cases already referred to are pertinent at this point as to the effect of the forfeiture of the estate of an offender for his life only, and as to the effect of such forfeiture upon the remainder in fee, which this clause clearly shows to be exempt from forfeiture, and should pass to the heirs. In a number of cases this question was discussed by the Supreme Court.[1] In a late case, *Railroad Co. v. Bosworth*,[2] the question was discussed with great acuteness by Mr. Justice Bradley, delivering the unanimous opinion of the court. He said, speaking of the act of July 17, 1862,[3] and the joint resolution passed contemporaneously, limiting the confiscation to the life estate of the offender: "It would seem to follow as a

[1] Bigelow v. Forrest, 9 Wall. 339, Day v. Micou, 18 id. 156; Wallach v. Van Riswick, 92 U. S. 202; Pike v. Wassall, 94 id. 711; French v. Wade, 102 id. 133; Shields v. Schiff, 124 id. 351.

[2] 133 U. S. 92.

[3] 12 Statutes at Large, 589.

logical consequence from the decision in *Avegno v. Schmidt* (113 U. S. 293), and *Shields v. Schiff* (*supra*), that after the confiscation of the property the naked fee (or the naked ownership, as denominated in the civil law), subject, for the life-time of the offender, to the interest or usufruct of the purchaser at the confiscation sale, remained in the offender himself; otherwise how could his heirs take it from him by inheritance? But by reason of his disability to dispose of or touch it, or affect it in any manner whatsoever, it remained as before stated, a mere dead estate, or in a condition of suspended animation. We think that this is, on the whole, the most reasonable view.

"There is no corruption of blood; the offender can transmit by descent; his heirs take from him by descent. Why, then, is it not most rational to conclude that the dormant and suspended fee has continued in him?

"Now, if the disabilities which prevented such person from exercising any power over this suspended fee, or naked property, be removed by a pardon or amnesty — so removed as to restore him to all his rights, privileges and immunities, as if he had never offended, except as to those things which have become vested in other persons,— why does it not restore him to the control of his property so far as the same has never been forfeited, or has never become vested in another person? In our judgment it does restore him to such control."

The subsequent cases of *Jenkins v. Collard*[1] and *United States v. Dunnington*[2] sanction the decision in *Bosworth's Case*. The result, therefore, is this: On a conviction of treason and on a confiscation proceeding under the above act the result is the same; that is, 1st, the forfeiture of the life estate of the offender, and its absolute alienation from his control by a sale under the procedure; 2d, the estate in remainder remains in him, but is in a condition of suspended animation, in which he is absolutely disabled from all power of alienation thereof, but with the estate in him in such condition as to descend from him to his heirs at law; and this because the

[1] 145 U. S. 546.

[2] 146 U. S. 338.

Constitution provides there shall be no corruption of blood; 3d, that upon his death the estate in remainder passes from him by descent to his heirs at law; 4th, but as the estate is in him with no power of alienation while living by reason of his attainder of treason, a pardon during his life re-vests him with the *jus disponendi* attached to his title in remainder, and therefore, if after pardon he disposes of the fee, such disposition binds his heirs, and even if before pardon he disposes of it with covenants of seisin and warranty against all persons whatsoever, such alienation will bind his heirs.[1]

Power Over Public Acts, Records, etc.

§ 306. Among the prime objects of the more perfect union among the States was to establish such relations between the citizens of the several States as would bring them into closer contact as regards business, commerce, intercourse and the like; the Constitution reserving to each State the local authority to manage its own internal polity according to its exclusive will. We have seen how much was sought to be accomplished by the powers given to Congress as to a common revenue, regulation of commerce with foreign nations and interstate, a common postal system, and army and navy for the common defense, uniform regulations for naturalization, coinage laws, and the like. The framers looked further to such regulations and relations between the citizens of the different States, and such relations of compact between the States as to the business of the people, as would make them one instead of many as to these important subjects.

The first of these to which attention will be called[2] was in reference to the use that in each State it might be desired to make of the public acts, records and judicial proceedings of the several States, how these should be proved, and what should be the effect of them when proved in the States other than that in which they originated. The States agreed to

[1] See also United States v. Klein, 13 Wall. 128; Jenkins v. Collard, 145 U. S. 546, *supra*.

[2] Const. U. S., Art. IV, sec. 1.

facilitate all these matters in order to the easy transaction of business.

In the fourth article of the Confederation it was provided that "Full faith and credit shall be given in each State to the public acts, records and judicial proceedings of every other State." It is obvious that this rested solely on compact, without any provision for making it effectual, independent of the will of each State. Accordingly in the convention Mr. Pinckney proposed an article very similar to the clause just referred to.[1] In the report of the Committee of Detail it was substantially reported in the same form.[2] Subsequently in the convention it was proposed to provide for the execution of judgments of one State in another under regulations by Congress. Objection was made to this, and the matter was referred.[3]

The committee reported a clause,[4] which was enlarged so as to allow the Legislature, by general laws, to "prescribe the manner in which such acts, records and proceedings shall be proved, and the effect which judgments obtained in one State shall have in another;" and then the clause was adopted substantially as it now appears. This removed the embarrassment which exists between different countries as to the effect of such public acts and judgments, giving no force except a *prima facie* one at most to any judgment of a foreign country when sued on here; leaving the defendant the right of every defense he had to the original cause of action, and is a pledge of each State that the judicial proceedings and other public acts of a sister State should be conclusive of any proceedings thereon in the State where it was instituted. The clause as finally adopted was in these words: "Full faith and credit shall be given in each State to the public acts, records and judicial proceedings of every other State. And the Congress may by general laws prescribe the manner in which such acts, records and proceedings shall be proved, and the effect thereof."

[1] Madison Papers, 745.

[2] Id. 1240.

[3] Id. 1448.

[4] Id. 1479.