dicial trial;" and held in that case that a bill of pains and penalties was within the prohibition of bills of attainder. Garland's case was shortly this: Garland was admitted as an attorney before the Supreme Court in 1860 and duly qualified. He took part in the rebellion. In 1865 he was granted a full pardon upon the strength of an oath which he took and subscribed. He produced his pardon before the court and asked permission to practice. Congress in January, 1865, passed an act that no person should be permitted to practice, or be permitted to appear and be heard, at the bar of the Supreme Court or any other court of the United States, unless he should have first taken and subscribed an oath known as the iron-clad oath, by which he should swear that he had given no aid, etc., to the rebellion. His application was argued by counsel. The court decided that to exclude him from the practice of law in the Federal courts or from any other avocation of life for past conduct was punishment; that the act of Congress of 1865 was a bill of pains and penalties, and as such was forbidden by this clause in respect of bills of attainder, and that the pardon of the President reached the punishment as well as the offense of treason. If granted before conviction, it prevented any penalty attaching consequent on conviction; if granted after conviction, it removed that penalty. The court admitted him to practice.

In *Cummings v. Missouri* the provision of the Constitution of Missouri requiring preachers and teachers, in order to continue in their professions of preaching and teaching, to take an oath equivalent to the iron-clad oath before mentioned, was brought in question. The court held that this clause of the Constitution of the State presumed the guilt of the man and adjudged the deprivation of his right to teach and preach, unless the presumption was removed by the expurgatory oath. They assumed the guilt, and adjudged the punishment conditionally. This amounted to condemnation and punishment *nisi*. This was equivalent to an *ex post facto* law in inflicting a penalty which did not attach to the alleged offense at the time committed, and changed the evidence upon which conviction could have been had, by first assuming the guilt and condemning for it, unless the accused established his innocence by an expurgatory oath. The opinions in these two cases are learned and full, and rest upon the definition of an *ex post facto* law as made by Chief Justice Marshall in *Fletcher v. Peck*, *supra*. He says an *ex post facto* law is one "which renders an act punishable in a manner in which it was not punishable when it was committed." So in *Fletcher v. Peck* the Chief Justice held that the State of Georgia could not take an estate from Fletcher derived from the State itself for any alleged criminal action on the part of its legislature, any more than it could have taken the estate from him through the form of an *ex post facto* law or bill of attainder for any offense of his own.

The State of West Virginia passed an act in September, 1863, providing that where a judgment was rendered against a non-resident in an action in which an attachment issued without personal service or other process in the suit and without his appearance, such defendant had a right, upon returning to the State, to have the proceeding reheard and make a defense. In the case of *Pierce v. Carskadon*[1] a judgment was entered against Pierce under an attachment in December, 1864. He appeared within a year and asked leave to file his petition for a rehearing in the case. It was refused, because it did not conform to the law passed in 1865 requiring it to be accompanied with an oath similar to the iron-clad oath already referred to. The court of appeals of West Virginia affirmed the decision of the lower court. Pierce appealed to the Supreme Court of the United States, because the act of February, 1865, requiring such oath as a condition of the exercise of a civil right was an *ex post facto* law. The Supreme Court reversed the decision upon the authority of *Ex parte Garland* and *Cummings v. Missouri* *supra*. This clause in reference to bills of attainder and *ex post facto* laws is in accord with all the fundamental prin-

[1] 16 Wall. 234.

ciples of Magna Carta which have been imbedded in the Constitution of the United States by these clauses of prohibition upon Federal as well as upon State power.

§ 321. An *ex post facto* law (out of or by after-made law) requires a little more consideration. It is a retrospective law, but not so in application to civil matters, but as to crimes and criminal matters. Mr. Justice Johnson, in *Satterlee v. Matthewson*,[1] held that the term "*ex post facto*" should be applied to past transactions of a civil as well as of a criminal nature. But these views did not prevail. The addition to the words "bill of attainder, *ex post facto* law" of the words "or law impairing the obligation of contracts"[2] would seem to show that *ex post facto* laws, which would clearly embrace a law impairing the obligation of contracts, must have referred to criminal and not civil matters. A very satisfactory piece of evidence on this point is found in the proceedings of the convention. Mr. King moved a prohibition on the States to interfere in private contracts. Mr. Madison suggested that that was covered by the prohibition as to *ex post facto* laws.[3] The next day Mr. Dickerson mentioned the fact that Blackstone said the terms *ex post facto* related to criminal cases only; that they would not consequently restrain the States from retrospective laws in civil cases, and that some further provision for that purpose was requisite.[4] The clause in reference to the obligation of contracts was introduced by the Committee of Style, which interpreted the words *ex post facto* as applying only to criminal matters. This was judicially passed upon in the case of *Calder v. Bull*,[5] and the full extent of its meaning was explained by the court. A law was held to be *ex post facto:*

1st. When the act previously committed, and then innocent, was by after law made a crime.

2d. When the after-made law increased the grade of criminality of a previously committed crime, as from misdemeanor to felony.

[1] 2 Pet. 380.
[2] Const. U. S., Art. I, sec. 10.
[3] Madison Papers, 1443–44.
[4] Id. 1450.
[5] 3 Dall. 386.

3d. When the after-made law increased the punishment for a previous offense.

4th. When the after-made law changed the rules of evidence, making less or different testimony necessary to convict, or changed essentially, and not formally merely, the modes of trial.

In the case of *Kring v. Missouri*,[1] a plea of guilty of murder in the second degree, on appeal was reversed and set aside. Kring was subsequently convicted of murder in the first degree. By the law in force when the homicide was committed, a conviction of murder in the second degree was an acquittal of the charge of murder in the first degree. But after the offense, and before the plea of guilty was entered, the law was changed, so that if a judgment on that plea was lawfully set aside, it would not be held an acquittal of the higher crime. It was held that in this case the new law was *ex post facto* and there could not be a new trial for murder in the first degree. Mr. Justice Miller, in delivering the opinion of the court, gave a history of the clause which is interesting and instructive. A majority of the court held, citing *United States v. Hall*,[2] that any law passed after an offense committed, which, "in relation to that offense or its consequences, alters the situation of a party to his disadvantage," is an *ex post facto* law; and, in the language of Denio, J., in *Hartung v. The People*,[3] "no one can be convicted and punished in this country unless according to the law prescribing the punishment by the sovereign authority at the time the offense was committed."

In *Hopt v. Utah*,[4] under a law existing at the time of the commission of the offense, persons convicted of felony, unless pardoned or judgment reversed, were not competent witnesses. By a law passed after the date of the alleged offense such persons were made competent witnesses, and it was held that statutes temporarily enlarging the class of persons so made competent to testify are not *ex post facto*,

[1] 107 U. S. 221.
[2] 2 Wash. C. C. Rep. 366.
[3] 22 N. Y. 95.
[4] 110 U. S. 574.

for they do not alter the degree or lessen the amount or measure of proof necessary to conviction when the crime was committed. This decision was unanimous. But *quære:* Is a law making *baron* and *femme* competent witnesses against each other after crime *ex post facto?* The case just cited might seem to hold the affirmative; but in that case the disability removed affected only the personal credibility. The relations of *baron* and *femme*, so confidential in the status existing at date of crime, ought not to be allowed to be betrayed by after-law on attempted evidence of facts not admissible at the date of the offense.

In the case of *Murphy v. Ramsay*[1] it was held that the deprivation of a bigamist's right to vote under an act passed in 1882 was not an *ex post facto* law. It defines the qualifications for exercising political functions, and does not punish for the offense of bigamy; nor is the divesting of a civil right an *ex post facto* law, for that applies only to criminal matters; nor does it forbid a State to divest rights unless it impairs the obligation of a contract.[2]

The Constitution of West Virginia in 1872 declared that the property of a citizen of the State should not be sold under process issued upon judgment heretofore rendered because of any act done in the prosecution of the war of the rebellion by either of the parties thereto. It was held that when this applied to a judgment founded upon a tort committed as an act of public war, it was not the impairment of the obligation of a contract, because based on tort; and that a bill in equity to set aside such judgment was due process of law, and was in no wise in conflict with the Constitution of the United States.[3]

In *Medley's Case*[4] a State statute, passed after the commission of a murder which adds to the punishment of death, the punishment when the crime was committed, the further pun-

[1] 114 U. S. 15.
[2] Watson v. Mercer, 8 Pet. 88.
[3] Freeland v. Williams, 131 U. S. 405.
[4] 134 U. S. 160; Houston & Texas Central Ry. Co. v. Texas, 170 id. 243.

ishment of solitary confinement until the execution, was as to such convict an *ex post facto* law, and a sentence inflicting both punishments was void. And so in a case where the statute conferred upon the warden the power to fix the day of execution and compelled him to withhold the knowledge of it from the offender, when neither of these provisions was part of the law of the State when the offense was committed. In this case the doctrine stated in *Kring's Case*, *supra*, was affirmed. If, however, the after-law requires the execution to be before sunrise on the day fixed, and within the jail or other inclosure higher than the gallows, thus excluding the view of people outside, and limiting the number who may witness the execution, these are regulations not affecting the rights of the convict, and are not *ex post facto;* and are to be distinguished from *Medley's Case*.

§ 322. The next provision runs, "No capitation or other direct tax shall be laid, unless in proportion to the census or enumeration hereinbefore directed to be taken."[1] This refers to the previous clause.[2] This subject has been sufficiently discussed under the head of the tax clause,[3] and in the cases there referred to,[4] and also in very recent cases.[5] This clause is the negation of any other mode of levy of direct taxes, except in the manner affirmatively established in a previous clause.[6]

"No tax or duty shall be laid on articles exported from any State."[7] The history of this provision and its importance as a part of the great compromise made in the convention between the navigation and commercial States and the cotton States has been fully given, and need not be repeated here except by this reference. The clause for-

[1] Art. I, sec. 9, clause 4.
[2] Art. I, sec. 2, clause 3.
[3] Art. I, sec. 8, clause 1.
[4] Hylton v. United States, 3 Dall. 171; License Tax Cases, 5 Wall. 462; Springer v. United States, 102 U. S. 586.
[5] Pollock v. Farmers' Loan & Trust Co., 157 U. S. 429. Same case reheard, 158 U. S. 601.
[6] Const. U. S., Art. I, sec. 2, clause 3.
[7] Id., Art. I, sec. 9, clause 5.

bids the laying of a duty or tax on articles exported. This applies as far as the word "duty" is concerned to the article as a subject of export when it puts on the character of an export; but lest there might be an evasion of the substantial purpose of the clause by laying a burden upon the article before it assumed the character of an export, the word "tax" was obviously added; and the phrase "on articles exported" was substituted for the simple word "exports," elsewhere used. The whole clause then means that the taxing and duty power of the government should not be laid as a burden on the products of any of the States, which were to be exported. Hence the discussion which arose in the cases previously cited as to the stamp required by law to be placed, as a means of identification, on tobacco which was intended to be exported, in order to prevent its being sold in the domestic market, evading exportation. The question might be raised whether the prohibition applies to articles exported from one State to another, but this has been settled in the negative. It applies to exportation only from any State to a foreign country.[1] Some cases hold a different view, but there is strong reason for believing that it was never intended that articles exported from a State to another should be subject to tax or duty by the State or by Congress.

§ 323. "No preference shall be given by any regulation of commerce or revenue to the ports of one State over those of another; nor shall vessels bound to, or from, one State, be obliged to enter, clear, or pay duties in another."[2] The latter part of this clause explains the mode in which preference might be given by a regulation of commerce or revenue to the ports of one State over those of another. Preference between the ports of the same State in this respect was not forbidden; but the commercial and revenue power

[1] Cooley v. Wardens of the Port of Philadelphia, 12 How. 299; Almy v. California, 24 id. 169; Pace v. Burgess, 92 U. S. 372; Turpin v. Burgess, 117 id. 504; Woodruff v. Parham, 8 Wall. 123.

[2] Const. U. S., Art. I, sec. 9, clause 6.

of the Federal government without this prohibition might be used to the great advantage of some States and to the great disadvantage of others.[1]

In *State of Pennsylvania v. Wheeling and Belmont Bridge Co.*,[2] it would seem from the language of Justice Nelson that this prohibition upon the otherwise exclusive power of Congress to establish ports of entry and clearance throughout the Union was restricted so as to require Congress to allow the vessel bound to the port of a State to enter at that port and deliver its cargo, and not to be required to go to a preferred port in another State. But Congress may make preference between the ports of the same State, and requiring a vessel going to a particular point, for instance, to enter or clear and pay duties at that port preferably to any other port of the State.

§ 324. "No money shall be drawn from the treasury, but in consequence of appropriations made by law."[3] This is an important provision, inasmuch as, in connection with the tax-laying power already discussed, it puts under the law-making power — that is, Congress — the power to lay and collect taxes; that is, the power of gathering in the funds necessary for governmental purposes, and gives also to Congress the power to appropriate it; and that between the collection and the appropriation, the money shall be in what was denominated the treasury, from which it cannot be withdrawn by any but by the law-making authority. In the early period of English history the assessment of taxes in the shires was adjusted between the *quasi*-judicial officers of the exchequer and the shire authorities; and the collection of the taxes was very largely under the power of the Crown, although the original idea was that revenue was a grant by the people to the Crown and not an exaction by the Crown from the people. At a later day Parliament insisted that the revenue collected should be under the control of Parliamentary officials, and not of offi-

[1] Packet Co. v. Catlettsburg, 105 U. S. 559.

[2] 18 How. 429.

[3] Const. U. S., Art. I, sec. 9, clause 7.

cers of the Crown, and that they should be held subject to Parliamentary appropriation. The contention between the Crown and Parliament is described by Dr. Stubbs,[1] out of which emerged the practice that taxes should be assessed and collected and held by officers of Parliament, whose accounts of expenditures should be audited under the supervision of Parliament, thus keeping the revenue from the possession or control of the Crown, except when it had been appropriated by acts of Parliament.[2]

At an early period the levy of customs duties was claimed as part of the royal prerogative over commerce; but that was never conceded, and ever since the House of Stuart was expelled from the throne of England it has been abandoned; and the royal prerogative over trade includes no power to lay duties upon exports, the exercise of which is held to be exclusively under the control of Parliament.[3] It is clear that the claim by Parliament of the right to collect revenue and grant it to the Crown is wholly inconsistent with any power in the Crown or its officials to do so free from the supreme control of Parliament. If the King collected and held the revenue under his authority, the Parliamentary power to grant subsidies and appropriate money to the Crown would be a sham. Hence all the machinery, not only for levying but for collecting and keeping the public revenue, is under the supreme control of Parliament. The freedom of grant would be transformed into the enforced exactions of the King if the revenue were, through the machinery of collecting and keeping, directly or indirectly under the royal power, and the device of appropriations for the army for one year only, would cease to be any check upon the prerogative. It is the independent holding of the revenues within Parliamentary hands that effects the divorce of the purse from the

[1] Stubbs' Constitutional History of England, 594 *et seq.*

[2] Id. 598, note 5; Stubbs' Select Charters, 352, 361, 364, 366; Green's History of the English People, 175–177; 2 Stephen's Commentaries, 548, 549.

[3] Hallam's Constitutional History, 183–85.

Crown, and which makes prerogative impotent in its assaults upon liberty. This clause of our Constitution is the embodiment of these principles of English liberty into the fundamental law of the land. While, therefore, the President appoints all the officers of the government, their functions, powers, duties and responsibilities are prescribed by law, and make them independent of the authority of the President. In the first Congress the State Department was established by law, July 27, 1789, and its Secretary was to perform such duties as should be entrusted to him by the President of the United States. This was because the President has confided to him, by the second article of the Constitution, the conduct of foreign affairs. The Secretary of State was subordinate to the constitutional power of the President.

The War Department was established in 1789, and its Secretary was to perform the duties entrusted to him by the President of the United States, as to the land and naval forces, because they belonged to the Executive Department; the President by the Constitution being commander-in-chief of the army and navy of the United States. But in the organization of the Treasury Department we find a remarkable change. The Secretary of the Treasury was to be deemed the head of his department. His duty was to superintend the collection of the revenues, to grant warrants for money from the treasury if appropriated by law, etc. The office of Treasurer was created by the same act, the duties being to receive and keep the money of the United States, and to disburse the same upon warrants drawn by the Secretary, countersigned by the Comptroller, and recorded by the Register of the Treasury, and not otherwise. It is striking evidence of the motives of Congress in this peculiar legislation that the report of the Secretary of the Treasury is made to Congress and not to the President, while the reports of the heads of other departments are all made to the President. The officers of the revenue cutters provided for the collection of customs were deemed officers of customs and not of the navy, as had been suggested by Mr. Secretary

Hamilton. Had they been officers of the navy they would have been under the control of the President; as officers of customs they are under control of the Secretary of the Treasury. This legislation under these constitutional provisions shows that the doors to and from the treasury are under legislative control, and the key is in the hands of Congress. The obstructions to drawing money from the treasury, except through sworn officers, without whose concurrent action the custodian of money in the treasury can never permit it to pass from him, make the appropriation by a law of Congress to be the only pass-key to the vaults of the treasury, as the Constitution intended; and all legislation which Congress is authorized to pass as necessary and proper to carry this important provision into execution must be directed to the point of fencing the contents of the treasury beyond the reach of any other power than the Congress of the United States. The last provision of this clause was fully commented on in the convention: that the people by public reports from time to time should be made aware of the collections of money as well as of its disbursement.

§ 325. The last clause of the ninth section reads as follows: "No title of nobility shall be granted by the United States; and no person holding any office of profit or trust under them shall, without the consent of the Congress, accept of any present, emolument, office, or title, of any kind whatever, from any king, prince, or foreign State."[1]

The first provision as to title of nobility is correlative with the last words of the following section declaring that no State shall grant any title of nobility; and both of these may be taken in connection with the clause[2] already considered requiring the guarantee to every State of a republican form of government. This perfect equality of all of the citizens of the country with no fixed customs or rank of nobility admitted among them, and none capable of being created by the Federal or State authorities, is the exclusion from both branches of our Federal system of the possibility of mon-

[1] Const. U. S., Art. I, sec. 9, clause 8. [2] Art. IV, sec. 4.

archy or aristocracy in the form of government, and the guarantee of republican forms of government to every State in the Union as well as to the government of the Union of the States. The latter part of this clause was intended to exclude everything like foreign influence in the form of express bribery or of gifts, which, though more insidious, are not less hurtful, in respect to any one holding an office of profit of trust under them, that is, the United States. What persons hold offices of profit or trust under the United States has been already considered somewhat when it was found that senators and representatives are not officers of the United States, but delegates and representatives of the several States. But the President, Vice-President and other officers, such as judges, public ministers, the heads of departments, and all subordinate officers, are persons holding offices of profit and trust under the United States. However indelicate, therefore, it may be for members of either House of Congress to accept presents from any foreign State, they are not prohibited from doing so by this clause of the Constitution.

This ninth section of the first article is the prohibition or limitation on the previously delegated powers of Congress, or upon any possible implication of power from the preceding grants of power; but they were not considered enough to meet the loud demand for something more definite in the shape of a bill or declaration of rights. Accordingly Congress, at its first session in March, 1789, passed resolutions proposing amendments to the Constitution, twelve in number, with this preamble: "The conventions of a number of the States having, at the time of their adopting the Constitution, expressed a desire, in order to prevent misconstruction or abuse of its powers, that further declaratory and restrictive clauses should be added, and as extending the ground of public confidence in the government will best insure the beneficent ends of its institution." As a matter of historic record it is therefore true that these proposed amendments were intended to prevent misconstruction or

abuse of its powers by the declaratory and restrictive clauses. The first two articles proposed were never ratified.

As limitations upon the powers of the Federal government, it is proper now to consider these amendments, after having considered the original limitations and restrictions imposed in the Constitution itself. That these ten amendments are to be regarded as limitations on the powers of the Federal government, and not upon the powers of the States, has been well settled by a large list of judicial decisions.[1]

[1] Barron v. Mayor and City of Baltimore, 7 Pet. 243; Permoli v. First Municipality of New Orleans, 3 How. 589; Fox v. Ohio, 5 id. 410; Withers v. Buckley, 20 id. 84; Twitchell v. Commonwealth, 7 Wall. 321; Anarchist Cases, 123 U. S. 131; Bradley v. United States, 98 id. 105; Presser v. Illinois, 116 id. 259; Boyd v. United States, id. 616; Eilenbecker v. District Court of Plymouth Co., 134 id. 31.

CHAPTER XI.

FIRST TEN AMENDMENTS.

The First Amendment.

§ 326. The first of the ten amendments is in these words: "Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof; or abridging the freedom of speech, or of the press, or the right of the people peaceably to assemble, and to petition the government for a redress of grievances."

The first branch of this article is in respect to religion. Several of the States, and notably Virginia, had in their acts of ratification denied the power of the United States under the original Constitution to prohibit, abridge, restrain or modify the liberty of conscience and of the press, and enjoined the same views in a proposed bill of rights. These various propositions from the States resulted in this and the other amendments proposed in the First Congress. The language used is very comprehensive, not only forbidding a law to establish a religion, but any law respecting the establishment of a religion. This may be considered in connection with article VI, clause 3, of the original Constitution, forbidding the requirement of any religious test as a qualification for public office. Nor is the amendment to be regarded as the concession of a power in Congress as to the matters forbidden in this clause, which conceded power is to be restricted only by the terms of this clause. The ratification of Virginia just referred to excludes this view, and similar language in other ratifications confirms it, and the preamble to the Congressional proposal of these amendments is also conclusive. These were not limitations upon powers granted by the original Constitution, but were inserted, as the Con-