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-

gressional preamble expressed it, "in order to prevent misconstruction or abuse of its powers." In 1887 the Mormon act which disestablished the Mormon Church was passed, and its constitutionality was fully sustained in the case of *The Mormon Church v. United States*.[1] Congress had no right to establish the Mormon Church under this amendment, nor could a territorial legislature, deriving all its powers from Congress, do that which Congress could not do. This was the ground taken in Congress. In the original bill it had been proposed to carry on the Mormon Church by the appointment of thirteen persons by the President and Senate to co-operate with the church authorities in its management. This would have been a law respecting the establishment of a religion and a direct union of Church and State. The only alternative was the disestablishment of the church and putting it, as to the free exercise of its religious views, upon the same footing as all other religious societies. All laws giving special privileges to the Mormon Church were repealed by Congress.[2]

What is an abridgment of religious freedom has been a question of recent adjudication. Mr. Jefferson, following the bill of rights of Virginia of June 12, 1776, drawn by George Mason, drew the Act for Religious Freedom adopted December 16, 1785.[3] Its preamble states with nervous energy, fervid eloquence and logical precision the basis of all religious liberty. In that preamble he says: "That to suffer the civil magistrate to intrude his powers into the field of opinion, and to restrain the profession or propagation of principles on the supposition of their ill tendency, is a dangerous fallacy, which at once destroys all religious liberty. . . . It is time enough for the rightful purposes of civil government, for its officers to interfere, when principles break out into overt acts against peace and good order."

The civil power may not pass the boundary line which

[1] 136 U. S. 1.

[2] Reports H. of R. Nos. 2568, 2735, 1st Sess. 49th Cong.

[3] Code of Virginia, ch. 63.

divides it from the realm of conscience, but conscience must not break over the same boundary to invade the realm of civil power. As long as religion is a matter of the conscience the civil power must not invade it; but when religious conscience violates the rights of others and disturbs social peace and order it must be restrained within its own domain, and excluded from the civil realm which it may not control. Accordingly the act of Congress of 1882, which punished Mormons for bigamy, was held constitutional because not abridging religious freedom.[1] And this view is vindicable without reference to the fact that it is a mooted question among them whether their creed enjoins polygamy or only permits it.

The next clause forbids the abridgment of the freedom of speech or of the press. By the act of July 14, 1798, Congress passed the celebrated Sedition law, by which *inter alia* it punished with fine and imprisonment as a public crime the writing, printing, uttering or publishing any scandalous and malicious writing against the government of the United States, or either House of Congress or the President, so as to bring them into contempt and disrepute, etc. This produced with its twin measure, the Alien law, such excitement in the country as resulted in the overthrow of the administration of John Adams and the election of Mr. Jefferson. They were the cause of the celebrated resolutions of Virginia and Kentucky in 1798, and of their celebrated vindication in Madison's report of January, 1800. In the discussion of the Sedition law, to which reference may be made,[2] Mr. Madison maintained its unconstitutionality upon the ground of its being an abridgment of the freedom of speech and of the press.

There were some prosecutions under these laws, and their constitutionality was maintained by some judges, but they were never before the Supreme Court for adjudication. The

[1] Reynolds v. United States, 98 U. S. 145; Cannon v. United States, 116 id. 55; Murphy v. Ramsay, 114 id. 15.

[2] Story's Commentaries on the Constitution, secs. 1891–92, and notes.

law of libel, as far as it affects private responsibility to the injured party, was for the States to fix and regulate. Clearly this was outside of the powers of Congress. To abridge the right of the citizen to discuss orally or in writing, and by publication, the public acts of the government and its officers, and the attempt to screen themselves from censure by such a law as the Sedition law, would seem to be too clearly within the prohibition of this clause of the Constitution to need further comment. If that law be constitutional, to what can this amendment, as to the freedom of speech and of the press, look for protection against the powers of Congress? On the law of libel in England, Hallam has a comprehensive statement to which reference may be made.[1] By section 3894 of the Revised Statutes of the United States, a penalty was inflicted upon any person who shall knowingly deposit in the mail any letter or circular concerning lotteries, etc. The case of *Ex parte Jackson* brought up for adjudication the question whether this was not an abridgment of the liberty of the press.[2] The Supreme Court held that Congress could determine what it would carry in the mails and what it would exclude therefrom; that in this case, as in case of obscene literature, which was prohibited access to the mails, it would not furnish the vehicles for carrying such literature.

In a subsequent case, *In re Rapier*,[3] this decision was affirmed, but the court held that the right to transport such excluded matter in any other way would not be forbidden by this law. The case rests simply upon the proprietary right of Congress in the mails. It may be well objected that this interpretation of the Constitution is not consistent with its purpose. If the postal power and duty be conferred as an essential facility for the transmission of written and printed intelligence; if without postal facilities the press of the country, as the medium of information, political and otherwise, be diverted from the mails, and if Congress refrains from the use of this postal power and duty so as to interfere with the publication of newspapers and other printed matter, is it not an abridgment of the freedom of the press, by refraining from the exercise of power, and the non-performance of public duty, just as great as if it absolutely prohibited the transmission? The author, therefore, would consider this question disconnected with an immoral or criminal use of the mails an open question for reconsideration by the court.

[1] Hallam's Constitutional History of England, ch. 15.

[2] 96 U. S. 727.

[3] 143 U. S. 110. In *accord:* Horner v. United States, 143 U. S. 207.

The last clause, in reference to the right of the people peaceably to assemble and to petition the government, etc., has not been the subject of adjudication. This does not prevent interference with the riotous assemblages of the people; where there is no riotous conduct the government cannot interfere.

The right of petition for the redress of grievances is secured. There is no provision for action on the part of the person to whom the petition is addressed. It gives no assurance that the prayer of the petition shall be granted, or what consideration shall be given it. It simply protects the petitioners in their right to get up the petition, circulate it for signatures, and have it presented.[1] As to all of this article it will be observed that in terms it is only a limitation on Congressional power.

Second Amendment.

§ 327. The second amendment reads thus: "A well regulated militia being necessary to the security of a free State, the right of the people to keep and bear arms shall not be infringed."

This prohibition indicates that the security of liberty against the tyrannical tendency of government is only to be found in the right of the people to keep and bear arms in resisting the wrongs of government.[2] The case of *Presser*

[1] Bradley v. Heath, 12 Pick. 163; Fairman v. Ives, 5 B. & Ald. 642; Vandezie v. McGregor, 12 Wend. 145; State v. Burnham, 9 N. H. 34.

[2] Federalist, Nos. XXVIII, XLVI.

v. Illinois[1] arose out of an act passed by the State of Illinois prohibiting all bodies of men other than the regularly organized volunteer militia of the State from associating and drilling as such. The Supreme Court held that it did not conflict with this amendment, because the amendment is only a limitation of power on Congress, not on the States.

Third Amendment.

§ 328. "No soldier shall, in time of peace, be quartered in any house, without the consent of the owner, nor in time of war, but in a manner to be prescribed by law."

This prohibition finds its original in the Petition of Right of 1628.[2]

Fourth Amendment.

§ 329. The fourth amendment is as follows: "The right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated, and no warrants shall issue but upon probable cause, supported by oath or affirmation, and particularly describing the place to be searched, and the persons or things to be seized."

The origin of this amendment may doubtless be found in events that occurred in England about the year 1763. A practice had grown up in the office of the secretaries of the cabinet ever since the Restoration of issuing general warrants, arresting, without naming any persons in particular, printers, publishers and authors of obscene and seditious libels as were particularly specified in the warrant. These practices continued until 1763. They were brought up for adjudication before the King's Bench in *Money v. Leach*,[3] and were adjudged illegal and void for uncertainty. It was held that a warrant must be issued by a magistrate upon the oath of an accuser, stating the name, time, place and nature of the offense with reasonable certainty.[4] In *Boyd v. United States*[1] a suit was brought for a penalty under the Customs acts. The law provided that the prisoner must produce the invoice in court for the inspection of the government attorney or else be taken to confess the offense. This was held a violation of this amendment. It is equivalent to compulsory production of papers, and it violates a subsequent amendment in compelling the accused to produce evidence against himself.

[1] 116 U. S. 252.

[2] Stubbs' Select Charters, 515-17.

[3] 3 Burr. 1742.

[4] Ex parte Burford, 3 Cr. 447; 9 State Trials, 817, Algernon Sydney's Case; Entic v. Carrington, 2 Wilson, 275.

This case was relied on in the case of *Spies v. United States*,[2] the Anarchist case, where in a State court the papers of the accused had been seized without warrant, contrary to this amendment. The court decided that this amendment did not apply to such a case, but limited only the powers of Congress and not of the States.

Fifth Amendment.

§ 330. The fifth amendment is in these words: "No person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment or indictment of a grand jury, except in cases arising in the land or naval forces, or in the militia, when in actual service in time of war or public danger; nor shall any person be subject for the same offense to be twice put in jeopardy of life or limb; nor shall be compelled in any criminal case to be a witness against himself, nor be deprived of life, liberty, or property, without due process of law; nor shall private property be taken for public use without just compensation."

The first clause of this amendment involves the solution of an important question. The offenses to which the provision refers are in two classes: first, capital; second, otherwise infamous crimes. The first needs no exposition; the second requires the interpretation of what is meant by "infamous crimes." The word "otherwise" shows that a capital crime is infamous; but what is an infamous crime other than a capital crime?

[1] 116 U. S. 616.

[2] 123 U. S. 131.

Two late cases have involved the decision of this question. They decided that any offense was infamous for which the penalty was death or imprisonment in the penitentiary with or without hard labor. The place makes the infamy.[1] It was not decided, but it is a grave question, whether imprisonment in a jail with or without hard labor as the penalty for the offense would not be infamous. Could Congress by merely changing the place with an equal deprivation of liberty make an imprisonment in jail less infamous than imprisonment in the penitentiary. As to this, *ideo quære.* Story intimates that these words mean all offenses above the grade of misdemeanor. The provision against "twice in jeopardy" is a great privilege secured by the common law.[2]

The next question is as to the indictment or presentment of a grand jury. This excludes the prosecution of such offenses by information or otherwise than by presentment and indictment of a grand jury. In *Bain's Case*[3] the grand jury found an indictment for an infamous offense. A demurrer to the indictment was submitted on a formal matter; whereupon the indictment was amended by the court. The trial proceeded and the accused was convicted and sentenced. He obtained a writ of *habeas corpus* from the Supreme Court, which held that the indictment on which he was tried was not the indictment found by the grand jury, hence the conviction was void and the prisoner was discharged.

Again, the exception to this stringent provision is found in "cases arising in the land or naval forces." Construing this clause with the clause "to make rules for the government and regulation of the land and naval forces,"[4] it is obvious that it was intended to leave the trial of those who were in the army or navy to be tried for any such infamous offense according to the rules and regulations of war provided by Congress. The further exception is in cases arising in the

[1] Ex parte Wilson, 114 U. S. 417; Mackin v. United States, 117 id. 348.

[2] 4 Blackstone's Commentaries, 375; Hawk. P. C., Book 2, ch. 35.

[3] 121 U. S. 1; Thompson v. United States, 155 id. 271.

[4] Const. U. S., Art. I, sec. 8, clause 14.

militia when in actual service. Comparing this with the clause "for calling forth the militia to execute the laws of the Union, suppress insurrections and repel invasions,"[1] and with the clause making the President commander-in-chief of the army and navy of the United States, and of the militia of the several States when called into the actual service of the United States, it is evident that those who are in the militia when in actual service of the United States are triable by the rules and regulations of war, and are not within the operation of this amendment.

In a late case the question was raised whether the words "in time of war or public danger" should be applied to the words "cases arising in the land or naval forces," or should be confined in their application to the words "or in the militia when in actual service." It was decided by the circuit court of the United States for Virginia against this objection of one in the army or navy to trial otherwise than by presentment and indictment of a grand jury, except "in time of war or public danger." The Supreme Court, upon appeal, decided that those words in time of "war or public danger" applied only to the militia, who could only be called into the actual service of the United States to repel invasions and suppress insurrections, or to enforce the law, and did not apply to, and were disconnected from, the words "cases arising in the land and naval forces."[2]

§ 331. Again, "Nor shall any person be subject for the same offense to be twice put in jeopardy of life or limb." These terms were those used in the common law, and include cases that involve liberty, which, indeed, is a part of life, and when taken away is, *pro tanto*, a deprivation of life, and prevents the government from subjecting the accused to a second trial after the previous conviction or acquittal. The power thus forbidden is one of unmitigated evil. If the government might try and try again to convict, the ultimate conviction of the accused would be assured. This does not mean to forbid a second trial where the first

[1] Id., Art. I, sec. 8, clause 16.

[2] Johnson v. Sayre, 158 U. S. 109.

has resulted in a failure of the jury to agree, nor in the case of a faulty indictment, because in neither case is the accused in jeopardy.[1] In *Bain's Case*, *supra*, the accused was tried again because he had not been in jeopardy — that is, tried in the only way in which he could be tried; that is, by a regular indictment.[2]

Again, "Nor shall be compelled in any criminal case to be a witness against himself." In *Boyd v. United States*[3] we have referred to the requirement that a defendant should produce his books, or in the alternative be adjudged to confess his crime, and to the fact that this requirement was held to be repugnant to this clause of the Constitution. This case also decided that the requirement was an offense against the fourth amendment. A very stringent decision was rendered in the case of *Counselman v. Hitchcock*,[4] under the Interstate Commerce Law. An officer of a railroad was compelled to answer a question in respect to the business of his road which he claimed tended to criminate himself. It was argued that there was no criminal case pending, and that therefore the clause did not apply. The court, upon an elaborate review of a number of cases, decided that he was not compelled to give testimony which might lead to a criminal prosecution of himself or to any procedure in which he would be endangered. Congress thereupon passed the act of February, 1893, which authorized the exemption of the party called from prosecution in respect to the subject-matter of his testimony. A very late case involving this question has been decided.[5]

Again, "Nor be deprived of life, liberty or property without due process of law." This prohibition upon the Federal power has been followed by the fourteenth amendment, which prohibits a State from depriving any person of life, liberty or property without due process of law, and comment

[1] United States v. Perez, 9 Wheat. 579.

[2] Simmons v. United States, 142 U. S. 148. See also Craemer v. Washington State, 168 id. 124.

[3] 116 U. S. 616.

[4] 142 U. S. 547.

[5] Brown v. Walker, 161 U. S. 591.

upon this part of this amendment will be deferred until we reach the fourteenth amendment.

§ **332.** Again, "Nor shall private property be taken for public use without just compensation." This is part of the eminent domain of every government. It is the sovereign power of the Body-politic to subject to public use property rights of private members of the Body-politic upon just compensation. It is in effect the same power which calls a man to give his life or limb or liberty in defense of his country. If his life may be subjected why not his property? This clause refers only to property rights, and limits this sovereign power by two important phrases. It must be taken for public use, and even for this only on just compensation. It includes every right in property of which a citizen may be deprived. A leading case is *Eaton v. Railroad Co.*[1] In that case it was shown that a hill which protected A's land from being flooded by a river intervened. The hill did not belong to A. The railroad company cut through the hill for its road, and through the aperture the flood came upon A's land. *Held*, that it took away his property rights and he must be compensated.[2] A taking which occupies the land of A without taking the fee, or by occupation or condemnation of a part of A's land will injure the residue, would probably be held to be a taking under this clause.[3]

Land taken for one use cannot by a trick be devoted to another use which supersedes the former, without compensation.[4] And where an easement is taken in land, and subsequently the public takes the fee, the owner must have added compensation.[5] In all these cases the judicial proceeding of

[1] 57 N. H. 504.

[2] *Accord:* Wynehamer v. The People, 13 N. Y. 378, 433; Thompson v. Androscoggin River Imp. Co., 54 N. H. 645; Grand Rapids Booming Co. v. Jarvis, 30 Mich. 320.

[3] Tuckahoe Canal Co. v. Tuckahoe & James River R. R. Co., 11 Leigh, 42; Newman v. M. E. R. Co., 118 N. Y. 618; Wilson v. Railroad Co., 59 Ill. 273; Shipley v. B. & O. R. R. Co., 34 Md. 336, cited in 1 Beach on Public Corporations, § 686.

[4] Matter of City of Buffalo, 68 N. Y. 167.

[5] Pierce v. Drew, 136 Mass. 78; Julia Building Ass'n v. Bell Telephone Co., 88 Mo. 258.

condemnation is required, and notice of the proceeding to the owner is essential.[1] Compensation need not be paid before condemnation, in case of a State, or perhaps in case of a municipality; but as to private parties, railroad corporations, etc., it is different. In the latter case the payment must precede or be contemporaneous with the taking. These questions are very elaborately discussed, and the cases upon them, in Dillon on Municipal Corporations,[2] and by Beach on Public Corporations.[3]

The Federal government, under this clause, which recognizes and limits its eminent domain for all purposes related to the necessary and proper execution of its powers in respect to the use, holding and title to the property of the citizen, may take what is necessary and proper for the execution of its powers, but can take only for public use and upon just compensation; and while Congress takes the initiative in this matter, and decides primarily whether it is a public use, it is subject to judicial decision as to whether it is a public use, and in respect to what is just compensation upon a full hearing, to which the owner shall be a party.

The Sixth Amendment.

§ 333. The sixth article of amendment is in these words: "In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, by an impartial jury of the State and district wherein the crime shall have been committed, which district shall have been previously ascertained by law, and to be informed of the nature and cause of the accusation; to be confronted with the witnesses against him; to have compulsory process for obtaining witnesses in his favor, and to have the assistance of counsel for his defense." It is appropriate to consider this article in connection with an article in the original Constitution,[4] which reads

[1] Huling v. Kaw Valley Ry. & Imp. Co., 130 U. S. 559.

[2] §§ 991-993.

[3] Vol. I, § 686.

[4] Const. U. S., Art. III, sec. 2, clause 3.

thus: "The trial of all crimes, except in cases of impeachment, shall be by jury; and such trial shall be held in the State where the said crimes shall have been committed; but when not committed within any State, the trial shall be at such place or places as the Congress may by law have directed." The fifth amendment, as has been seen, was directed to the mode in which the party shall be accused, and the way in which the grand jury makes the accusation. This sixth article, and the one considered with it, provide as to the trial of the party under the accusation and the conduct of the criminal prosecution.

1st. There is secured the right to a speedy and public trial. Speedy refers to the necessity of preventing a long imprisonment of an accused party before trial, but does not define the mode in which this speedy trial may be secured. In some of the States, *e. g.*, Virginia, if a party's trial is deferred at the instance of the Commonwealth for longer than three terms of the court, he will be discharged. The trial must not only be speedy but it must be public. This is to bring the power of public opinion to bear against despotic procedure for the conviction of the accused, and to insure a trial where all his rights will be conserved.

Again: By whom shall the trial be had? By an impartial jury. Jury trial has been declared to be the palladium of English liberty; and it is the great security of American liberty. This is subject to the exception provided in the fifth amendment as to cases arising in the army, navy or militia. In all other cases jury trial is secured to the accused.

2d. It must be an impartial jury of the State where the crime was committed. This is by the terms of the article in the original Constitution; but the sixth amendment is more particular. It must not only be a jury of the State, but of the district wherein the crime shall have been committed, which district shall not be a district provided by a law subsequent to the offense, but a district which shall have been previously ascertained by law. This is intended to prevent