the choice of a jury from a district provided by *ex post facto* legislation, and which might thus do great injustice to the accused. Further, upon such trial he must be informed of the nature and cause of the accusation. If the crime is not committed in any State, as felony on the high seas or piracy, then Congress has power, before the offense is committed, to determine the place at which the trial of such criminal shall be held.[1] Upon his trial he must be confronted with the witnesses against him. The Supreme Court decided in *Mattox v. United States*[2] that this clause was not violated by the use upon the second trial for the offense of the copy of the testimony of a dead witness given upon the first trial when the witness was confronted with the accused. To use it upon the second trial was held to give to the accused the full benefit of this provision. Three judges dissented.

3d. The accused shall have compulsory process for obtaining witnesses in his favor. This was to correct a great grievance at the common law, which forbade the accused to exculpate himself by the testimony of any witnesses. The House of Commons soon after the accession of the House of Stuart to the throne had a bill passed which affirmed the right to have process for witnesses for as well as against the accused; and in the seventh of William III. and in the reign of Queen Anne the rule was extended to all cases of treason and felony.[3]

The last clause of this amendment removes another evil practice of the common law which denied the prisoner the assistance of counsel. This denial was based upon the idea that the judge should be counsel for the prisoner — an idea which in practice was a cruel mockery.[4]

[1] Id., Art. III, sec. 2, clause 3.

[2] 156 U. S. 237.

[3] 4 Blackstone's Commentaries, 359, 360; 2 Hale's Pleas of the Crown, 283; 1 Tucker's Blackstone, Appen., 304, 305; Rawle on the Constitution, 129, 130; Story on the Constitution, 1785–86.

[4] Story on the Constitution, sec. 1787; Blackstone's Commentaries, 355, 356; 1 Tucker's Blackstone, Appen., 305; Rawle on the Constitution, *supra*. See Anderson v. Treat, 172 U. S. 24.

It must be confessed that these provisions are rather declarations of rights than well-established securities of liberty. They require to be supplemented by legislative provisions, and by the enlightened administration of justice by an independent judiciary, or sustained by a sound and liberty-loving public sentiment of the people of the country. *Milligan's Case*[1] was one in which these fifth and sixth amendments were set at naught by the legislature and the President, and in which the right of the accused to an accusation by a grand jury and to a trial by an impartial jury of the State and district was upheld by a bare majority of the Supreme Court of the United States.

Mrs. Surratt was unconstitutionally tried by a court-martial against the imperative requirement of these two amendments and hung in sight of the capitol upon a judgment of a court-martial and in defiance of her petition for a *habeas corpus* which the military power resisted. Cases under this sixth amendment are referred to in the note.[2]

In *Twitchell v. Commonwealth*[3] the Supreme Court decided that these two amendments had no application to the States, but only to the Federal government. In *Miller v. United States*[4] it was held that the confiscation acts were not in conflict with the fifth and sixth amendments. The case of *United States v. Cruikshank*[5] discusses the provision as to being informed of the nature and cause of the accusation.

In the case of *Callan v. Wilson*[6] the provision that the trial of all crimes should be by jury was held to mean not only felonies, but misdemeanors involving the deprivation of liberty, and that these provisions are in force in the District of Columbia.

[1] 4 Wall. 2.

[2] Twitchell v. Commonwealth, 7 Wall. 321; Miller v. United States, 11 id. 268; United States v. Cruikshank, 92 U. S. 542; Stanley v. Supervisors of Albany, 121 id. 540; Allis v. United States, 155 id. 117.

[3] 7 Wall. 321.

[4] 11 Wall. 268.

[5] 92 U. S. 542.

[6] 127 U. S. 540.

In the case of *Mattox v. United States*, *supra*, the court held that all these provisions of the amendments are to be interpreted in the light of the law as it existed at the time it was adopted, and as securing to every individual such rights as he possessed previously as a British subject, and as his ancestors had inherited from the days of Magna Carta.

The case of *In re Ross*[1] was a singular decision — that an American citizen in a foreign land may be tried by a consular court situated in the foreign country, established under an act of Congress, and that such citizen may be condemned to death by such court without accusation by indictment of a grand jury, or trial by an impartial jury of the country. The doctrine held by the court was that the Constitution had no operation outside of the United States. It would seem to follow logically that Congress, which derives all of its powers through the Constitution, could not pass a law which would have any operation outside of the United States any more than the Constitution does, and therefore that such law providing for the trial, if a violation of the Constitution, is null and void. The author may therefore suggest the query as to the soundness of this decision.

The Seventh Amendment.

§ 334. The seventh amendment is in these words: "In suits at common law, where the value in controversy shall exceed twenty dollars, the right of trial by jury shall be preserved, and no fact tried by a jury shall be otherwise re-examined in any court of the United States, than according to the rules of the common law."

In the original Constitution (art. III, sec. 2, clause 2) it is provided: "The Supreme Court shall have appellate jurisdiction, both as to law and fact, with such exceptions, and under such regulations, as the Congress shall make." It appears from the *Federalist*[2] that great clamor was

[1] 140 U. S. 456.

[2] No. LXXXI.

made against this provision, lest the appellate power of the Supreme Court would set aside the decision on a question of fact by a jury; and in the same book,[1] the apprehension, which was strongly expressed by the opponents of the Constitution, that there was no security in that instrument for the trial by jury of civil cases, though there was as to criminal cases, was met by a very able discussion of the objection. We have seen that these objections to the original Constitution were the occasion of the first ten amendments. It will be seen how this seventh amendment meets this objection which had been made to the original Constitution as to jury trial in civil cases. The clause in reference to the Supreme Court had recognized cases in law and equity as within the judicial power. This obviously referred to the distinctive jurisdiction of the common-law courts and the equity courts existing in England, and which all the thirteen States had adopted as a part of their own system. As the equity system did not recognize jury trial as a part of its machinery, the revision on appeal by the Supreme Court as to law and fact was really the exercise by the appellate jurisdiction, in respect to equity causes, of the power of granting new trials and the like in causes at common law. But this seventh amendment put an end to all criticism upon this point. It provides that in suits at common law (obviously excluding suits in equity), where the value in controversy shall exceed $20, excluding cases below that sum, which might be tried by a civil magistrate, the right of trial by jury shall be preserved. This met the objection that civil juries were not secured as a part of the judicial system of the United States. The amendment goes further, and provides that no fact tried by a jury shall be otherwise re-examined in any court of the United States, supreme or inferior, except according to the rules of the common law; that is, that a verdict may be set aside and a new trial granted, and the practice of the common-law courts as existing prior to the Consti-

[1] No. LXXXIII.

tution should not be set aside by this amendment. This amendment, therefore, clearly allows trials in equity causes without jury, and suits at common law with jury, re-examinable according to the rules of the common law, but not otherwise.

The foregoing question arose in the Supreme Court in the case of *Elmore v. Grymes*,[1] where a peremptory nonsuit against the will of the plaintiff had been ordered in a circuit court. The appellate court reversed the judgment, holding that the plaintiff had a right to have his case submitted to the jury.

In *Parsons v. Bedford*[2] the same doctrine was applied to a judgment in the Louisiana district court, which was rendered according to a civil-law proceeding, and held to be within the meaning of the terms of this amendment "suits at common law," and it was held that the Supreme Court could not re-examine the facts if tried by a jury in the Louisiana district court by the civil-law proceeding.

In *Castle v. Bullard*[3] these cases were approved; and so in *McElrath v. United States*[4] it was held that a suit against the government could be tried in the court of claims without the intervention of a jury. Such suits are not suits at common law within the meaning of the amendment.

In *Baylis v. Insurance Co.*[5] it was held that without a waiver of right of trial by jury a court cannot substitute itself for a jury, pass upon the effect of the evidence and render judgment thereon. This would violate the seventh amendment, which the court has always "guarded with jealousy."[6]

The decision of the court in the above case was distinguished from that of *Randall v. B. & O. R. R. Co.*, in which the court said if the court had directed a verdict for the defendant on the ground that the evidence with all the in-

[1] 1 Pet. 469. *Accord:* D'Wolf v. Rabaud, Id. 476.
[2] 3 Pet. 433.
[3] 23 How. 172.
[4] 102 U. S. 426.
[5] 113 U. S. 316.
[6] Randall v. B. & O. R. R. Co., 109 U. S. 478.

ferences that the jury could justifiably draw from it was insufficient to support a verdict for the plaintiff, so that such a verdict if returned must be set aside, it would have followed a practice sanctioned by repeated decisions of the court. That would have allowed trial by jury, subject only to be re-examined according to the rules of common law.

The question of how far this amendment will allow a judge to express an opinion on the facts to the jury, or direct a verdict according to his opinion, has already been considered by the Supreme Court in several cases, the last of which was the case of *Allis v. United States*,[1] in which the court held that the judge may express his opinion as to the weight of the evidence, and may recall the jury after deliberation for a time to ascertain their difficulties, and to make proper efforts to assist them in their conclusions. That was a criminal case. The same doctrine was strongly asserted in *Simmons v. United States*,[2] where the court (citing *Vicksburg, etc. R. R. Co. v. Putnam*,[3] *United States v. Railroad Co.*,[4] and *Lovejoy v. United States*[5]) says: "It is so well settled, by a long series of decisions of this court, that the judge presiding at a trial, civil or criminal, in any court of the United States, is authorized, whenever he thinks it will assist the jury in arriving at a just conclusion, to express to them his opinion upon the questions of fact which he submits to their determination," etc.

In *Sparf and Hansen v. United States*[6] it was held that in the courts of the United States the jury in criminal cases are bound to receive the law from the court, and apply it as given by the court, subject to the condition that by a general verdict the court may determine both law and fact upon the issue submitted to them; and while the court may instruct as to the legal presumptions from a given state of

[1] 155 U. S. 123.
[2] 142 U. S. 155.
[3] 118 U. S. 546.
[4] 123 U. S. 113.
[5] 128 U. S. 171.
[6] 156 U. S. 57.

facts, it must not by peremptory instructions require the jury to find the accused guilty of any offense. In *Allison v. United States*[1] the court charged the jury as to the weight to be attributed to the evidence of the accused in his own behalf, and the decision was reversed because of it, citing *Hicks v. United States*.[2] It may be open to serious question whether the latitude allowed to the court in some of the above cases in instructing the jury on the weight of evidence actually given will not lead to great injustice, such as was rectified in the case last cited, but which may be beyond rectification in some cases, and thus the right of trial by jury be destroyed under the strong and dominating instructions of the court.

The Eighth Amendment.

§ 335. The next amendment is in these words: "Excessive bail shall not be required, nor excessive fines imposed, nor cruel and unusual punishments inflicted."

This amendment was derived from the Bill of Rights of 1689, which reads, "Excessive bail ought not to be required, or excessive fines imposed, nor cruel and unusual punishments inflicted."[3] The explanation of the provision as to excessive bail is found in a previous clause of the Bill of Rights. The purpose of this is obvious. If bail disproportioned to the means of the accused be required, it will result that he will be imprisoned for lack of means, while another's ability to furnish it may avail to release such other person. The rich may go free, the poor must be imprisoned. So on judgment of fine and imprisonment until the fine is paid, the lack of means of the convict to pay the fine might result in his imprisonment, when the man of wealth would avoid imprisonment by the payment of a fine. This, therefore, applies not only to the legislative but to the judicial depart-

[1] 160 U. S. 203.
[2] 150 U. S. 442.
[3] Stubbs' Select Charters, Appen., 525.

ment. The discretion of neither should be so used as to demand excessive bail or to inflict excessive fines. In *Pervear v. Commonwealth*[1] this amendment was held to apply only to the Federal government.

The question has come up to the Supreme Court from State courts in reference to electrocution, as to whether it was not cruel and unusual punishment. The court again decided that this and the kindred amendments were limitations upon Federal power, and not upon State power.[2]

The Ninth Amendment.

§ 336. The ninth amendment is in these words: "The enumeration in the Constitution, of certain rights, shall not be construed to deny or disparage others retained by the people."

It has been already observed that one of the most serious objections urged against the original Constitution was that it did not contain a bill of rights. Mr. Hamilton, in the *Federalist*,[3] argued with great force that a bill of rights in the Federal Constitution was really out of place, because this Constitution was one to create a government with limited and enumerated powers; that a bill of rights was proper in respect of a government which had unlimited power over the rights of the people under its control; but why should there be a bill of rights in a Constitution where the power was so limited by enumeration as that the power of the government could not touch such rights? He says: "But a minute detail of particular rights is certainly far less applicable to a Constitution like that under consideration, which is merely intended to regulate the general political interests of the nation, than to one which has the regulation of every species of personal and private concerns." He further urged that these were dangerous as well as unnecessary. "They

[1] 5 Wall. 475.
[2] In re Wood, 140 U. S. 278; McElvaine v. Brush, 142 id. 155.
[3] No. LXXXIV.

would contain various exceptions to powers not granted; and on this very account would afford a colorable pretext to claim more than were granted. For why declare that things shall not be done which there is no power to do? Why, for instance, should it be said that the liberty of the press shall not be restrained, when no power is given by which restrictions may be imposed. I will not contend that such a provision would confer a regulating power; but it is evident that it would furnish, to men disposed to usurp, a plausible pretense for claiming that power. They might urge, with a semblance of reason, that the Constitution ought not to be charged with the absurdity of providing against the abuse of an authority which was not given, and that the provision against restraining the liberty of the press afforded a clear implication that a right to prescribe proper regulations concerning it was intended to be vested in the national government."

There were, as we have seen, certain limitations upon the powers of the Federal government in respect to *ex post facto* laws and bills of attainder, to which we have referred already. The inhibition of these certainly furnished an argument that these powers might be implied for Congress had they not been inhibited. In order to exclude any such inference this amendment was adopted, and, in the language of Judge Cooley,[1] "However unfounded such a fear might be, there could be no harm in affirming by this amendment the principle that constitutions are not made to create rights in the people, but in recognition of, and in order to preserve them, and that if any are specially enumerated and specially guarded, it is only because they are peculiarly important or peculiarly exposed to invasion."

This amendment, therefore, was meant to exclude the inference that the Federal government could touch any of the great fundamental rights of the people, because there was no special inhibition of power to the Federal government to

[1] Cooley's Constitutional Law (2d ed.), 34.

invade them. The fact that some are guarded against the power of the government is therefore not to be the basis of an argument that others not so guarded may be invaded by its power. The maxim *Expressio unius exclusio est alterius*, therefore, does not apply to the rights of the people in reference to the powers of the government of the United States. The language of Judge Story in accordance with these views may be quoted. He says:[1] "This clause was manifestly introduced to prevent any perverse or ingenious misapplication of the well-known maxim, that an affirmation in particular cases implies a negation in all others; and *e converso*, that a negation in particular cases implies an affirmation in all others. The maxim, rightly understood, is perfectly sound and safe; but it has often been strangely forced from its natural meaning into the support of the most dangerous political heresies. The amendment was undoubtedly suggested by the reasoning of the *Federalist* on the subject of a general bill of rights."[2]

The Tenth Amendment.

§ 337. The amendment is in these words: "The powers not delegated to the United States by the Constitution, nor prohibited by it to the States, are reserved to the States respectively, or to the people."

So much has been said as to this clause that but little need be said now. In the Articles of Confederation it was declared that each State retained its sovereignty, freedom and independence and every power, jurisdiction and right which was not by this confederation expressly delegated to the United States in Congress assembled. It is said that in Congress, when this amendment was proposed, the insertion of the word "expressly" before the word "delegated" was proposed as an amendment, and so in the Virginia conven-

[1] Story on the Constitution, sec. 1905.

[2] Federalist, No. LXXXIV; Tucker's Blackstone, Appen., 307, 308, 309.

tion. But the argument that it is impossible to confine a government to the exercise of express powers, and that there must be powers necessarily implied, was sufficient to reject the amendment. And, as we have seen, the adjudications of the courts have uniformly followed this strong language of Judge Story in *Fairfax v. Hunter*,[1] "The government, then, of the United States can claim no powers which are not granted to it by the Constitution, and the powers actually granted must be such as are expressly given, or given by necessary implication." See also *Gibbons v. Ogden*,[2] *McCulloch v. Maryland*,[3] and cases cited *ante*. These decisions justify this analysis of this important amendment:

First. The Federal government has no powers but those delegated by the Constitution. It has no inherent powers, but only those derived from the Constitution as expressly delegated or granted by necessary implication.

Second. Those not so delegated, unless prohibited to the States, are reserved to the States respectively, or to the people.

Reservation of powers is the basis of the title of the States or of the people of the States to political powers under the Constitution. They are not secured to the States or to the people by virtue of the Constitution: they are inherent in the people of the States, and unless delegated to the United States, or by their constitutional act prohibited to themselves, they remain with the States respectively and the people. The word "reserved" in the Constitution is synonymous with the word "retained" in the Confederation. This amendment, therefore, differentiates the powers of the United States and the powers of the States. The former are derived by the United States through delegation from the States. The latter, the reserved powers, remain in and are retained by the States, because not delegated or prohibited.

The words "to the States respectively or to the people"

[1] 1 Wheat. 326.
[2] 9 Wheat. 1.
[3] 4 Wheat. 416.

require a word of explanation. At the time of the adoption of the Constitution in 1789 the States were bound by the Articles of Confederation. The several Constitutions had by express grant of the people of the States as separate Bodies-politic vested in the State governments a number of powers, while others not granted to the Congress of the Confederation, or granted to the State governments, were retained by each State. By the Constitution of the United States a number of the powers, *e. g.*, regulation of commerce, laying of duties, imposts, etc., which were under their several Constitutions vested in the State governments, were taken from the State governments and delegated to the United States by the Constitution of 1789. The States intended that all the powers vested by their several Constitutions in the State government should be retained and exercised by that government, except such as by the Constitution vested exclusively in the United States or by contractual agreement were prohibited to the States. The consequence is that it is not only natural, but necessary, that this amendment should declare that the powers not delegated to the United States, and not prohibited to the States, should still remain with the several State governments or with the sovereign people of each State. But, *e converso*, they divested the State governments of the powers given them by the respective State Constitutions, in so far as by the Constitution of 1789 those powers were exclusively delegated to the United States. Cases containing these views might be cited without number.[1]

In the case of *United States v. Cruikshank*,[2] Chief Justice Waite uses this emphatic language: "The government of the United States is one of delegated powers alone. Its authority is defined and limited by the Constitution. All powers not granted to it by that instrument are reserved to the States or the people."

This closes the review of the delegated powers of Con-

[1] Collector v. Day, 11 Wall. 113; United States v. Cruikshank, 92 U. S. 549.
[2] 92 U. S. 551.

gress, and the express limitations upon those powers in the original Constitution and in the first ten amendments, all of which, by a series of decisions already cited, apply exclusively to the Federal government, and in no case to the government of the States.[1]

[1] Barron v. Baltimore, 7 Pet. 244; Smith v. Maryland, 18 How. 71; Purvear v. Commonwealth, 5 Wall. 475; Twitchell v. Commonwealth, 7 id. 321; The Justices v. Murray, 9 id. 274; Edwards v. Elliott, 21 id. 532; Walker v. Sauvinet, 92 U. S. 90.

CHAPTER XII.

THE EXECUTIVE DEPARTMENT.

§ **338.** In the orderly arrangement of the Constitution we have already seen that the first article applies to the Legislative Department, and the powers delegated to it by the Constitution. This second article applies to the Executive Department, and the powers delegated to the President as the officer in whom the executive power shall be vested. The first article is prefaced with the language, "All legislative powers herein granted shall be vested in a Congress of the United States." The second article is prefaced by the declaration, "The executive power shall be vested in a President of the United States of America."

We will now take up this article, clause by clause, and attempt to expound its meaning. We have already referred to the general purpose of the convention to conform the organism of the Federal government to the familiar canon of Baron Montesquieu, requiring the complete separation of the three departments as an essential security to the liberties of the people. It has also been seen that in the framing of the portions of the Constitution relating to the Legislative Department, it was intended to grant to the Congress of the United States legislative powers alone. It will now be seen on the threshold of the article in respect to the Executive Department that "the executive power shall be vested in a President of the United States of America." Whatever might be considered the powers thereafter granted to the President in any other Constitution or system of government, or however the powers granted in the first article to Congress, or in the third article to the Judicial Department, might be considered under any other system of government than our own, it is obvious that the Con-