

Major John Rogers. Mayor

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[WHOLE No. 123.]

FOR THE GAZETTE OF THE UNITED STATES.

## DISCOURSES ON DAVILA.—No. X.

Wife if a minister, but if a king  
More wife, more learn'd, more just, more every thing.

THERE is scarcely any truth more certain or more evident, than that the nobles of Europe, are, in general, less happy, than the common people.—There is one irrefragable proof of it, which is, that they do not maintain their own population. Families, like stars, or candles, which you will, are going out continually; and without fresh recruits from the plebeians, the nobility would in time be extinct. If you make allowances for the state, which they are condemned by themselves and the world to support, they are poorer than the poor; deeply in debt, and tributary to usurious capitalists, as greedy as the Jews. The kings of Europe, in the sight of a philosopher, are the greatest slaves upon earth; how often soever we may call them despots, tyrants, and other rude names, in which our pride and vanity takes a wonderful delight, they have the least exercise of their inclinations, the least personal liberty, and the least free indulgence of their passions of any men alive. Yet how rare are the instances of resignations, and how universal is the ambition to be noble, and the wish to be royal. Experience and philosophy are lost upon mankind. The attention of the world has a charm in it, which few minds can withstand. The people consider the condition of the great in all those delusive colours in which imagination can paint and gild it, and reason can make little resistance, to this impetuous propensity. To better their condition, to advance their fortunes without limits, is the object of their constant desire, the employment of all their thoughts by day and by night. They feel a peculiar sympathy with that pleasure, which they presume those enjoy, who are already powerful, celebrated and rich, "we favour," says a great writer, "all their inclinations, and forward all their wishes. What pity, we think, that any thing should spoil and corrupt so agreeable a situation; we could even wish them immortal, and it seems hard to us, that death should at last put an end to such perfect enjoyment. It is cruel we think in nature, to compel them from their exalted stations, to that humble, but hospitable home, which she has provided for all her children. Great king, live forever! is the compliment, which, after the manner of eastern adulation, we should readily make them, if experience did not teach us its absurdity. Every calamity that befalls them, every injury that is done them, excites in the breast of the spectator ten times more compassion and resentment, than he would have felt, had the same things happened to other men; it is the misfortunes of kings only, which afford the proper subjects for tragedy; they resemble, in this respect, the misfortunes of lovers. These two situations are the chief which interest us upon the theatre; because, in spite of all that reason and experience can tell us to the contrary, the prejudices of the imagination, attach to these two states a happiness superior to any other. To disturb or put an end to such perfect enjoyment, seems to be the most atrocious of all injuries. The traitor who conspires against the life of his monarch, is thought a greater monster, than any other murderer. All the innocent blood that was shed in the civil wars, provoked less indignation than the death of Charles the first. A stranger to human nature, who saw the indifference of men about the misery of their inferiors, and the regret and indignation which they feel for the misfortunes and sufferings of those above them, would be apt to imagine, that pain must be more agonizing, and the convulsions of death more terrible to persons of higher rank, than to those of meaner stations.

Upon this disposition of mankind, to go along with all the passions of the rich and powerful, is founded the distinction of ranks, and the order of society. Our obsequiousness to our superiors more frequently arises from our admiration for the advantages of their situation, than from any private expectations of benefit from their good will. Their benefits can extend but to a few; but their fortunes interest almost every body. We are eager to assist them in completing a system of happiness that approaches so near to perfection; and we desire to serve them for their own sake, without any other recompence but the vanity or the

"honor of obliging them. Neither is our deference to their inclinations founded chiefly, or altogether, upon a regard to the utility of such submission, and to the order of society, which is best supported by it. Even when the order of society seems to require that we should oppose them, we can hardly bring ourselves to do it. That kings are the servants of the people, to be obeyed, respected, deposed, or punished, as the public convenience may require, is the doctrine of reason and philosophy; but it is not the doctrine of nature. Nature would teach us to submit to them, for their own sakes, to tremble and bow down before their exalted station, to regard their smile as a reward sufficient to compensate any services, and to dread their displeasure, though no other evil was to follow from it, as the severest of all mortifications. To treat them in any respect as men, to reason and dispute with them upon ordinary occasions, requires such resolution, that there are few men whose magnanimity can support them in it, unless they are likewise assisted by familiarity and acquaintance. The strongest motives, the most furious passions, fear, hatred and resentment, are scarce sufficient to balance this natural disposition to respect them: and their conduct must either justly or unjustly, have excited the highest degree of all those passions, before the bulk of the people can be brought to oppose them with violence, or to desire to see them either punished or deposed. Even when the people have been brought this length, they are apt to relent every moment, and easily relapse into their habitual state of deference. They cannot stand the mortification of their monarch; compassion soon takes the place of resentment, they forget all past provocations, their old principles of loyalty revive, and they run to re-establish the ruined authority of their old masters, with the same violence with which they had opposed it. The death of Charles the first, brought about the restoration of the royal family. Compassion for James the second, when he was seized by the populace, in making his escape on ship board, had almost prevented the revolution, and made it go on more heavily than before.

(To be continued.)

BOSTON, MAY 6, 1790.

### EASTERN CIRCUIT COURT.

#### The CHARGE of Chief Justice JAY, to the Grand Juries of the Eastern Circuit.

WHETHER any people can long govern themselves in an equal uniform and orderly manner, is a question which the advocates for free governments justly consider as being exceedingly important to the cause of liberty. This question, like others, whose solution depends on facts can only be determined by experience: it is a question on which many think some room for doubt, still remains. Men have had few fair opportunities of making the experiment; and this is one reason why less progress has been made in the science of government, than in almost any other. The far greater number of the constitutions and governments of which we are informed, have originated in force or in fraud; having been either imposed by improper exertions of power, or introduced by the arts of designing individuals, whose apparent zeal for liberty, and the public good, enabled them to take advantage of the credulity and misplaced confidence of their fellow-citizens.

Providence has been pleased to bless the people of this country, with more perfect opportunities of choosing, and more effectual means of establishing their own government than any other nation has hitherto enjoyed; and for the use we may make of these opportunities, and of these means, we shall be highly responsible to that Providence, as well as to mankind in general, and to our own posterity in particular. Our deliberations and proceedings, being unawed and uninfluenced by power or corruption, domestic or foreign, are perfectly free—our citizens are generally and greatly enlightened—and our country is so extensive, that the personal influence of popular individuals, can rarely embrace large portions of it. The institution of general and State governments—their respective conveniences, and defects in practice, and the subsequent alterations made to some of them, have operated as useful experiments, and conspired to promote our advancement in this interesting science. It is pleasing to observe, that the present national government, already affords advantages, which the preceding one proved too feeble and ill constructed to produce. How far it may be still distant from the degree of perfection to which it may possibly be carried, time only can decide. It is a consolation to reflect, that the good sense of the people will be enabled, by experience, to discover and correct its imperfections, especially while they continue to retain a proper confidence in themselves, and avoid those jealousies and dissensions, which, often springing from the worst designs, frequently frustrate the best measures.

Wife and virtuous men, have thought and reasoned very differently respecting government; but in this, they have at length very unanimously agreed, viz.—That its powers should be divided into three distinct, independent departments; the executive, legislative and judicial. But how to constitute and balance them, in such a manner as best to guard against abuse and fluctuation, and preserve the constitution from encroachments, are points on which there continues to be a great diversity of opinions, and on which we have all, as yet much to learn. The constitution of the United States, has accordingly instituted these three departments; and much pains have been taken so to form and define them, as that they may operate as checks one on the other, and keep each within its proper limits: It being universally agreed, to be of the last

importance to a free people that they who are vested with executive, legislative and judicial powers, should rest satisfied with their respective portions of power—and neither encroach on the provinces of each other, nor suffer themselves nor the others to intermeddle with the rights reserved by the Constitution, to the people.

If then so much depends on our rightly improving the before mentioned opportunities; if the most discerning and enlightened minds may be mistaken relative to THEORIES, unconfirmed by PRACTICE; if on such difficult questions, men may differ in opinion; and yet be patriots—and if the merits of our opinions can only be ascertained by experience—let us patiently abide the trial, and unite our endeavors to render it a fair and impartial one.

These remarks may not appear very pertinent to the present occasion—and yet it will be readily admitted, that occasions of promoting good will and good temper, and the progress of useful truths among our fellow-citizens, should not be omitted. These motives urge me further to observe, that a variety of local and other circumstances, rendered the formation of the judicial department, particularly difficult.

We had become a nation—as such we were responsible to others for the observance of the laws of nations; and as our national concerns were to be regulated by national laws—national tribunals became necessary for the interpretation and execution of them both. No tribunals of the like kind and extent had heretofore existed in this country; from such therefore, no light of experience, nor facilities of usage and habit were to be derived. Our jurisprudence varied in almost every State, and was accommodated to local, not general convenience—to partial, not national policy. This convenience and this policy, were nevertheless to be regarded, and tenderly treated. A judicial controul, general and final, was indispensable—the manner of establishing it, with powers neither too extensive, nor too limited: rendering it properly independent, and yet properly amenable, involved questions of no little intricacy. The expediency of carrying justice as it were to every man's door, was obvious; but how to do it in an expedient manner was far from being apparent. To provide against discord between national and State jurisdictions, to render them auxiliary instead of hostile to each other; and so to connect both as to leave each sufficiently independent, and yet sufficiently combined, was, and will be arduous.

Institutions formed under such circumstances, should therefore be received with candor and tried with temper and prudence. It was under these embarrassing circumstances, that the articles in the constitution on this subject, as well as the act of Congress for establishing the judicial courts of the United States, were made and passed.

Under the authority of that act, this court now sits—its jurisdiction is two-fold civil and criminal: to the exercise of the latter, you, gentlemen, are necessary, and for that purpose are now convened.

The most perfect constitutions—the best governments, and the wisest laws, are vain, unless well administered and well obeyed. Virtuous citizens will observe them from a sense of duty; but those of an opposite description, can be restrained only by fear of disgrace and punishment. Such being the state of things, it is essential to the welfare of society, and to the protection of each member of it, in the peaceable enjoyment of his rights, that offenders be punished.

The end of punishment, however, is not to expiate for offences; but by the terror of example, to deter men from the commission of them. To render these examples useful, policy as well as morality, require not only that punishment be proportionate to guilt, but that all proceedings against persons accused or suspected, should be accompanied by the reflection that they may be innocent. Hence therefore, it is proper that dispassionate and careful enquiry should precede those rigours, which justice exacts, and which should always be tempered with as much humanity and benevolence as the nature of such cases may admit. Warm, partial and precipitate prosecutions, and cruel and abominable executions such as racks, embowellings, drawing, quartering, burning and the like are no less impolitic than inhuman. They infuse into the public mind, disgust at the barbarous severity of government, and fill it with pity, and partiality for the sufferers. On the contrary, when offenders are prosecuted with temper and decency; when they are convicted, after impartial trials, and punished in a manner becoming the dignity of public justice to prescribe, the feelings and sentiments of men, will be on the side of government; and however disposed they may, and ought to be to regard suffering offenders with compassion; yet that compassion will never be unmingled with a due degree of indignation.

We are happy, that the genius of our laws is mild, and we have abundant reason to rejoice, in possessing one of the best institutions that ever was devised, for bringing offenders to justice, without endangering the peace and security of the innocent, I mean that of Grand Juries. Greatly does it tend to promote order and good government, that in every district, there should frequently be assembled a number of the most discreet and respectable citizens in it, who on their oaths are bound to enquire into, and prevent all offences committed against the laws in such district—and greatly does it tend to the quiet and safety of good and peaceful citizens, that no man can be put in jeopardy for imputed crimes, without such previous enquiry and presentment. The extent of your district, gentlemen, which is commensurate with the State, necessarily extends your duty throughout every county in it, and demands proportionable diligence in your enquiries, and circumspection in your presentments.

The objects of your enquiry are, all offences committed against the laws of the United States in this district, or on the high seas by persons now in the district. You will recollect that the laws of nations make part of the laws of this, and of every other civilized nation. They consist of those rules for regulating the conduct of nations towards each other, which, resulting from right reason, receive their obligation from that principle, and from general assent and practice. To this head also belong, those rules or laws which by agreement become established between particular nations, and of this kind are treaties, conventions, and the like compacts. As in private life, a fair and legal contract between two men, cannot be annulled or altered by either, without the consent of the other, so neither can treaties between nations. States and legislatures may repeal their regulating statutes, but they cannot repeal their bargains. Hence it is, that treaties fairly made and concluded, are perfectly obligatory, and ought to be punctually observed. We are now a nation, and it equally becomes us to perform our duties as to assert our rights.

The penal statutes of the United States are few, and principally respect the revenue. The right ordering and management of this important business, is very essential to the credit, character and prosperity of our country. On the citizens at large, is placed the burthen of providing for the public exigencies: Whoever therefore fraudulently withdraws his shoulder from that common burthen, necessarily leaves his portion of the weight to be borne by the others, and thereby does injustice, not only to the government but to them.