THE CASE

OF

THE GENERAL ASSEMBLY

OF

THE PRESBYTERIAN CHURCH

IN THE

UNITED STATES OF AMERICA,

BEFORE THE

Supreme Court of the Commonwealth of Pennsylvania,

IMPARTIALLY REPORTED

BY DISINTERESTED STENOGRAPHERS;

INCLUDING

ALL THE PROCEEDINGS, TESTIMONY, AND ARGUMENTS AT NISI PRIUS, AND BEFORE THE COURT IN BANK,

WITH THE

CHARGE OF JUDGE ROGERS,

THE VERDICT OF THE JURY,

AND

THE OPINION OF CHIEF JUSTICE GIBSON.

THE WHOLE COMPILED AND PREPARED FOR THE PRESS

BY THE

REV. D. W. LATHROP.

PHILADELPHIA:
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1839.

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INTRODUCTION.

In preparing for the press, the report now submitted to the public, the single aim of the editor has been, *accuracy* in the exhibition of the facts, testimony, arguments and decisions, which make up the whole case, as it was actually developed in court.

To accomplish this object, all that could be effected, by unremitting perseverance in the use of the best materials for the purpose, has probably been attained.

No apprehension is entertained that any candid man, of any ecclesiastical party, will find occasion to complain of partiality or favoritism in this report.

The case necessarily involved the discussion, by distinguished civilians, of great principles of law, order, and constitutional and natural rights, which have given to it an importance, rarely if ever attached to a judicial investigation in our country. Eminent lawyers not connected with the case, have even said, that in view of the extensive range, and weighty character of the questions involved, it is the most important judicial case, to be found on the legal records of the world.

Its importance is perhaps not diminished by the condition in which it now stands on the records of the court, by the fact that it is yet *undecided.* Whether or not, this case in its present form, shall ever be prosecuted to an ultimate decision; it is hardly possible, if it be not, that other cases will not arise involving the same principles, and resting, indeed, on the precise facts of this case. So far, the case has elicited two official decisions in the same court, of a diametrically opposite character, and involving opposite legal opinions on points of fundamental import.

One of the parties now claim of right, on their side, the decided opinion officially promulgated, of the judge of the Supreme Court, who presided at the trial, in relation to the *law,* and the verdict of a jury of twelve enlightened freemen on the *facts* of the case, in coincidence with the opinion, as understood and admitted by all parties, of another judge of the same court; while the other side, with equal truth, claim the opposite opinion, both of the law and the facts, of the three other judges, being the majority, and including the chief justice of the same high court; the latter in the regular course of legal authority, suspending the verdict of the jury, super-

ceding the former legal opinion, and granting to the defendants, the privilege of a new trial.

Under these circumstances, not only the two large bodies, each claiming to be "the Presbyterian Church in the United States," but the whole community, and especially all religious denominations in the country, as well as all connected with the legal profession are interested to know the facts, and the arguments on which these opposite conclusions are predicated, while many are desirous, irrespective of any interest in the result, to be acquainted with the testimony relating to the controversy, and to see the arguments, in a case of this magnitude, of gentlemen, so distinguished in their profession, as those who advocated the cause of the respective parties in this suit.

To make the work as perfect as possible in the particulars proposed, no practicable pains have been spared, and a much longer period has been occupied, than, with less regard to accuracy, would have been requisite, and particularly, has the assistance of the counsel in the cause been obtained, whenever it could be, in relation to that which pertained respectively to their own part of the case. In this respect special acknowledgments are due to Josiah Randall and George Wood, Esqs., for the relators, and F. W. Hubbell, Esq., for the respondents at Nisi Prius, and to Wm. M. Meredith and F. W. Hubbell, Esqrs., for the same parties respectively, before the Court in Bank. The argument of Mr. Randall before the Court in Bank is given only in the form of a succint statement, by that gentleman, of the points made in argument, this course having been preferred by him, as his absence, when it was needed for the press, prevented a revision of his argument as reported by the stenographer.

It may not be inappropriate to note the following facts connected with the early history of the Presbyterian Church; facts unquestioned, it is supposed, by all parties in the church, and which may, perhaps, to those unacquainted with them, throw some light on the occasion of the present divisions.

As early as the 6th of April, 1691, the Presbyterian and Congregational denominations in Great Britain, consummated a union of the two denominations, adopting what they called the "HEADS OF AGREEMENT," embracing a few cardinal principles, which were to govern them in their fraternal intercourse.

This Presbyterian and Congregational Union, sent over one of their number, Mr. M'Kemie, as a missionary to the new settlements in America, who, in connexion with Messrs. M'Nish, Andrews, Hampton, Taylor, Wilson and Davis, in 1704, formed the first presbytery in this country, the presbytery of Philadelphia. This presbytery was formed upon the principles which governed the London Association, by which Mr. M'Kemie was sent, and was composed partly of Presbyterian and partly of Congregational ministers and churches. [Mr. Andrews, the first pastor of the first church in Philadelphia, was a decided Congregational Presbyterian. That church was under the care of the presbytery *sixty-four* years, before they elected ruling elders.] This state of things continued until 1716, when the Synod of Philadelphia was formed out of the presbyteries of Philadelphia, New Castle, Snow Hill and Long Island, the last three having grown up after the formation of the first.

The Church of Scotland, instead of imbibing those principles which resulted in the union of 1691, in London, and in the establishing of a modified Presbyterianism in America, solemnly bore their testimony against religious toleration.

In 1724, those ministers from Scotland, who, in the language of Dr. Miller, "were desirous to carry into effect the system to which they had been accustomed in all its extent and strictness," began to insist that the entire system of the Scottish

Church be received in this country. This led to the adopting act of 1729, which embodied the liberal principles of 1691, in such language as follows: "Although the synod do not claim, or pretend to any authority of imposing our faith on other men's consciences, but do profess our just dissatisfaction with, and abhorrence of such impositions, and do not only disclaim all legislative power and authority in the church, being willing to receive one another as Christ has received us to the glory of God, and admit to fellowship in church ordinances, all such as we have grounds to believe that Christ will at last admit to the kingdom of heaven, yet we are undoubtedly obliged to take care that the faith once delivered to the saints, be kept pure and uncorrupt among us, and do therefore agree, that all the ministers of this synod, or that shall hereafter be admitted to this synod, shall declare their agreement in, and approbation of the Confession of Faith, with the Larger and Shorter Catechisms of the Assembly of divines at Westminster, as being in all essential and necessary articles, good forms and sound words, and systems of Christian doctrine, &c. And we do also agree, that the presbyteries shall take care not to admit any candidate but what declares his agreement in opinion with all the essential and necessary articles of said Confession. And in case any minister, or any candidate shall have any scruples with regard to any article of said Confession or Catechisms, he shall declare his sentiments to the presbytery or synod, who shall, notwithstanding, admit him to the exercise of the ministry within our bounds, if they shall judge his scruples or mistakes to be only about articles not essential and necessary in doctrine, worship, or government. And the synod do solemnly agree, that none of us will traduce or use any opprobrious terms towards those who differ from us in those extra essential and not necessary points of doctrine, but treat them with the same friendship, kindness and brotherly love, as if nothing had happened."

In 1730, an increased determination to the more rigid forms of adoption was manifested by the presbytery of New Castle, by the presbytery of Donegal, in 1732, and by a majority of the synod, in 1736, which met with such opposition as to result in the great schism, of 1741, and the organization of the Synod of New York, in 1745.

In 1758, the Synods of New York and Philadelphia were united; and in the 6th article of their union, they agreed to adopt the Confession of Faith, Catechisms and Directory, as they had been adopted in 1729.

In 1766, eight years after the union of the synod, under the name of the Synod of New York and Philadelphia, that body proposed a convention of delegates of the pastors of the Congregational, Consociated and Presbyterian Churches in North America, which was held annually for ten years, when it was interrupted by the American Revolution. In 1788, the General Assembly was organized, and in 1790, the Assembly, "being peculiarly desirous to renew and strengthen every bond of union between brethren so nearly agreed in doctrine and forms of worship, as the Presbyterian and Congregational Churches evidently are, do resolve, that the Congregational churches in New England, be invited to renew their annual convention with the clergy of the Presbyterian Church." This resolution resulted in the plan of correspondence with the Congregational bodies of New England, which still exists, and which provides that "every preacher travelling from one body to the other, and properly recommended, shall be received as an authorized preacher of the gospel, and cheerfully taken under the patronage of the presbytery or association, within whose limits he shall find employment as a preacher."

In 1801, the two denominations produced another Plan of Union, which is the one so often alluded to in this trial, and is fully spread out in the following pages.

One or two errors in regard to matters of fact, obviously undesignedly committed, during the trial, although, of course, the editor is not accountable for them, yet, as they cannot affect the case, or be regarded as interfering with it, it may not be amiss to correct.

When Judge Rogers inquired, if the assent of the General Association of Connecticut had been obtained to the repeal of the Plan of Union, it was replied, that "a communication had been sent to the Association requesting such consent, but no answer had been received." The fact was that a resolution was adopted by the Assembly to that effect, but the request was not presented to the Associa-

tion, the commissioners from the Assembly not being furnished with the minutes for that year.

An error of some of the counsel, in regard to the *profession* of Presbyterial reports, may be corrected by the following statement.

The Presbyterial reports are made out according to forms prescribed and sent down; and the few presbyteries which add to that form a designation, (Con.) for Congregational, do so to show that certain ministers are pastors of Congregational Churches, having no connexion with the presbytery, altogether unlike the class of churches alluded to in the testimony as "initiate, &c.," in connexion with the excinded synods; which churches, in the presbyteries alluded to, are as fully under the care of the presbytery, as any others in their connexion. These presbyteries do not report *at all* the churches not connected with them, although some of their members (ministers) may be pastors of such churches. For example, in the Presbytery of Portage, Rev. Giles Doolittle is reported as SS., (stated supply,) but the church which he supplies, Hudson, a Congregational Church, is not reported at all. So with Rev. Joseph Merriam of the same presbytery, reported as pastor, but his church (Randolph) is not reported at all.

It is perhaps due to the respective parties, and may elucidate the state and prospects of the case, to give the subjoined fact:—

In the Assembly, which met in the first church, May 20th, 1839, Judge Darling, from the committee of twelve, appointed on the 21st day of May, 1838, "to advise and direct in respect to any legal questions and pecuniary interests that might require attention during the ensuing year," reported that previous to the trial before Judge Rogers, at Nisi Prius, the committee were informed by one of their counsel, that John K. Kane, Esq., one of the trustees of the General Assembly, and who was of counsel for the respondents, had stated to him that those he represented were disposed to adjust, amicably and equitably, all matters in controversy in this cause, and had requested him to ascertain what terms the committee would propose, as a basis for an amicable division of the Presbyterian Church, and the final adjustment of all the matters in dispute between the Reformed and Constitutional General Assemblies. Keeping in view the resolution of the General Assembly of 1838, viz.: "That this body is willing to agree to any reasonable measures tending to an amicable adjustment of the difficulties in the Presbyterian church, and will receive, and respectfully consider, any propositions made for that purpose,"—they waived all exceptions which might have been taken to enter into negotiation with, or to making propositions to, an irresponsible individual, and promptly requested their counsel to furnish Mr. Kane with a copy of the following articles.

ARTICLES OF AGREEMENT PROPOSED.

"In order to secure an amicable and equitable adjustment of the difficulties existing in the Presbyterian church in the United States of America, it is hereby agreed by the respective parties, that the following shall be articles on which a division shall be made and continued.

Article I. The successors of the body which held its sessions in Ranstead Court, shall hereafter be known by the name and style of "The General Assembly of the Presbyterian Church in the United States of America:" The successors of the body which held its sessions in the First Presbyterian Church, shall hereafter be known by the name and style of "The General Assembly of the American Presbyterian Church."

Article II. Joint application shall be made by the parties to this agreement, to the legislature of Pennsylvania, for a charter to incorporate trustees of each of the respective bodies, securing to each the immunities and privileges now secured by the existing charter to the trustees of the General Assembly of the Presbyterian Church in the United States of America; subject, nevertheless, to the limitations

and articles herein agreed on; and when so obtained, the existing charter shall be surrendered to the state.

Article III. Churches, ministers, and members of churches as well as presbyteries, shall be at full liberty to decide to which of the said Assemblies they will be attached; and in case the majority of legal voters of any congregation shall prefer to be connected with any presbytery connected with the Assembly to which their presbytery is not attached, they shall certify the same to the stated clerk of the presbytery, which they wish to leave, and their connexion with said presbytery shall thenceforth cease.

Article IV. The Theological Seminary of Princeton, the Western Theological Seminary, the Board of Foreign Missions, the Board of Domestic Missions, the Board of Education with the funds appertaining to each, shall be the property and subject to the exclusive control of the body which according to this agreement, shall be chartered under the title of "the General Assembly of the Presbyterian Church in the United States of America."

This agreement shall not be considered a secession on the part of either body, from the Presbyterian Church in the United States of America, but a voluntary and amicable division of this church into two denominations, each retaining all the ecclesiastical and pecuniary rights of the whole body, with the limitations and qualifications in the above articles specified."

The only reply which the committee received to these propositions was, that they could not be accepted, but that the Old School party would agree that the members of the Constitutional General Assembly, and all who adhered to this General Assembly, should be at liberty to leave the Presbyterian Church without *molestation* from them, and that they should not be called *Seceders*.

The following appears on the minutes of the Assembly which met in Ranstead Court, May 21, 1839:—

Be it *resolved* by the General Assembly of the Presbyterian Church in the United States of America,

I. That this body considers itself and the church at large, bound, as both have been, not only willing, but desirous to adjust all claims against the corporate property of the church, whether legal or equitable, in the most prompt, fair, and liberal manner.

II. That this is especially the case touching any claims which may exist on the part of the four Synods of Utica, Geneva, Genessee, and Western Reserve, declared in 1837 to be no part of the Presbyterian Church: or on the part of those who seceded from the church in 1838; or on the part of any body constituted out of the whole or any part of these elements. And that in regard to all and each of these bodies and persons, the Assembly will faithfully adhere to any pledge or promise, express or implied, which it can justly be construed ever to have made, and will fulfil every expectation which it knowingly allowed to be cherished.

III. The trustees of the Assembly are hereby authorised and requested to do on the part of this Assembly, should occasion offer, whatever is lawful, competent, and equitable in the premises, conformable to the principles and in the manner heretofore laid down* in the minutes of this Assemb y for 1837 and 1838, so far as relates to the corporate property of the church, or any equities springing out of the same.

IV. With reference to all institutions, corporations, congregations, and other public persons or bodies in connexion with us, but holding property for ecclesias-

* An act was adopted by the Assembly in Ranstead Court, May 30th, 1838, directing that minorities of presbyteries, sessions, and churches should be considered as the true presbyteries, in cases when the majority "decline or fail to adhere to the Presbyterian Church on the basis of the Assemblies of 1837 and 1838." The following clause of sec. 5 of that act is all that I find in the minutes of that body, to which allusion can be made, in these resolutions, subsequent to the excinding resolutions of 1837:—

"In regard to the temporal interests of the churches, and the difficulties which may arise on their account, the Assembly advise that, on the one hand, great liberality and generosity should mark the whole conduct of our people, and especially in cases where our majorities in the churches are very large, or our minorities are very small: while on the other hand, it would advise, that providential advantages, and important rights, ought not in any case to be lightly thrown away."—[Ed.]

tical purposes or for religious and benevolent uses, which property is not subject to the control of the Assembly, although the said persons, institutions or congregations may be—in all such cases where difficulties relating to property have arisen or shall arise, in consequence of the long and painful disorders and divisions in our church, we advise all our members and friends to act on the general principles heretofore laid down, and with the spirit of candour, forbearance, and equity which has dictated this act.

V. The Assembly reiterates the declaration that its chief desire, on all this part of our church troubles, is to do even and ready justice to and between all persons and interests over which it has any control or in regard to which it has any duty to perform.

Having endeavoured faithfully to execute the task, reluctantly assumed at the earnest solicitation of others, and at an expense of time and a sacrifice of other interests, which, had they been anticipated, would certainly have prevented the attempt, I might consider myself released from any further obligation respecting it. But I cannot readily dismiss the reflection, that in preparing these pages I have been occupied about controversies, the belligerent contests of *brethren*, with whom I have been associated in the same branch of the church of the Prince of Peace, for about twenty years, and for more than fifteen years in the *ministry of reconciliation*, in the same church. With many of those now ranged in the one and the other of these "hostile bands," I have in former years "taken sweet counsel," as together we contemplated the mild but rich glories of the gospel of peace, or concerted measures for extending its benign ministry among the poor and perishing. If any choose to call it *weakness*, I would not therefore wish to conceal the fact, that though not easily moved to tears, I have, more than once, wept over this painful scene of contention and strife. Compelled, in the revision of the several portions of the following work, to have the subjects, and the occasions of the strife passing under my notice, how often have I most earnestly desired to reach the hearts of those thus ranged in hostility, with the expostulation, "Sirs, ye are brethren!"

Whatever may be the present aspect of the controversy, whatever its immediate results, whatever developments of the imperfections of good men, it may occasion, or whatever unveiling of the deformities of bad men, in the church; JEHOVAH will ultimately vindicate the cause of truth and righteousness. *That* is his cause. Those who are sincerely and intelligently associated with that cause, devoted to its interests, consecrated to its advancement; *they* shall ultimately triumph. That all, who, from any motive, shall look into these pages, may be led to "pray for the peace of Jerusalem," and may "prosper" with those "that love her," is the sincere prayer of their servant for Christ's sake,

D. W. LATHROP.

THE CASE

OF "THE GENERAL ASSEMBLY OF THE PRESBYTERIAN CHURCH IN THE UNITED STATES OF AMERICA,"

BEFORE

THE SUPREME COURT

OF THE COMMONWEALTH OF PENNSYLVANIA.

QUO WARRANTO.

COUNSEL.

For the Relators,

JOSIAH RANDALL, WM. M. MEREDITH, *of Philadelphia, Esquires.*
GEORGE WOOD, *of New York, Esquire.*

For the Respondents,

F. W. HUBBELL, JOSEPH R. INGERSOLL, JOHN SERGEANT, *of Philadelphia, Esquires.*
WM. C. PRESTON, *of South Carolina, Esquire.*

The COMMONWEALTH at the suggestion of JAMES TODD, JOHN R. NEFF, F. A. RAYBOLD, GEORGE W. M'CLELLAND, WILLIAM DARLING, and THOMAS FLEMING,
vs.
ASHBEL GREEN, WILLIAM LATTA, THOMAS BRADFORD, SOLOMON ALLEN, and CORNELIUS C. CUYLER.

Of July Term, 1838. No. 60.

IN THE SUPREME COURT OF PENNSYLVANIA, FOR THE EASTERN DISTRICT.

City and County of Philadelphia, ss.

James Todd, John R. Neff, Frederick A. Raybold, George W. M'Clelland, William Darling and Thomas Fleming, who sue for the Commonwealth in this behalf, come here into the Supreme Court for the Eastern District of Pennsylvania, and for the said Commonwealth give the court here to understand and be informed, that Ashbel Green, William Latta, Thomas Bradford, Solomon Allen and Cornelius C. Cuyler, all of the city and county of Philadelphia, since the twenty-fourth day of May, in the year of our Lord one thousand eight hundred and thirty-eight, have exercised and do still exercise the franchises and privileges of corporators, within the said city and county, without lawful authority, namely, the franchises and privileges of trustees of a certain corporation, called and known by the name of Trustees of the General Assembly of the Presbyterian church in the United States of America: That on the day and year last aforesaid, the above named James Todd, John R. Neff, Frederick A. Raybold, George W. M'Clelland, William Darling and Thomas Fleming, were in due and regular form of law, elected trustees of the said

corporation, by the General Assembly of the Presbyterian Church in the United States of America, agreeably to the provisions of an act of assembly, passed on the twenty-eighth day of March, in the year of our Lord one thousand seven hundred and ninety-nine, entitled, "An act for incorporating the trustees of the Ministers and Elders constituting the General Assembly of the Presbyterian Church in the United States of America," but, notwithstanding the said election, they the said Ashbel Green, William Latta, Thomas Bradford, Solomon Allen and Cornelius C. Cuyler, have for the time aforesaid used, and still do use the franchises, offices, privileges and liberties aforesaid, and during the said time have usurped and do usurp upon the Commonwealth therein, to the great damage and prejudice of the constitution and laws thereof. Whereupon the said relators for the said Commonwealth, do make suggestion and complaint of the premises, and pray due process of law against the said Ashbel Green, William Latta, Thomas Bradford, Solomon Allen and Cornelius C. Cuyler, in this behalf to be made, to answer to the said Commonwealth by what warrant they claim to have, use and enjoy the franchises and privileges aforesaid.

29th May, 1838.

J. RANDALL,
W. M. MEREDITH,
For the Relators.

City of Philadelphia, ss.

Frederick A. Raybold, of the city of Philadelphia, being duly affirmed, says, that the facts set forth and contained in the foregoing suggestion are true to the best of his knowledge, judgment, information and belief.

F. A. RAYBOLD.

Affirmed and subscribed this 29th
May, 1838, before me,
PETER HAY, *Alderman.*

Writ of quo warranto allowed on special cause shown the 31st May, 1838, being returnable 1st Monday in July next.

JOHN B. GIBSON.

Filed June 2, 1838. Exit. June 2, 1838.

Commonwealth of Pennsylvania, Eastern District, ss.

The Commonwealth of Pennsylvania, to the Sheriff of Philadelphia county, greeting: We command you that you summon Ashbel Green, William Latta, Thomas Bradford, Solomon Allen and Cornelius C. Cuyler, so that they be and appear before our Supreme Court of the Commonwealth, for the Eastern District thereof, to be holden at Philadelphia, on the first Monday of July, A. D. 1838, and then and there to show by what authority they claim to exercise the office of trustees of a certain corporation, called and known by the name of Trustees of the General Assembly of the Presbyterian Church in the United States of America, in the county of Philadelphia, or to show by what authority they exercise within the said county, the liberties and franchises following to wit: "That since the 24th day of May, A. D. 1838, have exercised and still do exercise the franchises and privileges of corporators within the said city and county of Philadelphia, without lawful authority, namely, the franchises and privileges of trustees of a certain corporation, called and known by the name of the Trustees of the General Assembly of the Presbyterian Church of the United States of America, and have you then there this writ.

[L. S.] Witness the honourable John B. Gibson, Chief Justice of the said Court, at Philadelphia, second day of June, A. D. 1838.

JOSEPH SMITH, *Prothonotary.*

Endorsed.

Served by leaving a copy of the within writ at the residence of Ashbel Green and Thomas Bradford, in the presence of an adult member of his family, on the 22d day of June, 1838.

Served by giving Solomon Allen and Cornelius C. Cuyler, defendants, notice of

the contents of the writ, and by giving them a true and attested copy thereof, on the 22d day of June, 1838.

So answers,

AMOS PHILLIPS, *D. S.*
JNO. G. WATMOUGH, *Sheriff.*

The Commonwealth at the suggestion of James Todd, and al.
vs.
Ashbel Green, William Latta, Thomas Bradford, Solomon Allen and Cornelius C. Cuyler.

Supreme Court,
July 1838. No. 60.

Enter my appearance for the defendants, de bene esse, with reservation of all objections, because of the writ being returnable on a day in vacation.

J. K. KANE, *for defendants.*
Philada. 3d July, 1838.

To the Prothonotary, S. C. E. D.

Comm. ex rel. Todd and al.
vs.
Green and al.

Supreme Court,
July, 1838. No. 60.

Enter rule on defendants to plead in four weeks or judgment. 3d July, 1838.
P. S. C.

MEREDITH,
for Com.

Filed July 3d, 1838.

Plea of Ashbel Green.

In the Supreme Court of the Commonwealth of Pennsylvania, for the Eastern District, of the term of July, 1838. No. 60.

And now, this thirty-first day of July, in the year of our Lord one thousand eight hundred and thirty-eight, comes the said Ashbel Green, by John K. Kane, his attorney; and protesting that the suggestion filed in this case, is altogether insufficient in law, and that he need not, according to the law of the land, to make answer thereunto; nevertheless, for a plea in this behalf he saith, that the said commonwealth ought not to implead him by reason of the premises in the said suggestion set forth, because he saith, that by the first section of an act of assembly of this commonwealth, passed the twenty-eighth day of March, A. D. 1799, entitled An act for incorporating the trustees of the ministers and elders constituting the General Assembly of the Presbyterian Church in the United States of America, this defendant and certain other citizens of this commonwealth, were made, declared and constituted a corporation and body politic and corporate in law and in fact to have continuance for ever, by the name style and title of Trustees of the General Assembly of the Presbyterian Church in the United States of America; by force of which said act of assembly, he saith that he became lawfully authorized and entitled to exercise with his associates, in that behalf lawfully constituted, the office of one of the trustees of the General Assembly of the Presbyterian Church in the United States of America, and the franchises, liberties and privileges thereunto belonging and appertaining, within the city and county of Philadelphia. And he further in fact saith, that he did thereupon accept and take upon himself the said office, and that he hath ever since, and as well after as before the twenty-fourth day of May, A. D. 1838, exercised and continued to exercise the same in the city and county of Philadelphia, by virtue of the said act of assembly of this commonwealth; all which he is ready to verify, without this, that on the twenty-fourth day of May, A. D. 1838, or at any other time before or since, the relators or any of them were in due and regular form of law elected trustees of the General Assembly of the Presbyterian Church in the United States of America, as they have suggested to this honourable Court. And without this, that by reason of any matter or thing whatsoever, the said office of this defendant and his right to have, exercise and enjoy the same, together with the liberties, franchises and privileges thereunto be-

longing and appertaining, have been in any wise vacated, determined or abridged. Wherefore, this defendant prays judgment, and that the office, liberties, franchises and privileges, by him herein claimed as aforesaid, may be adjudged and allowed to him, and that he may be dismissed and discharged by the court here, of and from the premises above charged upon him, &c.

J. K. KANE,
Attorney for defendant.

Filed July 31, 1838.

Plea of Thomas Bradford.

In the Supreme Court of the Commonwealth of Pennsylvania, for the Eastern District, of the term of July, A. D. 1838. No. 60.

And now, this thirty-first day of July, in the year of our Lord, one thousand eight hundred and thirty-eight, the said Thomas Bradford, one of the above named defendants, in his proper person, comes and protesting that the suggestion filed in this case, is altogether insufficient in law, and that he need not, according to the laws of the land, to make answer thereto; nevertheless, for a plea in this behalf he saith, that the commonwealth ought not to implead him, by reason of the premises in the said suggestion set forth, because he saith, that on the twenty-seventh day of May, A. D. 1822, the General Assembly of the Presbyterian Church in the United States of America, then holding its session in the State of Pennsylvania, to wit, in the city of Philadelphia, *did*, according to the provisions of an act of Assembly of this Commonwealth, passed the twenty-eighth day of March, A. D. 1799, entitled "An act for incorporating the Trustees of the Ministers and Elders constituting the General Assembly of the Presbyterian Church in the United States of America," in due and regular form of law, elect, constitute and appoint him the defendant, to be one of the trustees of the General Assembly of the Presbyterian Church of the United States of America, by force of which election and appointment so made as aforesaid, he saith that he became lawfully authorized and entitled to take upon himself, and with his associates in that behalf lawfully constituted, to exercise and enjoy the office of one of the trustees of the General Assembly of the Presbyterian Church in the United States of America, and the franchises, liberties and privileges thereunto belonging and appertaining within the city and county of Philadelphia. And he further in fact saith, that he did thereupon accept and take upon himself the said office, and that he hath ever since, and as well after as before the twenty-fourth day of May, A. D. 1838, exercised and continued to exercise the same in the city and county of Philadelphia, by virtue of the authority so to him granted by the said election and appointment, and by virtue of the said act of assembly of this commonwealth, all which he is ready to verify. Without this, that on the twenty-fourth day of May, A. D. 1838, or at any other time, before or since the said relators or any of them were in due and regular form of law elected trustees of the General Assembly of the Presbyterian Church in the United States of America, as they have suggested to this honourable Court; and without this, that by reason of any matter or thing whatsoever, the said office of him, this defendant, and his right to have, exercise and enjoy the same, together with the franchises, liberties and privileges thereunto belonging and appertaining, have been in any wise vacated, determined or abridged. Wherefore this defendant prays judgment, and that the office, franchises, liberties and privileges by him herein claimed as aforesaid, may be adjudged and allowed to him, and that he may be dismissed and discharged by the Court here, of and from the premises above charged upon him, &c.

THOMAS BRADFORD.

Filed July 31, 1838.

Replication to the Plea of Ashbel Green.

Com. ex. rel. Todd, and al. *v.* Green and al.	}	Supreme Court, July, 1838. No. 60.

And the said relators, who prosecute for the Commonwealth in this behalf, having heard the plea of the said Ashbel Green, in manner and form aforesaid, above pleaded in bar to the said suggestion for the said Commonwealth, say, that by any

thing in that plea alleged, the said Commonwealth ought not to be barred from having the said suggestion against the said Ashbel, because protesting that the said plea and the matters therein contained, are not sufficient in law to bar the said Commonwealth from having the aforesaid suggestion against the said Ashbel, to which said plea in manner and form above pleaded, the said relators are under no necessity, nor any ways obliged by the law of the land to answer; for replication, nevertheless, the said relators say, that by the said act of Assembly of this Commonwealth, in the said plea above mentioned and referred to, it was among other things enacted, that the said Ashbel Green and seventeen other persons in the said act named, and their successors duly elected and appointed in manner as is thereinafter directed, should be, and they were thereby made, declared and constituted a corporation and body politic and corporate in law and in fact, to have continuance for ever, by the name, style and title of Trustees of the General Assembly of the Presbyterian Church in the United States of America, and that the said corporation and their successors, by the name, style and title aforesaid, should be able and capable in law, all and every matter and thing to do in as full and effectual a manner as any other person, bodies politic or corporate, within this commonwealth might or could do, and that the said corporation should not at any time consist of more than eighteen persons, whereof the said General Assembly, might at their discretion, as often as they should hold their sessions in the state of Pennsylvania, change one-third in such manner as to the said General Assembly should seem proper, which said act of assembly, the persons named therein, afterwards, to wit, on the said twenty-eighth day of March, in the year one thousand seven hundred and ninety-nine accepted, to wit, at the city and county aforesaid. And the said relators in fact say, that on the seventeenth day of May, in the year one thousand eight hundred and thirty-eight, the said General Assembly commenced and held a session at the city of Philadelphia, in the state of Pennsylvania, to wit, at the city and county aforesaid, and thenceforth continued to hold the same there for a long space of time, and that during the last mentioned session thereof, to wit, on the twenty-fourth day of May, in the year last aforesaid, the said General Assembly in pursuance of the provisions of the said act of assembly, and in the due and lawful exercise of the power and authority thereby conferred upon them, to change the said trustees as therein mentioned, chose the said James Todd to be one of the trustees of the General Assembly of the Presbyterian Church in the United States of America, in the place of the said Ashbel Green, and he the said James Todd was thereby then and there in due manner elected and appointed one of the said trustees as aforesaid, in the place of the said Ashbel Green, and the said James Todd then and there accepted and took upon himself the said office, and the said General Assembly thereby then and there amoved, disfranchised and discharged the said Ashbel Green, of and from the office of one of the trustees of the General Assembly of the Presbyterian Church in the United States of America, and of and from the franchises, liberties and privileges thereunto belonging and appertaining; all and singular which said matters and things the said relators are ready to verify and prove as the court shall award: wherefore they pray judgment, and that the said Ashbel may be convicted of the premises above charged upon him, and that he may be ousted and altogether excluded from the said office of one of the trustees of the General Assembly of the Presbyterian Church in the United States of America, so by him claimed in manner aforesaid, &c.

J. Randall,
Meredith,
For Relators.

Filed October 10th, 1838.

Comm. ex rel.
Todd and al.
v.
Green and al.

Supreme Court,

J. 1838. No. 60.

Enter rule on defendants Green, Cuyler, Allen and Bradford, to rejoin in four weeks, or judgment, sec. reg.

W. M. Meredith,
For Relators.

10th Oct. 1838.
To P. S. C.

Replication to the Plea of Thomas Bradford.

Comm. ex rel. Todd and al. *v.* Green and al.	}	Supreme Court, J. 1838. No. 60.

And the said relators who prosecute for the Commonwealth in this behalf having heard the plea of the said Thomas Bradford, in manner and form aforesaid above pleaded in bar to the said suggestion for the said Commonwealth say, that by any thing in that plea alleged, the said Commonwealth ought not to be barred from having the said suggestion against the said Thomas Bradford, because protesting that the said plea and the matters therein contained are not sufficient in law to bar the said Commonwealth from having the aforesaid suggestion against the said Thomas Bradford, to which said plea in manner and form above pleaded, the said relators are under no necessity, nor any ways obliged by the law of the land to answer; for replication, nevertheless, the said relators say, that by the said act of assembly of this Commonwealth, in the said plea above mentioned and referred to, it was among other things enacted that Ashbel Green and seventeen other persons named in the said act, and their successors duly elected and appointed in manner as is thereinafter directed, should be and they are thereby made, declared and constituted a corporation and body politic and corporate in law and in fact, to have continuance for ever, by the name, style and title of Trustees of the General Assembly of the Presbyterian Church in the United States of America, and that the said corporation and their successors, by the name, style and title aforesaid, should be able and capable in law, all and every matter and thing to do in as full and effectual a manner as any other person, bodies politic or corporate within this commonwealth, might or could do, and that the said corporation should not at any time consist of more than eighteen persons, whereof the said General Assembly might at their discretion, as often as they should hold their sessions in the state of Pennsylvania, change one-third in such manner as to the said General Assembly should seem proper, which said act of assembly, the persons therein named, afterwards, to wit, on the said twenty-eighth day of March, in the year one thousand seven hundred and ninety-nine, accepted, to wit, at the city and county aforesaid. And the said relators in fact say, that afterwards, to wit, on the seventeenth day of May, in the year one thousand eight hundred and thirty-eight, the said General Assembly commenced and held a session at the city of Philadelphia, in the state of Pennsylvania, to wit, at the city and county aforesaid, and thenceforth continued to hold the same there for a long space of time, and that during the said last mentioned session thereof, to wit, on the twenty-fourth day of May, in the year last aforesaid, the said General Assembly in pursuance of the provisions of the said act of assembly, and in the due and lawful exercise of the power and authority thereby conferred upon them to change the said trustees as therein mentioned, elected and appointed the said George W. M'Clelland to be one of the trustees of the General Assembly of the Presbyterian Church in the United States of America, in the place of the said Thomas Bradford, and he the said George W. M'Clelland was thereby then and there in due manner elected and appointed one of the said trustees as aforesaid, in the place of the said Thomas Bradford, and the said George W. M'Clelland, then and there accepted and took upon himself the said office, and the said General Assembly thereby then and there amoved, disfranchised and discharged the said Thomas Bradford of and from the office of one of the trustees of the General Assembly of the Presbyterian Church in the United States of America, and of and from the franchises, liberties and privileges thereunto belonging and appertaining; all and singular which said matters and things the said relators are ready to verify and prove as the court shall award. Wherefore they pray judgment, and that the said Thomas Bradford may be convicted of the premises above charged upon him, and that he may be ousted and altogether excluded from the said office of one of the trustees of the General Assembly of the Presbyterian Church in the United States of America, so by him claimed in manner aforesaid, &c.

J. Randall,
Meredith,
For the Relators.

Filed October 10, 1838.

Green et al.
ats.
Commonwealth
ex relatione
Todd, et al.

And the said Ashbel Green, protesting that the said plea of the said relators, &c., in manner and form aforesaid, made and pleaded in reply, and the matters therein contained, are not sufficient in law, &c., and that he need not, nor is he obliged by the law of the land to answer thereto, yet the said Ashbel Green, for a rejoinder to the replication of the said relators, saith, that the General Assembly of the Presbyterian church, in the United States of America, did not choose the said James Todd to be one of the trustees of the General Assembly of the Presbyterian Church, in the United States of America, in the place of the said Ashbel Green, nor was the said James Todd in due manner elected and appointed one of the trustees as aforesaid, in the place of the said Ashbel Green, nor did the said General Assembly amove, disfranchise and discharge the said Ashbel Green, of and from the office of one of the trustees of the General Assembly of the Presbyterian Church, in the United States of America, nor of and from the franchises, liberties and privileges thereunto belonging and appertaining, in manner and form as the said relators have in their said replication alleged, and of this, he the said Ashbel Green puts himself upon the country, wherefore this defendant prays judgment, &c.

F. W. Hubbell.

Filed November 7, 1838.

Green, et. al.
ats.
Commonwealth,
ex relatione
Todd, et al.

And the said Thomas Bradford protesting that the said plea of the said relators, &c., in manner and form aforesaid, made and pleaded in reply, and the matters therein contained are not sufficient in law, &c., and that he need not, nor is he obliged by the law of the land to answer thereto, yet the said Thomas Bradford, for a rejoinder to the replication of the said relators saith, that the General Assembly of the Presbyterian Church, in the United States of America, did not elect and appoint the said George W. M'Clelland to be one of the trustees of the General Assembly of the Presbyterian Church in the United States of America, in the place of the said Thomas Bradford, nor was the said George W. M'Clelland in due manner elected and appointed one of the said trustees as aforesaid, in the place of the said Thomas Bradford, nor did the said General Assembly amove, disfranchise and discharge the said Thomas Bradford of and from the office of one of the trustees of the General Assembly of the Presbyterian Church, in the United States of America, nor of and from the franchises, liberties and privileges thereunto belonging and appertaining in manner and form as the said relators have in their said replication alleged, and of this, he the said Thomas Bradford puts himself on the country, &c., wherefore the said defendant, Thomas Bradford, prays judgment, &c.

F. W. Hubbell.

Filed November 7, 1838.

Comm. ex. rel.
Todd & al.
vs.
Ashbel Green & al.

S. C. J. 1838.

No. 60.

Quo warranto.

Enter the similiter on the several rejoinders of Ashbel Green, Thomas Bradford, Solomon Allen and Cornelius C. Cuyler, and set the issues down for trial.

J. Randall,
W. M. Meredith,
for Relators.

To P. S. C.

7th November, 1838.

Similiter and issues, filed Nov. 7th, 1838.

This cause was tried at the December Term, Second Period, before Hon. Molton C. Rogers, at Nisi Prius, and a special Jury. It commenced on Monday, March 4, A. D. 1839, and occupied twenty days being; committed to the Jury, and their verdict rendered, on Tuesday the 26th of the same month.

The Jurors empanelled were:

Charles Barrington,	William S. Greiner,
Charles Wagner,	Miller N. Everly,
James Simpson,	R. C. Dickinson,
Lewis Quandale,	John Burks,
George Mecke,	S. Baker,
Isaac Jeanes,	Edward R. Myers.

Tuesday morning, March 5th.

The jury having been charged to inquire of the matters of fact contested,

Mr. Randall, for the relators, opened the case as follows:

May it please your Honour—Gentlemen of the Jury: This action is brought in the name of the Commonwealth of Pennsylvania, but it is not to be considered in the light of a criminal proceeding. It does not involve any question as to the moral character of the defendants. The suit, though nominally a prosecution by the Commonwealth, is only a method which the law has prescribed, to determine the rights of individuals. The object of the writ *Quo Warranto* in this case is to try whether certain persons, viz. Dr. Ashbel Green, Thomas Bradford, Esq., Solomon Allen, Esq., and Dr. Cornelius C. Cuyler were, on the 24th day of May, A. D. 1838, trustees, a body incorporated by the Legislature of Pennsylvania, as "The Trustees of the General Assembly of the Presbyterian Church in the United States of America." In order to understand this case, it will be necessary to recur to a portion of the history of the Presbyterian Church.

The first presbytery formed in the United States was the Presbytery of Philadelphia. In the year 1758, there existed two synods, the Synod of New York and the Synod of Philadelphia; in that year they united, forming an ecclesiastical body, called the Synod of New York and Philadelphia. This organization continued until the year 1788, when, in the place of this general synod, was instituted what was termed the General Assembly of the Presbyterian Church in the United States of America, the first meeting of which was held in the city of Philadelphia, on the third Thursday of May, 1789. On the 28th day of March, 1799, the Legislature of Pennsylvania passed an act incorporating certain persons therein mentioned, under the name of "The Trustees of the General Assembly of the Presbyterian Church in the United States of America." The sixth section of this act is as follows:

"That the said corporation shall not, at any time, consist of more than eighteen members; whereof, the said General Assembly may, at their discretion, as often as they shall hold their sessions in the State of Pennsylvania, change one-third, in such manner as to the

said General Assembly shall seem proper: And the corporation aforesaid shall have power and authority, to manage and dispose of all moneys, goods, chattels, lands, tenements, and hereditaments, and other estate whatsoever committed to their care and trust, by the said General Assembly; but in cases where special instructions for the management and disposal thereof, shall be given by the said General Assembly in writing, under the hand of their clerk, it shall be the duty of the said corporation, to act according to such instructions: *Provided*, said instructions shall not be repugnant to the constitution and laws of the United States, or to the constitution and laws of this Commonwealth, or to the provisions and restrictions in this act contained."

The lowest court of judicatory known to the Presbyterian Church is the session. This primary ecclesiastical body consists of the pastor, or pastors, and the ruling elders of a particular congregation, such elders being chosen from among the male members of the church, and holding their office for life. The next court is the presbytery, which consists of all the ministers, and one ruling elder from each congregation, within a certain district; at least three ministers, however, and as many elders as are present being necessary to constitute the body. The next superior judicatory is the synod, which includes a number of presbyteries, at least three, and is composed of all the ministers, and of representative elders, one from each church within its bounds. The highest tribunal is the General Assembly, which is entirely a representative body, consisting of ministers and elders delegated from the various presbyteries. The representation of each being in proportion to the number of its constituent number of ministers within its bounds, each presbytery being entitled to one minister and one elder, and to two additional commissioners when the number of ministers exceeds twenty-four, and so in proportion for each successive twenty-four ministers, to two additional commissioners of like character. The synods, as such, have no representation in the General Assembly; they are courts superior to the presbyteries in certain points, as in the right of trying appeals from the latter, yet they are passed by in the organization of the Assembly, which is composed of the immediate representatives of the presbyteries.

In the year 1803, the Synod of Albany was created, by a union of the Presbyteries of Oneida, Albany and Columbia: and in 1812 this synod was divided into the two Synods of Albany and Geneva, the latter comprising within its bounds the Presbyteries of Onondaga, Cayuga and Geneva. The Synod of Geneva thus formed, was itself divided in the year 1821, the Presbyteries of Niagara, Genessee, Rochester and Ontario, then component parts of that body, being erected into a separate synod called the Synod of Genessee. In the year 1825 the Synod of Pittsburgh was divided and the Presbyteries of Grand River, Portage and Huron were constituted the Synod of the Western Reserve. In 1829, the Synod of Albany was a second time divided, and the Presbyteries of Ogdensburg, Watertown, Oswego, Oneida and Otsego, separated therefrom, were constituted a new synod, called the Synod of Utica.

We have thus traced the formation of the Synods of Utica, Geneva, Genessee and Western Reserve—the four synods to which, in the progress of this cause, your attention will be particularly directed. The presbyteries constituting these synods, continued to act under the General Assembly for many years; they were always recognized as parts of the Presbyterian Church, they were represented in the General Assembly, the officers of that body being sometimes chosen from their members, and funds being collected among them, were paid into the common treasury.

Thus matters continued until differences of opinion crept into the church, which, however, it was at first hoped would not destroy its unity or its peace. But they increased—two conflicting parties divided the General Assembly, and the terms Old and New School began to be applied respectively to them; which terms we shall employ for the purpose of description, without, however, intending to admit that those whom we represent have in any respect departed from the original Presbyterian faith.

For some years these two parties continued nearly equal. In 1831, 2, 3 and 4, our Old School brethren, for as brethren we still regard them, were a minority in the General Assembly. In 1835, they had a majority; in 1836, the New School were again a majority. This led to the adoption of a project by the Old School party, to separate from their brethren with whom they could not accord; and in May, 1837, a meeting of that party was held in Philadelphia, for deliberation on this project, and all the preliminary arrangements were made by the Old School party for a voluntary separation or secession. But in the Assembly of that year, they unexpectedly found themselves a majority, and this state of things changed their whole plan of action. At the meeting of the Assembly, a proposal of separation was made by the Old School, on their own terms, securing to them the name and succession; and to force a compliance with this proposal, the purpose of cutting off from the church a sufficient number of their opponents, to place themselves in a decided majority, was held out as a punishment to be inflicted on the New School, if they would not consent to the proposed separation. The New School party were willing to entertain the proposal, and to enter into a negotiation on the subject; and the terms which they offered are in our opinion most equitable, but they were refused, and the plan of excision resolved upon.

The Old School were determined to secure a future majority in the General Assembly. Their partisans were told plainly by the gentleman who was their master spirit in all these movements, that unless they improved the opportunity then offered, it might never again occur. Accordingly, they proceeded to the work of destruction, and cut off from the church the four synods above named —Utica, Geneva, Genessee and Western Reserve; by this act, casting out from their communion five hundred and nine ministers. five hundred and ninety-nine churches, and fifty-seven thousand seven hundred and twenty-four communicants. In several cases, reverend fathers of the church, who had reached the patriarchal limit of three-score and ten, were excluded; and this by a body, of

which the chief actors had been but a few years in the church. Dark as are the pages of ecclesiastical history, it furnishes no parallel to these proceedings.

Perhaps there is no part of the Presbyterian form of church government more wisely and carefully guarded, than that which provides for cutting off or expelling a member. For every such case a plan of proceeding is circumstantially prescribed. There must always be an accusation of crime, witnesses and proof; and above all, a regular trial, giving a full opportunity to the party accused to face his accuser, if there be one, and to speak in his own defence. To exhibit fully to you, gentlemen, the care with which this right is guarded, I will advert to the Form of Government and Discipline adopted by the Presbyterian Church, for the rules in relation to this matter. Chapter fourth, of the Book of Discipline, is devoted to the subject of Actual Process. Some of its provisions I will read.

[Mr. Randall then read different parts of the chapter referred to, as also of the succeeding one, which prescribes the form of "Process against a Bishop or Minister," to show how precise and strict were the rules on this point. They will be found in full in a subsequent part of this report. They provide for two modes in which an offence may be brought before a judicatory—by an individual appearing as accuser, or by common fame; enjoin great caution in receiving accusations from malicious, interested and otherwise improper persons; require a copy of the charge, with the names of the witnesses to be given to the accused, and notice to all parties concerned; that the trial shall be put off until the meeting of the judicatory next succeeding that at which the accusation is preferred; that the charge shall be made with all possible precision as to time, place and circumstances; and that the trial shall be fair and impartial, the witnesses being examined in the presence of the accused, who are permitted to question them; and prescribe the manner and degree of punishment to be inflicted, whether admonition, rebuke, or exclusion. Process against a Gospel minister is required always to be entered before the Presbytery of which he is a member.]

These are the provisions of the Book of Discipline; but widely different were the proceedings in the case before us! There was no accuser, no accusation. Notice was not given to the parties thus disciplined. In fact, the first information carried to the great mass of Presbyterians who inhabit the proscribed districts was, that they had been cut off, excluded from the communion of their church. Even the names of the individuals who moved and seconded one of the excinding resolutions are not recorded in the published minutes of the Assembly.

The ground for these proceedings of excision, upon which the Old School party rely, is the unconstitutionality of a certain Plan of Union, entered into in the year 1801, between the General Assembly of the Presbyterian Church, and the General Association of the State of Connecticut; a plan, by which, as they contend, Congregationalists have been received into the Presbyterian communion, and under the aid of which, they allege the four excinded

synods to have been formed. But we shall show you that this was only a plan of fellowship, of the same character as that adopted with the General Association of New Hampshire, Vermont, Massachusetts, the Associate Reformed Church and Dutch Reformed Church, both before and after the Plan of Union in 1801, and that not a single elder, minister, church, or presbytery has been, or ever could be admitted under its operation.

By its terms it can have no operation on a minister until he shall have been previously ordained as a Presbyterian minister. The Plan of Union authorized Presbyterian ministers to preach to a Congregational church, and in case of dispute between the pastor and his people, authorized a voluntary tribunal to adjust it by arbitrament. But it could in no manner affect or operate upon the admission of a minister or church into the presbytery, synod or General Assembly; the two subjects had no connexion. Under the plan a small proportion of ministers were settled over Congregational churches; that number has been, and is, yearly diminishing, and in the three excinded synods of New York is now almost extinct. Thus, gentlemen, you will perceive, that the General Assembly in 1801, authorize Presbyterian ministers to preach to Congregational churches, and in 1837 expel them for obeying their own resolution, and to increase the unequalled obliquity of the act, they excind every minister, communicant or church, that respectively may live or be located within the bounds of the synod, where a Presbyterian minister has, in obedience to their own authority, preached to a Congregational church.

We shall further exhibit, gentlemen, the unjust effect of the excinding acts. The synods have local bounds. Accordingly, therefore, by these resolutions, it becomes a crime for a Presbyterian to live within the proscribed districts. The mere circumstance of residence makes an individual, or ecclesiastical body, heretical or otherwise. While a minister, who had entered into the communion of the church, and received his ordination within the bounds of one of those synods, but who has removed to some other district, before the excision, remains in good standing, another, ordained by a body still acknowledged as strictly Presbyterian, has by entering the infected region, lost the right of fellowship, and is excinded.

The practical operation of these excinding resolutions is the local desecration of a whole region of country, about two thirds of the state of New York, and a portion of the state of Ohio. It was purely local, or geographical, and had the Rev. gentleman now before us, (Dr. Green,) removed before 1837 to any part of this expatriated country, he would have been cut off among the rest. The General Assembly of 1837 did not, with any consistency, carry out its plan of operation, into every case to which it was legitimately applicable. At one blow these four synods were excluded, while other bodies, equally obnoxious to the charges brought against them, were not touched, and still remain in full communion. The Synods of South Carolina and Georgia should have been excinded, if the Old School party had wished to be consistent and impartial. The Synods of Pittsburgh and New Jersey equally

deserved the same fate. And the parent Synod of Albany was suffered to escape, although obnoxious to the very charges under which its offspring was cut off. The case of the Synod of the Western Reserve is still more extraordinary. It was erected out of the Synod of Pittsburgh, and formerly included what is now the Synod of Michigan. In the course of time the Synod of Michigan was created, and while the Synod of the Western Reserve was cut off, those of Pittsburgh and Michigan were left untouched. The Assembly first abrogated the Plan of Union, and then declared that this plan having been unconstitutional and void from the beginning, no rights had ever been acquired by it; and therefore that the four synods, which were alleged to have been formed under its operation, had never been parts of the Presbyterian church. Yet the same consequences were not visited on other synods, standing in precisely the same situation. If any circumstance were wanting to render this proceeding more unjust, it was, that the General Assembly had, in 1835, repealed prospectively the Plan of Union of 1801, reserving intermediate rights acquired under it.

Thus far the work of excision was complete; but it was necessary to extend the operation of the act into the Assembly of 1838, in order to make it of any avail. It is the duty of the clerks of that body, who continue in office from year to year, during the pleasure of the Assembly—as a Committee of Commissions, to examine the commissions of the members, and report at the opening of the session, those duly elected. They are, in this matter, but ministerial, or executive officers, bound to act according to the constitution and laws of the church. It was feared that the clerks of 1837, in assisting in the organization of the next General Assembly, might refuse to acknowledge the legality of the resolutions of that year, excluding a part of the constituency of the Assembly, and might receive the commissions of delegates coming from within the bounds of the excinded synods. A pledge was therefore required from these clerks, that they would carry out the illegal acts of 1837, in the new organization of 1838. But no minute of this proceeding—of this pledge demanded and given, is to be found upon the published minutes of the Assembly of 1837.

At the time appointed in 1838, commissioners from the various presbyteries in the United States, including those coming from the four excinded synods, met as usual, in this city. The latter, with the rest, presented their commissions to the Stated and Permanent Clerks, and demanded that their names should be enrolled. But these officers had already been pledged to a course forbidding the reception of these commissions; and they accordingly refused.

Next, all the commissioners met together in the Seventh Presbyterian Church—the place appointed for the meeting of the Assembly of 1838. It was the duty of Dr. Elliott, the moderator of the last year, to preach a sermon at the opening of this Assembly, and preside during its organization, until the election of a new moderator. After the customary religious services, he accordingly took the chair. When the body was about to be organized, Dr. Patton,

a commissioner from the Third Presbytery of New York, rose, stating that he wished to offer certain resolutions, which he held in his hand. The Moderator declared him out of order. Dr. Patton appealed from his decision, and the Moderator declared the appeal also out of order, and refused to put the question upon it to the house, saying that the first business in order was the report of the clerks upon the roll. Dr. Patton then took his seat, and the clerks proceeded with their report. This being concluded, the Moderator announced, that if there were any commissioners present whose names had not been enrolled, that was the time for them to present their commissions. Upon this call, Dr. Mason, also a delegate from the Third Presbytery of New York, rose, and holding in his hand the commissions from the excinded synods, tendered them to the moderator, informing him that they had been presented to the clerks, and by them refused, and moved that the roll should be completed by the addition of the names contained in these commissions. The Moderator declared this motion also out of order, though it was in answer to his own call, and though the report upon the roll had then been concluded. Dr. Mason respectfully appealed from the decision: his appeal was seconded; but the Moderator, as before, declared it out of order, and declined putting the question to the house, that it might judge of the correctness of his decision.

Under these circumstances, Dr. M'Dowell, and Mr. Krebs, acting as the Committee of Commissions, having violated their duty, and Dr. Elliott, as Moderator, having upheld them in their illegal course, and created himself an autocrat—I use the term without intending any personal disrespect—exercising the illimitable power of determining every question, and every right, without admitting any appeal from his decision to the house, of which they all were but ministerial officers, it became absolutely necessary to depose these officers, in order to secure a constitutional organization of the Assembly. Accordingly, at this period, the Rev. John P. Cleveland, a commissioner from the Presbytery of Detroit, rose, and stated the difficulty that had occurred, and the necessity that a constitutional organization should be then and there effected, moved that Dr. Beman, of the Presbytery of Troy, should be temporary Moderator, and put the question to all the commissioners present. The motion was almost unanimously carried—there being, however, a few votes in the negative. The Assembly thus constituted, Dr. Fisher was chosen Moderator, and Dr. E. Mason and the Rev. E. W. Gilbert were chosen Clerks, and then adjourned to the First Presbyterian church of this city, where it sat in the regular discharge of its ordinary duties, for nearly two weeks.

We shall contend that the original excision of the four Western Synods was void, unconstitutional, and unlawful, and without precedent or authority; that the Rev. Dr. Elliott had, in attempting to carry into effect, in the organization of the Assembly of 1838, the illegal acts of the Assembly of 1837, forfeited his right to the moderator's chair: in short, that there was an imperative necessity for his removal, as also for the removal of the clerks, who, equally with him, had usurped an authority unconstitutional.

The General Assembly, organized as I have described, held its session in the First Presbyterian church, and in the course of its proceedings, on the twenty-fourth of May, 1838, according to the provisions of section 6, of their charter of incorporation, elected six trustees, namely: James Todd, Frederick A. Raybold, Geo. W. McClelland, William Darling, Thomas Fleming, and John R. Neff, respectively, in the place of Dr. Ashbel Green, William Latta, Thomas Bradford, Solomon Allen, Dr. Cornelius C. Cuyler, and George C. Potts. The question, gentlemen, that you are to decide is, whether the gentlemen last mentioned were lawfully removed from their places by such election—whether they have a right to exercise the offices which they continue to hold and exercise. In other words, you have to decide, whether the Assembly constituted, as above explained, which met in the First Presbyterian church, or the body which remained in the Seventh Presbyterian church, was the true and only General Assembly.

One feature of this case, gentlemen, I hope will be remembered during this inquiry. Our object is to preserve the unity of the church. We do not deny the rights of our opponents; but we deny their power to exclude from the communion of the church, without charge, accusation, or trial, the body of Presbyterians who reside within the bounds of the four excinded synods. We come into court reluctantly, and our effort is, not to take away the rights of others, but to preserve our own inviolate.

Mr. *Randall,* having concluded, proceeded to read the pleadings in the case, of which the following is an abstract.

The suggestion verified by the affidavit of one of the relators, *Frederick A. Raybold, Esq.*, on which the writ was issued, sets forth that the defendants have exercised, since the twenty-fourth day of May, 1838, and do still exercise the franchises and privileges of trustees of the General Assembly, without lawful authority, since, on the day mentioned, the relators were duly elected to that office; and prays that the said defendants may be made to answer, by what warrant they claim their places. To this, Ashbel Green pleads his appointment under the original act of incorporation, and Thomas Bradford, Cornelius C. Cuyler, and Solomon Allen, in separate pleas, their regular election by the General Assembly; and all deny that any thing has happened to determine their offices. Then follow replications to these pleas, setting forth the choice of James Todd, George W. McClelland, Thomas Fleming, and William Darling, in the place of the four defendants named, according to the provisions of the act of incorporation. The rejoinders deny such choice, and on this fact issue is joined. William Latta, though his name appears in the suggestion and in the writ, was not served with a process, and takes no part in the pleading.

[The pleadings, in full, are placed on preceding pages, 12 to 19, of this Report.]

The plaintiffs in support of this case, then read in evidence, the Act of the Legislature of Pennsylvania, passed May 28th, 1799. (Assembly's Digest, pp. 192 to 198,) entitled,

"An Act for incorporating the Trustees of the Ministers and Elders, constituting the General Assembly of the Presbyterian Church in the United States of America."

Whereas the ministers and elders forming the General Assembly of the Presbyterian Church in the United States of America, consisting of citizens of the state of Pennsylvania, and of others of the United States of America aforesaid, have by their petition represented, that by donations, bequests or otherwise, of charitably disposed persons, they are possessed of moneys for benevolent and pious purposes, and the said ministers and elders have reason to expect farther contributions for similar uses; but from the scattered situation of the said ministers and elders, and other causes, the said ministers and elders find it extremely difficult to manage the said funds in the way best calculated to answer the intention of the donors; Therefore,

Sec. 1. Be it enacted by the Senate and House of Representatives of the Commonwealth of Pennsylvania, in General Assembly met, and it is hereby enacted by the authority of the same, That John Rogers, Alexander McWhorter, Samuel Stanhope Smith, Ashbel Green, William M. Tennant, Patrick Allison, Nathan Irwin, Joseph Clark, Andrew Hunter, Jared Ingersoll, Robert Ralston, Jonathan R. Smith, Andrew Bayard, Elias Boudinot, John Nelson, Ebenezer Hazard, David Jackson, and Robert Smith, merchant, and their successors duly elected and appointed in manner as is hereinafter directed, be, and they are hereby made, declared and constituted, a corporation and body politic and corporate, in law and in fact, to have continuance for ever, by the name, style, and title of "Trustees of the General Assembly of the Presbyterian Church in the United States of America;" and by the name, style, and title aforesaid, shall, for ever hereafter, be persons able and capable in law as well to take, receive and hold, &c. &c. &c.

Sec. 2. Provides as to gifts and devises to the said corporation.

Sec. 3. Relates to the corporate seal.

Sec. 4. Relates to powers and liabilities of the corporation to sue and be sued.

Sec. 5. Authorizes said corporation to make by-laws.

Sec. 6. And be it further enacted by the authority aforesaid, That the said corporation shall not, at any time, consist of more than eighteen persons: whereof the said General Assembly may, at their discretion, as often as they shall hold their sessions in the state of Pennsylvania, change one-third, in such manner as to the said General Assembly shall seem proper: And, the corporation aforesaid, shall have power and authority to manage and dispose of all moneys, goods, chattels, lands, tenements and hereditaments, and other estate whatsoever, committed to their care and trust by the said General Assembly, but in cases where special instructions for the management and disposal thereof, shall be given by the said General Assembly in writing, under the hand of their clerk, it shall be the duty of the said corporation, to act according to such instructions: *Provided*, the said instructions shall not be repugnant to the constitution and laws of the United States, or to the constitution and laws of this commonwealth, or to the provisions and restrictions in this act contained.

Sec. 7, 8, 9 and 10 relate to the proceedings and powers of the said corporation.

The plaintiffs then read in evidence the Act of the General Assembly itself (Digest, p. 198,) prescribing the mode of choosing Trustees, in accordance with the charter.

The mode of choosing the trustees, adopted in 1801.

The General Assembly took into consideration the important concern of voting for trustees of the General Assembly of the Presbyterian Church in the United States, agreeably to the provision made in the sixth section of the act of the Legislature constituting the charter of incorporation. After maturely discussing this subject, the Assembly *resolved*, that it is expedient to adopt and recommend the following system:—1. That when this subject is called up annually, a vote shall first be taken whether, for the current year, the Assembly will, or will not, make any election of members in the board of Trustees. 2. If an election be determined on, the day on which it shall take place shall be specified, and shall not be within less than two days of the time at which such an election shall be decided

on. 3. When the day of election arrives, the Assembly shall ascertain what vacancies in the number of the eighteen trustees incorporated, have taken place by death or otherwise; and shall first proceed to choose other members in their places. When this is accomplished, they shall proceed to the trial whether they will elect any, and if any, how many of that third of the number of the trustees which by law they are permitted to change, in the following manner: viz. The list of the trustees shall be taken, and a vote be had to fill the place of him who is first on the list. In voting for a person to fill said place, the vote may be given either for the person who has before filled it, or for any other person: if the majority of votes shall be given for the person who has before filled it, he shall continue in office; if the majority of votes shall be given for another person, this person is a trustee, duly chosen in place of the former. In the same form the Assembly shall proceed with the list, till they have either changed one-third of the trustees, (always including in the third those who have been elected by the sitting Assembly to supply the places that become vacant by death or otherwise,) or by going through the list, shall determine that no further alterations shall be made.—Vol. i. p. 252.

The plaintiffs then gave in evidence the constitution of the Presbyterian Church, with the form of government and discipline, as amended and ratified by the General Assembly in May, 1821, and the report of the committee as to the ratification of the amendments, from the Assembly's minutes of 1821, page 5.

The minute in relation to the adoption of the amended constitution, is as follows:

The presbyteries were called upon to report their several decisions on the revised form of government and forms of process, sent down by the last Assembly, and their reports being read, were committed to Dr. McDowell and Mr. Chester, to ascertain precisely the opinions of the several presbyteries on the subject, and report their decision tot his Assembly. * * *

The Committee appointed to ascertain the decisions of the several presbyteries on the subject of the revised form of government, and forms of process, and the amendments to the directory, sent down by the last Assembly, reported, and their report being read, was adopted, and is as follows, viz:

That there are connected with this Assembly, sixty-two presbyteries; that therefore the affirmative vote of thirty-two presbyteries is necessary to make any one article binding; that forty-five presbyteries have reported to the Assembly their decisions on each chapter, section, and article; that from these reports it appears that most of the articles have been adopted unanimously, and that every chapter, section, and article, has been adopted by a majority of the whole number of presbyteries; that the smallest number of votes given for any one article is thirty-seven; that, therefore, the whole of the amendments sent down by the last Assembly to the presbyteries is ratified, and becomes a part of the constitution.

In relation to this subject, *Mr. Randall* said—

Previous to the year 1821, when the revised or amended constitution, including the Form of Government, was adopted by the presbyteries, the Synod of Geneva had been erected out of a part of the Synod of Albany, and then comprised the presbyteries of Onondaga, Bath, Geneva, Ontario, Niagara, Rochester, and Genessee.

The presbyteries of St. Lawrence, Oneida, and Otsego, *now* within the bounds of the Synod of Geneva, then belonged to the Synod of Albany; and the presbyteries of Grand River and Portage, *now* belonging to the Synod of the Western Reserve, were part of the Synod of Pittsburgh. It therefore appears, that of the *twenty-eight* presbyteries at present within the bounds of the four excinded synods, *fourteen*, having been erected prior to that time, participated in the adoption of the amended constitution, as is seen by the minutes of the Assembly given in evidence.

The plaintiffs then read the following sections from the form of government:

Chap. X. *Of the Presbytery.* Sec. 2. A presbytery consists of all the ministers, with one ruling elder from each congregation within a certain district. (Page 357.)

Sec. 7. Any three ministers, and as many elders as may be present, belonging to the presbytery, being met at the time and place appointed, shall be a quorum competent to proceed to business. (Page 358.)

Chap. XI. *Of the Synod.* Sec. 1. As a presbytery is a convention of the bishops and elders within a certain district; so a synod is a convention of the bishops and elders within a larger district, including at least three presbyteries.

The ratio of the representation of elders in the synod is the same as in the presbytery. (Page 361.)

Sec. 2. Any seven ministers belonging to the synod, who shall convene at the time and place of meeting, with as many elders as may be present, shall be a quorum to transact synodical business, provided, not more than three of the said ministers belong to one presbytery. (Page 362.)

Chap. XII. *Of the General Assembly.* Sec. 1. The General Assembly is the highest judicatory of the Presbyterian Church. It shall represent in one body, all the particular churches of this denomination; and shall bear the title of *The General Assembly of the Presbyterian Church in the United States of America.* (Page 363.)

Sec. 2. The General Assembly shall consist of an equal delegation of bishops and elders from each presbytery, in the following proportion, viz.: each presbytery consisting of not more than 24 ministers, shall send one minister and one elder: and each presbytery consisting of more than 24 ministers shall send two ministers and two elders; and in the like proportion for every 24 ministers in any presbytery; and these delegates so appointed shall be styled *Commissioners to the General Assembly.*

Sec. 3. Any fourteen or more of these commissioners, one-half of whom shall be ministers, being met on the day, and at the place appointed, shall be a quorum for the transaction of business. (Page 364.)

The plaintiffs than read in evidence the following resolutions of the Assembly creating synods:

Synod of Albany. Minutes, Vol. 2, 1803, *page* 17.

Resolved, That the Presbyteries of Albany, Oneida and Columbia, be, and they hereby are, constituted and formed into a synod, to be known by the name of the Synod of Albany; that they hold their first meeting in the Presbyterian Church of Albany on the first Wednesday of October next, at 2 o'clock P. M., and be opened with a sermon by the Rev. Jedediah Chapman; or, in case of his absence, by the next senior minister who may be present; and that they afterwards meet on their own adjournments.

Synod of Geneva. Minutes. Vol. 3, *page* 23.

The following application from the Synod of Albany, was overtured by the committee of overtures, that the said synod be divided in the manner following, viz: That the Presbyteries of Londonderry, Columbia, Albany and Oneida, form the Eastern division, and be constituted a synod, to be called and known by the name of the Synod of Albany; and that they hold their first meeting in the Presbyterian Church in the city of Albany, on the first Wednesday in October next, at 11 o'clock, A. M., and that the meeting be opened with a sermon by the Rev. Samuel Blatchford, D. D., and in case of his absence, then by the oldest minister present. That the Presbyteries of Onondaga, Cayuga and Geneva, form the Western division, and be constituted a synod; to be called and known by the name of the Synod of Geneva; and that they hold their first meeting in the first Presbyterian Church in Geneva, on the first Wednesday in October next, at 11 o'clock A. M., and that the meeting be opened with a sermon by the Rev. David Higgins, and, in case of his absence, then by the oldest minister present.

Resolved, That the Synod of Albany be divided as above; and it hereby is accordingly divided.

Synod of Genessee. Minutes, 1825, *Vol.* 5, *page* 10.

The Synod of Geneva requested that said synod be divided in the following manner, and their request was granted, viz:

That the Presbyteries of Niagara, Genessee, Rochester and Ontario, be erected

into a synod, to be known by the name of the Synod of Genessee, and that they hold their first meeting at Rochester, on the third Tuesday of September next, at 2 o'clock P. M., and be opened with a sermon by the Rev. Ebenezer Fitch, D. D., or, in case of his absence, by the senior minister present, and afterwards meet on their own adjournments; that the remaining presbyteries constitute the Synod of Geneva, and that they meet on their own adjournments.

Synod of the Western Reserve. Minutes, 1825, *Vol. 5, page* 263.

Application was made, through the committee of overtures, to erect a new synod, to be composed of certain presbyteries in the Synod of Pittsburgh. The Assembly, after hearing the papers in relation to this application read, and duly considering the subject,

Resolved, That the Presbyteries of Grand River, Portage and Huron, be, and they hereby are, detached from the Synod of Pittsburgh, and constituted a new synod, to de designated by the name of the Synod of the Western Reserve; that they hold their first meeting at Hudson, on the fourth Tuesday of September next, at 11 o'clock A. M., and that the Rev. Joseph Badger preach the synodical sermon, and act as moderator till another shall be chosen; or, in case of his failure, then the oldest minister present shall officiate in his place.

Synod of Utica. Minutes of 1829, *page* 373, *Vol. 5.*

Overture No. 3,—an application from the Synod of Albany, for the erection of a new synod was taken up, when it was resolved that the request be granted agreeably to the request of the synod, the Presbyteries of Ogdensburg, Watertown, Oswego, Oneida, and Otsego are hereby constituted a new synod, to be called the Synod of Utica.

Resolved, That the Synod of Utica hold their first meeting in Utica, in the First Presbyterian church, on the Tuesday preceding the third Wednesday of September next, at 7 o'clock, P. M., and that the Rev. Israel Brainerd preach the opening sermon, and preside until a moderator is chosen, and in case of his absence, these duties shall devolve on the senior minister present.

Plaintiffs' counsel then read extracts from the records of the Assembly, showing that *it had extended its jurisdiction over the territory of the excinded synods for thirty-six years;* that the validity of their presbyteries, in all this time, had not been questioned.

In 1801, (Minutes, page 18, vol 1,) the Assembly appointed missionaries to labour in the region embraced in those synods.

1802, (id. p. 8,) the Assembly divided the Presbytery of Albany, and formed the Presbytery of Oneida.

1802. Rev. J. Chapman, the Assembly's missionary, reported to that body that he had organized three churches in the Genessee country. The General Assembly appointed a missionary to labour within [what is now the territory of the Synod of Geneva.] (id. page 12.)

1803. Oneida Presbytery reported as having done its duty in contributing to the Assembly's funds for missions. The Presbytery of Oneida, with those of Albany and Columbia, were this year erected into the Synod of Albany by the General Assembly. (id. page 16.)

1804. The Assembly appointed missionaries to labour in Western New York, and the Presbytery of Oneida contributed to its contingent fund. (id. 61, 69.)

1805. Oneida Presbytery contributed to the contingent funds of the Assembly. This presbytery also reported its approval of certain amendments to the constitution. The Assembly divided this presbytery, and formed out of it the presbyteries of "Oneida" and "Geneva." (Vol. 2, pages 82, 96, 108.)

1806. The Oneida Presbytery contributed to the General Assembly's missionary funds. The Assembly order its Committee of Missions to cause a number of copies of the *Plan of Union* between Presbyterians and Congregationalists to be printed and delivered to the missionaries sent to Western New York. (id. 141.)

1807. The Oneida Presbytery contribute to the missionary funds of the General Assembly. (id. 173.)

1808. The Presbyteries of Oneida and Geneva contribute to the same funds; also to the commissioners' fund. In the minutes of this year there is a record of the Assembly's approval of the conduct of these presbyteries. (id. 188, 189, 197.)

In 1809, The presbyteries just named contribute to the Assembly's missionary, education and commissioners' funds. (id. 220, 230, 252.)

In 1810, the same presbyteries are reported as having done their duty in raising funds for the Assembly. (id. 278, 288.)

In 1811, the Presbyteries of Oneida, Geneva, Onondaga and Cayuga, contribute to the Assembly's missionary and commissioners' funds. (id. 353.)

In 1812, the same presbyteries contribute to the Assembly's funds for missions, &c. (vol. 3, page 30.)

In 1813, they do the same. The Assembly also acknowledges the receipt of funds for the Theological Seminary at Princeton. (vol. 3, pp. 85, 101.)

In 1814, a similar acknowledgment is found in the Assembly's minutes. (id. 141.)

In 1815, the Assembly acknowledges the receipt of funds ($1666.26) from the excinded region, for the Seminary at Princeton. Also funds for missions, education, &c., from the same source. (id. 250, 267.)

1816. The Presbyteries of Onondaga and Geneva raise money for the Seminary at Princeton; and these and two other presbyteries in that region contribute to the missionary and commissioners' funds. (id. 313, 318, 336 and 337.)

1817. These presbyteries report funds for the education cause. The Presbytery of Grand River, in the Western Reserve Synod, contribute to the funds for the Theological Seminary at Princeton. (vol. 4, p. 9.)

1818. The records of the Assembly acknowledge the receipt of moneys from the excinded districts for the Theological Seminary at Princeton. The Presbyteries of Niagara, Ontario, Bath, Geneva, and Cayuga, contribute to the Assembly's education and commissioners' funds. (id. 59, 61, 83.)

1819. Several of the excinded presbyteries vote on alterations to the constitution; and Grand River, Portage, Ontario, Bath, Geneva, and Onondaga, contribute to the Assembly's education funds. (id. 158.)

The Assembly this year commend some of the excinded presbyteries, for having done their duty in educating men for the ministry. (id. 159 and 200 to 211.)

1820. The presbyteries of Ontario, Cayuga, Geneva, Bath,

Oneida, Onondaga, Portage and Grand River, are commended for having faithfully attended to the education of men for the ministry. (id. 306, 345, 6, 7, 8, 9.)

1821. The revised form of government was voted for by the presbyteries which have been excinded. The General Assembly designate a line bounding the Synods of Pittsburgh and Geneva. The presbyteries of Geneva, Rochester, Cayuga, St. Lawrence, Otsego, Portage, Hartford and Grand River, all contribute to funds for education, Theological Seminary, missions and commissioners. The General Assembly, this year, divide the Synod of Geneva, and form the Synod of Genessee. (vol. 5, pp. 5, 6, 10, 12 and 16, 31 to 41.)

1822. The Assembly recognise said excinded presbyteries as under their care. (See vol. 5, pp. 8 & 9.)

The Assembly approve the records of the Synod of Geneva. (p. 12.)

The Assembly, in a compendious view, include as under their care the excinded presbyteries. (p. 19.)

The excinded presbyteries contribute as in previous years, to the Assembly's funds for different purposes. The Assembly appoint a missionary to labour in that region, who was pastor of a Presbyterian Church at Buffalo. (Vol. 5, p. 45 to 59.)

1823. Assembly issued a complaint against Synod of Genessee, (id. 135.) Minutes of Synod of Genessee approved. (id. 145.)

The excinded presbyteries reported contributions to education funds for the ministry. (id. 159, 160, 161.)

Report of the Board of Education, established by the General Assembly; for May, 1823.

This year no reports have been received from the Presbyteries of Northumberland, *Grand River*, &c. The presbyteries which have reported are the following, viz:

1. *Genessee*, which has one young man under its care, and has expended last year nineteen dollars.
2. *Rochester*, which supports *three* beneficiaries.
3. *Geneva*, which has *two* youths under its care, and co-operates with the Western Education Society.
4. *Bath*, which has *one* beneficiary, raised last year twenty-six dollars thirty-four cents, and expended twenty-five dollars.
5. *Oneida*, which has *nine* beneficiaries.
6. *Onondaga*, which aids *five* young men in board and clothing, &c.

1824. The same was done. The Assembly, this year, send missionaries to the excinded region. (id. 235.)

1825. The Presbytery of Geneva is decided to be competent to try two elders, &c. (id. p. 262.) Funds raised in these synods are reported in the minutes. (id. 335 to 360.) The Assembly appoint more missionaries to labour in the excinded region. (id. 300.)

1826. The excinded presbyteries vote on an alteration of the constitution. (vol. 6, p. 11.) Funds are reported as usual, from these presbyteries. (id. 63, 4, 5, 6 & 7.) The Assembly this year, form the Presbytery of Chenango, of ministers detached from the Presbyteries of Otsego, Cayuga, Columbia and Susquehanna, and attach said presbytery to the Synod of Geneva. (id. 21.) The Assembly appoint missionaries again to labour in the excinded region. (id. 59.)

1827. Presbytery of Detroit attached to the Synod of Western Reserve. (id. 120.) Records of Synod of Genessee approved by General Assembly: (id. 121.) Dr. H. Axtill of Geneva and Horace Hill of Auburn, members of the Board of Education. (id. 147.)

The excinded presbyteries contributed to the Commissioners, Education, Theological Seminary and Missionary funds. (Page 178 to 183.)

1828. Funds contributed for Missionary, Commissioners, Theological Seminary and Education purposes. (p. 282 to 284.)

1829. Records of Synod of Geneva and Western Reserve, approved. (id. 371–2.) Funds to Missions, Commissioners, Education and Theological Seminary. (p. 439 to 442.)

1830. The Assembly give instructions to the Presbytery of St. Lawrence. (p. 30.) Moneys acknowledged from the excinded presbyteries. (pp. 65, 66 & 67.)

1831. The Assembly detach a church from the Synod of New Jersey and put it into the Synod of Geneva. (p. 175.) The records of the Synods of Geneva, Genessee and Western Reserve approved by the General Assembly. (p. 184.) Funds acknowledged as raised in the presbyteries excinded. (id. 221 to 263.)

1832. The records of the Synods of Utica and Western Reserve, approved by the General Assembly. (p. 324.) Funds received from excinded presbyteries. (id. 367 to 418.)

1833. The Rev. Sylvester Eaton was elected temporary clerk of the General Assembly. Mr. Eaton was from the Presbytery of Buffalo. (Vol. 6, p. 173.)

The excinded presbyteries vote on a proposed alteration in the constitution. (p. 485.) The committee appointed to examine the records of the Synods of Utica and Genessee, reported, and those records were approved. (p. 485.) The Synod of the Western Reserve gave an answer to certain questions proposed to them by the General Assembly. (See p. 489.) And the Assembly approve their records, with a single exception. (pp. 489 & 490.)

The committee to whom was referred the report of the Synod of the Western Reserve made a report, which being read and amended, was adopted, and is as follows, viz. After having maturely considered the subject referred to them, they recommend to the Assembly, without approving the views of the synod in relation to order and discipline, as stated in their report, that the report be accepted and printed in the Minutes of the Assembly.

The report of the Synod is as follows:

Report of the Synod of the Western Reserve to the General Assembly of the Presbyterian Church in the United States of America, in relation to the direction to this synod, by the last Assembly, recorded in their printed minutes, p. 327.

At the stated meeting of the Synod of the Western Reserve, held at Detroit, Oct. 18th, 1832, the following resolution was adopted, viz.

Resolved, That in reference to the point named by the Assembly, as having been charged by common rumour against this synod; the synod having, as their custom is, and agreeably to the direction of the Assembly, devoted a part of their sessions to review and examine the state of the presbyteries and churches under their care, do report to the next General Assembly:

1. That the synod see no ground for the charge of delinquency in relation to the permission alleged in the first specification. The synod would remark, that previously to the resolution of the Assembly on this subject in 1828, it is believed that a difference of practice prevailed in our presbyteries, in the reception of members from corresponding churches; (as has been common in other presbyteries in

different parts of the country,) without any formal profession of adopting the Confession of Faith of the Presbyterian Church. But since the passage of that resolution by the Assembly, the synod believe that no such practice has obtained in any of our presbyteries. In regard to the allegation respecting persons licensed and ordained by our presbyteries, without receiving and adopting the Confession of Faith, the synod have no knowledge or belief of the prevalence of any such practice in any of our presbyteries.

2. That in relation to the remaining allegation, viz. on the subject of ruling elders, the synod do not discover any reason for the charge of having violated the constitution of the church, inasmuch as that constitution does not make the eldership essential to the existence of a church, and as the number of persons in many churches is too small to admit the election of suitable persons to fill that office, and where this is not the case, the fact of their being Congregationalists mingled with Presbyterians in many churches, is a sufficient reason for the non-existence of the eldership, according to the plan of agreement between the General Assembly and the General Association of Connecticut; from the spirit of which, the synod believe, that none of our presbyteries have departed.

However, with regard to the charge of the presbyteries allowing the office of ruling elder to go into disuse, the synod would say, that during the last year, there have been more ruling elders elected and ordained, in the churches connected with our presbyteries, than during any three or four years previously.

By order of the Synod of the Western Reserve,

Attest, WM. HANFORD,
Stated Clerk.

The report of the committee to examine the records of the Synod of the Western Reserve, which was laid on the table, was taken up, and adopted, and is as follows, viz. That the records be approved, with the exception of the sentiment on p. 154, viz. that the eldership is not essential to the existence of the Presbyterian Church. In the opinion of the committee, the Synod advanced a sentiment, that contravenes the principles recognized in our Form of Government, Chap. II. sec. 4. Chap. III. sec. 5. Chap. V. Chap. IX. sec. 1, 2.

Funds acknowledged from the excinded presbyteries. (Id. 517 to 568.)

1834. The excinded presbyteries vote on a change in the constitution. (Vol. 7, p. 13.) The Assembly send an appeal against a decision of the Presbytery of Otsego to the Synod of Utica, to be judicially settled by them. (p. 17.) Also another case on p. 19.

The Assembly entertain a petition from the Synod of Western Reserve, and at their request make a new Synod, viz. "the Synod of Michigan," p. 22. The General Assembly set off the Presbytery of Angelica, from the Synod of Geneva to the Synod of Genessee, p. 27. The Assembly approve of the records of the Synod of Western Reserve, p. 28. The General Assembly, at the request of the Synod of Albany, put the congregation of Stratford into the Synod of Utica, p. 38. The Assembly appoint committees in the excinded synods, to superintend the publication of the constitution, pp. 40, 41. Funds reported from excinded presbyteries, Id. 82 to 139.

1835. The Assembly approve the records of the Synod of Geneva, with some slight and unimportant exceptions, vol. 7, p. 17. The records of Utica and Geneva, p. 18, 19. The Assembly state that it is no longer desirable that churches should be formed on Plan of Union, p. 29.

The Assembly consider an appeal from the Synod of Utica, p. 30.

The records of the Synod of the Western Reserve were approved, p. 32.

1836. The Rev. Josiah Hopkins, of Cayuga Presbytery, was appointed a delegate to the Association of New Hampshire.

The Assembly approve the records of the Synods of Utica, Western Reserve, and Genessee, p. 263.

The excinded presbyteries vote on a proposed alteration as to the time of studying for the ministry, to change the term to three years, p. 276.

1837. Assembly acknowledges the receipt of funds from the *excinded Presbyteries.* Minutes from page 527 to 544; and from 572 to 576.

The next evidence offered by the plaintiffs, was Chapters IV. and V. of Form of Discipline, to show how carefully the constitution of the church guards the rights and character of its members.

Chap. IV. *Of Actual Process.* Sect. 1. When all other means of removing an offence have failed, the judicatory to which cognizance of it properly belongs, shall judicially take it into consideration.

2. There are two modes in which an offence may be brought before a judicatory: either by an individual or individuals, who appear as accusers, and undertake to substantiate the charge; or by common fame.

3. In the former case, process must be pursued in the name of the accuser or accusers. In the latter, there is no need of naming any person as the accuser. *Common fame* is the accuser. Yet a *general rumour* may be raised by the rashness, censoriousness, or malice of one or more individuals. When this appears to have been the case, such individuals ought to be censured, in proportion to the degree of criminality which appears attached to their conduct.

4. Great caution ought to be exercised in receiving accusations from any person who is known to indulge a malignant spirit towards the accused; who is not of good character; who is himself under censure or process; who is deeply interested, in any respect, in the conviction of the accused; or who is known to be litigious, rash, or highly imprudent.

5. When a judicatory enters on the consideration of a crime or crimes alleged, no more shall be done, at the first meeting, unless by consent of parties, than to give the accused a copy of each charge, with the names of the witnesses to support it; and to cite all concerned to appear at the next meeting of the judicatory, to have the matter fully heard and decided. Notice shall be given to the parties concerned, at least ten days previously to the meeting of the judicatory.

6. The citations shall be issued and signed by the moderator or clerk, by order, and in the name of the judicatory. He shall also furnish citations for such witnesses as the accused shall nominate, to appear on his behalf.

7. Although it is required that the accused be informed of the names of all the witnesses who are to be adduced against him, at least ten days before the time of trial, (unless he consent to wave the right, and proceed immediately,) it is not necessary that he, on his part, give a similar notice to the judicatory of all the witnesses intended to be adduced by him for his exculpation.

8. In exhibiting charges, the times, places, and circumstances should, if possible, be ascertained and stated, that the accused may have an opportunity to prove an *alibi*, or to extenuate or alleviate his offence.

9. The judicatory, in many cases, may find it more for edification, to send some members to converse, in a private manner, with the accused person; and if he confess guilt, to endeavour to bring him to repentance, than to proceed immediately to citation.

10. When an accused person, or a witness, refuses to obey the citation, he shall be cited a second time; and if he still continue to refuse, he shall be excluded from the communion of the church, for his contumacy, until he repent.

11. Although, on the first citation, the person cited shall declare in writing, or otherwise, his fixed determination not to obey it; this declaration shall, in no case, induce the judicatory to deviate from the regular course prescribed for citations. They shall proceed as if no such declaration had been made. The person cited may afterwards alter his mind.

12. The time which must elapse between the *first* citation of an accused person, or a witness, and the meeting of the judicatory at which he is to appear, is at least ten days. But the time alloted for his appearance in the *subsequent* citation is left to the discretion of the judicatory; provided always, however, that it be not less than is quite sufficient for a seasonable and convenient compliance with the citation.

13. The second citation ought always to be accompanied with a notice, that if the person cited do not appear at the time appointed, the judicatory, besides censuring him for his contumacy, will, after assigning some person to his defence, proceed to take the testimony in his case, as if he were present.

14. Judicatories before proceeding to trial, ought to ascertain that their citations have been duly served on the persons for whom they were intended, and especially before they proceed to ultimate measures for contumacy.

15. The trial shall be fair and impartial. The witnesses shall be examined in the presence of the accused; or, at least, after he shall have received due citation to attend; and he shall be permitted to ask any questions tending to his own exculpation.

16. The judgment shall be regularly entered on the records of the judicatory: and the parties shall be allowed copies of the whole proceedings, at their own expense, if they demand them. And in case of references or appeals, the judicatory referring, or appealed from, shall send authentic copies of the whole process to the higher judicatory.

17. The person found guilty shall be admonished or rebuked, or excluded from church privileges, as the case shall appear to deserve, until he give satisfactory evidence of repentance.

18. As cases may arise in which many days, or even weeks, may intervene before it is practicable to commence process against an accused church member, the session may, in such cases, and ought, if they think the edification of the church requires it, to prevent the accused person from approaching the Lord's table until the charge against him can be examined.

19. The sentence shall be published only in the church or churches which have been offended. Or, if the offence be of small importance, and such as it shall appear most for edification not to publish, the sentence may pass only in the judicatory.

20. Such gross offenders as will not be reclaimed by the private or public admonitions of the church, are to be cut off from its communion, agreeably to our Lord's direction, Matt. xviii. 17. And the apostolical injunction respecting the incestuous person. 1 Cor. v. 1—5.

21. No professional counsel shall be permitted to appear and plead in cases of process in any of our ecclesiastical courts. But if any accused person feel unable to represent and plead his own cause to advantage, he may request any minister or elder, belonging to the judicatory before which he appears, to prepare and exhibit his cause as he may judge proper. But the minister or elder so engaged, shall not be allowed, after pleading the cause of the accused, to sit in judgment as a member of the judicatory.

22. Questions of order, which arise in the course of process, shall be decided by the moderator. If an appeal is made from the chair, the question on the appeal shall be taken without debate.

23. In recording the proceedings, in cases of judicial process, the reasons for all decisions, except on questions of order, shall be recorded at length; that the record may exhibit every thing which had an influence on the judgment of the court. And nothing but what is contained in the record, may be taken into consideration in reviewing the proceedings in a superior court.

Chap. V. *Of Process against a Bishop or Minister.* 1. As the honour and success of the gospel depend, in a great measure, on the character of its ministers, each presbytery ought, with the greatest care and impartiality, to watch over the personal and professional conduct of all its members. But as, on the one hand, no minister ought, on account of his office, to be screened from the hand of justice, nor his offences to be slightly censured; so neither ought scandalous charges to be received against him, by any judicatory, on slight grounds.

2. Process against a gospel minister shall always be entered before the presbytery of which he is a member. And the same candour, caution, and general method, substituting only the presbytery for the session, are to be observed in investigating charges against him, as are prescribed in the case of private members.

3. If it be found that the facts with which a minister stands charged, happened without the bounds of his own presbytery, that presbytery shall send notice to the presbytery within whose bounds they did happen: and desire them either (if within convenient distance,) to cite the witnesses to appear at the place of trial; or, (if the distance be so great as to render that inconvenient,) to take the examination themselves, and transmit an authentic record of their testimony: always giving due notice to the accused person, of the time and place of such examination.

4. Nevertheless, in case of a minister being supposed to be guilty of a crime, or crimes, at such a distance from his usual place of residence, as that the offence is not likely to become otherwise known to the presbytery to which he belongs; it shall, in such case, be the duty of the presbytery within whose bounds the facts shall have happened, after satisfying themselves that there is probable ground of accusation, to send notice to the presbytery of which he is a member, who are to proceed against him, and either send and take the testimony themselves, by a commission of their own body, or request the other presbytery to take it for them, and transmit the same properly authenticated.

5. Process against a gospel minister shall not be commenced, unless some person or persons, undertake to make out the charge: or unless common fame so loudly proclaims the scandal, that the presbytery find it necessary, for the honour of religion, to investigate the charge.

6. As the success of the gospel greatly depends upon the exemplary character of its ministers, their soundness in the faith, and holy conversation; and as it is the duty of all Christians to be very cautious in taking up an ill report of any man, but especially of a minister of the gospel; therefore if any man knows a minister to be guilty of a private, censurable fault, he should warn him in private. But if the guilty person persist in his fault, or it become public, he who knows it, should apply to some other bishop of the presbytery for his advice in the case.

7. The prosecutor of a minister shall be previously warned, that if he fail to prove the charges, he must himself be censured as a slanderer of the gospel ministry, in proportion to the malignancy or rashness that shall appear in the prosecution.

8. When complaint is laid before the presbytery, it must be reduced to writing; and nothing further is to be done at the first meeting, (unless by consent of parties,) than giving the minister a full copy of the charges, with the names of the witnesses annexed; and citing all parties, and their witnesses, to appear and be heard at the next meeting; which meeting shall not be sooner than ten days after such citation.

9. When a member of a church judicatory is under process, it shall be discretionary with the judicatory whether his privileges of deliberating and voting, as a member, in other matters, shall be suspended until the process is finally issued, or not.

10. At the next meeting of the presbytery, the charges shall be read to him, and he shall be called upon to say whether he is guilty or not. If he confess, and the matter be base and flagitious; such as drunkenness, uncleanness, or crimes of a higher nature, however penitent he may appear, to the satisfaction of all, the presbytery must, without delay, suspend him from the exercise of his office, or depose him from the ministry; and, if the way be clear for the purpose, appoint him a due time to confess publicly before the congregation offended, and to profess his penitence.

11. If a minister accused of atrocious crimes, being twice duly cited, shall refuse to attend the presbytery, he shall be immediately suspended. And if, after another citation, he still refuse to attend, he shall be deposed as contumacious.

12. If the minister, when he appears, will not confess; but denies the facts alleged against him, if, on hearing the witnesses, the charges appear important, and well supported, the presbytery must, nevertheless, censure him; and admonish, suspend, or depose him, according to the nature of the offence.

13. Heresy and schism may be of such a nature as to infer deposition; but errors ought to be carefully considered; whether they strike at the vitals of religion, and are industriously spread; or, whether they arise from the weakness of the human understanding, and are not likely to do much injury.

14. A minister under process for heresy or schism, should be treated with Christian and brotherly tenderness. Frequent conferences ought to be held with him, and proper admonitions administered. For some more dangerous errors, however, suspension may become necessary.

15. If the presbytery find, on trial, that the matter complained of, amounts to

no more than such acts of infirmity as may be amended, and the people satisfied; so that little or nothing remains to hinder his usefulness, they shall take all prudent measures to remove the offence.

16. A minister deposed for scandalous conduct, shall not be restored, even on the deepest sorrow for his sin, until after some time of eminent and exemplary, humble and edifying conversation, to heal the wound made by his scandal. And he ought in no case to be restored, until it shall appear, that the sentiments of the religious public are strongly in his favour, and demand his restoration.

17. As soon as a minister is deposed, his congregation shall be declared vacant.

The following passage from the Form of Government and extract from the minutes of the General Assembly of 1822 were here read by plaintiffs' counsel, to show the powers of the General Assembly, as they were understood immediately after the adoption of the amended constitution in 1821, and that, in the judgment of that body, on an occasion when peculiar circumstances had drawn together an unusually large share of the deliberative wisdom of the church, it was utterly inconsistent with the constitution for the Assembly to attempt the exercise of its powers in the excision of members, without regular disciplinary process.

Chap. XII. *Form of Government.* 4. The General Assembly shall receive and issue all appeals and references, which may be regularly brought before them, from the inferior judicatories. They shall review the records of every synod, and approve or censure them; they shall give their advice and instruction, in all cases submitted to them, in conformity with the constitution of the church; and they shall constitute the bond of union, peace, correspondence, and mutual confidence among all our churches.

5. To the General Assembly also belongs the power of deciding in all controversies respecting doctrine and discipline; of reproving, warning, or bearing testimony against error in doctrine, or immorality in practice, in any church, presbytery, or synod; of erecting new synods, when it may be judged necessary; of superintending the concerns of the whole church; of corresponding with foreign churches, on such terms as may be agreed upon by the Assembly and the corresponding body; of suppressing schismatical contentions and disputations; and, in general of recommending and attempting reformation of manners, and the promotion of charity, truth, and holiness, through all the churches under their care.

6. Before any overtures or regulations proposed by the Assembly to be established as constitutional rules, shall be obligatory on the churches, it shall be necessary to transmit them to all the presbyteries, and to receive the returns of at least a majority of them, in writing, approving thereof.

1822. Min. p. 22. The committee to which was referred a paper purporting to be a remonstrance from John M. Rankin and others, who allege that they are members of the Presbyterian Church in the United States, having had the same under serious consideration, submitted the following report, which was adopted, viz:

The General Assembly can never hesitate, on any proper occasion, to recommend to those, who, at both their licensure and ordination professed "sincerely to receive and adopt *the Confession of Faith of this Church*, as containing the system of doctrine taught in the Holy Scriptures," and to all other members of our church, steadfastly to adhere to that "form of sound words."

But while the General Assembly is invested with the power of deciding in all controversies, respecting doctrine and discipline; of reproving, warning, or bearing testimony, against error in doctrine in any church, presbytery, or synod; or of suppressing schismatical contentions and disputations, all such matters ought to be brought before the Assembly in a regular and constitutional way. And it does not appear that the constitution ever designed, that the General Assembly should take up abstract cases, and decide on them, especially when the object appears to be, to bring those decisions to bear on particular individuals, not judicially before the Assembly. Neither does it appear, that the constitution of the church, intended that any person or persons, should have the privilege, of presenting for decision, remonstrances respecting points of doctrine, on the conduct of individuals, not brought

up from the inferior judicatories, by appeal, reference, or complaint; and this especially, when such remonstrances contain no evidence whatsoever, of the facts alleged, but mere statements, of the truth or justness of which, the Assembly have no means of judging, inasmuch as a contrary course, would allow of counter and contradictory remonstrances, without end.

Wherefore, on motion resolved, that the committee be discharged from the further consideration of this remonstrance; and the committee were accordingly discharged.

The Court now adjourned.

Wednesday, March 6th.

The plaintiffs offered in evidence the minutes of the General Assembly of 1837, and called the attention of the Court to the statistical table of that year, (pages 521—523,) by which it appears that presbyteries not affected by the excinding acts of 1837 have several ministers who are pastors of Congregational churches. In the Presbyteries of Londonderry and Newburyport, belonging to the Synod of Albany, there were *forty-one* ministers reported to the General Assembly of 1837; *sixteen* of whom were pastors of Congregational churches, and only *fourteen* pastors of Presbyterian churches; while by other parts of the table it appeared that there were no cases of that character reported by any of the presbyteries belonging to the four excinded synods. Next was read from the same table (page 527) the amount of contributions to the funds of the church made by presbyteries within the four synods, for the year then reported to the General Assembly. Among the presbyteries were

The Presbytery of St. Lawrence, which contributed in that year			$953 33
The Presbytery of Oswego,	"	"	662 07
" Geneva,	"	"	7729 95
" Rochester,	"	"	15,750 50

Mr. Randall, of counsel for the relators, then said he would read from the minutes of the General Assembly, (page 520,) the official statement, made by order of the Assembly, of the synods and presbyteries recognized as in its connexion at the opening of the Assembly.

Mr. Hubbell, of counsel for the respondents, objected to this being admitted as evidence, on the ground, that the admission would involve other questions than those stated in the pleadings—that the testimony was irrelevant to the issue. Why, (he asked,) do the relators desire to introduce the proceedings of the General Assembly of 1837? Is it their purpose to show that the General Assembly of 1837 dismembered, destroyed, annihilated itself? If they propose any thing other than this, what effect can the proceedings of the General Assembly of 1837 have on those of the General Assembly of 1838? But the pleadings preclude the admission of evidence for this purpose.

The General Assembly of 1838 derived its very existence from the last act of the Assembly of 1837. The very appearance in this suit, of the relators, as Trustees, is, on their part, an acknowledgment that the General Assembly of 1837 did not dismember

itself; for they can claim only under the appointment of an Assembly as the successor of that of 1837. Their object must be, and by their own admission in their opening, it is, to prove that the officers of the General Assembly of 1838 committed error, that they defeated, or endeavoured to defeat, the constitutional organization of the General Assembly, by their refusal to admit certain claimants to their seats. If this is so—if they can prove such a rejection as they allege, and that it prevented the organization of the Assembly in the usual manner—then the relators have succeeded in that part of their case.

Now we, as counsel for the respondents, deny that any such rejection was ever made by the General Assembly of 1838, or by its officers. We deny that they ever committed themselves on that subject; and we challenge the proof. But if it were so, are our opponents to be allowed to bring in the proceedings of the previous General Assembly, to show our reasons, either good or bad, for doing it? If any such reasons exist, it is our business to exhibit them, not theirs. They have no right to come into our camp to find reasons for our conduct.

The General Assembly of 1838 was the sole judge of the qualifications of its own members. In this respect, it was entirely independent of the General Assembly of 1837. It was composed of different members, or if in part the same, yet a new election had intervened, and it might have been composed *entirely* of different members from those of the former year. The same Moderator did not preside in both of those Assemblies: for the old Moderator continues in office no longer than is necessary to constitute the *new* Assembly, when a new Moderator is chosen.

The Clerks, whose business it was to judge of the validity of commissions, rejected those of certain commissioners. An attempt was made to bring the matter before the General Assembly for consideration. The Moderator declared the motion for that purpose, out of order. An appeal was taken from his decision, and he decided the appeal to be out of order also. Now the relators may claim that the General Assembly dismembered and destroyed itself by this act: or that, on an appeal being made to the house, it, by a unanimous vote, removed its officers, on account of their misconduct. *This* is *their* case, if they can make it out. If they do so, *we* may need the acts of 1837 for our justification; but let them not anticipate our defence.

Suppose it were even true, that the General Assembly of 1837 committed acts of injustice, what effect can these acts have to impart an evil character to the proceedings of the Assembly of 1838? Suppose they take the ground, that the action commenced by the Moderator and Clerks for organizing the Assembly of 1838, was irregular; and that every thing done in this process, after the rejection of certain of the commissioners by the Clerks, was utterly null and void.

Must we proceed in the way prescribed by them, when we attempt to justify our Moderator and Clerks? We intend to prove that those officers acted rightly; and that the party of the relators

becoming offended at the inferior and primary tribunal, never presented their case regularly to the General Assembly, and consequently were not rejected by that body.

The plaintiffs assert that the error of the Clerks and Moderator constituted them the true General Assembly, and also dismembered and annihilated our Assembly. But now they propose to go much further. They propose to enter into our motives: they propose to show that we were (as they have charged upon us) actuated by bad motives.

Judge Rogers said the evidence appeared to him to be precisely of the same character with that already admitted by the court.

Mr. Hubbell resumed. For the purpose for which we understood the other to be admitted, we have no objection to the admission of this. It is doubtless the right, the duty of the opposite counsel to build up a General Assembly if they can. But is this to be done by showing that these bodies have been admitted and recognized as parts of the Presbyterian church? That point is conceded. We have no contest on that subject: but whether they were *constitutionally* recognized by the General Assembly or not, is quite another thing. At any rate, they cannot be allowed to show that our proceedings in 1837, were a poor reason for our conduct in 1838; or that our defence is a poor defence, until we have given that reason, or made that defence. We have a right to be the masters of our own defence.

Mr. Ingersoll, also for the respondents, said he would like to know the objects for which this species of evidence was offered. It might have a double object. If the testimony were offered simply to prove the recognition of the four synods, and the inferior judicatories belonging to them, he would not object to it, inasmuch as it was merely irrelevant. But if offered with a view to prove the rejection of those synods, it was wholly inadmissible.

The Court inquired of Mr. Randall what was the object of the evidence.

Mr. Randall replied: May it please your honour, our object is to show what was the state of the Presbyterian church at the meeting of the General Assembly of 1837. We desire to show that the four excinded synods were then in good standing, as a part of the Presbyterian church in the United States, as the documents already introduced show that the presbyteries belonging to those very synods participated in the adoption of the constitution of 1820. We then intend to follow this up, by showing the act of dismemberment of the General Assembly in 1838, begun by the Clerks, and carried out by the Moderator, by which they defeated their own attempt at an unjust and partial organization, and enabled us to carry out the regular and lawful organization, as the true General Assembly of the Presbyterian church. We intend further to show that these measures of the Clerks and the Moderator originated in the acts of excision of the General Assembly of 1837, and were an attempt to carry out those acts, which were null and void. The document offered is part of a consecutive chain of evidence, the several links of which are independent of each other, except as to

their order. We expect to prove them all—but one link at a time.

The Court intimated to Mr. Hubbell that he might proceed.

Mr. Hubbell then argued, that, as the respondents do not set up the pretence that the act of the Clerks refusing to receive the commissions of the claimants from the detruded synods, was a mistake, the relators could not bring evidence to prove that it was not a mistake; that they were precluded by the rules of evidence, from going into an inquiry as to the designs of the adverse party. If the relators (he said) can prove their positions, before adverted to, respecting the incipient measures for organizing the Assembly of 1838, then they have laid the *basis* of their superstructure; but they must not be allowed to anticipate our defence against their allegations. If the proceedings of 1837 dismembered and destroyed the General Assembly, then our trustees, previously elected, are entitled to hold. If this were alleged, it would defeat the issue chosen by the relators. It would put them immediately out of Court. They therefore admit that the trustees, which were elected in 1837, were legally chosen, notwithstanding they were elected after the acts of excision, of which they complain.

If, then, on the other hand, as appears to be admitted by them, no dismemberment of the General Assembly was effected, what can be the influence of the evidence offered by the counsel? The General Assembly of 1838 was the judge of the qualifications of its own members; and in this respect was entirely an independent body. The rejection of commissioners by the Clerks in 1838, was not, and could not be influenced by the proceedings of the General Assembly of 1837, except so far as they furnish us with an excuse, or a reason, if you please, should we choose to employ it, for our defence.

The relators themselves contend that the proceedings of the General Assembly of 1838 ought not to have been influenced by what took place in 1837. They say that the acts of 1837 were null and void, and that *therefore* the rejection of certain commissions by the Clerks, in 1838, was a bad procedure; and shall we be denied the advantage of these admissions, by their anticipating our defence? We will show the reason for the rejection of those commissions, in our own time, and do not intend to allow our case to be anticipated and mangled by our opponents.

Judge Rogers said that he did not like, at this stage of the proceedings, to decide the question, whether the testimony now offered involved the merits of the case or not. He did not see how the *defendants* could do without it. It might be admitted now, unless they had something further to object to its character; and its bearing could be decided afterwards.

Mr. Ingersoll said he should like to say one word more, perhaps half a dozen, in explanation; whether the testimony were admitted or not.

If it resembled the testimony offered by reading the minutes yesterday, was intended to prove the same thing, it was merely irrele-

vant; but if it proceeded one step further, it was decidedly objectionable, inasmuch as it presented a false—a dangerous issue, and might be highly injurious and fatal to the defendants. There were two courses which the New School party might have taken. They might have applied for a *mandamus*, and this court would, at once, have reinstated them in the full enjoyment of their rights, if they had been unjustly deprived of any right. If, as they allege, *one hundred and eighty thousand* worshippers were, without form or reason, excluded from their connexion with the Presbyterian church, they could have brought an action, such as was instituted against Mr. Breckinridge, Dr. Elliott, and Dr. Plumer, in May last, and this court would have restored them. They had not, however, chosen to take that course as a remedy for their grievances. They chose to try a bolder course. They chose to meet in Ranstead court and offer certain motions and resolutions, and at a certain period of their proceedings, to resolve the body into its original elements. It was a bold and intrepid measure, surely. But they did not succeed, for having reached a certain point of these proceedings, and meeting some unexpected obstacles, they openly seceded from the body. They withdrew from the General Assembly, and created another Assembly, and it is for them to prove that theirs is the *true* and lawful General Assembly.

The question now at issue is, did they secede in a proper manner? Under this writ of *quo warranto*, the remedy of their own selection, it is for them to show their title.

They say that we acted irregularly in the General Assembly of 1838—and therefore ask the judgment of this court *in ouster:* but the General Assembly of 1837 was entirely dissolved by the very terms of its adjournment. Look at what is prescribed in the constitution.

Form of Government, Chapter XII. sect. 8. Each session of the Assembly shall be opened and closed with prayer. And the whole business of the Assembly being finished, and the vote taken for dissolving the present Assembly, the moderator shall say from the chair—"By virtue of the authority delegated to me, by the church, let this General Assembly be dissolved, and I do hereby dissolve it, and require another General Assembly, chosen in the same manner, to meet at —— on the —— day of —— A. D. ——," —— after which he shall pray and return thanks, and pronounce on those present, the apostolic benediction.

The General Assembly of 1837, then was dissolved, entirely extinguished and annihilated, as though it had never had an existence. It was not an adjournment of the General Assembly to meet again, nor a *curia advisare vult*, as is the practice of the Supreme Court of this state. As to the General Assembly of 1837, then, when it adjourned there was an end of every thing. It was *dissolved.* If any had been unjustly excluded from that Assembly, their proper remedy was to apply for re-admission to the General Assembly of 1838. They should have so applied. But instead of doing so, they chose to secede, and it is not competent for them now to prove that the proceedings of the General Assembly of 1837 were wrong, but they must prove that their secession was right, and conducted properly. We say that they never were excluded from the General Assembly of 1838, that they never sought

admission there in a proper manner; that they never gave that General Assembly an opportunity to decide their case.

Judge Rogers said that the evidence appeared to be one link in connexion with the testimony which had already been admitted. The proceedings of the Assembly of 1837, were necessary to explain the proceedings of 1838; and if not necessary for the relators, it would be for the respondents.

The Court therefore overruled the objection, and admitted the minutes of 1837, as evidence in the case.

The plaintiffs then read in evidence, an extract from the minutes of 1837, page 520, viz.

Synods and Presbyteries.

The following summary account of synods and presbyteries, together with the statistical reports of presbyteries in detail, present the Presbyterian Church as it was at the commencement of the sessions of the General Assembly. During these sessions, *four* of these synods, with all their respective presbyteries, were declared to be no longer a part of the Presbyterian church in the United States of America, viz. the Synod of the *Western Reserve*, [see Minutes, page 440,] and the Synods of *Utica*, *Geneva* and *Genessee*, [see Minutes, page 444,] and the Third Presbytery of Philadelphia was dissolved, [see Minutes, page 472.] The Assembly directed the Stated Clerk, having inserted a note to this effect, to publish the statistics of these judicatories for the past year. [See Minutes, page 494.]

The General Assembly of 1837, at the commencement of their sessions, had under their care *twenty-three* synods, comprising *one hundred and thirty-five* presbyteries, viz.

2. The Synod of Utica, containing the *five* Presbyteries of St. Lawrence, Watertown, Oswego, Oneida, and Otsego.

3. The Synod of Geneva, containing the *nine* Presbyteries of Geneva, Chenango, Onondaga, Cayuga, Tioga, Cortland, Bath, Delaware, and Chemung.

4. The Synod of Genessee, containing the *six* Presbyteries of Genessee, Ontario, Rochester, Niagara, Buffalo, and Angelica.

9. The Synod of the Western Reserve, containing the *eight* Presbyteries of Grand River, Portage, Huron, Trumbull, Cleveland, Maumee, Lorain, and Medina.

In explanation of the document just read, *Mr. Randall* said he would read the following extract from the same minutes, (1837,) page 414.

In answer to a request of the Stated Clerk, for direction in making out the general statistical table, for the current year, the Assembly ordered that he should insert in that table, the statistics in his hands for the past year, of those judicatories that have been declared by the General Assembly to be no longer parts of the Presbyterian Church, and to insert a marginal note to this effect; and that hereafter, those statistics shall not appear in the general table published by the General Assembly.

The plaintiffs next offered in evidence, a list of the presbyteries within the bounds of the four excinded synods, with the dates of their erection by the proper judicatories, by which it appeared that there were connected with those synods, *twenty-eight* presbyteries, *five hundred and ninety-nine* churches, with *five hundred and nine* ministers, and *fifty thousand four hundred and eighty-nine* communicants, as officially reported; and by an estimate founded on the number of churches not reported, the whole number of communicants is stated at fifty-seven thousand seven hundred and twenty-four.

The list is here subjoined.

PRESBYTERIES OF THE FOUR EXCINDED SYNODS.

Presbyteries.	Year in which constituted.	No. of Ministers.	No. of Churches reported.	No. of Communicants reported.	No. of Churches not reported.	Total of Communicants by estimate.	How Constituted.
Synod of Utica.							
Oneida,	1802	43	36	5364		5500	Digest, page 57.
St. Lawrence,	1818	8	10	1151	1	1200	By Synod Albany.
Otsego,	1820 or 21	8	16	1971	1	2031	Do. do.
Watertown,	1822	10	22	1182	11	1732	Do. do.
Oswego,	1823	11	24	965		1325	Do. do.
		80	108	10,633		11,788	
Synod of Geneva.							
Geneva,	1805	41	39	4690	4	4900	Ass. Dig. p. 58.
Onondaga,	1810	18	22	2409	2	2559	Sy. Alb. Di. p. 41.
Cayuga,	1810	36	30	4119	6	4500	Do. do.
Bath,	1817	11	20	1010	5	1300	Synod of Geneva.
Cortland,	1825	11	15	1443	2	1550	Do. do.
Chenango,	1826	10	17	782	11	1272	As. v. 6, p. 21 Min.
Tioga,	1829	15	16	1700	5	1950	Synod of Geneva.
Delaware,	1831	9	20	2550	4	2750	Do. do.
Chemung,	1836	16	23	1158	6	1458	Do. do.
		167	202	19,861		22,239	
Synod of Genessee.							
Ontario,	1817	22	24	1087	8	1487	Synod of Geneva.
Niagara,	1817	13	14	1015	9	1465	Do. do.
Genessee,	1819	26	24	2267	8	2669	Do. do.
Rochester,	1819	29	25	2850	10	3500	Do. do.
Buffalo,	1823	35	43	2226	24	3750	Do. Genessee.
Angelica,	1828	11	20	1429		1429	Do. Geneva.
		136	150	10,874		14,300	
Synod of Western Reserve.							
Grand River,	1814	27	35	1934	9	2200	Synod Pittsburgh.
Portage,	1818	29	24	2019		2264	Do. do.
Huron,	1823	17	23	1176	1	1200	Do. do.
Trumbull,	1827	11	16	1298	1	1398	Do. W. Reserve.
Cleaveland,	1830	15	10	1100	10	1200	Do. do.
Maumee,	1836	7	8	344	7	444	Do. do.
Lorain,	1836	10	10	642	10	694	Do. do.
Medina,	1836	10	13	600	10	600	Do. do.
		126	139	9121		9400	
Total in four Synods,		509	599	50,489		57,724	

Rev. Eliakim Phelps was called to testify to the correctness of the statistical list, but he was not examined; the counsel for the respondents, being informed that it was prepared from the published minutes, agreed to admit it without proof, subject, however, to be corrected, if any error should be discovered in it.

Mr. Randall then said, there is another case, which I think proper to mention here. Though somewhat isolated in its character, it yet forms a link in the chain of testimony which hitherto had been kept out of view. I now speak of the Third Presbytery of Philadelphia, which contains thirty-two churches, thirty-three ministers, and four thousand eight hundred and fifty communicants. At the same meeting of the General Assembly, (in 1837,) this presbytery was declared to be dissolved—but without attaching, according to the principles of the constitution, the ministers and churches belonging thereto to other presbyteries. They were left to apply for admission to other presbyteries, and, of course, to incur the risk of being told, if they applied, "We do not know you." This act, like the excision of the synods, was wholly without citation, trial, or proof, and without accusation.

Mr. Randall then read from the minutes of the General Assembly of 1837, beginning with the organization, as follows: (page 411.)

The General Assembly of the Presbyterian Church in the United States of America, met agreeably to appointment, in the Central Presbyterian Church, in the city of Philadelphia, on Thursday, the 18th day of May, 1837, at 11 o'clock, A. M.; and was opened with a sermon by the Rev. John Witherspoon, D. D., the Moderator of the last Assembly, &c.

The Standing Committee of Commissioners reported that the following persons present have been duly appointed Commissioners to this General Assembly.

Here he presented the list of members of the General Assembly of 1837, pp. 411 to 414, showing that every one of the presbyteries in the four synods of Utica, Geneva, Genessee and Western Reserve, were represented, their delegates amounting, in all, to the number of *fifty-one*, of whom *thirty-five* were ministers, and *sixteen* elders. These voted in the choice of moderator, and up to a certain period, took a part in all the proceedings of the Assembly.

From the same minutes, page 419, remarking that here commenced the record of that series of acts which resulted in the excision of these synods, he read as follows:

Monday morning, May 22d.—The Assembly met, &c.

The Committee to whom overture No. 1, viz:

"The memorial and testimony of the Convention," had been referred, made a report, in part; and their report was read and accepted.

It was moved to adopt so much of the report as relates to doctrinal errors, whereupon a motion was made to amend the report by adding to the specification of errors, certain others, when, after some debate it was

Resolved, That the whole subject be postponed, and made the order of the day for to-morrow.

Resolved, That that part of the report which refers to the Plan of Union between Presbyterians and Congregationalists in the new settlements, adopted in 1801, be made the order of the day for this afternoon.

Monday afternoon, &c.

The Assembly proceeded to the order of the day, viz. That part of the report of the committee on overture, No. 1, which relates to the "Plan of Union" adopted in 1801.

The report was read and adopted, in part, as follows, viz:

In regard to the relation existing between the Presbyterian and Congregational Churches, the committee recommend the adoption of the following resolutions:

1. That between these two branches of the American Church, there ought, in the judgment of this Assembly, to be maintained sentiments of mutual respect and esteem, and for that purpose no reasonable efforts should be omitted to preserve a perfectly good understanding between these branches of the church of Christ.

2. That it is expedient to continue the plan of friendly intercourse, between this church and the Congregational churches of New England, as it now exists.

A third resolution to abrogate the "Plan of Union," was discussed for some time.

Tuesday morning, May 23d, &c.

The order of the day, viz., that part of the report of the committee on overture No. 1, which relates to doctrinal errors, was postponed, with a view of resuming the unfinished business of yesterday, viz., that part of the report of the same committee, which recommends the abrogation of the "Plan of Union."

The third resolution on this subject was taken up, and discussed for a considerable time.

Tuesday afternoon, &c.

The Assembly resumed the unfinished business of the morning, viz., that part of the report of the committee on overture, No 1, which recommends the abrogation of the "Plan of Union." The resolution was discussed for some time, when the previous question was demanded, and decided in the affirmative, by yeas and nays, as follows, viz:

Shall the main question be now put?

Yeas—129: nays—123.

The resolution was then adopted, by yeas and nays, as follows, viz:

3. But as the "Plan of Union" adopted for the new settlements in 1801, was originally an unconstitutional act on the part of that Assembly—these important standing rules having never been submitted to the presbyteries—and as they were totally destitute of authority as proceeding from the General Association of Connecticut, which is invested with no power to legislate in such cases, and especially to enact laws to regulate churches not within her limits; and as much confusion and irregularity have arisen from this unnatural and unconstitutional system of union, therefore, it is resolved, that the act of assembly of 1801, entitled a "Plan of Union," be, and the same is hereby abrogated." See Digest, pp. 297–299.

Yeas—143: nays—110.

Wednesday afternoon, May 24th.—The committee on overture No. 1, viz., "the Testimony and Memorial of the Convention," made a further report, "respecting so much of the memorial as relates to the toleration of gross errors in doctrine, or disorders in practice, by inferior judicatories." The report was read and accepted. The report was then recommitted, and the committee was instructed to make a full report on the memorial as soon as convenient.

The Assembly proceeded to the order of the day, postponed from yesterday, viz., that part of the report of the committee on the memorial which relates to doctrinal errors. When, the motion to amend the report by adding to the specification of errors certain others, was discussed for some time; it was then moved that the amendment be indefinitely postponed; and after some debate, the Assembly adjourned till to-morrow morning at 9 o'clock.

Thursday morning, May 25th.—A motion was made that the Assembly now take up so much of the report of the committee on the memorial, as relates to the toleration of disorders in practice, and errors in doctrine, by inferior judicatories. Adjourned till this afternoon at half past 3 o'clock.

Afternoon.—The house resumed the unfinished business of this morning, viz., the motion to take up that part of the report of the committee on the memorial which relates to the toleration of disorders in practice, and errors in doctrine, by inferior judicatories. The motion was carried. And resolutions to cite to the bar of the next Assembly such inferior judicatories as shall appear to be charged by common fame with irregularities, were offered and debated a considerable time.

Friday morning, May 26th.—The Assembly resumed the unfinished business of yesterday, viz., the resolution to cite to the bar of the next Assembly such inferior judicatories as shall appear to be charged by common fame with the toleration of gross errors in doctrine, and disorders in practice; and after debate, the Assembly adjourned till the afternoon.

Afternoon.—The Assembly resumed the unfinished business of the morning, viz., the resolutions to cite to the bar of the next Assembly such inferior judicatories as

may be charged by common fame with the toleration of gross errors in doctrine, and disorders in practice; and, after debate, the previous question was demanded, and decided in the affirmative, by yeas and nays, as follows, viz:

"Shall the main question be now put?"

Then follow the yeas 141, and the nays 108.

The resolutions were then adopted, by yeas and nays, as follows, viz:

1. *Resolved*, That the proper steps be now taken, to cite to the bar of the next Assembly, such inferior judicatories as are charged by common fame with irregularities.

2. That a special committee be now appointed to ascertain what inferior judicatories are thus charged by common fame, prepare charges and specifications against them, and to digest a suitable plan of procedure in the matter; and that said committee be requested to report as soon as practicable.

3. That, as citations on the foregoing plan is the commencement of a process involving the right of membership in the Assembly; therefore, resolved, that agreeably to a principle laid down, chap. v. sec. 9th, of the "Form of Government," the members of said judicatories be excluded from a seat in the next Assembly, until their case shall be decided.

Then follow the yeas 128, and nays 122. Non liquet 1.

Resolved, That the committee to be appointed under the foregoing resolutions, consist of five members.

Mr. Hay, for himself and others, gave notice of a protest against the foregoing resolutions.

Mr. Cleveland, for himself and others, gave notice of a protest against the resolutions adopted on Thursday last, abrogating the "Plan of Union."

Mr. Breckinridge gave notice, that he would to-morrow morning offer a resolution to appoint a committee, to consist of equal numbers from the majority and minority on the vote to cite inferior judicatories, to inquire into the expediency of a voluntary division of the Presbyterian church.

Saturday morning, May 27th.—Agreeably to notice given last evening, Mr. Breckinridge moved that a committee of ten members, of whom an equal number shall be from the majority and minority of the vote on the resolutions to cite inferior judicatories, be appointed on the state of the church.

Dr. Junkin and Mr. Ewing, on the part of the majority, and Messrs. A. Campbell and Jessup, on the part of the minority, were appointed to nominate each five members of the committee on the foregoing resolutions.

Dr. Junkin and Mr. Campbell, from the committees to nominate the committee of ten on the state of the church, respectfully reported the following nomination, viz: Mr. Breckinridge, Dr. Alexander, Dr. Cuyler, Dr. Witherspoon, and Mr. Ewing, on the part of the majority; and Dr. McAuley, Dr. Beman, Dr. Peters, Mr. Dickinson, and Mr. Jessup, on the part of the minority. The report was adopted; and the committee was directed to meet in this house at the rising of the Assembly this morning, and afterwards on their own adjournments.

On motion, the Assembly engaged in prayer, on behalf of this committee, and of the subject referred to them.

Tuesday morning, May 30th.—The committee on the state of the church, reported by their chairman, Dr. Alexander, that they had not been able to agree, and asked to be discharged.

Both portions of the committee then made separate reports, accompanied by various papers, which reports and papers were ordered to be entered upon the minutes of the Assembly.

REPORT OF THE COMMITTEE OF THE MAJORITY.

The Committee of the Majority, from the United Committee on the State of the Church, beg leave to report:

That having been unable to agree with the Minority's Committee on any plan for the immediate and voluntary separation of the New and Old School parties in the Presbyterian church, they lay before the General Assembly the papers which passed between the committees, and which contain all the important proceedings of both bodies.

These papers are marked one to five of the majority, and one to four of the mi-

nority. A careful examination of them will show that the two committees were agreed in the following matters, namely:

1. The propriety of a voluntary separation of the parties in our church; and their separate organization.

2. As to the corporate funds, the names to be held by each denomination, the records of the church, and its boards and institutions.

It will further appear, that the committees were entirely unable to agree, on the following points, namely:

1. As to the propriety of entering at once, by the Assembly, upon the division, or the sending down of the question to the presbyteries.

2. As to the power of the Assembly to take effectual initiative steps, as proposed by the majority; or the necessity of obtaining a change in the constitution of the church.

3. As to the breaking up of the succession of this General Assembly, so that neither of the new Assemblies proposed, to be considered *this* proper body continued; or that the body which should retain the name and institutions of the General Assembly of the Presbyterian Church in the United States of America, should be held in fact and law, to be the true successors of *this* body. While the committee of the majority were perfectly disposed to do all that the utmost liberality could demand, and to use in all cases such expressions as should be wholly unexceptionable; yet it appears to us indispensable to take our final stand on these grounds.

For, *first*, we are convinced that if any thing tending towards a voluntary separation is done, it is absolutely necessary to do it effectually, and at once.

Secondly. As neither party professes any desire to alter any constitutional rule whatever, it seems to us not only needless, but absurd, to send down an overture to the presbyteries on this subject. We believe, moreover, that full power exists in the Assembly, either by consent of parties, or in the way of discipline, to settle this, and all such cases; and that its speedy settlement is greatly to be desired.

Thirdly. In regard to the succession of the General Assembly, this committee could not, in present circumstances, consent to any thing that should even imply the final dissolution of the Presbyterian church, as now organized in this country; which idea, it will be observed, is at the basis of the plan of the minority; insomuch that even the body retaining the name and institutions should not be considered the successor of *this* body.

Finally. It will be observed from our fifth paper, as compared with the fourth paper of the minority's committee, that the final shape which their proposal assumed, was such, that it was impossible for the majority of the house to carry out its views and wishes, let the vote be as it might. For if the house should vote for the plan of the committee of the majority, the other committee would not consider itself, or its friends, bound thereby: and *voluntary* division would therefore be impossible, in that case. But if the house should vote for the minority's plan, then—the foregoing insuperable objections to that plan being supposed to be surmounted—still the whole case would be put off, perhaps indefinitely.

A. Alexander, C. C. Cuyler, J. Witherspoon, N. Ewing, R. J. Breckinridge.

REPORT OF THE COMMITTEE OF THE MINORITY.

The subscribers, appointed members of the Committee of ten on the State of the Church, respectfully ask leave to report, as follows:

It being understood that one object of the appointment of said committee was to consider the expediency of a voluntary division of the Presbyterian church, and to devise a plan for the same, they, in connexion with the other members of the committee, have had the subject under deliberation.

The subscribers had believed that no such imperious necessity for a division of the church existed, as some of their brethren supposed, and that the consequences of division would be greatly to be deprecated. Such necessity, however, being urged by many of our brethren, we have been induced to yield to their wishes, and to admit the expediency of a division, provided the same could be accomplished in an amicable, equitable, and proper manner. We have accordingly submitted the following propositions to our brethren on the other part of the same committee, who at the same time submitted to us their proposition, which is annexed to this report.

[Here read the Proposition marked Minority No. 1, and Majority No. 1.]

Being informed by the other members of the committee, that they had concluded not to discuss in committee the propositions which should be submitted, and that

all propositions on both sides were to be in writing, and to be answered in writing, the following papers passed between the two parts of the committee: Here read,

No. 2, Minority paper.
2, Majority "
3, Majority "
3, Minority "
4, Majority "
4, Minority "
5, Majority "

From these papers it will be seen, that the only question of any importance upon which the committee differed, was that proposed to be submitted to the decision of the Assembly, as preliminary to any action upon the details of either plan. Therefore, believing that the members of this Assembly have neither a constitutional nor moral right to adopt a plan for a division of the church, in relation to which they are entirely uninstructed by the presbyteries; believing that the course proposed by their brethren of the committee to be entirely inefficacious, and calculated to introduce confusion and discord into the whole church, and instead of mitigating, to enhance the evils which it proposes to remove; and regarding the plan proposed by themselves, with the modifications thereof as before stated, as presenting in general the only safe, certain, and constitutional mode of division, the subscribers do respectfully present the same to the Assembly for their adoption or rejection.

Thomas M'Auley, N. S. S. Beman, Absalom Peters, B. Dickinson, William Jessup.

No. 1, of the majority.

The portion of the committee which represents the majority, submit for consideration:

1. That the peace and prosperity of the Presbyterian Church in the United States, require a separation of the portions called respectively the Old and New School parties, and represented by the majority and minority in the present Assembly.

2. That the portion of the church represented by the majority in the present General Assembly, ought to retain the name and the corporate property of the General Assembly of the Presbyterian Church in the United States of America.

3. That the two parties ought to form separate denominations, under separate organizations; that to effect this with the least delay, the commissioners in the present General Assembly shall elect which body they will adhere to, and this election shall decide the position of their presbyteries respectively for the present; that every presbytery may reverse the decision of its present commissioners, and unite with the opposite body, by the permission of that body properly expressed; that minorities of presbyteries, if large enough, or if not, then in connexion with neighbouring minorities, may form new presbyteries, or attach themselves to existing presbyteries, in union with either body, as shall be agreed on; that synods ought to take order and make election on the general principles already stated—and minorities of synods should follow out the rule suggested for minorities of presbyteries, as far as they are applicable.

No. 1, of the minority.

Whereas, the experience of many years has proved that this body is too large to answer the purposes contemplated by the constitution, and there appear to be insuperable obstacles in the way of reducing the representation:

And whereas, in the extension of the church over so great a territory, embracing such a variety of people, difference of views in relation to important points of church policy and action, as well as theological opinion, are found to exist:

Now, it is believed, a division of this body into two separate bodies, which shall act independently of each other, will be of vital importance to the best interests of the Redeemer's kingdom.

Therefore, resolved, That the following rules be sent down to the presbyteries, for their adoption or rejection, as constitutional rules, to wit:

1. The General Assembly of the Presbyterian Church in the United States of America, shall be, and it hereby is divided into two bodies—the one thereof to be called the General Assembly of the Presbyterian Church in the United States of America, and the other, the General Assembly of the American Presbyterian Church.

2. That the Confession of Faith and form of government of the Presbyterian Church of the United States of America, as it now exists, shall continue to be the Confession of Faith and form of government of both bodies, until it shall be constitutionally changed and altered by either, in the manner prescribed therein.

3. That in sending up their commissioners to the next General Assembly, each presbytery, after having, in making out their commissions, followed the form now prescribed, shall add thereto as follows: "That in case a majority of the presbyteries shall have voted to adopt the plan for organizing two General Assemblies, we direct our said commissioners to attend the meeting of the General Assembly of the 'Presbyterian Church of the United States of America,' or the 'American Presbyterian Church,' as the case may be." And after the opening of the next General Assembly, and before proceeding to other business than the usual preliminary organization, the said Assembly shall ascertain what is the vote of the presbyteries; and in case a majority of said presbyteries shall have adopted these rules, then the two General Assemblies shall be constituted and organized in the manner now pointed out in the form of government, by the election of their respective moderators, stated clerks, and other officers.

4. The several Presbyteries shall be deemed and taken to belong to that Assembly with which they shall direct their commissioners to meet, as stated in the preceding rule. And each General Assembly shall, at their first meeting, as aforesaid, organize the presbyteries belonging to each, into synods. And in case any presbytery shall fail to decide as aforesaid, at that time, they may attach themselves within one year thereafter to the Assembly they shall prefer.

5. Churches, and members of churches, as well as presbyteries, shall be at full liberty to decide to which of said Assemblies they will be attached; and in case the majority of male members in any church shall decide to belong to a presbytery connected with the Assembly to which their presbytery is not attached, they shall certify the same to the Stated Clerk of the presbytery which they wish to leave, and the one with which they wish to unite, and they shall, *ipso facto*, be attached to such presbytery.

6. It shall be the duty of presbyteries, at their first meeting after the adoption of these rules, or within one year thereafter, to grant certificates of dismission to such ministers, licentiates, and students, as may wish to unite with a presbytery attached to the other General Assembly.

7. It shall be the duty of church sessions to grant letters of dismission to such of their members, being in regular standing, as may apply for the same within one year after the organization of said Assemblies under these rules, for the purpose of uniting with any church attached to a presbytery under the care of the other General Assembly; and if such session refuse so to dismiss, it shall be lawful for such members to unite with such other church, in the same manner as if a certificate were given.

8. The Boards of Education and Missions shall continue their organizations as heretofore, until the next meeting of the Assembly; and in case the rules for the division of the Assembly be adopted, those boards shall be, and hereby are transferred to the General Assembly of the Presbyterian Church in the United States of America, if that Assembly at its first meeting shall adopt the boards as their organizations; and the seats of any ministers or elders in those boards, not belonging to that General Assembly, shall be deemed to be vacant.

9. The records of the Assembly shall remain in the hands of the present Stated Clerk, for the mutual use and benefit of both General Assemblies, until, by such an arrangement as they may adopt, they shall appoint some other person to take charge of the same. And either Assembly, at their own expense, may cause such extracts and copies to be made thereof, as they may desire and direct.

10. The Princeton Seminary funds to be transferred to the Board of Trustees of the seminary, if it can be so done legally and without forfeiting the trusts upon which the grants were made; and if it cannot be done legally, and according to the intention of the donors, then to remain with the present Board of Trustees until legislative authority be given for such transfer. The supervision of said seminary, in the same manner in which it is now exercised by the General Assembly, to be transferred to and vested in the General Assembly of the Presbyterian Church in the United States, to be constituted. The other funds of the church to be divided equally between the two Assemblies.

Pass a resolution suspending the operation of the controverted votes, until after the next Assembly.

No. 2, OF THE MINORITY.

The committee of the Minority, &c., make the following objections to the proposition of the Majority.

1. To any recognition of the terms, "old and new schools," or "majority and minority," of the present Assembly, in any action upon the subject of division, the Minority expect the division in every respect to be equal; no other would be satisfactory.

2. Insisting upon an equal division, we are willing that that portion of the church which shall choose to retain the present Boards, shall have the present name of the Assembly. The corporate property which is susceptible of division, to be divided, as the only fair and just course.

3. We object to the power of the commissioners to make any division at this time, and as individuals we cannot assume the responsibility.

No. 2, OF THE MAJORITY.

The committee of the Majority, having considered the paper submitted by that of the Minority, observe:

1. That they suppose the propriety and necessity of a division of the church may be considered as agreed on by both committees; but we think it not expedient to attempt giving reasons in a preamble—the preamble is therefore not agreed to.

2. So much of No. 1, of the plan of the committee of the Minority, as relates to the proposed names of the new General Assemblies, is agreed to.

3. Nos. 1 to 8, inclusive, except as above, are not agreed to; but our proposition, No. 3, in our first paper, is insisted on. But we agree to the proposal in regard to single churches, individual ministers, licentiates, students, and private members.

4. In lieu of No. 9, we propose that the present Stated Clerk be directed to make out a complete copy of all our records, at the joint expense of both the new bodies, and after causing the copy to be examined and certified, deliver it to the written order of the moderator and stated clerk of the General Assembly of the American Presbyterian church.

5. We agree, in substance, to the proposal in No. 10, and offer the following as the form in which the proposition shall stand: that the corporate funds and property of the church, so far as they appertain to the Theological Seminary at Princeton, or relate to the professors' support, or the education of beneficiaries there, shall remain the property of the body retaining the name of the General Assembly of the Presbyterian Church in the United States of America; that all other funds shall be equally divided between the new bodies, so far as it can be done in conformity with the intentions of the donors; and that all liabilities of the present Assembly shall be discharged in equal portions by them: that all questions relating to the future adjustment of this whole subject, upon the principles now agreed on, shall be settled by committees appointed by the new Assemblies, at their first meeting respectively; and if these committees cannot agree, then each committee shall select one arbitrator, and these two, a third, which arbitrators shall have full power to settle finally the whole case in all its parts; and that no person shall be appointed an arbitrator, who is a member of either church—it being distinctly understood that whatever difficulties may arise in the construction of trusts, and all other questions of power, as well as right, legal and equitable, shall be finally decided by the committees, or arbitrators, so as in all cases to prevent an appeal by either party, to the legal tribunals of the country.

No. 3, OF THE MINORITY.

1. We accede to the proposition to have no preamble.

2. We accede to the proposition No. 4, modifying our proposition No. 9, in relation to the records and copies of the records. The copy to be made within one year after the division.

3. We assent to the modification of No. 10, by No. 5 of the propositions submitted, with a trifling alteration in the phraseology, striking out the words, "shall remain the property of the body retaining the name of the General Assembly of the Presbyterian Church in the United States of America," and inserting the words, "shall be transferred and belong to the General Assembly of the Presbyterian Church of the United States, hereby constituted."

4. We cannot assent to any division by the present commissioners of the Assembly, as it would in no wise be obligatory on any of the judicatories of the church, or any members of the churches. The only effect would be a disorderly dissolu-

tion of the present Assembly, and be of no binding force or effect upon any member who did not assent to it.

5. We propose a resolution to be appended to the rules, and which we believe, if adopted by the committee, would pass with great unanimity, urging in strong terms the adoption of the rules by the presbyteries; and the members of the minority side of the committee pledge themselves to use their influence to procure the adoption of the same by the presbyteries.

No. 3, of the Majority.

The committee of the Majority, &c., in relation to paper No. 2, observe:

1. That the terms, "old and new school, majority and minority," are meant as descriptive—and some description being necessary, we see neither impropriety nor unsuitableness in them.

2. Our previous paper, No. 2, having, as we suppose, substantially acceded to the proposal of the minority in relation to the funds, in their first paper, we deem any further statement on that subject unnecessary.

3. That we see no difficulty in the way of settling the matter at present, subject to the revision of the presbyteries, as provided in our first paper, under the third head; and as no "constitutional rules" are proposed in the way of altering any principles of our system, we see no constitutional obstacle to the execution of the proposal already made. We therefore adhere to that plan as our final proposal. But if the commissioners of any presbytery should refuse to elect, or be equally divided, then the presbytery which they represent shall make such election at its first meeting after the adjournment of the present General Assembly.

No. 4, of the Majority.

The committee of the Majority, &c., in reply to paper No. 3, of the Minority's committee, simply refer to their own preceding papers, as containing their final propositions.

No. 4, of the Minority.

The committee of the Minority, in reply to paper No. 3, of the Majority, observe:

That they will unite in a report to the Assembly, stating that the committee have agreed that it is expedient that a division of the church be effected; and in general, upon the principles upon which it is to be carried out—but they differ as to the manner of effecting it.

On the one hand, it is asked that a division be made by the present Assembly, at their present meeting; and on the other hand, that the plan of division, with the subsequent arrangement and organization, shall be submitted to the presbyteries, for their adoption or rejection.

They will unite in asking the General Assembly to decide the above points previous to reporting the details—and in case the Assembly decide in favour of immediate division, then the paper No. 1, of the majority, with the modifications agreed on, be taken as the basis of the report in detail.

If the Assembly decide to send to the presbyteries, then No. 1, of the Minority's papers, with the modifications agreed on, shall be the basis of the report in detail.

The committee of the Minority cannot agree to any other propositions than those already submitted, until the above be settled by the Assembly.

If the above proposition be not agreed to, or be modified, and then agreed to, they desire that each *side* may make a report to the Assembly to-morrow morning.

No. 5, of the Majority.

The committee of the Majority, &c., in answer to No. 4, &c., reply, that understanding from the verbal explanations of the committee of the Minority, that the said committee would not consider either side bound by the vote of the Assembly, if it were against their views and wishes respectively, on the point proposed to be submitted to its decision in said paper, to carry out in good faith a scheme which, in that case, could not be approved by them; and under such circumstances, a *voluntary* separation being manifestly impossible, this committee consider No. 4, of the Minority, as virtually a waver of the whole subject. If nothing further remains to be proposed, they submit that the papers be laid before the Assembly, and that the united committee be dissolved.

The Committee on the State of the Church was discharged.

It was moved that the further consideration of the reports be indefinitely postponed; and, after debate,

It was moved that this whole subject be laid on the table for the present. The motion was adopted, by yeas and nays, as follows, namely, yeas 138, nays 107.

Mr. Randall added, that the proceedings for an amicable separation were thus at a stand: this method of "pacification" failed—the whole subject was laid on the table; and the same morning,

A resolution was offered, that the Synod of the Western Reserve is not a part of the Presbyterian church.

This resolution was debated on Tuesday afternoon, Wednesday morning, May 31st, and Wednesday afternoon.

Thursday morning, June 1st.—The Assembly postponed the orders of the day, and resumed the unfinished business of yesterday, namely, the motion to postpone the further consideration of the resolution declaring the Synod of the Western Reserve not to be a part of the Presbyterian church. And after debate, the previous question was demanded, and decided in the affirmative, by yeas and nays, as follows, namely.

Shall the main question be now put?

Then follow the yeas 130, nays 102. Non liquet 1.

So the motion to postpone was cut off. And then the original resolution was adopted, by yeas and nays, as follows, namely.

Resolved, That by the operation of the abrogation of the Plan of Union of 1801, the Synod of the Western Reserve, is, and is hereby declared to be no longer a part of the Presbyterian Church in the United States of America.

Then follow the yeas 132, and the nays 105.

Thursday afternoon, June 1st. (Min. page 441.)—A motion was made, that those members who were out of the house when the last vote of this morning was taken, be allowed to have their names entered among the yeas and nays: after debate, this motion was laid on the table.

The Assembly proceeded to the order of the day, namely, the election of Trustees of the General Assembly.

A motion was made that this election be by ballot, and decided in the affirmative, by yeas 68, nays 6.

Before the vote was announced, a motion was made, directing the clerk to call the names of members of the Western Reserve Synod, which motion the moderator decided to be out of order. An appeal was taken from the moderator, and the house sustained his decision.

Mr. Jessup presented a written demand that the members of the Western Reserve Synod be admitted to vote, in the election now in progress, and protesting against the rejection of their votes.

The paper was laid on the table.

Friday morning, June 2d.—A protest against the resolutions of the Assembly abrogating the "Plan of Union" of 1801, was introduced and accepted; and it was referred to Dr. Junkin, Dr. Green, and Mr. Anderson—to be answered.

Saturday morning, June 3d.—Mr. Jessup offered a paper, purporting to be a protest from the commissioners, members of the Western Reserve Synod, against the resolution of this Assembly, declaring that that synod is not a part of the Presbyterian Church. The protest was received, read, and committed to Messrs. Plumer, Ewing, and Woodhull—to be answered.

Dr. Beman introduced a protest, signed by himself and others, against the resolutions of this Assembly respecting the citation of such inferior judicatories as may be charged by common fame with irregularities, and against the resolution of this Assembly, declaring the Synod of the Western Reserve not to be a part of the Presbyterian Church. The protest was read, accepted, and committed to Messrs. Breckinridge, Annan, and C. S. Todd—to be answered.

Resolutions were offered by Mr. Breckinridge, respecting the connexion of the

Synods of Utica, Geneva and Genessee with the Presbyterian Church of the United States. A division of the question was called for by Mr. Jessup; and, after debate, it was moved by Mr. Jessup to postpone the resolutions, with a view of introducing the following substitute, viz.

Whereas, it has been alleged, that the Synods of Geneva, Genessee and Utica, of the Presbyterian Church in the United States of America, have been guilty of important delinquency and grossly unconstitutional proceedings, and a resolution predicated on this allegation to exclude the said synods from the said Presbyterian Church, has been offered in this Assembly; and, whereas, no specified act of the said synod has been made the ground of proceeding against that body, nor any specific members of that body have been designated as the delinquents; and, whereas, these charges are denied by the commissioners representing those bodies on this floor, and an inquiry into the whole matter is demanded; and, whereas, a majority of the members of the synods have had no previous notice of these proceedings, nor of the existence of any charge against them, individually or collectively, nor any opportunity of defending themselves against the charges so brought against them:

Therefore, *Resolved*, That the Synods of Utica, Geneva and Genessee, be, and hereby are cited to appear on the third Thursday of May next, at Philadelphia, before the next General Assembly of the Presbyterian Church in the United States of America, to show what they have done or failed to do, in the case in question, and, if necessary, generally to answer any charges that may or can be alleged against them, to the end that the whole matter may be examined into, deliberated upon, and judged of, according to the Constitution and Discipline of the Presbyterian Church in the United States of America.

Monday morning, June 5th.—The Assembly resumed the unfinished business of Saturday, viz. the motion to postpone the resolution offered by Mr. Breckinridge, respecting the connexion of the Synods of Utica, Geneva, and Genessee, with the Presbyterian Church, for the purpose of introducing a resolution to cite those synods to the bar of the next Assembly.

Monday afternoon.—The Assembly resumed the unfinished business of this morning, viz. the motion to postpone the resolutions respecting the Synods of Utica, Geneva and Genessee; and, after debate, the previous question was demanded, and decided in the affirmative; and the motion to postpone being cut off by the previous question, the resolutions were divided, and the first was adopted, by yeas and nays, as follows, viz.

Be it resolved by the General Assembly of the Presbyterian Church in the United States of America,

1. That in consequence of the abrogation, by this Assembly, of the Plan of Union of 1801, between it and the General Association of Connecticut, as utterly unconstitutional, and therefore null and void from the beginning, the Synods of Utica, Geneva and Genessee, which were formed and attached to this body, under and in execution of said "Plan of Union," be, and are hereby declared to be out of the ecclesiastical connexion of the Presbyterian Church of the United States of America, and that they are not in form or in fact an integral portion of said church.

(Yeas 115, nays 88. Non liquet 1.)

The second, third, and fourth resolutions were then adopted, by yeas and nays, as follows, viz.

2. That the solicitude of this Assembly on the whole subject, and its urgency for the immediate decision of it, are greatly increased by reason of the gross disorders which are ascertained to have prevailed in those synods, (as well as that of the Western Reserve, against which a declarative resolution, similar to the first of these, has been passed during our present session,) it being made clear to us, that even the Plan of Union itself was never consistently carried into effect by those professing to act under it.

3. That the General Assembly has no intention, by these resolutions, or by that passed in the case of the Synod of the Western Reserve, to affect in any way the ministerial standing of any members of either of said synods; nor to disturb the pastoral relation in any church; nor to interfere with the duties or relation of private Christians in their respective congregations; but only to declare and determine according to the truth and necessity of the case, and by virtue of the full authority existing in it for that purpose, the relation of all said synods, and all their constitutent parts to this body, and to the Presbyterian Church in the United States.

4. That inasmuch as there are reported to be several churches and ministers, if not one or two presbyteries, now in connexion with one or more of said synods, which are strictly Presbyterian in doctrine and order, be it, therefore, further resolved, that all such churches and ministers as wish to unite with us, are hereby directed to apply for admission into those presbyteries belonging to our connexion which are most convenient to their respective locations; and that any such presbytery as aforesaid, being strictly Presbyterian in doctrine and order, and now in connexion with either of said synods, as may desire to unite with us, are hereby directed to make application, with a full statement of their cases, to the next General Assembly, which will take proper order thereon.

(Yeas 113, nays 60.)

Tuesday morning, June 6th.—The following resolutions were offered by Dr. Alexander, viz.

Resolved, That the following be added to the Rules of the General Assembly :—

1. That no commissioner from a new formed presbytery shall be permitted to take his seat, nor shall such commissioner be reported by the Committee on Commissions, until the presbytery shall have been duly reported by the synod, and recognized as such by the Assembly; and that the same rule apply when the name of any presbytery has been changed.

2. When it shall appear to the satisfaction of the General Assembly, that any new presbytery has been formed for the purpose of unduly increasing the representation, the General Assembly will, by a vote of the majority, refuse to receive the delegates of presbyteries so formed, and may direct the synod to which such presbytery belongs, to re-unite it to the presbytery or presbyteries to which the members were before attached.

After debate, it was moved to lay the resolutions on the table. The motion was decided, by yeas and nays, as follows, viz.

(Yeas 44, nays 115.)

So the motion to lay on the table was lost. After further debate, the resolutions were carried.

Tuesday afternoon.—A protest, signed by the commissioners from the Synods of Genessee, Geneva, and Utica, against the resolutions of this Assembly declaring those Synods to be out of the Presbyterian Church, was received, read, and referred to Dr. Witherspoon, Mr. Murray, and Dr. Simpson—to be answered.

Mr. Breckinridge offered the following resolutions, viz.

Be it resolved, by the General Assembly of the Presbyterian Church in the United States of America,

1. That the Presbyteries of Wilmington and the Third Presbytery of Philadelphia, be, and hereby are dissolved.

2. The territory embraced in these presbyteries is annexed to those to which it respectively appertained before their creation. Their stated clerks are directed to deposite all their records and other papers, in the hands of the Stated Clerk of the Synod of Philadelphia, on or before the first day of the sessions of that synod, at its first meeting after the Assembly adjourns.

3. The candidates and foreign missionaries of the Presbytery of Wilmington, are hereby attached to the Presbytery of New Castle; and those of the Third Presbytery of Philadelphia, to the First Presbytery of Philadelphia.

4. The ministers, churches, and licentiates in the two presbyteries hereby dissolved, are directed to apply without delay to the presbyteries to which they most naturally belong, for admission into them; and upon application so made, by any duly organized Presbyterian church, it shall be received; but as great, long continued, and increasing common fame charges errors and irregularities in doctrine and order in both these presbyteries, it is hereby ordered, that all presbyteries to which any of the ministers or licentiates now belonging to either of them shall apply for admission, shall strictly examine them, touching their soundness in the faith, and other matters, as shall seem good to the presbyteries to which application for admission may be made.

5. If either of the aforesaid presbyteries, or any church, minister, licentiate, missionary, or candidate, shall fail or refuse to comply with the terms of these resolutions, according to their true intent, said presbytery, church, or person, as the case may be, is hereby declared to be henceforward, *de facto*, out of the communion of the Presbyterian Church in the United States of America, and no longer an integral portion thereof.

6. These resolutions shall be in force from and after the final adjournment of the present sessions of the General Assembly.

After debate, Mr. Lowrie moved to amend these resolutions, by striking out all after the word "received," in the 4th resolution, and also the whole of the 5th and 6th resolutions; and after debate, it was moved to commit this whole subject to a special committee; and, after further debate,

The Assembly adjourned till 9 o'clock to-morrow morning.

Wednesday morning, June 7th.—Mr. Breckinridge offered the following preamble and resolutions, viz.

Whereas, it has come to the knowledge of this General Assembly, that the persons who were appointed commissioners to this body from the presbyteries attached to the Synod of the Western Reserve, have served a notice upon the Treasurer of the Trustees of the General Assembly, "not to regard any orders drawn, nor any resolutions passed by this Assembly, since the passage of the act which declared said Synod of the Western Reserve to be no longer in the connexion of the body represented in this General Assembly;" and whereas, said notice is no doubt to be considered as the commencement of a series of judicial investigations, growing out of the proceedings of this Assembly, in reforming the church, during its present sessions; now, therefore, be it resolved, by the General Assembly of the Presbyterian Church in the United States of America,

1. That this Assembly expects of its trustees, full compliance with all its acts as in past times, and relies confidently on their continued fidelity to the church, in the discharge of all the important duties devolving on them.

2. That the Presbyterian Church is morally responsible, and will fully and cheerfully meet that responsibility, to sustain their trustees in all their acts, in consequence of any resolution passed or order given in virtue of such resolution of the present or any other General Assembly--and to hold said trustees harmless by reason of any loss or damage they may personally sustain thereby.

3. That this Assembly, in virtue of the powers vested in it by the act incorporating its trustees, do hereby, in writing, direct their trustees to continue to pay as heretofore, and to have no manner of respect to the notice mentioned above, nor to any similar notice that may come to their knowledge. And these resolutions, duly signed and certified, shall be delivered to them on the part of this Assembly.

Mr. Breckinridge read the notice referred to in the resolutions: and after debate, the resolutions were adopted.

Wednesday afternoon, June 7th.—On motion of Mr. Breckinridge,

The Assembly took up the unfinished business of yesterday, viz. the motion to amend the resolutions respecting the connexion of the Third Presbytery of Philadelphia, and the Presbytery of Wilmington, with the Presbyterian Church. And,

On motion of Mr. Breckinridge, the resolutions were amended, by striking out every thing relating to the Presbytery of Wilmington.

The motion offered yesterday by Mr. Lowrie, to amend the resolutions by striking out all after the word "received," in the fourth resolution, and the whole of the fifth resolution, was then renewed and adopted.

And, after debate,

It was moved to lay this whole subject on the table. The motion was decided in the negative, by yeas and nays, as follows, viz.

(Yeas 59, nays 71. Non liquet 3.)

So the house refused to lay the resolutions on the table.

The previous question was then demanded, and having been decided in the affirmative,

The resolutions as amended, were agreed to, by yeas and nays, as follows, viz.

Be it resolved, by the General Assembly of the Presbyterian Church in the United States of America,

1. That the Third Presbytery of Philadelphia, be, and hereby is dissolved.

2. The territory embraced in this presbytery is re-annexed to those to which it respectively appertained before its creation. Its stated clerk is directed to deposite all records and other papers, in the hands of the Stated Clerk of the Synod of Philadelphia, on or before the first day of the sessions of that synod, at its first meeting after this Assembly adjourns.

3. The candidates and foreign missionaries of the Third Presbytery of Philadelphia, are hereby attached to the Presbytery of Philadelphia.

4. The ministers, churches, and licentiates, in the presbytery hereby dissolved, are directed to apply without delay, to the presbyteries to which they most naturally belong, for admission into them. And upon application being so made by any duly organized Presbyterian church, it shall be received.

5. These resolutions shall be in force from and after the final adjournment of the present sessions of the General Assembly.

(Yeas 75, nays 60.)

During and subsequent to the proceedings which have been read from the minutes of the Assembly of 1837, those minutes show, (said *Mr. Randall,*) that several protests against the measures of excision were presented to the General Assembly; each of them was followed by an answer, prepared by a committee appointed for that special purpose, and these answers were adopted by the Assembly.

These were all offered in evidence by the plaintiffs; and *Mr. Randall,* after reading at some length, proposed, and the opposite counsel agreed, that, to save time, the whole of the minutes of the General Assembly of 1837, should be considered in evidence, without further reading; and to be employed as either party might have occasion in argument. The protests, and the answers, with their dates as they respectively appear in the minutes of the Assembly, are here subjoined.

Minutes of Assembly.

Wednesday morning, June 7th.—Mr. Plumer, from the committee to answer the protest signed by the commissioners from the Western Reserve Synod, made a report. The report was read, accepted, and adopted; and the protest and the answer were ordered to be entered on the minutes, and are as follows, viz.

PROTEST.

Philadelphia, June 2, 1837.

We, the subscribers, commissioners to this General Assembly, from the Presbyteries of *Grand River, Trumbull, Portage, Cleaveland, Lorain, Medina, Huron,* and *Maumee,* feel it our duty to enter our solemn PROTEST and REMONSTRANCE against what we regard the *unconstitutional and unjust* act of the Assembly, by which we are interrupted in the discharge of the duties assigned us by our respective Presbyteries, and *excluded from the floor of this house,* and from the Presbyterian church of these United States of America; and by which the General Assembly of the said church is actually dismembered—and for the following reasons, viz.

1. We were regularly appointed, by our Presbyteries, commissioned in due form, and admitted to our seats in this Assembly, and exercised our undisputed rights as members, for two weeks.

2. The Presbyteries represented by us, *all* have a regular Presbyterian existence, according to the constitution of the Presbyterian church, as interpreted and administered by all the courts of the church; and some of these presbyteries existed prior to the adoption of the constitution in 1821, and participated in that act.

3. If there was any thing wrong in the original organization of our Presbyteries—which we do not admit or believe—this wrong was chargeable, not upon *us,* but upon the Synod of Pittsburgh, from whose act our original Presbyteries received their existence, and which act has been *sanctioned* by twenty-two General Assemblies, up to the present time.

4. But if—after an administration of the constitution for thirty-six years, on the assumption that the "Plan of Union" with the "Association of Connecticut" was constitutional—a *different* conclusion is *now* arrived at, we can see no reason why this new discovery, which legally concerns the "*accommodation churches*" only, should be made a reason why presbyteries, ministers, and elders, regularly introduced into the Presbyterian church, according to its known and common forms, should be driven, without a constitutional trial, from the rights and privileges secured to them by our constitution.

5. If it be assumed that the existence of churches on the "accommodation plan" rightfully annihilates the existence of all presbyteries and synods where such

churches have been formed, we see not why this principle should be confined in its severe application to the "Synod of the Western Reserve," when it is known that the same system has prevailed in the synods of Albany, New Jersey, and South Carolina, and Georgia; and extensively in other synods under the care of the General Assembly. And, if the toleration of the "accommodation plan" proves so fatal to the existence of inferior courts, we see not why the *originating and the fostering* of this plan for thirty-six years, should not render nugatory all the acts of the Assembly itself, and even destroy its charter.

A principle which leads to results so disastrous and "suicidal" to the Presbyterian church, we cannot regard as constitutional.

6. Once admit that regularly appointed commissioners may be excluded *instanter*, without a charge of discourtesy to the house, and without trial, and the way is open to drive from the General Assembly, under some pretext or other, any member, or any number of members, who, for the time being, may be obnoxious to the majority. This principle annihilates at once and for ever, the rights of presbyteries on this floor, and renders the constitution itself a dead letter.

We complain not so much that we were denied a patient hearing—that it was professed we were not on trial, on the ground that we were already out of the house, by the passage of a previous resolution; and that still testimony was elicited from us catechetically, which, we think, was abused to our condemnation—that the whole case on which hung the destiny of the synod, was hurried through, and finally closed by the "*previous question*," which shut up the mouths of ourselves and our friends—that, finally, we were furnished with no communication dismissing us from the house in a courteous manner. *All this* we have felt to be unkind and unjust treatment; but we have passed it over, to select our reasons for protest from the great principles of Presbyterianism, which, in our case, have been violated. We, therefore, wish to leave this our solemn PROTEST on the records of a court, of which we still regard ourselves as rightful members. Having done this, we commit our case to the calm decision of the church at large—of posterity—of God.

Rufus Nutting, Alanson Saunders, Henry Brown, Eldad Barber, John Seward, William Fuller, Joseph H. Breck, James Boyd, Harmon Kingsbury, Isaac J. Rice, Varnum Noyes, Benjamin Woodbury, Dudley Williams.

ANSWER.

The General Assembly might not only decline to reply to the Protest signed by the commissioners from the presbyteries composing the Synod of the Western Reserve, but even refuse to admit it to record. For if the "Plan of Union" was unconstitutional, and therefore void, from the beginning, and the existence of these presbyteries was founded on that Plan of Union, then they never had a constitutional existence, and their commissioners never had a constitutional right to a seat in the General Assembly. The Assembly, therefore, do not *exclude* those whom they admit *once had a right* to seats here, but they simply *declare* that, from the unconstitutional organization of these presbyteries, their commissioners never had, and of course now have not a right to seats in this Assembly. They therefore had no "right to vote," and consequently had no "right to join in a protest" against any decision of this house, or to have their protest admitted to record. They did vote, however, in the decision against which they protest: but if they did that in one case which the constitution did not authorize, that certainly gives them no right to do another thing which depended on their right to do the first act.

But the Assembly desire to treat those brethren with all courtesy, and therefore allow their Protest a place in the records.

To their reasons for protesting, the following answers are given.

It seems, however, to be proper, in the first place, to state the great principle on which the Assembly decided.

We believe that our powers, as a judiciary, are limited and prescribed by the constitution of the Presbyterian church. Whatever any Assembly may do which it is not authorized by the constitution to do, is not binding on any inferior judicatory, nor on any subsequent Assembly.

The constitution provides that all our judicatories shall be composed of bishops or ministers and ruling elders of the Presbyterian church, and the General Assembly have no right to introduce into any of the judicatories any other persons claiming to hold any other offices, either in the Presbyterian church, or any other church. And should they attempt to do this, no one is bound by it. But the General Assembly of 1801 did permit members of standing committees in churches

not Presbyterian, "to sit and act" in our presbyteries, and under this provision they have sat in the higher judicatories of the church.

On a thorough investigation, it is now fully ascertained that they had no authority from the constitution to admit officers from any other denomination of Christians to sit and act in our judicatories; and, *therefore*, no presbytery or synod thus constituted, is recognised by the constitution of our church, and no subsequent General Assembly is bound to recognise them.

The presbyteries of the Synod of the Western Reserve are thus constituted—for committee-men are permitted "to sit and act" in all these presbyteries; therefore this General Assembly cannot recognise the constitutional existence of these presbyteries.

The fact that they have been recognised by former Assemblies, cannot bind this Assembly, when it is fully convinced of the unconstitutionality of the organization.

In reply to the first reason in the Protest, namely, that they were regularly appointed by their presbyteries, &c., we say they were not regularly appointed—for it is admitted that these committee-men are allowed to vote for commissioners to the Assembly, and these illegal votes, of which there may have been a majority, renders the appointment illegal. They held their seats in this Assembly for some time, it is true, but this gives them no right to continue to hold them after it is ascertained that they had no constitutional right to seats.

As to the second reason that their presbyteries have a regular Presbyterian existence, it is denied by this Assembly, and on this ground they are denied seats. The existence of presbyteries thus constituted, is recognised neither in the former nor the amended constitution of the church.

3. If the Synod of Pittsburgh constituted presbyteries in part of materials not allowed by the constitution, this Assembly is not bound to recognise them.

4. It is well known to those acquainted with the history of this General Assembly, that the "Plan of Union," as an unconstitutional compact, has long been a subject of complaint, and as long ago as the year 1831, the Assembly resolved, that the appointment of members, of standing committees, to be members of the General Assembly, was of questionable constitutionality, and therefore ought not in future to be made; and since that time none have been received in the Assembly, known to be such. But their right to seats here is just as constitutional as in the presbytery.

The protestants still assume that their presbyteries are regularly constituted, while we consider it a fundamental departure from our system to organize a presbytery with one or two Presbyterian churches, and ten or twelve of another denomination of Christians. And had none but Presbyterian churches been allowed to belong to the presbyteries, some of these presbyteries never would have existed. The representatives of these churches, on the accommodation plan, form a constituent part of these presbyteries, as *really* as the pastors or elders, and this Assembly can recognise no presbytery thus constituted, as belonging to the Presbyterian Church.

5. The Assembly has extended the operation of this principle to other synods which they find similarly constituted. But even if they did not, this injures not the Synod of the Western Reserve.

6. "Once admit that regularly appointed commissioners may be excluded," &c. This is assuming what we deny. Many of those who voted for these commissioners, and, for aught we know, a majority were neither bishops nor ruling elders in the Presbyterian Church, and therefore had no right to vote for those commissioners.

The constitution says expressly, it (the General Assembly) shall represent in one body, *all the particular churches of this denomination:* but these commissioners were voted for by the delegates of churches of *another denomination;* therefore they represent churches of another denomination. According to their own showing, there is one presbytery with only one Presbyterian church, another with two, and in the whole synod, containing one hundred and thirty-nine churches, there are only twenty-five, or at most, thirty Presbyterian churches, and one hundred and nine Congregational churches, or churches of a mixed character. It cannot, therefore, be a Presbyterian body, where more than three-fourths of the churches are *not* Presbyterian. It is perfectly manifest, that in a body thus constituted, it would often occur that the commissioners elected would be chosen by those who had no right to vote, and so they would be the representatives, not of the Presbyterian, but of the Congregational denomination.

We would observe, in reference to the conclusion of the Protest, that the members of the Synod of the Western Reserve, and their friends, occupied a larger space in the discussion than the majority of the Assembly; and the "previous question" was not called for until it was manifest that the minds of members were made up. As the Assembly has already made provision for the organization into presbyteries, and annexation to this body, of all the ministers and churches who are thoroughly Presbyterian, it is not necessary to reply to the closing remarks of the Protest.

Dr. Junkin, from the committee to answer the Protest against the abrogation of the Plan of Union, made a report. The report was read, accepted, and adopted; and the Protest and answer were ordered to be entered on the Minutes, and are as follows, viz:

PROTEST.

The undersigned, members of the General Assembly, respectfully present the following Protest against the resolutions of said Assembly, adopted on the 23d ult., *abrogating* the act of the General Assembly of 1801, entitled "a Plan of Union," &c., and for the following reasons, viz:

1. Because the said act is declared, in the resolution complained of, to have been *unconstitutional*. The utmost that can be said on this subject is, that it is an act neither specifically provided for, nor prohibited, in the constitution. It cannot, therefore, be affirmed to be *contrary* to the constitution.

The constitution provides, that before any constitutional rules proposed by the General Assembly to be established, shall be obligatory on all the churches, the approval of them by a majority of presbyteries must be first obtained. (Form of Government, c. XII., sec. 6.) The act of the Assembly adopting the Plan of Union, it is admitted, was not previously transmitted to the presbyteries for their approval. It does not therefore follow, however, that that act was unconstitutional—because the provisions of the Plan of Union were, neither in fact, nor ever regarded by any of the presbyteries as "constitutional *rules*," "to be obligatory on *all* the churches." They were the mere terms of an agreement, or treaty, between the General Assembly of the Presbyterian Church and the General Association of Connecticut, and through that Association, with all the churches which have been formed according to the terms of that treaty.

In the act of the Assembly adopting *that Plan of Union*, the General Assembly being constitutionally "the bond of *Union*, peace, correspondence, and mutual confidence, among all our churches," (Form of Government, c. XII., sec. 4,) merely exercised its legitimate functions, agreeably to the constitution, (Form of Government, c. I., sec. 2,) in declaring "the terms of admission into the *communion*" of the Presbyterian Church, proper to be required on the frontier settlements. And in this light the entire Presbyterian Church has so regarded this Plan of Union, from its adoption up to the present time, when the abrogation of it is publicly declared, by the advocates of the measure, to be *necessary* for the acquisition and perpetuation of power to accomplish the ends avowed and sought by the minority of the last General Assembly, and prosecuted by means of a convention, called at their instance, and holding its sessions cotemporaneously with those of the Assembly. For, the following facts are undeniable, namely. 1st. That the Plan of Union now declared to be unconstitutional, was formed TWENTY YEARS *before* the adoption of the present constitution of the Presbyterian Church: 2d. That this Plan, at the time of the adoption of the constitution, was in full and efficient operation, and of acknowledged authority as common law in the church: 3d. That it had been recognised and respected, in numerous precedents, in the doings of the General Assembly, from year to year: and 4th. That for SIXTEEN YEARS *since* the adoption of this constitution, it has been regarded of equal authority with any act whatever to which the General Assembly is constitutionally competent.

Had the Plan of Union, and the act of the General Assembly adopting it, been regarded unconstitutional and null, as being either an assumption of power not granted, or a trespass on the rights of presbyteries, some remonstrance, or objection to the imposition of constitutional rules for the government of all the churches, not legitimately enacted, would have been heard from some quarter, before the

lapse of one third of a century. Had the Plan of Union been thought illegal, or had it been designed or desired, by the presbyteries in 1821, when the constitution was revised, amended, and adopted by them a second time, to frustrate or resist the operation of this Plan, unquestionably either the revised and amended constitution would have had embodied in it some provision against it, or some attempt at least would have been made to that effect. The truth is, that the Plan of Union, adopted by the General Assembly, was felt to be morally binding as a solemn agreement or treaty, duly ratified by the power constitutionally competent to do so, and by no means the enactment of constitutional rules to be "obligatory on all the churches" for their government.

It is to no purpose, in our opinion, to allege the unconstitutionality of the Plan of Union, by pleading, that for a church to be regarded as a Presbyterian church, it must, according to our constitution, be organized with ruling elders, while that plan provides for the organization of churches in certain cases, without such officers—because the Plan of Union designedly contemplates a process, which the Assembly was constitutionally competent to prescribe, and which the entire church had approved, by which churches on the frontier settlements may be organized partially at first on the Presbyterian ground, and be gradually brought fully on to it; and because, if the provisions of the constitution prescribing the *full* form of organization proper for a Presbyterian church, must in every case be minutely and completely observed, and any deviation from it should vitiate the organization, then must those numerous churches among us, in which there are no deacons, be for the same reason pronounced unconstitutional.

The attempt, too, to prove the unconstitutionality of the act of the Assembly adopting the Plan of Union, by attributing to the provisions of that plan the character of constitutional rules obligatory on *all* the churches, and by objecting that the presbyteries had not been previously consulted, strikes as directly, and is as conclusive against the plans adopted for the organization and government of the Theological Seminaries at Princeton and Allegheny, of the Boards of Education and of Missions, and for the union and perpetuated existence of the presbyteries belonging to the General Synod of the Associate Reformed Church, who were admitted into the communion with the Presbyterian Church, by the terms of a Plan of Union agreed upon between that Synod and the General Assembly: for the provisions of these plans have never been transmitted to the presbyteries for their approval. If, therefore, the Plan of Union with the General Association of Connecticut is to be abrogated because of alleged unconstitutionality on these grounds, so must be the rules and regulations and the whole organization and government of the Theological Seminaries of the General Assembly, and also the act of the Assembly by which the presbyteries of the Associated Reformed Synod were united with the Presbyterian Church of these United States, and by which the General Assembly became possessed of the valuable theological library, known as the Mason Library, now in Princeton, and formerly belonging to the Associate Reformed Synod.

2. We protest against the resolution referred to, because the Plan of Union adopted by the General Assembly of 1801 was designed *to suppress and prevent schismatical contentions, and for the promotion of charity*,—or, in the language of the Plan itself, "with a view to prevent alienation, and promote union and harmony," which, through a long series of years, it has been efficient in doing, and has proved, both itself efficacious to do, and the wisdom of the Assembly in its projection and adoption; both which ends the General Assembly is constitutionally competent to design, and for which it is invested with ample authority by the constitution, (Form of Government, c. XII., sec. 5,) and held responsible by the great Head of the Church.

3. We protest against the resolution referred to, because it declares the said "Plan of Union" to have been "totally destitute of authority as proceeding from the General Association of Connecticut, which is invested with no power to legislate in such cases." Even on the assumption, that the said Association was invested with no *such* power—which, it seems to us, both indecorous and irrelevant for this General Assembly to assert as a reason for the resolution adopted—we cannot doubt that that Association had full power to agree to the stipulations of a treaty or contract, proposed by the General Assembly, and urged on the acceptance of the General Association; and especially, when it is considered, that by acceding to the said stipulations, the said Association relinquished whatever right it had to the direction and regulation of the members of its own churches in the new settlements, and allowed and influenced them to increase, both the numbers and the pe-

cuniary and spiritual strength of the Presbyterian Church. And even if the plan referred to had not authority in so far as it emanated from the General Association of Connecticut, which we by no means admit, it was unquestionably binding on the General Assembly, by virtue of its own engagement, to fulfil its own obligations, and after numerous churches had been formed under their own care, the obligations of the plan appear to us to have been common to the General Assembly, the General Association of Connecticut, and the churches, presbyteries, and synods, formed in pursuance and in the faith of it, and that no one of these bodies could lawfully abrogate it without the consent of all the others. Our opinion, therefore is, that the resolution of this General Assembly, abrogating the said Plan of Union, so far as it was intended to affect churches already formed under its provisions, is a breach of faith, and wholly void and of no effect; that all such churches have a right to continue their organization on the conditions of the said plan; and that it is the duty of the presbyteries, the synods, and all future General Assemblies to protect them in that right, until they shall voluntarily, under the kind and conciliatory influence of the aforesaid bodies, adopt the Presbyterian organization in full, as many of them have already done, and others, we are happy to learn, will probably soon do, if allowed to exercise their choice unrestrained by the attempted exercise of assumed authority.

4. We protest against the said resolution, because it denominates the Plan of Union *unnatural*, as well as unconstitutional, and attributes to it much confusion and irregularity; whereas, it appears to us to have been a most natural, wise and benevolent plan for promoting the unity, increase, and purity of the church in our new settlements, and that its operation for thirty-six years, with but such occasional irregularities as may occur under any system of government, has, on the whole, been productive of benign and happy effects; in view of which this General Assembly and the whole church ought to cherish sincere and devout gratitude to God.

5. We protest against the said resolution, because the mode in which it was brought before the Assembly, appears to us to have been exceedingly exceptionable, it having been in substance proposed in the memorial of a convention, of whose alleged cause and object, and of most of whose declarations, because unaccompanied with satisfactory proof, we wholly disapprove, and which memorial, as coming from such a body, we think this Assembly ought not to have received and entertained, especially when it was found to contain representations of the state of the church, in our opinion not justified by fact, and of very injurious tendency. Another objection to the mode in which the said resolution was brought before the Assembly is, that a majority of the committee to whom the memorial was referred, and who reported the resolution against which we protest, were members of the convention presenting the memorial.

6. We protest, because, against the earnest remonstrances of many who are best acquainted with the happy effects of the Plan of Union, the debate on the subject was arrested by an impatient call for the previous question, more than *eighty* of the members voting for it, having been members of the convention in whose name the said memorial was presented. The Assembly was thus forced to a decision without any proper evidence of the existence of the alleged irregularities, and before the subject of errors in doctrine had been discussed in the Assembly, notwithstanding the memorialists had declared, that they "complain and testify," against said Plan of Union, "chiefly because of their sincere belief, that the doctrinal purity of our ancient Confession of Faith is endangered, and not because of any preference for a particular system of mere church government and discipline."

For these reasons, the undersigned enter this their solemn protest.

Philadelphia, June 1st, 1837.

John P. Cleaveland; William Jessup, Baxter Dickinson, Absalom Peters, Henry Brown, Horace Bushnell, Harmon Kinsbury, Timothy Stillman, David Porter, E. W. Gilbert, Darius O. Griswold, John B. Richardson, James B. Shaw, Washington Thatcher, Thomas Brown, Thomas Lounsbury, Nahum Gould, Abner Hollister, Ephraim Cutler, William Fuller, Gardner Hayden, Robert Stuart, Silas West, Marcus Smith, John L. Grant, John Gridley, Nathaniel C. Clark, Varnum Noyes, Dudley Williams, George Spalding, John Seward, Edwin Holt, Alanson Saunders, Jonathan Cone, J. M. Rowland, J. W. M'Cullough, Dewey Whitney, H. S. Walbridge, Horace Hunt, Samuel Reed, Rufus Nutting, Zina Whittlesey, James R. Gibson, Bennet Roberts, Joseph H. Breck, Enoch Kingsbury, James Boyd, Eldad Barber, David Schenck, Ira Pettibone, Lewis

H. Loss, Jonathan Hovey, J. B. Preston, Ambrose White, Wilfred Hall, John S. Martin, George Painter, Benjamin Woodbury, Burr Bradley, Ira M. Wead, P. W. Warriner, T. D. Southworth, Adam Miller, Jacob Faris, Alexander Campbell, N. S. S. Beman, H. H. Hayes, Henry Brewster, N. E. Johnson, Solomon Stevens, Daniel Sayre, William C. Wisner, Isaac J. Rice, Felix Tracy, Bliss Burnap, E. Cheever, E. Seymour, Obadiah Woodruff, Frederick W. Graves, James I. Ostrom, Philip C. Hay, Jacob Gideon, David B. Ayers, S. W. May, Ammi Doubleday, Robert Aikman, William Roy, Thomas M'Auley, John Leonard, Calvin Cutler, Merit Harmon, F. A. M'Corkle, James W. Phillips, George E. Delevan, James A. Carnahan, Obadiah N. Bush, John M'Sween, George Duffield, S. Benjamin, John Crawford, Fayette Shipherd, Thomas Williams, R. Campbell.

ANSWER.

The committee to whom that subject was referred, beg leave to present the following answer to the protest against the resolution, abrogating "the Plan of Union," and request that both be placed on your minutes. The reasons of protest are numbered from one to six. No. 1, is the principal, and therefore we prefer leaving it to the last, and commencing with No. 2. "We protest," say the minority, "against the resolution referred to, because the Plan of Union adopted by the General Assembly of 1801, was designed *to suppress and prevent schismatical contentions, and for the promotion of charity*, or, in the language of the plan itself, "with a view to prevent alienation and promote union and harmony."

To this a sufficient answer is found in the broad undeniable fact, that "the Plan of Union" has been a principal means of dividing the church and this General Assembly into two parties, and been the main source of those schisms which for many years have distracted our Zion. Whilst it is admitted, that in some instances it may have beneficially affected certain localities, it has laid the deep foundation of lasting confusion, and opened wide the flood-gates of error and fanaticism. For proof of this, we have only to refer to the recorded votes of the last and the present General Assemblies, from which it abundantly appears, that the representatives of churches formed on this plan, have always opposed the Boards of Education and of Missions, and the efforts towards reform, and the suppression of errors and of schismatical contentions.

No. 3. "Because it declares the said 'Plan of Union' to have been totally destitute of authority, as proceeding from the General Association of Connecticut, which is invested with no power to legislate in such cases."

In reply to this, let it be remarked, 1st, that the protestors seeming to admit that the General Association of Connecticut had no power and authority to bind their churches, yet insist that the General Assembly could make a treaty or covenant that should be binding on the other side: and the brethren in arguing the case, did insist on the "Plan" being of the nature of a covenant, (although no such term is contained in it,) and yet one of the parties to this covenant had no authority to make a contract and to make it obligatory on their churches. That is, a contract, treaty, or covenant can exist and be and continue for ever, binding in right and in law upon one party, whilst the other party, having no power or authority to bind themselves and those for whom they plead its benefits, never could be bound. That is, a treaty or covenant may exist without a mutual obligation!

2ndly. The protestors, without distinctly affirming it again, seem willing that the reader of their protest should believe that the General Association of Connecticut had power to bind their churches—that their acts participate of the nature of ecclesiastical authority. "By acceding to the said stipulations," say they, "the said Association relinquished whatever right it had to the direction and regulation of the members of its own churches in the new settlements." Now these remonstrants know perfectly well, that the General Association of Connecticut never had, never claimed, and never exercised any right at all "to the direction and regulation of the members of its own churches," even in Connecticut itself, much less "in the new settlements." The "right" of counsel and advice is the utmost stretch of their power and authority. And this General Assembly might give counsel and advice to the churches of Connecticut, and should it be founded in truth, it is just as binding upon those churches as the counsel of their own General Association, *i. e.* it comes *divested* entirely of all ecclesiastical *authority*.

3dly. The resolution of abrogation is alleged to be "a breach of faith, and wholly void and of no effect." This is begging the question: it goes on the *assumption* that faith was plighted of right, and that the treaty, so called, lawfully constituted; which we have supposed to be the very point in question.

No. 4. "Because it denominates the Plan of Union *unnatural* as well as unconstitutional, and attributes to it much confusion and irregularity." A sufficient answer to this is found in the preceding; to which may be added a single remark as to irregularity; viz. that upon inquiry at brethren who came in upon this "Plan," it appeared from their own showing, to the abundant conviction of this General Assembly, that there were some members on this floor, deliberating and voting on the very resolutions in questions, who had never adopted the Confession of Faith of this church.

No. 5. The fifth reason of protest is, that the resolution was concocted and brought before the Assembly by members of this body who had previously consulted, in the form of a convention, and memorialized this body on the subject: and that a majority of the committee to whom the memorial was referred, were members of the convention.

As to the former, let it suffice to say, that it is the right of every freeman and the duty of every Christian, before entering upon any great and important measure, to "ponder the path of his feet," because "in the multitude of counsellors there is safety." How the name "convention," any more than the name "caucus," should utterly vitiate their counsel, it may be difficult to discern.

As to the latter, it may be remarked, that in all deliberative bodies, the principle is settled, that large committees ought to be selected in proportion to the respective party views that may be entertained on the subject committed. The wisdom of the rule is obvious to common sense, and the moderator of this Assembly simply carried out the rule in this case.

No. 6. The sixth reason of protest is, "because the debate on the subject was arrested by an impatient call for the previous question. The Assembly was thus forced to a decision without any proper evidence of the existence of the alleged irregularities, and before the subject of errors in doctrine had been decided on in the Assembly."

Here remark, *first*, the call for the previous question was not *impatient*—it was asked for and seconded by a majority of the house, not in the spirit of violence and unjust oppression of the minority; nor, *secondly*, there was no unreasonable curtailment of debate. The resolution was discussed two whole days—a period of time perhaps more extended than was ever before allotted or allowed by any General Assembly to any single naked resolution. And, *thirdly*, the brethren of the minority occupied the floor more than one-half of the time. And on another resolution, when the discussion was arrested by the previous question, it was just at the close of two long speeches by the minority, and after they had consumed more than five hours in debate; whereas, the majority had not occupied the floor two hours and a half. So utterly groundless is the insinuation that a cruel and unjust use has been made of the previous question.

"The Assembly was thus forced," say the protestors—"the Assembly was forced!" "Forced" by whom? Undoubtedly by itself—"forced" to do just as it wished to do—"forced to decide by a strong vote on a subject which had been discussed two whole days! Strange coercion this!!

But, *fourthly*, the resolution in question was passed before the doctrinal errors were condemned. This is true. But it is also true, that "the Assembly was thus forced," by the opposition of the minority, to pass by the doctrinal discussion, because they could not have it in the order recommended by their committee. Certain alleged errors were offered by the minority, which they refused to have put in their proper place; but insisted on having first of all a decision upon them as amendments; which attempt, had it been successful, would have precluded their discussion, except upon a vote of reconsideration, which requires two-thirds: and thus the majority would have been completely, as to these alleged errors, in the power of the minority. Hence they were laid on the table, to be taken up at a future time. We now proceed to

No. 1. The principal reason of protest is in these words, viz: "Because the said act is declared, in the resolution complained of, to have been *unconstitutional*."

In opposition to the resolution declaring the Plan of Union unconstitutional, it would appear most reasonable that the protestors should affirm its constitutionality; *i. e.* that the constitution covers and provides for it. This ground, however, the protestors have not ventured to take. On the contrary, they explicitly admit, that the constitution makes no provision for said act—"it is," say they, "neither specifically provided for nor prohibited in the constitution."

A remark or two will show that in this they have abandoned their ground. For,

1. The constitution of the Presbyterian Church, like that of our national Union, is a constitution of specific powers, granted by the presbyteries, the fountains of power,

to the synods and the General Assembly. 2. No powers, not specifically granted, can lawfully be inferred and assumed by the General Assembly, but only such as are indispensably necessary to carry into effect those which are specifically granted. 3. Therefore the burden of proof lies upon those who affirm that the Assembly had power to enact this "Plan of Union." They admit that there is no specific grant of such power; they are bound then to prove that its exercise was indispensably necessary, in order to carry out some other power specifically granted. Now we search in vain for any such proof in the protest. There is, we believe, but a single effort of the kind. This effort is made in view of two distinct and distant clauses in our book. (Form of Gov., Chap. XII. sec. 4.) The General Assembly "shall constitute the bond of union, peace, correspondence, and mutual confidence among all our churches." But surely here is no power granted to constitute a bond of union with churches of another denomination. It has exclusive reference to "all our churches," and yet the protestors refer to this as authority for forming a union with a denomination not holding the same form of government.

An equally unsuccessful attempt is made upon Chap. I. sec. 2, where the book affirms, that "any Christian church, or union or association of churches, is entitled to declare the terms of admission into its *communion*." And the protestors assert here, that the General Assembly exercised this power in forming "the Plan of Union," and so declared "the terms of admission into the *communion* of the Presbyterian Church, proper to be required in the frontier settlements."

On this statement two remarks seem requisite; *first*, the settling of the terms of communion, we had thought, was the highest act of power—an act beyond the reach of the General Assembly itself—an act which the constitution itself provides, shall be done only by a majority of the presbyteries. When, we ask, did the Presbyterian Church "declare the terms of admission into its *communion*? Most assuredly, when the constitution was adopted. And yet the protestors in this case aver, that "the Plan of Union" is a declaration of the terms of admission into our communion! Could they affirm more directly its unconstitutionality?

The other remark is, that the Plan of Union itself does not prescribe the terms of admission into the communion of the Presbyterian Church. It prescribes the manner in which Congregationalists may remain out of this Church, and yet exercise a controlling and governing influence over its ecclesiastical judicatories.

In the entire absence of all proof, that the power exercised in forming the Plan of Union, was indispensably necessary to carry out a power specifically granted, and in the face of their own admission, that such power is not specifically given to the General Assembly, we conclude, that the act in question was without any authority, and must be null and void.

The next thing worthy of notice, is the criticism on the phrases "constitutional rules" and "obligatory on all the churches." This plan of Union, it is argued, is not of the nature of constitutional rules, obligatory on all the churches, and therefore it was not necessary that it should have been sent down, and have received the sanction of a majority of the presbyteries. In presenting this argument, the protestors admit, that if the Plan did embrace constitutional rules, the Assembly had no power to enact it. The book, (Form of Gov., Chap. XII. sec. 6,) declares, "Before any overtures or regulations proposed by the Assembly to be established as constitutional rules, shall be obligatory on the churches, it shall be necessary to transmit them to all the presbyteries, and to receive the returns of at least a majority of them in writing, approving thereof."

This was not done with the Plan; and the only question before us is, whether it is an alteration of the constitution. This Assembly affirms that it is a radical and thorough change of the entire system. On which remark—

1. Our book describes four church courts, viz. the Church Session, the Presbytery, the Synod, and the General Assembly. And (Chap. IX.) it defines "the church session to consist of the pastor or pastors, and ruling elders of a particular congregation," and entrusts to these, as permanent officers, the government of that church. But the Plan of Union provides for no such thing. It expressly dispenses with the church session, and leaves the government in the hands of the people, or of a temporary committee.

Again, Chap. X. sec. 2, "A presbytery consists of all the ministers and one ruling elder from each congregation, within a certain district." But the Plan of Union abrogates this provision. It does not merely pass it by, but absolutely repeals and nullifies it. According to the Plan, a presbytery may have committee-men less or more in it, and may have not a single elder. The book farther states, that "Every congregation, (*i. e.* of Presbyterians as before described,) which has a stated pas-

tor, has a right to be represented by one elder; and every collegiate church, (*i. e.* a church with two or more ministers,) by two or more elders, in proportion to the number of pastors." Here it is perfectly obvious that the principle of equal representation in the presbytery is aimed at. The same is true of a synod, Chap. XI. "The ratio of the representation of elders in the synod is the same as in the presbytery." That is, every congregation, governed by its own session, shall be represented in presbytery and synod. But the Plan provides for Congregational committee-men, sitting and acting and voting in presbytery, altgough it also provides that the congregation he represents shall not be under the government of the presbytery, and no appeal can be taken from it to the presbytery, even by a minister, unless the church agree to it. Thus the power of government is in the hands of men over whom that government does not extend. It is surely not necessary to proceed farther, to show that the Plan is an abrogation of the fundamental principles of the Presbyterian system. And yet the protestors say, it does not contain constitutional rules. No, verily, but it is a mass of unconstitutional usurpations, resulting from an overstretch of power. By the criticism of the protest, it is denied that the Plan contains constitutional rules; whereas, in the first sentence of the instrument itself, it is called "a plan of government for the churches in the new settlements." And the second sentence runs thus: "regulations adopted by the General Assembly, &c." Now if *regulations* are not rules, language has lost its meaning; and if *regulations* containing "a plan of government for the churches," are not intended to be binding, and do not touch the constitution, we are utterly at a loss to see how rules and regulations could be expressed. The article in question has been called "a Plan of Union," "a contract," "a covenant," none of which phrases is found in the document itself. It declares itself to be "regulations," containing "a plan of government for the churches." Now the General Assembly never had the power to establish "regulations," and a new "plan of government;" the plan is therefore null and void.

But, we are told, these govermental regulations were not binding on *all the churches.* Were they not, indeed! Have they not given rise to heterogeneous bodies, who have come up here and bound us almost to our undoing? Have they not bound with green withes and new cords this body, and its Board of Education and Missions? Have they not well nigh shorn us of the locks of our strength, and forbidden us to go forth into the field of missionary conflict against the foes of our God and King? Surely these protestors will not say the regulations are not binding upon all the churches.

But, again, we are told in the protest, they are of long standing, and have acquired the force of common law. Does long use constitute law? Then it would follow that concubinage and polygamy exist of moral right.

Again, we are told, that this "plan of government" was in existence twenty years prior to the last adoption of our constitution; and the inference is, that therefore it is binding, and was viewed as a contract to be kept in good faith. The fair inferences, however, from the fact, ought to be, that this "plan of government" was not submitted to our presbyteries by the General Assembly, and is therefore not binding; and that this neglect was owing to the circumstance that it was then little known, and its evils were not all developed.

Again, we are told in the protest, in reference to this new "plan of government," that its omission of elders, being expressly provided for and designed, does not "vitiate the organization—for then must numerous churches among us, in which there are no deacons, be for the same reason pronounced unconstitutional." And we are free to confess, that, if the constitution made the deacon a ruling officer in the church, he must be found in our ecclesiastical courts, and his absence would nullify their constitutional existence. This, however, is not the case. The deacon's office, in the New Testament, and in our book, is limited to "serving tables." The argument, therefore, is lame, and shows its eastern birth.

Again, the protest affirms that the argument against this "plan of government for the churches," because it was not submitted to the presbyteries, strikes equally against the Theological Seminaries, the Boards of Education and of Missions, and also against the admission of the presbyteries of the Associate Reformed Synod into this church.

Let us touch these in their order: and first, the Theological Seminaries. Here, again, if our protestors can show that these seminaries are, in the language of our book, "constitutional rules—obligatory on the churches," or, even in the language of their favourite plan, "regulations," and "a plan of government for the churches in the new settlements," we will give up the argument, and Princeton, and the Western Seminaries and all. But if, as every one knows, the constitutions and

regulations of these seminaries have nothing to do with the government of the churches, any more than the private regulations of a private clergyman, for his private class of students, then is this argument null and void from the beginning. As to the power in the Assembly to organize a seminary, it may be found in the book, (Form of Gov. ch. xii. sec. 5,) under the general power "of superintending the concerns of the whole church," none of which concerns is of more vital importance than that of providing an efficient ministry: also to them belongs the power of "promoting charity, truth and holiness, through all the churches under their care." Now, the training of a pious and orthodox ministry is the most effectual mode of accomplishing this work, and clearly places Theological Seminaries within the Assembly's power.

The same remarks are relevant and true in reference to the Board of Education.

As to the Board of Missions, "the superintending of the concerns of the whole church" cannot be carried out without missions; and the Form of Government, ch. xviii. expressly provides for them, and grants to the Assembly power over this very business. It reads thus: "The General Assembly may, of their own knowledge, send missions to any part to plant churches, or to supply vacancies; and, for this purpose, may direct any presbytery to ordain evangelists or ministers, without relation to any particular churches." How utterly unreasonable, then, for the protestors to deny the Assembly's power to institute a Board of Missions.

As to the Mason Library and the Associate Reformed Churches, it may be necessary only to remark, that the two presbyteries of New York and of Philadelphia—the only parts which came into this Presbyterian Church—were, from their beginning, *Presbyterian*, according to the strictest order; holding the same identical Westminster Confession of Faith, and Presbyterian form of church government: it is, therefore, difficult to perceive how the admission, by the General Assembly, of strict and rigid Presbyterians into their connexion, could be either extra or unconstitutional. The act of their admission did not create "regulations," and "a plan of government for the churches," as did the "Plan" in question: it was not "an overture or regulation for establishing constitutional rules, obligatory on the churches," and therefore its transmission to all the presbyteries was not necessary.

Finally, the unconstitutionality of the "plan of government for the churches in the new settlements," abrogated by this resolution, is further demonstrated by a reference to Form of Government, ch. xii. sec. 1, which says: "The General Assembly is the highest judicatory of the Presbyterian Church. It shall represent, in one body, all the particular churches of this denomination;" and, subsequently, it defines the ratio of representation. Now, it has been proved, on the open floor of this General Assembly, by the protestors themselves, that the Synod of the Western Reserve, which was formed on this "plan of government," and which contains one hundred and thirty-nine particular churches, has only from twenty-four to thirty Presbyterian churches in it; and yet that synod claim a right to twenty representatives here! Whom do these twenty represent? Certainly not "particular churches of this denomination," as our book says. No, but Congregational churches, which, by the terms of our book, and the whole representative spirit of our system, have no right to be represented here, and to judge and vote here, under a constitution which they deny to be binding upon themselves. With no greater impropriety would unnaturalized foreigners claim the right of franchise in our country, and of eligibility to office in our legislatures, our supreme judicial tribunals, and the executive departments of our states and the nation. Besides, it has been shown by themselves here, that this "plan of government" has been here violated, by those claiming privileges under it, sending men to the Assembly who had never adopted our constitution.

We therefore conclude, that the reasoning of the protestors is fallacious; the "plan of government" adopted in 1801 is, and ever has been unconstitutional, and therefore this General Assembly ought to declare, as it has done in the resolution protested against, that it is, from the beginning, null and void.

Mr. Murray, from the committee to answer the Protest of the commissioners from the Synods of Utica, Geneva and Genessee, against the resolution of this Assembly declaring those synods to be out of the Presbyterian Church, made a report. The report was accepted, read and adopted; and the Protest and Answer were ordered to be entered on the minutes, and are as follows, viz.

PROTEST.

Protest of the Commissioners from the Synods of Utica, Geneva and Genessee, against the act of the General Assembly of 1837, declaring them no longer constituent parts of the Presbyterian Church.

Whereas, the General Assembly of the Presbyterian Church in the United States of America, now in session, has declared the Synods of Utica, Geneva and Genessee no longer constituent parts of the Presbyterian Church; and whereas the commissioners from the presbyteries constituting those synods have been deprived of the right of deliberating and voting in this house—Therefore,

The undersigned, commissioners from the Synods of Utica, Geneva and Genessee, claim their right to enter their protest and remonstrance against these acts, for the reasons following, viz.

1. Because we deem such acts utterly unconstitutional and unprecedented. In our Form of Government, (ch. xii. sec. 4 and 5,) the powers of the General Assembly are specifically defined, but no authority to exercise such summary process and excision is there granted. In our Book of Discipline (ch. iv. and v.) the mode of procedure in the trial and punishment of ministers of the gospel is expressly and specifically prescribed, yet no one point of these laws of discipline has been conformed to in the excision and virtual excommunication of four or five hundred ministers, in good and regular standing in the Presbyterian Church; no citations have been issued or served; no charges have been specified or preferred; and no opportunity has been afforded for justification or defence.

2. Because, when the regular and constitutional method of trial was proposed to this house, the majority rejected this plan, and proceeded without trial in any form, and, in our judgment, in the face of all the regulations and provisions of our constitution and rules of discipline, to declare the aforesaid synods to be "out of the ecclesiastical connexion of the Presbyterian Church in the United States, and not in form or fact an integral portion of said church."

3. Because the act of exclusion is professedly based on the previous act of the Assembly purporting to abrogate the "Plan of Union" formed by the Assembly of 1801 with the Connecticut Association, and acted upon for thirty-six years; whereas, in our estimation, that ancient compact could not, in good faith, be abrogated without previous conference with said Association; and even if it could be so abrogated, that abrogation would not destroy or invalidate the institutions established, and the rights vested under its operation. Besides, the majority of the churches within the bounds of said synods are strictly Presbyterian in their structure, and with few exceptions, even the small number of churches originally Congregational, were not organized under the stipulations of the said "Plan of Union," but came in under a different arrangement, and possessed rights on this subject, separate from, and independent of, the "Plan of Union" of 1801, secured to them by the Assembly of 1808, by which the Synod of Albany was authorized to take the "Middle Association under its care; in virtue of which arrangement, commissioners from said Association were admitted to the floor of the General Assembly up to the period when the Association was dissolved, and erected into two presbyteries, regularly organized out of its materials.

4. Because all our synods and presbyteries have been regularly and constitutionally formed and recognised, and, *as such*, have no necessary dependence whatever upon the "Plan of Union," or any other plan of accommodation, and consequently could not be affected either by the existence or abrogation of such plan.

5. Because no proof was exhibited on the floor of the Assembly that a single minister in these synods was irregularly inducted into the office of the ministry, and we know of none such; and in every presbytery belonging to these synods there are churches formed on strict Presbyterian principles, and in most of our presbyteries such churches compose a large majority.

6. Because, while the resolution for the exclusion of these synods was under discussion, members were permitted to read and refer to letters and publications containing what we consider unfounded statements, and to utter vague and injurious reports, and when requested, refuse to give names, places and dates; and, although the right was insisted upon, not a single commissioner from any one of the three synods could obtain the floor to address the Assembly on the resolution, being put down by the motion for the previous question.

7. Because no notice whatever was given to the synods in question of the intention to sever them from the Presbyterian Church, nor the least opportunity afforded them for vindicating themselves from the vague and informal charges uttered against them on the floor of the General Assembly.

8. Because there has been no definite or authentic evidence whatever, regularly before this Assembly, of the existence within the bounds of the said synods of those errors in doctrine, or those gross irregularities in practice, which they are alleged to be guilty of tolerating.

9. Because, in our view, these acts of the Assembly are not only unconstitutional and unwarrantable, but tend to disturb the peace of our churches, to injure our ministerial character and standing, and to impair our usefulness, and thus to retard the progress of truth and righteousness in one of the most populous and important sections of our country.

10. Because, finally, while in the accompanying resolutions it is declared that these acts are not intended to affect our ministerial character, or to interfere with the organization and peace of our synods or presbyteries, the last resolution in the category directs presbyteries, ministers and churches, to detach themselves from the bodies with which they are now connected, and apply for admission into the nearest presbyteries of the Presbyterian Church. Thus attempting to exercise authority over bodies already declared not to be constituent portions of the Presbyterian Church in the United States, and to disturb their order and peace.

For these reasons we do hereby enter our solemn protest and remonstrance against the proceedings in question.

John W. M'Cullough, George Spalding, S. Benjamin, Philip C. Hay, Thomas Lounsbury, Merit Harmon, Solomon Stevens, Ira Pettibone, John Gridley, J. B. Richardson, Marcus Smith, Horace Hunt, Henry Brewster, Samuel W. May, Fayette Shipherd, Washington Thatcher, J. B. Preston.

ANSWER.

In reply to the protest of the commissioners from the presbyteries composing the synods of Utica, Geneva and Genessee, against the act of this Assembly, declaring them no longer a constituent portion of the Presbyterian Church, the Assembly remark:

1. That the above named synods became connected with the Presbyterian Church by the Plan of Union of 1801, which plan the Assembly had no constitutional power to adopt, and was accordingly null and void from the beginning. So it has been declared by this Assembly. And as these synods became connected with the General Assembly by an unconstitutional Plan of Union, they never have been a constitutional part of it. And this is all the act in reference to them declares.

Nor is there, as the protestants declare, an excommunication of four or five hundred ministers. The act itself asserts the contrary. As there was no judicial process instituted against them, no citations were necessary. Without impeaching the character or standing of the brethren composing these synods, this Assembly, by a legislative act, merely declares them, in consequence of the abrogation of the Plan of Union of 1801, no longer a constituent part of the General Assembly of the Presbyterian Church in the United States.

2. When resolutions were before the house for the citation of judicatures to the bar of the next Assembly, charged by common fame with sanctioning errors in doctrine and irregularities in practice, the protestants unanimously opposed them. And now they complain that they were not thus cited.

3. The compact of the Assembly of 1808, with the Synod of Albany, in reference to the "Middle Association," is as unconstitutional as the Plan of Union of 1801. And the fact stated by the protestants, that two large presbyteries were made out of that Middle Association, and that commissioners from said Association were admitted to the floor of the Assembly as members, only proves the constitutionality of the act against which they complain. So that their third specification of grievance contains its own answer.

4. The contrary of their fourth specification of grievances is believed and proved to be the fact. The great majority of the churches of these synods were formerly Congregational; and the great majority of those of them now Presbyterian, retain much of their Congregational peculiarities and prejudices. They almost unanimously prefer the institutions of the church they have abandoned, to those of the church of their adoption. They are in form Presbyterian, but in prejudice and in fact Congregational.

5. As no charge was brought against any minister or ministers, that they were irregularly inducted into the office of the ministry, no proof was needed to sustain it. The charge is, not that they were irregularly inducted into the Christian ministry, but that they were unconstitutionally connected with the Presbyterian Church.

6. The papers complained of were official papers, published over the signatures

of stated clerks of presbyteries, and committees of synods and associations. The resolutions complained of were thirty-six hours under debate, and more than one half of the time was occupied by those opposed to their adoption. A brother, in the midst of an argument, yielded the floor that the protestants might make what statements they thought proper: but none were made. The previous question was once withdrawn for the same purpose; and they were yet silent. And yet they complain because no time was given—that they were put down by the previous question!!

7. This is founded on the supposition, that they were constitutional parts of the Presbyterian Church, and that the act by which they are declared to be no longer a constitutional part of it, is not a legislative but a judicial act. Both of which suppositions are incorrect.

8. The evidence of great errors in doctrine and gross irregularities in practice, prevailing to an alarming extent within the bounds of said synods, and if not countenanced, certainly unsuppressed by them, is before the church and the world.

9. This is a mere expression of opinion by the protestants, to which, in this free country, every man has an undoubted right.

10. In the resolution complained of, this Assembly merely tenders its advice to the ministers and churches sincerely Presbyterian, and points them to the constitutional door by which they may speedily return to the church of their preference and affection.

Thursday Morning, June 8th.—Mr. Todd, from the committee to answer the protest against the resolutions of this Assembly, respecting the citations of inferior judicatories, and also against the resolution of this Assembly, declaring the Synod of the Western Reserve not to be a part of the Presbyterian Church, made a report. The report was read, accepted, and adopted; and it was ordered that the Protest and Answer be entered on the minutes, as follows, viz.

PROTEST.

The undersigned, members of the General Assembly, beg leave, respectfully, to enter their solemn *protest* to the act of the Assembly adopting the three resolutions relative to the citation of inferior judicatories, and likewise to the resolution of the Assembly, declaring the Synod of the Western Reserve not a part of the Presbyterian Church. In support of our protest we subjoin the following reasons:

1. We object to the *mode* of investigation adopted, in the first named resolutions, by the Assembly. They resolve, in the first place, "to cite to the bar of the next Assembly such inferior judicatories as are charged, by common fame, with irregularities." The first step, in our estimation, should have been to appoint a committee to inquire into the *nature* of the various rumours which are said to be afloat, and to report to the Assembly whether there was any cause for citation.

2. The committee was empowered, by the second resolution, merely to ascertain what judicatories were charged by common fame; whereas, they ought to have been instructed, in this stage of the investigation, to ascertain whether there was or was not any *foundation* for existing rumours. It seems to be made imperative, by the resolution, that all judicatories shall be reported by that committee, for citation, against which any unfavourable rumours are in circulation.

3. The majority of the committee recommending these measures were members of the convention which originated all this business, and brought it into the Assembly. They act upon it first in the convention, then in the Assembly; after that in the committee, and then are to pass a final vote in the Assembly. They petition *themselves*, consider their own petition, and then grant to *themselves* what *they themselves* ask.

4. The investigation ought to have been expressly limited to synods, because the book of discipline makes provision for the Assembly, in certain cases, to cite synods, but no other judicatories. (See Gen. Rev. and Con. VI.)

5. The resolution, to deprive the judicatories to be cited of a seat in the next Assembly, is, in every respect, unconstitutional and void, "*ab initio.*" This Assembly has no power, by their vote, to deprive commissioners duly elected from a seat in the next Assembly, because that Assembly has the exclusive right of judging of the qualifications of its own members, and because to do so would be to inflict a penalty before trial or investigation. Besides, the Assembly has power to cite synods only; and *presbyteries*, and not *synods*, are represented on this floor. To deprive every presbytery in a whole synod of a seat in the General Assembly, because a synod, in its collective capacity, may have been irregular, is unprecedented in ecclesiastical proceedings.

6. The provision in the book of discipline, referred to in the third resolution, to justify the exclusion of members from seats in the next Assembly, has no application in this case. It applies only to a minister of the gospel when on trial before his own Presbytery, and cannot justify the unconstitutional bearing of this resolution. Besides, the book of discipline expressly provides for those cases in which an inferior judicatory is to be excluded from a seat in the superior judicatory; and these cases are trials of appeals and complaints in which they are interested.

7. The resolution declaring the Synod of the Western Reserve not a part of the Presbyterian Church of the United States, we deem unconstitutional in its character, and oppressive in its operation upon those who are immediately affected by it. We think those brethren who have been excluded from this house, by this resolution, have a right to declare it a dismemberment of the Presbyterian Church. They further protest against this resolution, on account of the *time* and *manner* in which it has been introduced and adopted. While the whole subject respecting inferior judicatories was in the hands of a committee, and before receiving any report from that committee; while citation, according to the provisions of the book, was pending; and when the subject could not have been regularly reached but by a vote of reconsideration, the Assembly take the whole matter into their own hands, and disown a whole synod, containing eight presbyteries, without any regular and constitutional steps in the case. *The abrogation of the Plan of Union*, in the opinion of the undersigned, cannot justify this act. The Plan was a compact, and the Assembly was a *party* to that compact; and it is not in the power of *that party* to destroy the rights which have vested under that compact.

We add, this synod was constituted by the General Assembly, in 1825, out of *three* presbyteries then forming part of the Synod of Pittsburg, which presbyteries were in good, regular, and constitutional standing in the Presbyterian Church, and had been constituent parts of that synod, and had been represented by their commissioners on the floor of this house. They have, since their constitution, organized *five* presbyteries, all of which have been fully recognized by this Assembly. The synod has regularly presented its records to this house, from time to time, and the Assembly have acted thereon. The Plan of Union had no reference to the organization of presbyteries, and no effect thereon. It made no alteration in the mode of constituting them; and the committee of the churches, not being entitled to seats in the synods (when these presbyteries were constituted,) could not control the same. The authority of this synod, and of the presbyteries constituted by it, was not derived from any provision in the Plan of Union, nor could their existence or operation be affected by that plan. The only reason assigned by the resolution for thus annulling the organization of eight presbyteries, is stated to be the operation of the *abrogating resolution*. Now, it is plain to the subscribers, and, they believe, palpably evident, *that the Plan of Union, either in its existence or abrogation, could have no effect upon the formation or existence of a presbytery or synod.* The only effect of that Plan was the formation of churches of a peculiar character, which might be admitted to the presbyteries according to the special provisions of that Plan; and if the act of abrogation had any effect, passed as it was by the same body which made the original compact, it could only affect the churches now existing under the peculiar formation recommended in that plan, and could not, without plain absurdity, be construed to affect Presbyterian ministers and strictly Presbyterian churches.

Lastly. We protest against the exercise of the power of closing the debate upon both of the foregoing questions, by the majority, insisting as they did upon the previous question.

Philip C. Hay, (in relation to the three first mentioned resolutions, being out of the house when the last was passed;) N S. S. Beman, Calvin Cutler, T. D. Southworth, Edwin Holt, G. Hayden, D. O. Griswold, D. Sayre, John Cone, Bliss Burnap, Marcus Smith, Horace Hunt, Ira Pettibone, Thomas Williams, William Roy, Thomas Lounsbury, John Gridley, Abner Hollister, Washington Thatcher, H. S. Walbridge, John M. Rowland, Silas West, George E. Delavan, George Spalding, S. Benjamin, Solomon Stevens, Henry Brewster, James B. Shaw, Felix Tracy, J. B. Richardson, Timothy Stillman, John B. Preston, James R. Gibson, N. E. Johnson, Obadiah Woodruff, Adam Miller, William Jessup, John L. Grant, Ambrose White, Wilfred Hall, E. W. Gilbert, Alexander Campbell, John S. Martin, Alanson Saunders, William Fuller, John Seward, Dudley Williams, A. Peters, Rufus Nutting, Eldad Barber, George Duffield, James Boyd, Benjamin Woodbury, Isaac J. Rice, Henry Brown, Joseph H. Breck, H.

Kingsbury, Varnum Noyes, John P. Cleaveland, Robert Stuart, P. W. Warriner, Ira M. Wead, Samuel Reed, Bennet Roberts, Ephraim Cutler, Benjamin Dolbear, Baxter Dickinson, James W. Phillips, Burr Bradley, John Crawford, David B. Ayres, Nathaniel C. Clark, Enoch Kingsbury, Nahum Gould, F. W. Graves, Jacob Gideon, George Painter, Thomas Brown, John W. Cunningham, Robert Aikman, Samuel W. May, E. Seymour, William C. Wisner, James A. Carnahan, Zina Whittlesey, James I. Ostrom, Fayette Shipherd, Merit Harmon, R. Campbell, Thos. M'Auley, H. Bushnell, E. Cheever, David Whitney, Thomas Cleland, F. A. M'Corkle, John Leonard, John M'Sween, Jacob Faris, J. W. M'Cullough, H. H. Hays, Ammi Doubleday.

ANSWER.

The committee to whom was referred the protest of sundry members of this General Assembly, against the act adopting the three resolutions relative to the citation of inferior judicatories, and likewise to the resolution of the Assembly declaring the *Synod of the Western Reserve* not a part of the Presbyterian Church, have had the same under consideration, and would respectfully report the following answer to said protest.

The signers to the protest object to the mode of investigation adopted in the first named resolutions, and contend that the first step should have been to appoint a committee to inquire into the *nature* of the rumours which are said to be afloat, and to report to the Assembly whether there was any cause for citation. The resolutions as to citation refer to supposed cases, and the committee were to cite, and designate, and report to the Assembly for its approval and further action. In this aspect of the case, the objections urged lose their force. No wrong was done to any presbytery, nor any irregular process authorized, nor, indeed, any final step to be taken without action in the General Assembly. Upon the report of the committee to cite, the house would decide upon the *foundation* for existing irregularities, and a wholesome control as to the details of the whole subject would be exercised by the Assembly before the final disposition of the several cases; and the signers of the protest themselves affirm, in a subsequent part of the paper, and with the design of sustaining another position, that the citation contemplated by these resolutions was *according to the book*. Your committee deem it, therefore, unnecessary to dwell upon this part of the subject, it being evident, from the nature of the resolutions and the admission of the signers to the protest, that the steps contemplated by these resolutions were according to the book, and within the constitutional power of this Assembly.

It is difficult to conceive how this regular constitutional action could be impaired or destroyed by the suggestion, whether true or untrue, that the committee recommending these measures were members of the convention; that they acted upon it first in the convention, then in the Assembly, after that in the committee, and then were to pass a final vote in the Assembly. It is even gravely charged as a ground of objection, that "they petition *themselves*, consider their own petition, and then grant to *themselves* what they *themselves* ask." It is a sufficient answer to this objection, that a majority of the duly constituted members of this Assembly adopted and sanctioned the incipient as well as final steps in the case; and the acts of the Assembly are valid, until it be shown that the provisions of the constitution have been invaded, or that the majority consisted of persons who were not duly qualified commissioners. The fact of a majority or any number of members of the Assembly having been members of the convention, cannot invalidate the acts of the Assembly. The right of petition is guaranteed by every well-regulated government, whether civil, political, or ecclesiastical, and it is just as competent for any number of the individuals composing the Assembly to meet *publicly* for consultation, as it would be for any number to meet *privately* for the same object. In neither case could the action of those members in the Assembly be supposed to be purified or contaminated by such consultations.

The investigation contemplated by these resolutions was designed to apply to inferior judicatories, which includes synods, and may not necessarily mean presbyteries; the specification of such inferior judicatory was to be reported by the committee, and the fourth objection, as urged by the signers of the protest, could only be appropriate when a presbytery should be cited. Any supposed restriction of the right of the General Assembly to cite any other inferior judicatories but synods, (which is regarded by the signers of the protest as being derived from the sixth part of the section of general review and control,) is explained by the comprehen-

sive character of the fifth part, which assigns to the superior judicatory power to "examine, deliberate, and judge in the whole matter, as completely as if it had been recorded, and thus brought up by the review of the records." The General Assembly, by its very constitution, is regarded as having a general control of the whole church, and in its conservative character shall superintend all of its concerns. It is believed that the initiatory steps contemplated by the resolutions authorizing a committee to designate inferior judicatories who may have been guilty of irregularities, to cite them, and report as soon as practicable to this Assembly, do not infringe the spirit or letter of the inherent powers of the General Assembly. And the great principles of analogy would obviously dictate that the members of the inferior judicatories, upon whom these preparatory measures are supposed to operate, should not be permitted to sit in the next General Assembly until their cases should be decided. If there be any sound principle contained in the clause, and the uniform practice which excludes an interested judicatory from voting, that principle and that practice should be applied to the members of such inferior judicatories as may be affected by these resolutions. This view of the subject is exceedingly strengthened by the fact, that express power is vested in our judicatories to exclude at will their own members when on trial before them.

The other subject on which the signers to the protest present their objections, is one of vital importance, as involving in an eminent degree, the character of nearly all the proceedings of this General Assembly. It is represented by them to be unconstitutional and oppressive, and might be regarded as a dismemberment of the Presbyterian Church.

The fallacy of these opinions will appear, upon a just consideration of the real question at issue. The Synod of the Western Reserve was declared by that resolution to be no longer a part of the Presbyterian Church; and on the supposition, which can be confidently established, that this General Assembly has a right to declare who shall or who shall not compose its members, it follows, as a necessary consequence, that this declaration of that synod not being a part of the church, no more dismembers the church than the declaration, by Congress or any legislature, that certain persons pronounced not duly elected, would have the effect to dissolve that body, or vitiate its acts. The Plan of Union of 1801, was unconstitutional, and therefore void, *ab initio*, and only lived just so long as the discretion of the General Assembly permitted. It had no constitutional existence, and was subject at any time to be pronounced as dead. It was manifestly a gross interpolation upon the constitution, and was not even adopted in the mode pointed out by the constitution. It was not only voidable by any subsequent act of the General Assembly, but was void from the beginning, because without constitutional authority, and professing to bring into our judicatories persons who were not duly qualified members. The act of 1801 was not only unconstitutional, but the effect of its operation was to make inroads upon the great distinctive features both of doctrine and discipline in the Presbyterian Church; and whether reference be had to its nullity or its pernicious influence, no principle is more firmly established than that an unconstitutional law can give no rights, and that, *ipso facto*, whatever may be attempted to be built upon it, must fall with the sandy foundation on which it rests. The Synod of the Western Reserve was the result of the operation of the act of 1801, in virtue and by consequence of which a body of churches, presbyteries, and synods, radically anti-Presbyterian in doctrine and order, have been introduced into our connexion, in express violation of many particular provisions of our constitution and of the entire spirit of our system; and, therefore, it never was a legitimate part of the Presbyterian Church. Its abrogation destroyed no rights, because none existed under it; and every lover of the purity and peace of the church will contemplate with satisfaction the moral courage and Christian fortitude which, under God, has aroused the friends of truth to the great work of reformation.

It will devolve more naturally on another committee to prove the Plan of Union in question to have been utterly repugnant to the constitution, as that part of the protest to which we are replying is rather against the consequences flowing from that declaration by the Assembly, than against the legality and truth of the declaration itself. But, supposing the Assembly to have had good reasons for declaring the Synod of the Western Reserve not to be a Presbyterian synod at all, surely there could no longer be any reason why delegates from presbyteries in that synod should have seats in the Assembly. And whether the Assembly came wisely or otherwise to the decision as to the true posture of that synod, such a decision, when rendered, is thenceforward conclusive on all the parties, till changed by the

Assembly itself; and mere expressions of opinion, without any thing amounting even to a show of reason, on the part of those who protest, are sufficiently answered by a corresponding expression on the part of the Assembly—that it has had abundant reason to be convinced that its acts in this behalf were not only fully warranted by its constitutional powers, and amply justified by abundant evidence—but that they were absolutely necessary to save the church from impending ruin. As many of the declarations of the signers of the protest, in this part of their case, as well as in the preceding portions of it, are deprived of all their force by action of the Assembly subsequent to the writing of their protest, we need only refer to the resolutions in the case of the Synods of Utica, Geneva, and Genessee, for an answer to much of their protest in regard to that of the Synod of the Western Reserve.

And it seems that their whole procedure shows clearly how unreasonable, inconvenient, and impracticable it is to suitably protest in regard to business which has not yet assumed its final shape, and to attempt to fasten on this Assembly conclusions, which the persons protesting contradict themselves to reach, and which, if they had exercised only a small degree of patience, would have been presented to them in a complete, and therefore somewhat different aspect from the regular and necessary progress of the business of the house.

To the objection which is urged against the exercise of the power to close the debate on this question, it is a sufficient answer, that the General Assembly has the power to prescribe its own rules for the transaction of business; that the rule in relation to the previous question was adopted by a majority, a rule in conformity to that observed by Congress, and in its application by this General Assembly wrought no injustice to the minority, as a full discussion was allowed, in which that minority occupied more than half of the time.

Thursday afternoon, June 8th.—Dr. Beman introduced the following protest, which was read, accepted, and ordered to be entered on the minutes, namely:

PROTEST.

The undersigned, members of the General Assembly, enter their solemn and decided protest against the act of the Assembly, by which the Synods of Utica, Geneva, and Genessee, have been declared to be out of the ecclesiastical connexion of the Presbyterian Church.

For this protest, we assign, before the church and its great Head, the following reasons.

1. The resolutions of the Assembly declare the "Plan of Union," with the General Association of Connecticut, to have been unconstitutional; and assign the *abrogation* of that Plan as a leading reason for declaring these synods out of our connexion—whereas, in the estimation of the undersigned, not a single provision of the constitution was violated by that Plan.

2. It appears to the undersigned, that even if the Plan of Union had been unconstitutional, that its *abrogation* could not annul the solemn compacts which were ratified by this Plan between the General Assembly and the General Association, as contracting parties in that Plan.

3. Least of all, in the estimation of the undersigned, could the *abrogation* of the Plan of Union interfere with the constitutional existence of whole synods—for such synods could not, in the nature of the case, be "*formed and attached to this body, under and in execution of said Plan*," as declared in the resolutions. The only connexion which synods could have with this Plan, was to permit churches of a peculiar organization to be attached to the presbyteries under their care—and this was done in the Synods of Utica, Geneva, and Genessee, by successive acts of the Assembly.

4. The resolutions charge these synods with "*gross disorders*," in direct violation of the principles of the constitution and the rules adopted by the Assembly.

5. The resolutions assert, "that even the Plan of Union itself was never consistently carried into effect by those professing to act under it," and that this fact was "*made clear to us*," while not a particle of evidence to this effect was exhibited.

6. The charge of heresy is strongly implied, and that too in no doubtful terms, in the fourth resolution, against the great body of churches and ministers in these

three synods. Not more than "*one or two presbyteries,*" of all the number embraced in these synods, are represented as "*strictly Presbyterian in doctrine and order.*" This virtual charge of heresy against the remainder, is a violation of the constitution, which is intended to protect ministerial character. (Book of Discipline.)

7. The whole matter embraced in these resolutions, was, by a vote of the Assembly, in the hands of a committee; and the synods were declared out of our connexion, before the committee had reported to the house.

8. The undersigned deem this act a dismemberment of the Presbyterian Church, and adapted in its character and effects, to produce disorganization and ruin in our beloved Zion.

9. We add that these synods were regularly constituted before the adoption of the constitution of the Presbyterian Church, in its present form, and their presbyteries joined in its adoption; and these synods have contributed largely to the funds of the Presbyterian Church.

10. The Assembly admitted, while the resolutions were under discussion, various accusations to be stated against these synods, while they were not on trial, and could, in the nature of the case, have no opportunity for defence.

Lastly. We further protest against this act, because it was done after one whole synod had been unconstitutionally declared out of our church, and were deprived of a vote in the case; and this act must consequently be null and void.

David Porter, Nathan S. S. Beman, William Jessup, James W. Phillips, John P. Cleaveland, Baxter Dickinson, Thomas Brown, E. W. Gilbert, F. W. Graves, Robert Stuart, Absalom Peters, Jonathan Cone, Burr Bradley, Samuel W. May, E. Seymour, H. Bushnell, Solomon Stevens, Daniel Sayre, Adam Miller, John Crawford, J. W. Cunningham, N. E. Johnson, John Leonard, Nahum Gould, Wilfred Hall, Nathaniel C. Clark, Jacob Faris, Ambrose White, Tertius D. Southworth, George Duffield, Bliss Burnap, J. W. M'Cullough, D. O. Griswold, E. Cheever, Obadiah Woodruff.

ANSWER.

Mr. Plumer offered the following resolution, which was adopted, viz.

Resolved, That the protest just offered contains no mis-statement, reasoning or principle which has not been fully and fairly met and answered in the answers to other protests against votes of this house; and, therefore, for an answer, we refer to the answer to the protest respecting the abrogation of the Plan of Union, and also to the answer to the protest of members of the Synod of the Western Reserve, and to the answer to the protest of certain members of the Synods of Genessee, Utica and Geneva.

The plaintiffs next offered in evidence the "Plan of Union," (Assembly's Digest p. 297, and Minutes of 1801 p. 6,) which was read as follows, viz:

Sec. 5.—A plan of union between Presbyterians and Congregationalists in the new settlements, adopted in 1801.

The report of the committee appointed to consider and digest a plan of government for the churches in the new settlements, was taken up and considered; and after mature deliberation on the same, approved, as follows:

Regulations adopted by the General Assembly of the Presbyterian Church in America, and by the General Association of the state of Connecticut, (provided said Association agree to them,) with a view to prevent alienation and promote union and harmony, in those new settlements which are composed of inhabitants from these bodies.

1. It is strictly enjoined on all their missionaries to the new settlements, to endeavour, by all proper means, to promote mutual forbearance and accommodation, between those inhabitants of the new settlements who hold the Presbyterian and those who hold the Congregational form of church government.

2. If in the new settlements any church of the Congregational order shall settle a minister of the Presbyterian order, that church may, if they choose, still conduct

their discipline according to Congregational principles, settling their difficulties among themselves, or by a council mutually agreed upon for that purpose: but if any difficulty shall exist between the minister and the church or any member of it, it shall be referred to the presbytery to which the minister shall belong, provided both parties agree to it; if not, to a council consisting of an equal number of Presbyterians and Congregationalists, agreed upon by both parties.

3. If a Presbyterian Church shall settle a minister of Congregational principles, that church may still conduct their discipline according to Presbyterian principles; excepting that if a difficulty arise between him and his church or any member of it, the cause shall be tried by the Association to which the said minister shall belong, provided both parties agree to it; otherwise by a council, one half Congregationalists and the other half Presbyterians, mutually agreed on by the parties.

4. If any congregation consists partly of those who hold the Congregational form of discipline, and partly of those who hold the Presbyterian form; we recommend to both parties that this be no obstruction to their uniting in one church and settling a minister: and that in this case, the church choose a standing committee from the communicants of said church, whose business it shall be to call to account every member of the church who shall conduct himself inconsistently with the laws of Christianity, and to give judgment on such conduct: and if the person condemned by their judgment be a Presbyterian, he shall have liberty to appeal to the presbytery; if a Congregationalist, he shall have liberty to appeal to the body of the male communicants of the church: in the former case the determination of the presbytery shall be final, unless the church consent to a further appeal to the synod, or to the General Assembly; and in the latter case, if the party condemned shall wish for a trial by a mutual council, the cause shall be referred to such council. And provided that the said standing committee of any church shall depute one of themselves to attend the presbytery, he may have the same right to sit and act in the presbytery as a ruling elder of the Presbyterian Church.

On motion, *Resolved,* That an attested copy of the above plan be made by the stated clerk, and put into the hands of the delegates of this Assembly to the General Association, to be by them laid before that body for their consideration; and that if it should be approved by them, it go into immediate operation.—(Vol. I. p. 261, 262.)

Sec. 6. *Adopted by the Association.*

The delegates to the last General Association of Connecticut reported, that they all attended the Association during the whole of their sessions, and were received and treated with great cordiality and friendship.

That the regulations submitted by the last Assembly, respecting the establishment of churches in the frontiers, consisting of members partly of the Presbyterian and partly of the Congregational denominations, were unanimously adopted by the Association.—Vol. i. p. 276.

Sec. 7. *An order for printing the plan in* 1806.

Resolved, That the committee of missions cause a number of copies of this plan to be printed and delivered to the missionaries who may be sent by the Assembly among the people concerned.—(Minutes, Vol. ii. p. 192.)

Mr. *Randall* remarked, that the title given in the Digest to the document just read was "Plan of Union." It was, however, more properly denominated in the minutes of the Assembly, and on the face of the document itself, "Regulations to promote harmony in the New Settlements." It was only a measure, in accordance with an extended system of friendly correspondence with cognate churches, adopted by the Assembly at the commencement of its very existence, and modified and expanded from time to time, reaching down nearly to the present. In regard to the intimacy of the connexion which it established with another denomination; indeed, it fell short of a plan of intercourse, which was, in 1801, in full operation, between the General Assembly of the Presbyterian Church and the General Association of Connecticut, and of those into which it after-

ward entered, with other similar bodies. It was understood to be in accordance with the power expressly vested in the General Assembly, by the Constitution of the Church, to correspond with other churches.

In evidence of these facts he then read from the Assembly's Digest, sections of the Plans of Union and correspondence, adopted by the General Assembly with several ecclesiastical bodies. These documents are here given in the order of their dates.

INTERCOURSE.—CHAPTER II.

OF THE GENERAL ASSOCIATION OF CONNECTICUT.

Sec. 1. *A plan of union and correspondence adopted by the Assembly, in* 1792.

The minutes of the convention of the committees of the General Assembly of the Presbyterian Church in the United States, and of the General Association of the state of Connecticut, were taken into consideration, an extract of which is as follows.*

Considering the importance of union and harmony in the Christian Church, and the duty incumbent on all its pastors and members to assist each other in promoting, as far as possible, the general interest of the Redeemer's kingdom; and considering further, that divine Providence appears to be now opening the door for pursuing these valuable objects, with a happy prospect of success;

This convention are of opinion, that it will be conducive to these important purposes—

That a Standing Committee of Correspondence be appointed in each body, whose duty it shall be, by frequent letters, to communicate to each other whatever may be mutually useful to the churches under their care, and to the general interest of the Redeemer's Kingdom.

That each body should from time to time appoint a committee consisting of three members, who shall have a right to sit in the other's general meeting, and make such communications as shall be directed by their respective constituents, and deliberate on such matters as shall come before the body; but shall have no right to vote.

That effectual measures be mutually taken to prevent injuries to the respective churches from irregular and unauthorized preachers.

To promote this end, the convention judge it expedient, that every preacher, travelling from the limits of one of these churches into those of the other, shall be furnished with *recent testimonials* of his regular standing and good character as a preacher, signed by the moderator of the presbytery or association in which he received his license; or, if a minister, of his good standing and character as such, from the moderator of the presbytery or association where he last resided, and that he shall, previously to his travelling as a preacher into distant parts, further receive a recommendation, from one member, at least, of a standing committee to be hereafter appointed by each body, certifying his good qualifications as a preacher.

Also, that the names of this standing committee shall be mutually communicated, and also that every preacher travelling, and recommended as above, and submitting to the stated rules of the respective churches, shall be received as an authorized preacher of the gospel, and cheerfully taken under the patronage of the presbytery or association within whose limits he shall find employment as a preacher: And

That the proceedings of the respective bodies, on this report, be communicated to our brethren of the Congregational and Presbyterian churches throughout the states."

Upon mature deliberation, the Assembly unanimously and cordially approved of the said plan, and, to carry the same into effect, appointed the Rev. Dr. John Rogers, Dr. John Witherspoon, and Dr. Ashbel Green, to be a committee of corre-

* This convention originated in measures adopted by the General Assembly in 1790 and 1791, for affecting this union of intercourse.

[This note is in the Digest, and the minutes of 1790 and 1791 were subsequently read by plaintiff's counsel.]

spondence, agreeably to said plan. And it is moreover agreed, that this Assembly will send delegates to sit and consult with the General Association of Connecticut, and receive their delegates to sit in this Assembly, agreeably to another article of the plan, as soon as due information shall be received that it is adopted on the part of the General Association of Connecticut.

The Rev. Dr. M'Knight, Dr. M'Whorter, Mr. James Woodhull, Dr. S. S. Smith, Dr. Alison, Dr. Nesbitt, Mr. John B. Smith, Mr. Graham, Mr. Lacy, Mr. M'Call, Mr. M'Donald, and Dr. M'Corkle,* were appointed a standing committee to certify the good qualifications of the preachers travelling to officiate in the bounds of the Association of the State of Connecticut; and it was moreover agreed, that any preacher travelling as aforesaid, shall have at least the name of one of the committee, who shall belong to the synod from whose bounds he came.—Vol. i. p. 53.—Digest, p. 292 and following.

Sec. 2. *The plan ratified by the Association.*

The Rev. Dr. Jonathan Edwards and the Rev. Mr. Matthias Burnet, from the General Association of the state of Connecticut, appeared in the Assembly, and produced an extract from the records of that Association, whereby it appeared that the convention, between said Association and the General Assembly of the Presbyterian Church in the United States of America, had been ratified on their part; and that these gentlemen, with the Rev. Dr. Timothy Dwight, were appointed, agreeably to an article of said convention, to sit in this Assembly: whereupon Dr. Edwards and Mr. Burnet were admitted as members, and took their seats accordingly.—Vol. i. p. 68.

Sec. 3. *An alteration in the plan proposed by the Assembly in* 1794.

On motion, ordered, That the delegates appointed from the General Assembly to the General Association of Connecticut, propose to the Association, as an amendment to the articles of intercourse agreed upon between the aforesaid bodies, that the delegates from these bodies respectively shall have a right not only to sit and deliberate, but also to vote in all questions which shall be determined by either of them:—And to communicate the result of their proposal to the next Assembly.—Vol. i. p. 87.

Sec. 4. *Agreed to by the Association.*

Dr. M'Whorter laid before the General Assembly an extract from the minutes of the proceedings of the General Association of the State of Connecticut, which, having been read, was ordered to be entered upon the minutes of the General Assembly, and was as follows:

"The motion of the General Assembly of the Presbyterian Church, that the delegates from that Assembly to this Association, and the delegates from this Association to that Assembly, be empowered to vote on all questions decided in those bodies respectively, was taken into consideration, and, after discussion, the General Association voted a compliance with the said proposal."

That the above is an authentic extract from the minutes of the proceedings of the General Association of the State of Connecticut, at their sessions begun on the 17th day of June, A. D. 1794, is attested by

JONATHAN EDWARDS, Scribe of the General Association.

Vol. i. p. 106.

INTERCOURSE.—CHAPTER III.

OF THE CONVENTION OF VERMONT.

Sec. 1. *The plan of union and correspondence proposed by the Assembly in* 1803.

The committee appointed on the communication from the convention of the regular ministers of the gospel of the state of Vermont, reported. The report being considered and amended, was adopted, and is as follows:

Your committee are opinion, that although this Assembly have not received any answer to the request of last Assembly, proposed to the convention of Vermont, yet the Assembly have received satisfactory information on the subjects alluded to, both from their own delegates to the General Association of Connecticut of last year, and also from the representatives of that body in the present Assembly. The

* By an after order, Rev. Aaron Woolworth, of Long Island, was added to this committee.

committee, therefore, submit the following plan of union and intercourse between the said convention and the General Assembly, viz.

1. Each body shall send one or two delegates to meet and sit with the other, at the stated sessions of each body respectively.

2. The delegate or delegates from each respectively shall have the privilege of joining in the discussions and deliberations of the body, as freely and fully as their own members.

3. That the union and intercourse may be full and complete between the said bodies, the delegate or delegates from each respectively, shall not only sit and deliberate, but also act and vote: which articles comprise the great principles of the union between the General Assembly, and the General Association of Connecticut. Your committee finally submit the following resolution, viz: *Resolved*, That the above plan shall go into operation so soon as it shall be ratified by the Convention.—Vol. I. p. 334.

Sec. 2. *Ratified by the Convention.*

A communication from the Convention of the Congregational ministers in the State of Vermont, was received and read. From this it appears, that the Convention have ratified, on their part, the plan of union and correspondence agreed upon and transmitted to them by the last General Assembly, with one exception, viz. that the Convention, considering the smallness of their number, and distance from the Assembly's usual place of meeting, cannot promise to send an annual delegation to the General Assembly. *Resolved*, That this Assembly accept and ratify, on their part and behalf, the said plan of union and correspondence with the exception aforesaid; and that the Assembly will for the present year, send one delegate to attend the next meeting of the Convention.—Vol. II. p. 28, 29.

Sec. 3. *Proposition relating to travelling preachers, made in* 1809.

Resolved, That the delegate appointed to represent this Assembly at the next meeting of the Convention of Vermont, be and he is hereby authorized to propose and agree upon the same regulations which have been agreed to be observed by this Assembly and the General Association of Connecticut, in relation to the credentials requisite for such ministers as may come within the bounds of this Assembly or the Convention of Vermont, for the purpose of preaching the gospel.—Vol. II. p. 288.

Sec. 4. *Accepted by the Convention in* 1810.

The resolution of the General Assembly respecting the appointment of a standing committee to certify the good standing of ministers travelling into the bounds of the General Assembly from the State of Vermont, and which your delegate was authorized to transact, was agreed to with great unanimity: and an extract from the minutes of the Convention on this subject is forwarded herewith; to which it may be proper to add, that the publishing the names of the committees appointed by the respective bodies in this case, and taking measures to make the different parts of the church acquainted with them, to prevent imposition, was considered of great consequence.—Vol. II. p. 311. See also Vol. III. p. 131.

INTERCOURSE.—CHAPTER IV.

OF THE GENERAL ASSOCIATION OF NEW HAMPSHIRE.

Sect. 1. *A proposal from the Association accepted in* 1810.

A proposal from the General Association of New Hampshire was made by the Rev. William F. Rowland, and the Rev. John H. Church, commissioners appointed for that purpose, for a union between them and this Assembly, similar to that subsisting between the General Association of Connecticut and this Assembly. The certificate of their appointment, and the papers accompanying it containing the fundamental principles and regulations of the Association of New Hampshire, were read.

Resolved, That said union be formed, and it accordingly was formed.

Resolved, That the Rev. Messrs. Rowland and Church be invited to sit as members of this Assembly; and they accordingly took their seats.

Resolved, That the General Assembly send annually two delegates to the meetings of the General Association of New Hampshire.

Sect. 2. *An alteration in the delegation proposed by the Association, in* 1816.

The following extract from the minutes of the General Association of New Hampshire was received and read, viz.

"Voted that the delegates from this General Association to the General Assembly of the Presbyterian Church, be instructed to propose to that respected body, that this Association should in future be represented, in that Assembly, by only one delegate."

True copy from the minutes.—Vol. III. p. 224.

Sec. 3. *Acceded to by the Assembly.*

The committee, to which was referred the extract from the minutes of the General Association of New Hampshire, reported; and the report being read, was adopted, and is as follows, viz:

That after due deliberation they think, that the articles of union between the General Assembly of the Presbyterian Church, and the General Association of New Hampshire, require, that the Assembly should hereafter only send one delegate to the aforesaid Association.

Ordered, that a copy of this minute be forwarded to the Association of New Hampshire by the delegate who may be chosen to attend the next meeting of said Association.—Vol. III. p. 226.

INTERCOURSE.—CHAPTER V.

OF THE GENERAL ASSOCIATION OF MASSACHUSETTS.

Sec. 1. *A Proposal from the Association accepted by the Assembly in* 1811.

A proposal from the General Association of Massachusetts proper, was made by the Rev. Joseph Lyman, D. D., and the Rev. Samuel Worcester, delegates appointed for that purpose, for the establishment of a union between them and this Assembly, similar to that subsisting between the Association of Massachusetts proper, and the Associations of Connecticut and New Hampshire. The certificate of their appointment, and the articles of union with said Associations, were read.

The articles of said union are as follow:

"1st. The General Association of Connecticut, and the General Association of Massachusetts proper shall annually appoint each two delegates to the other.

"2d. The delegates shall be admitted in each body to the same rights of sitting, debating and voting with their own members respectively.

3d. "It shall be understood that the articles of agreement and connexion between the two bodies, may be at any time varied by their own consent."

The same articles were adopted in their connexion with the Association of New Hampshire.

The delegates stated that the shorter Catechism of the Westminster Assembly was adopted as the basis of their union; and by answering several questions proposed to them, fully satisfied the Assembly relative to the standard of their faith, and the object of their Association.

Whereupon, *Resolved*, unanimously, that said union be formed; and it was accordingly formed.

Resolved, That Dr. Lyman and the Rev. Samuel Worcester be enrolled as members of this Assembly; and they took their seats accordingly.

Resolved, That the Assembly send annually two delegates to the General Association of Massachusetts proper.

These articles of intercourse have been modified, within a few years, by mutual agreement to suspend the right of *voting*, by the correspondents respectively, in each other's bodies.

INTERCOURSE.—CHAPTER VII.

OF THE NORTHERN ASSOCIATE PRESBYTERY, ETC.

Sec. 1. *The plan of correspondence with the Presbytery of Albany approved by the Assembly in* 1802.

A communication was received from the Presbytery of Albany, stating, that a joint committee, consisting of members of that presbytery and members from a

presbytery known by the name of the Northern Associate Presbytery, had met, and agreed upon a plan of friendly correspondence between the ministers and churches belonging to these presbyteries respectively, consisting of three articles, viz.: The committee has in effect agreed,

1. That there shall be occasional communion between the members of the particular churches subordinate to those presbyteries respectively.

2. That there be a friendly interchange of services among the ministers: And,

3. That each presbytery, while in session, may invite members occasionally present from the other, to sit as corresponding members: That the Presbytery of Albany having heard the report of the said committee, approved thereof, and resolved to request the General Assembly to sanction the same, and authorize the Presbytery of Albany to adopt it.

The Assembly after due examination and deliberation, expressed their approbation of the said plan of correspondence.—Vol. II. p. 286.

Sec. 2. *The plan of union and correspondence with the Synod of Albany approved, in* 1808.

The Synod of Albany requested the Assembly to sanction a plan of union and correspondence, between themselves and the Northern Associate Presbytery, and the Middle Association in the Western District in the State of New York; which plan is contained in pages 117—121 of the synodical minutes. The plan being read, and the subject discussed, *Resolved*, That the Assembly sanction the aforesaid plan.—Vol. II. p. 258.

INTERCOURSE.—CHAPTER VIII.

OF THE REFORMED DUTCH CHURCH, AND THE ASSOCIATE REFORMED CHURCH.

Sec. 1. In 1798, committees from the three churches met in convention, and agreed that the plan of intercourse, having for its basis the preservation of the several ecclesiastical judicatories concerned, in a state entirely separate and independent, should embrace

1. The communion of particular churches;

2. The friendly interchange of ministerial services; and

3. A correspondence of the several judicatories, of the conferring churches.

It was moreover agreed that the several churches should watch over each other's purity in doctrine, discipline, and manners, and be ready to receive complaints against any of their ministers or members on these subjects.

This plan was unanimously approved by the General Assembly; but it was not accepted by the judicatories of the other churches. Still, however, a friendly intercourse has been maintained, more or less, between the ministers and people of the three denominations. We are happy to add that it is increasing.

Sec. 2. *A negotiation for effecting a correspondence with the Associate Reformed Church, in* 1819.

Resolved, That Drs. Romeyn, Blatchford, and Green, and Mr. Lewis and Dr. Rodgers, be a committee to confer with a similar committee of the General Synod of the Associate Reformed Church, and report to the next General Assembly the result of their conference on the subject of a brotherly correspondence between the two churches.

The following communication was received and read:

"Session of the General Synod of the Associate Reformed Church, May 27, 1819.

"*Resolved*, That this Synod reciprocate to the General Assembly their assurances of a disposition to maintain a friendly correspondence; and that the Rev. Drs. Mason and Proudfit, and Mr. M'Loud, ministers; and Messrs. William Wilson and Henry Rankin, elders; be and they hereby are appointed commissioners to confer on this subject with the commissioners already appointed by the General Assembly, and that the result of their deliberations be reported to this Synod at its next meeting.

"By order of the General Synod.

"R. M'CARTEE, Clerk of the Synod."

The commissioners from the two churches met shortly after their appointment, and adopted a plan of correspondence: and it is presumed that the plan will be

approved by the General Assembly and the General Synod of the Associate Reformed Church, in May next.

[This negotiation resulted in the union of the two churches, as subsequently given in evidence from the minutes of the Assembly of 1821–2.]

The plaintiffs now proceeded to the examination of witnesses, commencing with the Rev. William Patton, D. D., of New-York—Mr. Randall remarking that this was going out of the regular order of the testimony: but as Dr. Patton deemed it necessary to leave this city, he had requested to be examined at this time.

Dr. Patton being sworn—interrogated by Mr. Randall—said: I was a commissioner to the General Assembly of 1838, from the Third Presbytery of New York. I attended the meeting of the Assembly at the Seventh Presbyterian church, in Ranstead Court, on the third Thursday, being the 17th day of May last. I went there about half past 10 o'clock, on the morning of that day. The seats near to the pulpit, and those around the chair usually occupied by the moderator, were principally filled at that time, by delegates to the General Assembly, who had been in session there, as a convention, during the morning. I obtained a seat in a pew on the middle aisle of the church. Immediately after the introductory religious exercises and sermon, Dr. Elliott, the moderator of the previous year, announced that he would proceed, after the benediction, to constitute the General Assembly with prayer.

Accordingly, Dr. Elliott left the pulpit, and took his stand in front of it, where he offered a short prayer. At its close, I rose and addressed the moderator, by his official title, stating to him, that I held in my hand certain resolutions, which I was desirous to offer—and asked permission to read them at that time. Those resolutions in the printed minutes are correctly given. The moderator said they were out of order, as the first business was to hear the report of the clerks on the roll. I informed the moderator that the resolutions related to the formation of the roll—that I would present them without comment; and was willing to have the sense of the house taken on them without debate. The moderator said the clerk had the floor. I then reminded him that I had the floor before the clerk. The moderator again declared me out of order; and I appealed from his decision, which was seconded. The moderator declared the appeal to be out of order, and I took my seat.

Mr. Randall here requested the witness to read the resolutions, which he held in his hand.

Mr. Hubbell objected to their being read, remarking, that their paper was not read to the General Assembly, and therefore, though the fact of its having been offered is a part of the testimony, the contents of the paper are not. We did not know at that time what were its contents, and, *non constat*, we are not accountable for it. If we had known what the contents of the paper were, we might have acted differently on the occasion. If at any future stage of the proceedings, it shall appear that the resolutions were read to us

in the General Assembly, we will perhaps have no objection to their being read here. But it will be time enough, when that fact shall be established.

The *Court* overruled the objection, and the witness commenced reading, when

Mr. Hubbell objected to his reading further, alleging that the paper he was reading from was not the original.

The witness stated that he had given the original paper, of which this was a true copy, to Dr. Erskine Mason, the Stated Clerk of the General Assembly.

The objection was withdrawn, on Mr. Randall's saying that he would call Dr. Mason to account for it.

The witness then completed the reading of the paper, as follows:

"Whereas, the General Assembly of 1837 adopted certain resolutions intended to deprive certain presbyteries of the right to be represented in the General Assembly: and whereas, the more fully to accomplish their purpose, the said Assembly of 1837 did require and receive from their clerks a pledge or promise, that they would, in making out the roll of commissioners to constitute the General Assembly of 1838, omit to introduce therein the names of commissioners from said presbyteries: and whereas, the said clerks, having been requested by commissioners from the said presbyteries to receive their commissions and enter their names on the roll of the General Assembly of 1838, now about to be organized, have refused to receive and enter the same: Therefore,

"1. *Resolved*, That such attempts on the part of the General Assembly of 1837, and their clerks, to direct and control the organization of the General Assembly of 1838, are unconstitutional, and in derogation of its just rights as the general representative judicatory of the whole Presbyterian Church in the United States of America.

"2. *Resolved*, That the General Assembly cannot be legally constituted, except by admitting to seats, and to equality of powers, in the first instance, all commissioners, who present the usual evidences of their appointment; and that it is the duty of the clerks, and they are hereby directed to form the roll of the General Assembly of 1838, by including therein the names of all commissioners from presbyteries belonging to the said Presbyterian Church, not omitting the commissioners from the several presbyteries within the bounds of the Synods of Utica, Geneva, Genessee and the Western Reserve; and in all things to form the said roll according to the known practice and established usage of previous General Assemblies."

The witness proceeded as follows:

The moderator having declared my appeal out of order, directed the clerk to read the report on the roll. Mr. Krebbs, the permanent clerk, then read the roll of the commissioners as made out by the clerks. The names of the commissioners from the four excinded synods were not reported.

The moderator then announced that if there were commissioners present whose names had not been entered on the roll, then was the proper time to present their commissions, or words to that effect.

Dr. Erskine Mason, a commissioner from the third Presbytery of New York, then rose and stated that he held in his hand the commissions of several commissioners which the clerks had refused to receive; and he moved that the roll be amended by adding the names of those commissioners. He at the same time tendered the commissions which he held in his hand to the moderator, extending his hand towards him, and saying "here they are." The moderator asked from what presbyteries those commissioners were; and Dr. Mason replied that they were commissioners from the presbyteries within the bounds of the Synods of Utica, Geneva, Genessee and the Western Reserve. The moderator declared that the motion to receive those commissions was out of order. Dr. Mason then said, with great respect for the chair, he must appeal from his decision to the house. The appeal was seconded. The moderator declared the appeal to be out of order, and refused to put it to the house. Dr. Mason then took his seat. I don't recollect anything else being said at that time.

The Rev. Miles P. Squier, a commissioner from the Presbytery of Geneva, then rose and addressed the moderator, stating that he had a commission which had been presented to the clerks and rejected by them, and he *now* presented his commission, and demanded his seat on that floor. The moderator asked him from what presbytery he came. Mr. Squier replied from the Presbytery of Geneva. The moderator then asked him if the Presbytery of Geneva belonged to the Synod of Geneva. Mr. Squier replied that it was within the bounds of the Synod of Geneva. The moderator replied "*We do not know you, sir.*" Mr. Squier then took his seat.

Immediately after this the Rev. John P. Cleaveland, a commissioner from the Presbytery of Detroit, Michigan, arose, and after a few introductory remarks, in which he stated that as the constitutional organization of the General Assembly could not be effected except at that time, and in that place, he moved that Dr. Nathan S. S. Beman, of the Presbytery of Troy, be moderator. The motion was seconded, and then put to the house by Mr. Cleaveland, when it was carried by a large majority, a very few voting in the negative.

Dr. Beman then rose and left the pew in which he had been sitting, and took his station in the middle aisle of the church from one-third to one-half of the way down from the pulpit, where he called the attention of the house to business.

Dr. Mason and Mr. E. W. Gilbert were then nominated and elected clerks, no other nomination having been made.

Dr. Beman stated that the next business would be the election of moderator of the General Assembly. The Rev. Dr. Samuel Fisher, of the Presbytery of Newark, was nominated, and no other person being put in nomination, the question was taken *viva voce*, and Dr. Fisher was declared to be duly elected. My own recollection is that the vote was unanimous, that there were no negatives. Dr.

Beman then stated to Dr. Fisher that he was duly elected moderator of the General Assembly, and that he would govern himself by the rules which should be adopted by the Assembly; as it is usual for the General Assembly to adopt rules for its own government.

Dr. Fisher took the station which Dr. Beman had occupied as moderator and called for business. The Rev. Dr. Mason and the Rev. E. W. Gilbert were nominated together, and chosen stated and permanent clerks. No other person was nominated. A motion was made that the General Assembly now adjourn to meet forthwith in the session room of the First Presbyterian Church, on Washington Square; which was put and carried unanimously, that is, there were no negative votes. Dr. Fisher then announced the adjournment of the General Assembly to meet forthwith in the lecture room of the First Presbyterian Church, and directed that if any of the commissioners had not presented their commissions they should repair to that church and present them. We went to the First Presbyterian Church, and transacted the business of the General Assembly in a very affectionate and brotherly manner.

I offered my resolutions again to the General Assembly, on our arrival at the First Church, and they were unanimously adopted.

A committee of elections was then appointed to whom informal commissions were referred, and several commissions were presented and received from commissioners who came in after the adjournment to the First Church. The roll, including all who had reported commissions during any stage of the organization, was called daily while the General Assembly met in the First Church. The sessions there continued about two weeks, during which the relators in this case were elected trustees by the General Assembly.

Mr. Hubbell here suggested, that as the election of such trustees was recorded in the minutes of the proceedings of the body assembled at the First Church, claiming to be the General Assembly of the Presbyterian Church, time would be saved by waiving the examination of the witness on that point.

Mr. Randall said, if the fact of these trustees being elected was admitted, he had no objection to waive the examination.

The court adjourned.

Thursday, March 7.

Examination of Dr. Patton continued.—The motions for the election of moderator were made and put distinctly, and in a voice to be heard throughout the house. Dr. Elliott had a chair directly in front of the pulpit. Dr. Beman, while he officiated as temporary moderator, held a position in the middle aisle as before described. There were, on some of the motions, a few negative votes, coming, as I should judge by the sound, from the south-west part of the house, where the body of the Old School brethren sat. Some of those brethren, however, sat on the left, and in front of the pulpit. While I was endeavouring to obtain a hearing for the resolutions which I presented, there were frequent calls to "order" from gentlemen in the same general neighbourhood with the moderator.

When Dr. Mason rose to make his motion the calls increased; and whilst Mr. Cleaveland was speaking cries of "*order, order,*" were repeated by several persons, and were much more vociferous than previously. This was accompanied with scraping of the feet, coughing, and some very emphatic hisses, proceeding from the same part of the house, and obviously intended, as it appeared to me, to prevent the progress of business. This noise had in great measure subsided before Mr. Cleaveland put his motion to the house. When Dr. Fisher had announced the adjournment of the General Assembly, there was some clapping with the hands by persons in the galleries, expressive of approbation, and a few hissed at the same time, giving the light and shadow of the picture.

These, as far as my memory serves me, are the material occurrences on that occasion. I presume there were only spectators in the gallery; know of no members being there. It is not usual. A mixed company was in the gallery—ladies and gentlemen. I think that every commissioner had ample opportunity to vote on every question stated to have been put and carried.

Cross examination.—Interrogated by *Mr. Hubbell,* the witness said—I am not absolutely certain who seconded Dr. Mason's motion. My impression is that it was Dr. Dickinson, Professor in Lane Seminary. He sat in that vicinity, and I get my impression from general familiarity with the tones of his voice.

I seconded Dr. Mason's appeal. Our roll was called very soon after we went to the First Church, for the purpose of having it complete. I cannot answer with accuracy how many responded to that call, as I kept no account at the time. I should say more than one hundred; say in the general neighbourhood of a hundred and seventeen, or from a hundred and fifteen to a hundred and twenty. This number included those whose right was disputed. The excinded I understand by the disputed. This was the first time of calling the roll after Mr. Cleaveland's motion. We do not recognise that there was any new organization.

I was sitting in the same pew with Mr. Cleaveland when he made his motion. His face was turned toward Dr. Elliott when he made the preliminary remarks, and in the same direction when he made the motion and when he put the question. He did not, at any time during his remarks or his motion, turn either his back or his side toward the moderator. There was no gathering or crowding of persons round him, that I recollect, during either his remarks or his putting the motion. He did not call the moderator by name, but looking towards him, addressed his remarks and put his motion to the house, a large portion of which was between himself and the moderator. These remarks stated, that a number of the commissioners to the Assembly of 1838 had been refused their seats, and that learned counsel had informed us that the constitutional organization of the General Assembly of 1838 could not be effected or secured except at that time and place. He then made a remark to the effect that, in view of this position, he hoped it would not be considered discourteous to proceed with the organization of the Assembly, and offered his resolution, and put it to the house, as has

been already detailed. Dr. Beman, when called to the chair, took a place in the middle aisle, not far from Mr. Cleaveland. My impression is, that he had been before seated in the same pew with Mr. Cleaveland, or near it. He had no chair in the aisle—he stood up. Dr. Fisher, when chosen moderator, took the same place, and also stood up. Drs. Beman and Fisher, when they occupied this place, both looked towards the pulpit. I think it probable there were others besides members on the floor, for the church was well filled. No measures were taken to prevent these from voting, or to ascertain that they did not vote. Nothing of this kind was suspected. While Dr. Beman and Dr. Fisher held the place mentioned, Dr. Elliott, as a man, filled the chair, where he had been before, but now shorn of his office.

I presume that he did not consider himself shorn of office, and believe he continued to sit where he had before, until we adjourned to the First church. Dr. Elliott called me to order, as already stated. He also called Dr. Mason to order, and Mr. Cleaveland, frequently using the little hammer that is put into the moderator's hand. I do not know that this hammer is a badge of office: it is not always used; though of late I believe it has been, commonly. In some Presbyterian Assemblies where I have been, the moderator has used his cane. I do not mean, to strike the members. I do not know to whom this hammer belongs, unless it is the property of the General Assembly. Dr. Beman had no hammer. He did not use a cane. I did not hear Dr. Beman call Dr. Elliott to order. Dr. Elliott had ceased calling to order, and had ceased rapping with the mallet, before this time. I am not able to say, whether that part of the Assembly, called the Old School party, took any part in the proceedings, after Dr. Beman took the chair, up to the time of adjournment, except by their silence. The cries of order, and the coughing and hissing had ceased, when Mr. Cleaveland got through with his preliminary remarks. These noises had ceased when he made his motion, and there was but little coughing, or hissing, or noise of the hammer, afterwards.

The house had been occupied that morning for several hours before the General Assembly met, and nearly or quite up to the commencement of the religious exercises, by a convention of those who term themselves Old School men, sitting with closed doors, and admitting none to witness their counsels, except those who would sustain their proceedings.

[Here the witness was interrupted by *Mr. Hubbell*, who said he could not *know* this—and objected to his giving a statement of matters of which he could not possibly have *direct knowledge*.]

Mr. Randall said that the witness was competent and at liberty to state whether the fact came within his own knowledge.

Mr. Hubbell repeated his question, and requested the witness to confine his answer to that, viz: What part of the house did the New School members occupy?

The witness resumed. They occupied such seats as they found vacant when they entered the church, which were generally at a

considerable distance from the pulpit. A portion of them were around the pew occupied by Mr. Cleaveland, and behind him: they were mostly in that general neighbourhood, and toward the north part of the church. I did know at the time, accurately, how many persons the entire roll, called after the adjournment, contained. I cannot now state exactly. There were not, that I know of, two persons' names on that roll, who arrived in the city after our adjournment. Neither Dr. Beman nor Dr. Fisher demanded the possession of the chair, or of the hammer, from Dr. Elliott. I have seen the depositions of Dr. Beman and Mr. Cleaveland, during this visit to the city. I have read them—this I mean by saying I have seen them. There was a previous consultation.

Mr. Hubbell interrupted the witness, and demanded that he should give a categorical answer to the question: Were your proceedings in the organization of the General Assembly, the result of a preconcerted plan of the *New School* men?

Mr. Randall said that the witness had a right to give an explanatory answer, else, his answer being shaped by the question, might necessarily produce a false impression.

The *Court* said that the witness might answer "*Yes*," or "*No*," and then explain.

Witness said, I answer *Yes*, with this explanation, that there was a meeting of commissioners previous to the meeting of the General Assembly, in which there was a consultation as to the manner in which an *ex parte* organization might best be prevented, and a *constitutional* organization of the General Assembly be secured. This arrangement was not made in consequence of our knowing that we should be in a minority in that Assembly, nor from an apprehension that we should be. It was to maintain the Constitution inviolate. We had no knowledge whether we should be in the minority or majority, and could have none until all the commissions were received. I think there was a small majority on what was termed the Old School side: but this could only be known afterwards as matter of history—and not before, as prophecy.

I think I have already answered that question, [viz: Would you not have known it as matter of anticipation?]

That meeting was held in the lecture-room of the First Presbyterian church. It commenced its session on the Monday evening preceding the meeting of the General Assembly, and was held in pursuance of an invitation given to all the commissioners to the Assembly, to attend a meeting for consultation.

I do not know how many attended. The clerks of that meeting are present. They, I presume can state the number. The invitation was given through the medium of the public newspapers. I have here a copy of the notice, as it was published in the public papers.

At the request of the counsel, the witness then produced a printed paper, in the form of a circular, which he read as follows:

["IMPORTANT DOCUMENT.—We request the attention of Ministers and Elders, to the following notice:]

"*Commissioners to the General Assembly of* 1838.

A Meeting for Consultation.

"Whereas, the state of the Presbyterian body at present is such as to demand the consultations and prayers of all its Ministers and Churches, in order to preserve its unity and peace: and whereas, the measures adopted at the last Assembly, excluding certain Synods and the Third Presbytery of Philadelphia, and providing for the organization of the Assembly of 1838, give reason to apprehend unhappy collisions at the opening of that Assembly, as well as subsequently; and whereas, all party conventions in the Church, except for the defence of rights which have been assailed, are greatly to be deprecated, it is therefore proposed and recommended, that all the delegates to the Assembly of 1838, meet at 8 o'clock, on the evening of Monday the 14th of May, in the First Presbyterian Church of Philadelphia, for the purpose of interchanging views, and of devising such measures as the present exigencies of the Church may require.

[Rev. Thomas McAuley, D. D., James Richards, D. D., Luther Halsey, D. D., Josiah Hopkins, E. W. Gilbert, John L. Grant, Lyman Beecher, D. D., Calvin E. Stow, Thomas J. Biggs, Baxter Dickinson, Sylvester Eaton, Samuel C. Aiken, Samuel Hanson Cox, D.D., T. S. Spencer, Samuel Fisher, D. D., N. S. S. Beman, D. D., Daniel Dana, D. D., George E. Pierce, Wm. Patton, D. D., E. Cheever, J. P. Cleaveland.

"☞ N. B.—Editors of religious papers are requested to copy the above."]

Note.—The parts of the preceding document inclosed in brackets, were not attached to the copy read by Dr. P. The paper, as originally published in the Philadelphia Observer, and above given, with the signatures and the editorial notes, was afterwards read to the Jury.

The copy which I have read has no date. The notice took the date of the papers in which it was published. It was signed by some twenty clergymen. It was published in all the religious newspapers in which we could get it inserted, in this state, New York, and elsewhere. I think it was published in Maryland and Ohio. As wide a circulation was given to it as possible. Some who acted with the body organized under Dr. Plumer, met and voted at the consultation meeting. Drs. Church and Bradford I recollect, and believe there were others; but I cannot identify them at present. The circular was signed by Drs. Dana, Beman, Fisher, Halsey, myself, and others. I think about twenty. Dr. Halsey, formerly professor in the Western Theological Seminary at Allegheny Town. He was not professor there at that time. He was then located at Auburn. I do not recollect that Drs. Church and Bradford signed the circular, nor that any who signed this paper sat in the Assembly under Dr. Plumer. The signing of it was not

confined to commissioners. There was some diversity of opinion, in our debates, as to the means to be used for securing the object; but no difference as to the end, that of securing a constitutional organization of the General Assembly. There was a resolution on which there was debate, and to which there was some opposition, when it was first offered. But this opposition almost entirely disappeared before the debate closed. The resolution was finally agreed to without opposition. Various classical figures were used during the debate; among them, one eloquent gentleman said something about passing the Rubicon.

Re-examined by Mr. Randall.—The witness said: Dr. Beman is now in England, I presume. He left this country in January last, on account of ill health. I had the pleasure of seeing him safe on board of the vessel in which he sailed. Mr. Cleaveland resides in the town of Marshall, in the State of Michigan. I presume he is now there. The depositions which I said I had read, were handed to me by yourself. There is no such thing as a hammer or a stick to be used by the Moderator, recognized in the form of government of the Presbyterian Church. The constitution is strong enough without them. We occupied the nearest seats to the pulpit which we found vacant when we went into the church in Ranstead court. We found the seats nearest the pulpit occupied by what are called the Old School party. I do not know from personal observation that the Old School party sat with closed doors there in the morning, but I have no doubt that they did sit in that manner. I have been a minister of the Presbyterian Church about sixteen or seventeen years. I was forty years old in August last. I was born in the city of Philadelphia. Dr. M'Auley's name was appended to the circular. The gentleman who made use of the term, passing the Rubicon, was the Rev. Jared Waterbury. He afterwards acted with the Constitutional Assembly. The doors of the First Presbyterian Church were at all times open, and all the commissioners to the General Assembly had opportunity to take their seats with us if they chose. In our consultation meetings, every one who chose could come in. None were excluded. There was no bolting nor fastening.

I stated yesterday that I handed the original copy of my resolutions to the Stated Clerk, Dr. Mason. That was a mistake. I handed them to Mr. Gilbert, the Permanent Clerk.

The *Honourable William Jessup*, called on behalf of the plaintiffs, testified: I was a commissioner to the General Assembly of the Presbyterian Church, in 1837, from the Presbytery of Montrose, in this state, but connected with the Synod of New Jersey. So far as I know, this presbytery has always been in that synod. I took an active part in the proceedings of the Assembly, was a member of the committee appointed, on the motion of Mr. Breckinridge, to devise measures for the division of the church. Mr. Breckinridge was also a member. The two portions of the committee sometimes held separate meetings, and sometimes they all met together.

Mr. Randall here asked the witness whether he recollected any thing said by a member of the committee, when about separating,

in regard to the consequences, which would result from the refusal of the New School members, to concur in the terms of division proposed by the other party?

The question was objected to by the defendant's counsel, on the ground (stated by *Mr. Hubbell*) that, as the proceedings of the committee were recorded, and in evidence, embracing the conflicting propositions of the two parties, the remarks of individual members of the committee could have no bearing on this cause: that indeed the whole subject was foreign to this controversy. When the account of these attempts at compromise was read by the other party from the minutes of 1837, we did not object, because it was immaterial, and at most only irrelevant. Now, they attempt to substitute for the record, the remarks of individuals, of which we neither know nor wish to know any thing. They were *ex parte* statements, with which these parties have nothing to do.

Mr. Randall replied: We think this a very important link in the chain of testimony which we design to offer, and as a decision adverse to its admission would be, in our opinion, prejudicial to the cause of justice, we hope your Honour will allow us to connect the whole chain of testimony by—

Here *Judge Rogers* suggested to Mr. Randall that, as the question was an important one, he had better present it to the Court in writing.

Mr. Randall replied that he would do so, and to save time, he would now offer in evidence "The Philadelphia Observer," of March 29th, 1838, containing the notice of the meeting for consultation, previously mentioned by Dr. Patton. The notice was then read, together with the names of those who signed it.

[This document has been already given in connexion with Dr. Patton's testimony.]

Dr. Patton—recalled by Mr. Randall—was requested to examine the list of names appended to the notice, and say whether any of them belonged to the Old School party.

Dr. Patton replied: Some of the gentlemen whose names are appended to this notice are of what is called the Old School party. The Rev. Thomas S. Spencer is one.

Mr. Hubbell inquired for the piece of paper which was torn from the top of the copy of the notice which Dr. Patton first read.

Mr. Randall replied "*Here it is;* I am willing to give it in evidence if my friend on the other side desires it; it is a circular intended to accompany the notice.

After looking over the paper, *Mr. Hubbell* waived the subject, stating his willingness that it should be rejected.

Mr. Randall handed to the court, in writing, and to the opposite counsel, the points which he wished to prove by Judge Jessup, as follows:

"That in the course of negotiations of the joint committee appointed by the General Assembly, as a part of the *res gesta*, Mr. Breckinridge declared, that if the New School party did not accept the propositions of the Old School, he would the next day, in the General Assembly, move to excind a sufficient number of synods from the General Assembly, to secure thereafter, in that body, the

predominance of the Old School." That the other four ministers of this part of the joint committee assented to this declaration. "That he did accordingly move to exclude the Synods of Geneva, Genessee and Utica. That the General Assembly adopted the motion of Mr. Breckinridge. That Mr. Breckinridge made a similar declaration on the floor of the General Assembly."

Mr. Randall remarked, the court would perceive that the paper related to a declaration made in a meeting of the committee. It is said that it is only the act of an individual. But we wish to show an entire want of correspondence between the proposals of the Old School party and their real object. The opposite counsel have gone at length into an examination respecting the *ex parte* declaration of Mr. Waterbury, a gentleman not present in the Assembly of 1837, nor affected by their proceedings. Now, we wish to exhibit the acts of the individual who moved for this committee, one who was the mouth-piece and, I say it without disrespect, the master spirit of the Old School. We desire to show a concerted plan, a conspiracy, to exclude from their rights and privileges in the Presbyterian Church, certain synods, which, in pursuance to this concert, *were* subsequently cut off, without trial and without notice. This is the great feature of this case. Here was a violation of the great principle that none shall be condemned without a hearing. On this declaration depends the character of the acts excluding the four synods. A committee to agree upon terms of amicable division, was appointed on the motion of the individual in question. On the reception of their report came the act of exclusion; or, as one of the counsel on the other side has not inappropriately termed it, the *detrusion*. We wish to show that a menace was distinctly offered, and the act threatened subsequently consummated. This witness, appealing to the book, called for an accusation and for trial. His appeal was met by the *previous question*. The Supreme Governor of the universe has prescribed a different rule for dealing with offenders, and sanctioned it by his own example. The words of the Omniscient himself were to Adam, "Where art thou?" "What hast thou done?" Even he, with a perfect knowledge of all things, would not pass sentence upon frail, fallible man, without a hearing. But here are venerable fathers of the church, born and reared in its communion, detruded unheard. This is the very *gravamen* of the charge. The exclusion of these trustees, superseded by our appointment, fixes no stain upon their character. The exalted character of the man so often alluded to at the head of the list of those thus superseded is a sufficient proof that we contemplated no such stain. Our object was only to try whether 60,000 communicants, 599 churches and 500 ministers can be detruded, thrust out from all their rights and privileges, without trial or even the knowledge of an accusation. On this ground the present testimony is offered. I consider it the most interesting part of our inquiry and vital to our cause. I hope your honour will allow a full development of the facts in the case.

Mr. Wood addressed the court.—The question is raised whether

this evidence is material; but the court will not nicely scan its nature to decide whether it is material, but rather admit it and leave its bearing to the jury. I will attempt to show its application to this case. Having organized the General Assembly of 1838, under circumstances involving some unusual proceedings, we have to prove that in those proceedings we were right. This is essential to our cause. A moderator and two clerks were removed and others elected in their place. We now wish to show our reason for this transaction. It was this: several commissioners to that Assembly from certain presbyteries belonging to the Presbyterian Church, and up to that time uniformly recognised as a part of that church, whose rights had never been disputed, presented their commissions to the proper officers, the clerks, and were rejected, not for any informality in the documents, not for any contest respecting their election, but in obedience to an illegal mandate. When we demanded the enrolment of their names, the moderator refused to put to the house motion after motion, made for this object, saying on one occasion, to a person tendering his commission, "We do not know you." Further, he refused to put to the house, appeals from his decision. After these acts the members appointed a new moderator and new clerks. Their right to do so is not now to be decided. The act was within the power of the Assembly, and we assign as the cause of this act, a deliberate plan, preconcerted by a portion of the Assemblies of 1837 and 1838, to exclude the commissioners in question. Resolutions were passed in 1837, cutting off from the church the synods from which these commissioners came. What, then, is our present object? It is to prove a determined purpose, a conspiracy of the Old School, carried out by their clerks and moderator, to maintain the measures of excision by excluding these commissioners. How are we to prove this? Will it be said that these men would have been admitted at a later period? Was it not the fixed purpose of the Old School to exclude them forever? Can any one doubt it? The pledge demanded from the clerks demonstrates it. That clinches the nail. To prove this preconcerted plan we propose to show a threat proclaimed in a committee of the General Assembly, and afterwards executed in the body itself. A declaration by a member of the Old School portion of the committee, that unless there was a consent by the other portion to an immediate division of the church, without consultation with the presbyteries, a future preponderance of the Old School party in the Assembly would be secured by their cutting off a portion of the other party. And is not this material evidence, showing the reason of the subsequent acts of excision, a deliberate design and preconcerted plan? The declarations which we offer in evidence, are not those of an obscure member, of a mere cipher, of a dough-faced man, but of the head, the prime mover, the very *Coryphæus* of the party. We offer to prove that he held out at the time a distinct menace, that if the terms proposed were not acceded to, the very next act of the Assembly would be the total exclusion of certain members. If, then, it is proper that this conspiracy should be proved at all, how are we to prove it,

unless by evidence like that now offered, remarks made at the time, in the course of action in the committee room and in the house. The resolutions and proposals made by the two portions of the committee, which we exhibited from the records, do not show the *design* of those who passed the excinding acts. We mean to show a fraudulent design. I intend no disrespect to these gentlemen; they undoubtedly thought that they were doing right. But their measures were illegal and unjust in the eye of the law and in that sense at least they were fraudulent. How then is all this to be proved except by contemporaneous declarations? There is no other mode. The excinding resolutions give us only the bare fact of the excision. But is it said that the acts of 1837 had nothing to do with those of 1838; that if the roll, prepared by the clerks, was defective, the Assembly would have completed it? Never! And this very thing we wish to demonstrate, by showing a design, a preconcerted plan. This can be proved, in this case, only by the declarations of those active in arranging, counselling and executing the measure. Such declarations were made in a committee of the house, by Mr. Breckinridge, a leader of the Old School; were acquiesced in by his party and verified by subsequent acts, adopted with the express design of securing a majority. Is your honour prepared to say that evidence of this is not material, to show that we were right in removing the moderator and clerks, who, in consummation of this design, refused seats to regularly appointed commissioners? Is it any where pretended that the excinding resolutions are valid? No member of this bar will say it. The counsel for our opponents themselves will not say it. They wisely strive to keep those acts from view. But they must be dragged forth into the light of day. The design with which those acts were passed has an important bearing on this case; and we apprehend that it cannot be proved except by such declarations. If the court shall be of this opinion it will admit the testimony.

Mr. Preston replied: I understand the proposition to be, to introduce certain declarations of Mr. Breckinridge, an individual member of the committee, to show the design with which the General Assembly performed a certain act. We object, on the ground that an individual declaration is entirely incompetent to prove the designs of the Assembly. Are the acts of record to be expounded by oral testimony of the declarations of individuals, the declarations of a single man, made not in debate in the house, but in a subsidiary meeting of a portion of its members? Are these to be brought forward to explain public and recorded acts of a judicial assembly? Does the testimony offered contradict the record, or is it consistent with it? Here is a dilemma. If consistent, why seek to confirm that which is certain? Why bolster up what is already fully supported? If contradictory, shall an individual declaration overthrow the solemn record? Shall secondary evidence destroy the primary? Whoever heard the public proceedings of a body expounded by private declarations? Would your honour, sitting in judgment upon an act of the legislature, allow your decision, as to its validity, or the power of the body to pass it, to be influenced by declarations of individual mem-

bers made upon the floor of the legislature? Much less would you by declarations uttered in a committee room. Even the concurrence of the views of all the members of the body, if those views did not appear on the record, would not govern your decision. I venture the assertion, deriving a word from a theological source, as appropriate to a theological controversy,—I venture the assertion, that the *exegetical* history of no public body was ever introduced to explain its recorded acts. But another serious objection depends on considerations more important. If we examine the circumstances of the case, we see more general grounds for rejecting this testimony. In the decision of yesterday, admitting as evidence the minutes of 1837, I acquiesce. To show the exclusion of the synods, that record is competent evidence. But for no other purpose. To exhibit other acts, or a fraudulent design in those performing these acts, it is clearly incompetent. The issue presented, precludes the admission of such testimony.

In the pleadings, there is a simple assertion and denial of a fact, the fact, that the relators in this suit were elected to the office of trustees by the General Assembly of the Presbyterian Church in the United States. We deny this fact, and here is the sole issue between the parties. It devolves, therefore, on the plaintiffs, to prove the regular and constitutional organization, the proper authority and power of the Assembly by which they were elected. That power and authority we contest. This is the naked issue. If they prove that to be the only true General Assembly, there is an end of our cause. We are not attempting to set up an opposition General Assembly, to show that the Old School Assembly of 1838 was the constitutional Assembly. We rest on broader grounds, and are content with a mere negation of the facts claimed on the other side. However irregular or unconstitutional, however false or fraudulent may have been the proceedings of the Assembly of 1837, and the incipient measures of 1838, and indeed of all the acts of every General Assembly from the year 1800 until now, this does not assist their proof in the least degree. We are anxious to keep to the real, the naked issue. We have not to maintain the affirmative of one issue and they the negative, and the negative of another issue of which they maintain the affirmative. We come into court as defendants, and claim all the privileges of defendants. Could they prove our proceedings false and foul and fraudulent, this would not establish their claim. The venerable gentleman who sits near me, Dr. Green, whom they propose, under the authority of their Assembly, to detrude, employing a word previously introduced, to detrude from the board of trust, holds his office under the original appointment of the legislature, altogether independent of the Assembly of 1837, and of every other General Assembly. He is above all imputation of irregularity in his appointment. We have then nothing to do or to prove. It is for our opponents to show the paramount power by which they strike down this venerable man. Why then investigate the acts of the Assembly of 1837? Not one of those whom they would eject, holds office under that Assembly. Though he to whom I have just alluded, is the only relic of the

original board, yet these defendants all claim under General Assemblies on which no imputation rests. The proceedings of 1837, therefore, cannot affect either of them.

Let us look at the facts of this case, which are conceded on all sides. Each General Assembly closes its existence at the close of its session, is dissolved, vanishes in thin air.

> The earth hath bubbles as the ocean hath,
> And these are of them.

But is there nothing left? No prolific root, no germ of a future existence, no nucleus around which a succeeding body may be gathered? Yes, there is such a prolific root, such a germ, a nucleus for a new organization. This is the surviving power of the moderator and of the clerks. In 1837 an Assembly was dissolved. In 1838 another was organized. But who met for this organization? And why? The elements of which the Assembly was to be formed, met in pursuance of an act of the previous Assembly, under the auspices of the moderator's still surviving authority, and in the presence of the clerks. These were the materials around which the new organization was to be made. In these facts we all agree; even our opponents, by the advice of counsel "learned in the law," admit the validity of these proceedings. So far all was done regularly, but now came "the accepted time." Now the period had arrived for a new state of things to come into existence. Up to this time, Dr. Mason turned toward the moderator, and addressed the moderator, the moderator not yet "shorn of his office." But the refusal to put the motion and to put the appeal, derogated from his power, and by this refusal was he thus shorn. The elements of the incipient organization were thrown upon the amplitude of their original powers. Previous to this, we are all upon the same road. What then is the relevancy of the testimony now offered? Suppose, that in organizing the new Assembly, the moderator failed in his duty—suppose, that he committed a fundamental error, and it was necessary to remove him; if the act performed by him was illegal, pure motives may not shield it from condemnation; if it were legal, neither wrong motives, nor fraudulent design, can invalidate it, nor render less violent, disorderly and revolutionary, the acts of the other party. No matter, then, by what motives we were actuated, what concerted plan or determined purpose we had formed. I need not then vindicate any declaration, or any menace. Were it necessary, I would cheerfully undertake the task of vindicating every word uttered by Mr. Breckinridge. I would show them to be perfectly consistent with a Christian and a Presbyterian spirit. But he does not desire it, he does not need it. But we object to the waste which the introduction of such testimony would produce; the waste of words, the waste of time, and, worst of all, in a cause like this, the waste of temper, in the investigation of collateral issues. Should it be necessary, we would not shrink from the vindication of our words. Before I close, allow me a single remark on a position which will be taken in this controversy. Our friends on the other side may as

well be advised of it now as at any time, and therefore I throw it out. We shall contend that no General Assembly has been regularly organized since the year 1800. The act of the legislature in 1799, incorporated "the trustees of the ministers and elders constituting the General Assembly of the Presbyterian Church in the United States of America." Are not the words potential? Was not the act designed to incorporate the trustees of *Presbyterians*, and theirs only? But in 1801, the Assembly adopted articles by which Congregationalists were allowed a representation in that body. It may be seriously questioned whether this were not an avoidance of the trust. Had Baptists, Episcopalians, Methodists and Catholics been thus introduced, would it have been still the Assembly of Presbyterians to whom the charter was granted? Or to make the case a little stronger, suppose that those thus received to our communion, had by their numbers, their dexterity, and the "advice of counsel learned in the law," ousted us, proclaimed themselves to be the true General Assembly, and obtained counsel to come into this court and support their pretensions--would your honour say that this was the body to whom that charter was given? That act contemplated none but Presbyterians, thoroughpaced, true-blue Presbyterians. It does appear to me, that every Assembly since 1801 may have been vitiated by this introduction of heterogeneous members into its body.

But, to recur to the point in hand, our opponents must prove their paramount authority. To do this, they would derive no aid from proving void the acts of all previous assemblies; and we object to this attempted exegetical exposition of the proceedings of the Assembly of 1837. It must prove fallacious, and may be fatal.

Judge Rogers said: The proceedings of the Assembly of 1837, have a manifest bearing on the issue in this case; but I cannot perceive how the acts or declarations of individual members of that body can properly be admitted to explain, or in any way to affect those proceedings. I must therefore exclude the testimony.

Mr. Randall requested Judge Jessup to state all that he knew in regard to the pledge exacted, by the Assembly of 1837, from its officers, that they would carry out the excinding resolutions, in organizing the Assembly of 1838.

Mr. Hubbell objected—that parol evidence on such a subject was inadmissible, the minutes of the Assembly itself being the best evidence.

Mr. Randall replied: We are not bound by the minutes to prove what does not appear on them. We propose to show that the officers of the Assembly of 1837, after the passage of the excinding resolutions, were called upon for a pledge that in organizing the General Assembly of 1838, they would carry out those resolutions; that while the motion to this effect was before the house, the required pledge was given by those officers, and then the motion withdrawn; that these proceedings, entered on the minutes by the clerks, were afterward withheld from the records and from publication by certain gentlemen sympathising with the Old School

party. In such a case are we bound by the minute? Is it infallible?

The *Court* here inquired for the record, and Mr. Randall called *Dr. John M'Dowell*, the Stated Clerk of the Assembly of 1837, "whom," he said, "we have summoned by a *subpœna duces tecum*," to produce the original record. It appeared that Dr. M'Dowell was not in court.

Mr. Randall handed to the Court the Old School minutes of 1838, and pointing to page 15, said: There is a record which will show the point in relation to which testimony is now offered.

Suppose that a resolution offered to the Assembly is subsequently withdrawn, may we not prove its purport, except by the minutes? May I not prove, by a witness under oath, the contents of Mr. Ewing's resolution?

The part of the record on the Old School minutes of 1838, referred to by Mr. Randall, is as follows:

The committee appointed to examine into a supposed discrepancy between the printed and manuscript minutes of the General Assembly of 1837, made a report, which was read, accepted, amended, and adopted, and is as follows, viz.:

The committee have collated the original records as they were made by the Permanent Clerk, approved of by the Assembly, and put into the hands of the Committee of Revision, with the printed minutes, and find the following omission in the latter, viz.:

A resolution offered by Mr. Ewing, to appoint a committee to confer with the officers of the Assembly, who compose the Committee of Commissions, to procure from them a pledge to carry out the action of the Assembly in their official character to its full accomplishment; which resolution was subsequently withdrawn, upon satisfactory statements before the Assembly, on the part of said officers, of their intention to do as the Assembly should direct them, which were also omitted in the printed minutes.

Your committee impute no blame to the committee appointed by the Assembly to revise and prepare the minutes for publication, on account of this omission, although they are of opinion that it would have been better to have published the entire record. To prevent future mistakes in this matter, your committee would recommend to the Assembly the adoption of the following resolution, viz.:

Resolved, That the records of the Assembly be published in all respects substantially as they are approved by that body, when submitted by the Permanent Clerk, and that in no case shall any erasure be made in the manuscript records, except by the express order of the Assembly itself.

Your committee would further recommend that the minutes be read and carefully corrected at the opening of each session of the Assembly, and that no subsequent revision or alteration be permitted, except by vote of the Assembly. Also, that the Stated Clerk be directed to record, on the transcribed minutes, at their proper place, on interleaved blank pages, the whole of the omitted minutes alluded to in this report.

The *Court* ruled that the record as it stands should first be given in evidence, and that it might afterward be corrected.

Mr. Randall said: Dr. M'Dowell will bring it in the morning.

The court adjourned.

Friday morning, March 8.

Mr. Randall called *Dr. John M'Dowell* to produce that part of the original Minutes of the Assembly of 1837, referred to yesterday, relating to the pledges given by the clerks to carry out the decisions of the Assembly in regard to the excinded synods.

Dr. M'Dowell presented the original minutes, and *Mr. Randall* offered them in evidence, and proposed to read them.

A colloquy between the counsel here ensued, *Mr. Ingersoll*, for the respondents, objecting, "not to the papers being read, but to their being read as the minutes of the Assembly," while he claimed that they were only the rough drafts prepared by the clerks, for approval or correction by the house; and *Mr. Randall*, for the relators, claiming that they were proper to be read, as they were the papers produced by the witness, who was served with *subpœna duces tecum*, and directed to produce the minutes; and "they are the minutes."

Mr. Randall then read from these papers [remarking on certain erasures, as he read] as follows:

Tuesday morning, June 6th.—Mr. Ewing offered the following resolution, viz:

Resolved, That a committee be appointed to confer with the officers of this Assembly, who compose the Committee of Commissions, and to obtain and communicate to this body, their explicit promise or refusal, to carry out, in all its parts, the reform entered upon during our present sessions, by the full and exact performance on their part, as ministerial officers of this body, of all the duties either expressly directed, or necessarily implied, by the action of the Assembly, for the purification of the church, and which are required in giving entire efficacy to its acts, in all their parts, and especially in completing the roll of the next and subsequent Assemblies.

After debate, adjourned till this afternoon at half past three o'clock.

Concluded with prayer.

Tuesday afternoon, half past three o'clock.—The Assembly met, and was opened with prayer. The minutes of the last session were read.

The Assembly took up the unfinished business of this morning, viz: the resolution respecting the duty of the Committee of Commissions.

The Stated Clerk asked and obtained permission to make a statement in relation to his duty as a member of the Committee of Commissions.

The Permanent Clerk obtained the same permission. Then Mr. Ewing had leave to withdraw his resolution.

Mr Randall said, these are the rough minutes made up by the clerk. What I have read, was not the original resolution of Mr. Ewing, but a copy. I will inquire of Dr. M'Dowell, what became of the original.

Mr. Ingersoll, for the respondents, objected to the witness being called on.

The objection was overruled by the Court; and Dr. M'Dowell said that he never had the original in his possession.

The Rev. John M. Krebs, Permanent Clerk of the Assembly of 1837, being inquired of respecting the paper which he had read, stating his views of duty as clerk, in relation to the excinding acts, said that the original of that paper was not in his possession—that he had sent it to the printer—but could furnish an exact copy.

Mr. Randall then offered a copy of the paper, as published in the Philadelphia Observer of December 14, 1837—Mr. Krebs stating that he had no doubt of its perfect correctness. It was read by Mr. Randall, as follows:

The undersigned, Permanent Clerk of the General Assembly, begs leave to state to the Assembly, that he has no other reluctance to answer the question proposed by the resolution offered this morning by Mr. Ewing, than that arising

from the fear of the probability, strengthened by the course of debate on this resolution, that his readiness to reply, and the subject matter of his reply, in connexion with the phraseology of the resolution, may be misunderstood and misrepresented, where there is no opportunity for explanation. But in respect to the precise object of the question itself, as it specifically applies to the duties of the Permanent and Stated Clerks, as defined in their appointment as a Committee of Commissions, he has no hesitation in saying, that he fully recognizes the authority of the General Assembly to instruct its officers, and to ascertain that they understand their duties as ministerial officers of this body, both in relation to the present Assembly, and to future Assemblies, of which they continue to be officers, until they shall have been formally removed.

He considers it a dangerous principle, to confide such discretionary power to the committee of commissions, in respect to the action of this or of any subsequent General Assembly, as it was argued this morning that this committee possessed. Five years ago, the undersigned first had the honour to sit in this house as a commissioner from the Presbytery of New York, and three times recorded his vote adverse to the resolutions passed by the Assembly of 1832, creating the then Second Presbytery of Philadelphia, on the ground that the Assembly had no constitutional right to form that presbytery. Yet on the principle assumed this morning, in this discussion, the undersigned, if he had been a member of the committee of commissions in the year 1833, might have excluded the commissioners from that presbytery from seats in the General Assembly, in the exercise of the discretion impliedly attributed to the committee, of judging and acting on their private views of the constitutionality of the act of the Assembly, erecting that presbytery. He believes, that after the will of the Assembly is expressed, the committee have no discretion in the case, and have no right (as for himself he has no desire) to assume so high a responsibility, when acting as a mere executive officer. The constitutionality of the business, which is the subject matter of commands intrusted to him to execute, is not a question for him, but for the Assembly to decide; and can be a question for him only as an individual member of this house, when occupying a seat in it as a commissioner. He considers himself, therefore, simply as an agent—a ministerial officer of the Assembly, to record their proceedings, and to do such other things, (including the duty of a member of the Committee of Commissions,) as have been specified in the acts of this and of preceding Assemblies, creating and defining the duties of his office. This opinion he has expressed in private to members of both parties in the house.

He understands it therefore to be his duty, as a member of the Committee of Commissions, and especially in view of the rules adopted this morning, on the motion of Dr. Alexander, (and he will act on that understanding, unless otherwise expressly directed by the Assembly,) to enrol only such commissioners to the next Assembly as shall come from presbyteries, now, or at the close of this Assembly, recognized to be component and integral parts of the Presbyterian Church; and that, to the Assembly so constituted, when duly organized for the transaction of business, it will be his duty to report the names of persons claiming to be commissioners from presbyteries that may be formed during the intervening year, or from presbyteries belonging to the synods which have been declared by the Assembly to be out of the Presbyterian Church, should such persons present commissions to the committee.

JOHN M. KREBS.

Philadelphia, June 6th, 1837.

Mr. Ingersoll, for the respondents, proposed to show by the clerks, what was the true character of the papers which had been read as minutes respecting the resolution of Mr. Ewing in 1837. *Mr. Randall* objected—that it was not in time, but waived the objection, and asked the explanation from Dr. M'Dowell. Dr. M'Dowell referred him to Mr. Krebs, by whom the papers were written.

Rev. John M. Krebs then read the minutes substantially, as previously read by Mr. Randall, stating, these are the words which I read to the Assembly for their approval. In this form the minute was approved as correct without a word of dissent. These minutes are prepared while debate is going on, and I subsequently make

erasures and interlineations, to make the record correct, to read at the opening of the next session of the Assembly. Such erasures are very frequent. Sometimes they are made by order of the Assembly. I do not know, except from report, who made the *cancellation* on these papers. It was not done by me, nor did the Assembly order it. The Assembly of 1838 ordered the cancellated portions to be recorded on the transcript of the minutes. [*Mr. Randall* objecting to the witness going into the acts of 1838, and *Mr. Hubbell* claiming the evidence to show that the cancellation was unauthorized, *Judge Rogers* said it might be given as relating to the minutes of 1837.] Mr. Krebs, interrogated by *Mr. Ingersoll*, proceeded—the paper which I read, stating my views of the duty of the clerks, I asked leave to have inserted in the minutes, but no motion being made to that effect, I did not feel at liberty to insert it. It did not, therefore, belong to the Assembly, and I afterwards published it.

Interrogated by *Mr. Randall*, the witness said: I know not where the original of that paper is. I requested Mr. Engles to publish it in the Presbyterian, and gave him the original. I read it by permission before Mr. Ewing withdrew his resolution, first making an extempore statement, and then reading the paper. I cannot tell where the original of Mr. Ewing's resolution is. Such papers are usually destroyed as soon as copied. The copy on the minutes is correct.

Dr. John M'Dowell, interrogated by *Mr. Hubbell*, said: to understand how the marks of cancellation occurred on these papers, I would refer you to page 498 of the minutes of the Assembly of 1837.

"The Stated Clerk, with Dr. Cuyler and Mr. Grant were appointed a committee to revise the Minutes, and prepare them for publication."

These minutes, on the rising of the Assembly, were put into my hands, either as stated clerk, or as chairman of the committee. The committee met several times in my study on different days, and made various alterations, striking out the parts which you see marked with a cross. The obliterations had been made before. That this matter may be understood, I should say that it has been customary for the whole minutes to be read over to the Assembly, when they are finished, but occasionally they are in haste, and have several times appointed a committee to do what the Assembly ought to do. Sometimes they delegate the power to a committee to make the corrections. It was under such powers that we acted in 1837. Mr. Ewing's motion having been withdrawn, we thought that it ought not to be a matter of record. Mr. Grant, one of the members of the committee, differed from us in opinion, on this point. The pledge given by Mr. Krebs I never have had: it never came to me in any form. As soon as the revision was completed, I think about the first of August, the minutes were sent to press.

Interrogated by Mr. Wood. The statements made by the clerks formed no part of the minutes. We left out every thing, as if the transactions had never happened. The remarks made do not now appear, but the fact that they were made does. These crosses

were made by the committee. The obliterations I know nothing of.

Interrogated by Mr. Hubbell. The statement which I made was never on the minutes. The statements of neither of the clerks was filed. Mine was not in writing. I can give the substance of it if it is thought proper.

Judge Jessup, in continuation.—My recollection is that the matter was as it has been stated. In the forenoon Mr. Ewing offered his resolution; and in the afternoon, Dr. M'Dowell and Mr. Krebs offered their statements. Dr. M'Dowell made a statement of his views of his duty as clerk, of which, though I cannot repeat the whole, a part is impressed on my memory. After Mr. Ewing's resolution had been discussed for some time, the Assembly adjourned till afternoon. In the afternoon Dr. M'Dowell asked leave to offer a statement; and said, that he did not feel willing to give a pledge, as such, to the Assembly; but would state his views. That he did not think he could properly exercise any discretion in the matter. That he was only a ministerial officer, and, as such, would carry out the views of the Assembly; and that he should feel himself bound to do so, as long as he held the office, whatever his opinion might be as an individual. It is impressed on my mind that he added, if he found himself so situated that he could not carry out the views of the General Assembly, consistently with his principles, he would resign. I am not sure that he said so. This is all I recollect.

When Mr. Ewing rose and withdrew his resolution, it was said either by him or some other, that the explanations were satisfactory; leave was asked to withdraw the motion, which was granted by a vote taken.

The plaintiffs called *Rev. Miles P. Squier*, to prove the rejection by the clerks of the commissions from the presbyteries within the excinded synods.

Mr. Squier, interrogated by *Mr. Randall*, said: I was a commissioner to the General Assembly of 1838, from the Presbytery of Geneva, within the Synod of Geneva. The commissions of the commissioners from the excinded synods were handed to myself and Judge Brown, of Ohio, on Thursday morning, the day on which the Assembly met, and were by us tendered to the clerks, Dr. M'Dowell, and Mr. Krebs. Dr. M'Dowell, speaking in the name of the committee said, "We are not permitted by the instructions of the Assembly to receive these commissions; we cannot do it. Were I to exercise my own judgment I might act very differently, but I am bound by the instructions of the Assembly."

I have no doubt these [a file of papers handed to the witness by Mr. Randall,] are the identical commissions which Judge Brown and I presented to the clerks. There were about fifty of them. They were stated to be commissions from presbyteries within the four excinded synods. No objection was made to their form. They were not received, examined, or opened by the clerks. I desired the gentlemen present to take notice of the refusal. This was in the committee-room of the Seventh Presbyterian Church, between

nine and ten o'clock in the morning, the place and time, at which it had been advertised, that the clerks would be in waiting to receive commissions.

Cross-examined. Interrogated by *Mr. Hubbell*, the witness said: I had no other objection to say to Dr. Elliott, that the Presbytery of Geneva belonged to the Synod of Geneva, except that presbyteries, as regards the General Assembly, are not under the jurisdiction of synods. It would, therefore, have been irrelevant to say so. I came from the Presbytery of Geneva,—had been preaching the winter of that year in the congregation of Junius, in that presbytery, as a stated supply—was a member of that presbytery. The churches in that presbytery, with not more than one exception, were governed by ruling elders. That exception, if any, must have been the congregation of Middlesex.

Interrogated by Mr. Ingersoll.—With regard to my own presbytery, it is as I have stated. About the others I cannot speak absolutely. I know of no churches that are strictly Congregational; I do not know that all have sessions. If there be any churches connected with us in that country, within the bounds of the synod and beyond, which have not sessions, they have, by vote, put themselves under the care of some presbytery. I believe the elders in all those churches are for life; I know of no other elders than those chosen for life. I do not know that all those churches have elders chosen for life. I know of none which have committee-men. I presume there are some churches in some of the presbyteries where all questions are submitted to the male members of the church; I have parol evidence that there are such in that region. In the presbytery to which I belong, all have sessions except one, and for five or six years past my attention has been chiefly confined to that presbytery. Several years ago, I belonged to the Presbytery of Buffalo; there were then some churches connected with that presbytery, that had not appointed ruling elders. I am unable to say how many. This presbytery now belongs to the Synod of Genessee. They were the smaller number, and smaller churches, I should say. In the new churches there not being many male members; hardly enough for the formation of an eldership; in some instances the appointment of elders was delayed. In the mean time such a church was represented in the presbytery. I have no knowledge of subsequent changes in the Presbytery of Buffalo. Frequently these churches afterwards chose ruling elders. I now reside one hundred miles from them, and therefore do not know much about them.

Interrogated by *Mr. Ingersoll*, the witness said: I do not know [being pointed to page 534 of the minutes of 1837, containing the reports of the Presbyteries of Onondaga and Cayuga] whether all these churches have elders; I know of none which have not. I am not so extensively acquainted in Onondaga as in Cayuga. I am acquainted in Auburn, and both churches there have ruling elders. I am unacquainted of my own personal knowledge, with the fact how many churches there are in the Presbytery of Onondaga which have ruling elders. I have not travelled much in Onondaga. The seventeen counties in which I travelled, as agent for the Home

Missionary Society, were west of that presbytery. Some of the presbyteries have been formed since that time. In 1816, when I settled in Buffalo, Geneva was the only presbytery in those seventeen counties. The following presbyteries have since been formed: out of Geneva, in 1817, were formed Ontario, Niagara and Bath; and in 1819, the Presbyteries of Rochester and Genessee were formed, all by the Synod of Geneva. At a later period the Presbytery of Tioga was created by the same synod. Also the Presbytery of Angelica, by the same synod. In 1821, the Synod of Genessee was formed by the General Assembly, containing, I think, the Presbyteries of Ontario, Rochester, Niagara and Genessee. Still later the Presbytery of Niagara was divided by the Synod of Genessee; the part north of Tonnewanta Creek retained the name of Niagara, the other took that of Buffalo. The Presbytery of Chemung was subsequently formed by the Synod of Geneva. I do not know that any church was ever represented in the Presbytery of Ontario by a person not either a minister or a ruling elder. I know nothing about it. I know persons, who, when I was a member of the Presbytery of Niagara, fifteen years ago, were members of that presbytery, from churches that had not yet organized an eldership. To the best of my recollection, there were but a small number of such churches, and these among the smaller and newer ones. Each church belonging to a presbytery has one representative. I judge there were churches in some of these presbyteries, which, in the feature of not having elderships, were Congregational. There is one church which has the reputation of belonging to Bath Presbytery, which has no ruling elders—the church of Prattsburg. I do not know that this church was ever represented in presbytery. I do not know of any such in the Presbytery of Rochester. I am acquainted with all the principal churches in Rochester, but not with all. To the best of my knowledge, those churches which have not yet formed elderships, elect one from the male members to represent them in presbytery. I have never been present at any such election.

Interrogated by *Mr. Hubbell*, the witness said: I know of not a single church formed wholly or partly on the accommodation plan [that is, the "Plan of Union,"] being partly Presbyterian and partly Congregational. There are, I should think, between thirty and forty churches in the Presbytery of Buffalo. At the time I was acquainted with it, seventeen or eighteen years ago, there were some churches in that incipient stage which I have described. The common language in presbytery was, "While you are too young to form elderships, let the male members govern the church." I cannot say that all the churches, which were thus initiate, fifteen years ago, have now become consummate. I know that many of them have. The churches of Angelica, I have always understood, had sessions; I know of none in that presbytery that have not. I do not know, however, that all have. I do not know that all in Genessee have ruling elders; but I know none that have not. When I belonged, a number of years ago, to the Presbytery of Niagara, I had reason to suppose there were some churches that had not sessions in that presbytery.

Re-examined by Mr. Randall.—The representation from the Presbytery of Watertown which were referred to on the minutes of 1837, p. 528, is always according to the number of ministers, and so far as I know, always has been. It is so in all presbyteries. A minister without charge, as, for example, the president of a college, always counts one in presbytery. The right to a seat commences with his ordination. I know of no individual, of the whole number of five hundred and nine ministers, within the bounds of the four excinded synods, who is not a regularly ordained Presbyterian clergyman. All were such; but I must be understood as meaning, that we received clergymen from the Dutch Reformed Church, and from the Associations of New England, without re-ordination; the terms of correspondence did not require that they should be re-ordained. In all the presbyteries with which I am acquainted there are a sufficient number of Presbyterian Churches to constitute the presbyteries. Striking out all the churches about whose Presbyterianism there has been any question, there would have remained a sufficient number regularly organized to send commissioners to the General Assembly of 1837.

Mr. Randall here interrupted the witness, to give in evidence the commissions of the delegates from the excinded synods to the General Assembly of 1838.

Mr. Squier in continuation, interrogated by Mr. Randall.—I was present at the organization of the Assembly of 1838. After tendering the commissions to the clerks, I gave them for keeping to Mr. Nixon. I introduced him to Dr. Mason, and then went into the house—found the house very densely occupied at the south end, a large proportion of the gentlemen in that part of it being of the Old School party. The sermon was preached as usual, and at its close the moderator, Dr. Elliott, announced that after the usual prayer he would proceed to constitute the Assembly. This prayer being finished, he took his place in front of the pulpit, and made a prayer, at the close of which Dr. Patton rose and said, that he held in his hand certain resolutions which he wished to offer. Dr. Elliott said that was not the time to present resolutions. Dr. Patton said that he was anxious to present them at that time. Dr. Elliott stated that they could not be received, as the roll was the next thing in order; and I think, stated that the clerks were ready to make their report. Dr. Patton stated that he had the floor before the clerks, and that his motion related to the roll. The moderator told him he was out of order. Dr. Patton appealed from his decision. The appeal was seconded, to the best of my recollection. The moderator refused to put the appeal to the house, saying to Dr. Patton that he was out of order. Dr. Patton then took his seat, and the clerks made their report. Dr. Erskine Mason then rose, and addressed the moderator, saying that he held in his hand the commissions of certain commissioners from the presbyteries within the bounds of the Synods of Utica, Geneva, Genessee, and Western Reserve, which had been refused by the clerks; that he now tendered them (holding them up to view) for the purpose of completing the roll. The moderator inquired of him if those presbyteries were within the

four synods. He replied they were. The moderator replied that they could not be received, or in words to that effect. Dr. Mason then appealed from the decision of the moderator to the house, which appeal was seconded. The moderator refused to put the appeal, declaring him out of order. I then rose, and mentioned to the moderator, that my commission had been tendered to the clerks, and had been refused; and I now demanded my seat, and that my name should be enrolled. The moderator asked what presbytery I represented. I replied the Presbytery of Geneva. The moderator asked if that presbytery belonged to the Synod of Geneva. I replied that it was within the bounds of the Synod of Geneva. He then said, "We do not know you." Mr. Cleaveland, of Detroit, then rose, and said, in substance, that as a constitutional Assembly must be organized at that time and place, by the admission of all proper members to their seats, and as it was evident that this could not be done under these officers, or as it was impossible to go on and constitute or organize the Assembly under them, he moved that Dr. Beman take the chair, which motion was seconded, and was put by Mr. Cleaveland. Dr. Beman rose immediately after the question had been put and carried, by what I should think a nearly unanimous vote. He was sitting near the front of the slip. A motion was then made and seconded, and was put by Dr. Beman, that Dr. Mason and Mr. Gilbert be appointed clerks. Dr. Beman, the acting moderator, then called for nominations for the regular moderator of the Assembly, when Dr. Fisher was nominated, and the nomination being seconded, and none other made, the question was put *viva voce*. Dr. Beman then announced to Dr. Fisher, that he was elected moderator of the General Assembly, and should govern himself by the rules thereafter to be read to him. The Rev. Dr. Mason was then nominated as stated clerk, and Mr. Gilbert as permanent clerk, which nominations were put by Dr. Fisher, and carried. Some paper was then read, or referred to, the purport of which I did not then understand. On the back of this, a motion was made to adjourn to the First Presbyterian Church. The paper was on the subject of the occupancy of the house, and signed by a Mr. Schott. I cannot state by whom it was read, but to the best of my recollection, it was by Dr. Beman. The body then retired to the session-room of the First Presbyterian Church, the moderator announcing that if there were any other commissions, which had not yet been presented, they would be received there. After getting to the lecture-room of the First Church, the business went on as usual.

I think the motions in the Seventh Church were all made in an audible voice, and all seconded; and the question on each put by the chair. Opportunity was given to vote in the negative. So far as I could perceive, the business had the attention of the whole house. The house was very still when I was on the floor. There was a call to order, of Dr. Patton, by the moderator. There were, if I recollect, some cries of order when he and Dr. Mason were on the floor. There was more interruption when Mr. Cleaveland was on the floor, from Dr. Elliott and those in his part of the house.

The interruptions proceeded from the part of the house which was filled when we went in, by those who acted on the Old School side. I cannot say that they were all Old School men, but many I knew to be so. I entered the house near eleven o'clock, before the commencement of religious services; it was then occupied by a dense mass of men, nearly one-third of the way from the pulpit. There was a universal rumour, that a meeting for consultation had been held in the church previously to this time. I have been a member of the General Assembly since the year 1817, as often as once in four years. I have never before seen such a collection of persons at that hour. The members did not change their places afterwards. The Assembly is always opened with a sermon by the old moderator, who presides until a new moderator is chosen. The practice, to the best of my recollection, formerly was, to read the commissions before all the members. The late practice, for convenience, has been, to commit them to the stated and permanent clerks. My recollection is not distinct as to the subject of discussing the right to seats before, or after the choice of a moderator.

The plaintiffs called *Rev. Dr. William Hill*, who testified: I belong at present to the Presbytery of the District of Columbia, although my residence, for some months past, has been at Winchester, Virginia. I have been a member of the Presbyterian Church since 1787. I have been repeatedly a commissioner to the General Assembly; once soon after the Assembly was organized, and since, how often I cannot recollect, but I believe more frequently than any other member from Virginia. I have filled the office of moderator. It was the custom, at the time of my first acquaintance with the Assembly, for the commissions to be brought into the house, and read there. The constitution says merely that they shall be read, but as to the points where, when, and before whom, this shall be done, it is silent. The custom, for a number of years, was, for commissioners, as soon as the sermon was done, to present themselves at the clerks' table, and their commissions were read. The doubtful commissions were laid aside, to be acted upon by the house. Where nothing doubtful appeared, the names were put upon the roll immediately. The doubtful commissions were, I think, formerly discussed before the house; but this was found too tedious, and a Committee of Elections or Commissions was appointed, to examine them and make report as soon as possible. Sometimes persons appeared without their commissions, which perhaps had been lost, or had miscarried. These cases were referred to the same committee to be reported upon. I believe the common practice was to defer deciding on these doubtful commissions until after the moderator was chosen. Those commissioners who were not disputed were permitted to vote for moderator. When the Assembly, in process of time, became so large that reading the commissions, *in extenso*, consumed a great while, this was dispensed with, and the name merely of each commissioner, and of the presbytery from which he came, was announced. This continued the practice until thirteen years ago, when the custom arose of referring all the commissions to the two clerks, in order

to facilitate business; and they having previously examined them, reported the roll to the house. The constitution says nothing on the subject. Business progressed in this way comfortably and harmoniously, until these times of excitement came, when the custom was considered bad, dissatisfaction ensued, and a desire was manifested to revert to the old custom, especially when, in 1837, pledges were exacted from the clerks. It was my intention, last spring, to move the Assembly to return to the old order, as less objectionable, and less liable to abuse.

I was a member of the Assembly of 1835, which met in Pittsburgh. It was a pretty tedious process of organization to get into our gear on that occasion, and I believe near two days were spent before the choice of a moderator. The moderator of the last year was not present. The constitution says that the last moderator present shall preside until a new one shall be chosen. The moderator had written to Dr. Miller, requesting him to preach the sermon and preside in his place. He did preach; but after the sermon, it was objected to that he should act as moderator, and Dr. Beman presided a considerable time; but objection being made, the office devolved on Dr. William A. M'Dowell, I believe by a vote of the house. Dr. Beman occupied the chair a considerable time before his right was called in question. I think I know of repeated instances, in which disputed commissions were decided on before the organization of the Assembly.

Cross-examined.—Interrogated by Mr. Hubbell.—The ground on which Dr. Beman's right was disputed was that he was not the last moderator present. Dr. M'Dowell, the last one present, was in very feeble health, and it was to accommodate his feelings that another person was put in the chair.

The usage is, that the last moderator present is entitled to the chair.

My impression is that Dr. Beman took no part in the discussions of the house, relating to his removal; but it was discussed entirely by the members, and he was obedient to the decision as soon as it was made.

Interrogated by *Mr. Randall*, the witness said: I think the objection on which the moot point arose was, that Dr. M'Dowell was not a commissioner to that Assembly.

Cross-examined by Mr. Ingersoll.—Witness said it is not necessary to be a commissioner to preach the sermon. Dr. Miller preached it on this occasion.

The plaintiffs then read in evidence, extracts from the minutes of the Assembly of many years, to show the practice of the Assembly to decide on disputed commissions, and to transact other business before the choice of a moderator. The minutes presented were of most of the years from 1823 to 1837, inclusive.

The business transacted in the first named of these years is shown in the following extract:

Minutes of 1823, *pp.* 111—113.

After prayer the commissions were read, and it appeared that the following

ministers and elders were duly appointed, and attended as commissioners to this Assembly, viz.

[The roll of the Assembly.]

The Rev. Dr. John McFarland, of the Presbytery of Ebenezer, Dr. Cyrus Baldwin, ruling elder from the Presbytery of Onondaga, and Mr. Samuel Blood, ruling elder from the Presbytery of Carlisle, appeared in the Assembly without commissions; but sufficient testimony was given that they had been chosen commissioners to this Assembly, and they were received as members and took their seats accordingly.

The Assembly proceeded to elect a moderator and temporary clerks, &c.

In 1831, the transactions are exhibited as follows:

Minutes, pp. 155—158.

The Standing Committee of Commissions reported that the following persons present have been duly appointed Commissioners to this General Assembly, viz.

[Then the roll.]

The committee further reported four commissions from the Presbytery of New Brunswick, two from Watertown, one from New Castle, and one from Northumberland, as wanting the date of the year of the appointment: Also one commission from New Castle, and one from Rochester, as wanting the signature of the Moderator; and a commission from Grand River, for a member of the Standing Committee, instead of a Ruling Elder. The committee also reported, that the Rev. John M'Crea, of the Presbytery of Cleveland, had informed them that he had lost his commission.

Mr. Jacob Green, Mr. Patton, and Mr. A. Platt, were appointed a Committee of Elections, and the informal commissions were referred to them.

The Assembly had a recess until four o'clock this afternoon.

Thursday, four o'clock P. M. After recess the Assembly met.

The Committee of Elections reported that they had received satisfactory evidence of the regular appointment, as commissioners, of the persons whose commissions had been referred to them. With respect to the case of the Standing Committee-man from Grand River Presbytery, they decline expressing any opinion as to the constitutional question of the right of such to a seat in the Assembly.

The Assembly proceeded to consider the case of the person denominated 'Standing Committee' in the commission: and after considerable discussion, it was resolved that the member be received and enrolled.

The Assembly proceeded to the election of a Moderator, when the Rev. Nathan S. S. Beman, D. D. was elected.

After the reading of this document the Court adjourned.

Saturday, March 9th.

The reading, by plaintiffs, of extracts from the minutes of the Assembly, to show the practice of the Assembly to decide on disputed commissions, and transact other business previous to the election of moderator, was resumed.

Minutes of 1826, *page* 6.

Mr. Josiah Bissell, from the Presbytery of Rochester, appeared in the Assembly, and produced a commission as an elder from that Presbytery. A member of that Presbytery informed the Assembly that Mr. Bissel had not been set apart as an elder; but that he was appointed, as was supposed by the Presbytery, in conformity with the conventional agreement, between the General Assembly and the General Association of Connecticut. After some discussion, the Assembly adjourned till 9 o'clock to-morrow morning.

May 19th,—The Assembly resumed the consideration of the commission of Mr. Bissell, and after considerable discussion it was resolved, that Mr. Bissel be admitted as a member of the Assembly.

The Rev. Thomas M'Auley, D. D. was chosen Moderator: and the Rev. John Chester, D. D., and the Rev. Samuel T. Mills, were chosen temporary clerks.

Mr. Randall here adverted to subsequent pages of the same Minutes, showing a protest against the admission of Mr. Bissell.

1. Because he was neither an *ordained minister*, nor a *ruling elder*.
2. Because he was not even a *Committee-man*, on which ground some might have been disposed to advocate his admission.
3. Because he had not, either from the *constitution* or from the *Conventional Agreement*, the shadow of a claim to a seat.

Also the answer of the Assembly to that protest, stating that Mr. Bissell was received because he brought a regular commission as a ruling elder.

Plaintiffs then read from the minutes of 1835, pp. 3, 6, 7.

The General Assembly of the Presbyterian Church met in the First Presbyterian church in this city, and the Rev. Dr. Lindsley, the moderator of the last Assembly being absent, was opened with a sermon by the Rev. Samuel Miller, D. D., at the request of the Rev. Dr. William A. M'Dowell, the last moderator present. After sermon, the stated clerk called the house to order, and informed them, that the Rev. Dr. Lindsley, the moderator of the last Assembly being absent, the duties of the chair devolved upon the last moderator, who is present, and has a commission to sit in this Assembly, and therefore he moved that the Rev. Nathan S. S. Beman, D. D., be called to the chair. This motion prevailed, and Dr. Beman took the chair, and constituted the Assembly with prayer.

[Then the report of the roll.]

The committee further reported, that the commissions from the Second Presbytery of New York, and the Presbytery of Genessee, are without the signatures of the moderator; that the commissioners from the Presbytery of Oswego have presented an attested extract from the minutes to prove their appointment; that the Rev. Elisha Jenney has evidence of his appointment, but lost his trunk which contained his commission, in ascending the Ohio, and that the Rev. Hugh Wilson, Mr. Wm. H. Pegram, Mr. Oren Crittenden, and Mr. Asa S. Allen, have evidence of having been duly appointed to attend this Assembly, but cannot present their commissions in due form.

The Assembly had a recess until 3 o'clock this afternoon.

Thursday afternoon, 3 o'clock. The Assembly met. A motion was made to reconsider the vote by which Dr. Beman was called to the chair, on the ground that many persons voted in the apprehension that Dr. William A. M'Dowell, the moderator immediately preceding Dr. Lindsley, was not in the house; and that many others believed the rule of the house required the constituting moderator to be in commission, which Dr. M'Dowell was not. This motion, after considerable discussion, was adopted unanimously.

After some further remarks, it was agreed that the original motion of the stated clerk should be again submitted to the house, and the vote be taken by him. Whereupon Dr. Ely put the question; (Minutes of 1836, pages 235, 238, and 239,) 'all who are in favour of sustaining the resolution passed in the morning, by which Dr. Beman was called to the chair, will signify it by saying aye.' This motion was lost. It was then moved that the Rev. William A. M'Dowell, D. D., being the last moderator present, be requested to take the chair. This motion prevailed, and Dr. M'Dowell took the chair accordingly.

The Rev. Eliakim Phelps, J. M. Krebs, and Mr. Charles Starr, were appointed a Committee of Elections, and the cases of the commissioners above reported, were referred to them.

The Committee of Elections reported, that they had examined the cases of the commissioners referred to them, and finding ample evidence that they had all been duly appointed commissioners to this Assembly, recommended that their names be enrolled as members. The report was adopted.

The right of two persons to a seat in the Assembly from the Presbytery of Portage, was questioned, whereupon their case was referred to the Committee of Elections. After considering the subject, the committee reported that the names of the minister and elder last appointed, should be erased, because the presbytery is entitled to no more than two commissioners. The report was adopted.

A letter was received and read from John M'Dowell, D. D., informing the Assembly, that in consequence of ill health, he was not able to attend their present session. Whereupon the Rev. Jacob Green was appointed to act as permanent clerk, during the sessions of the present Assembly.

The Assembly proceeded to the choice of a moderator and temporary clerk.

Rev. Dr. Robert Cathcart, called to establish the same practice in the Assembly, previous to the time when the full minutes of the Assembly were published, interrogated by Mr. Randall, said:—I have been a minister of the Presbyterian church in the United States, upwards of forty-six years,—have been present in forty or more General Assemblies,—have been a commissioner from thirty to thirty-five times. From fifteen to twenty years I was clerk of the Assembly. Formerly there was no division of the duties of the clerk's office. Our constitution knows nothing of a stated and permanent clerk. It recognizes only a clerk of the Assembly, and the duties which it prescribes for him are very simple. In the early period of the Assembly either the previous clerk, or some one nominated on the occasion, officiated till the Assembly was constituted. The commissions were brought and put upon the table, and the clerk read them. After some years, when the number had increased, this method was found inconvenient, and it became customary to read only the most essential parts of each commission, the name of the commissioner, and of the presbytery, and the signature of the moderator. At this time there was so few disputed or defective commissions, that they were usually settled at the clerk's table. Afterwards, when the number had increased, another plan was adopted. Such commissions were laid aside, till those about which there was no difficulty had been read. A committee on commissions was then appointed, and into their hands went all the doubtful cases. Then a recess was usually allowed for dinner, and after the interval, the committee reported the names of those whom they thought duly elected. These were usually received from the report of the committee, and no vote passed upon them by the Assembly. Then the moderator announced that, if any commissioners had entered the house in the interim, they should come forward and present their commissions. After this they chose a moderator and clerks. Since the year 1802, the permanent clerk has continued in office, until a new one was appointed. The report of the committee was received *ex officio,* without any vote. They settled who were members, and those thus reported were put on the roll. It was never supposed that the clerks had a right to reject any commissions. The Assembly is entirely independent of any officers; if the moderator and clerks should all die, the body would still exist.

Cross-examined.—Interrogated by *Mr. Hubbell.* Of late, since it has been found that so much time was consumed in reading the commissions at the table, it has been the practice for the clerks to attend in the morning, before eleven o'clock, to receive commissions. They are called a Committee of Commissions. It is their business to examine the commissions, and see whether they are regular. Sometimes they find defects, as the want of a signature. Sometimes commissions have been lost, or forgotten. They have always reported according to circumstances. The irregular, or doubtful cases then go into the hands of a committee of elections.

Rev. Eliphalet Gilbert, called by the relators.—Interrogated by *Mr. Randall.* I belong to the Presbytery of Wilmington, Delaware.

I was a member of the General Assembly of 1837, and also of that of 1838. On the morning of the 3d Thursday of May, 1838, I went to the church in Ranstead court, about half past ten o'clock. I found the seats near the pulpit nearly filled by the brethren of the Old School party, as they are usually called. I then stepped round into the lobby, and handed my commission to the Committee of Commissions. I was surprised to hear Dr. M'Dowell say to Mr. Krebs, "These doors ought to be locked." As I had been present at many Assemblies, and had never known them locked, I was surprised at this. Soon after, the doors were locked. I then took my seat in the house on the east aisle, as near to the front as possible. After sermon and prayer, Dr. Patton rose, and said: "Mr. Moderator, I hold in my hand, certain resolutions, which I wish to present to the house." The moderator told him he was out of order, saying that the first business was the report on the roll. Dr. Patton replied, that his resolutions bore upon the roll, and that he desired they might be presented, and acted upon without debate. The moderator replied again, that he was out of order; that the clerk had the floor. Dr. Patton said, he had the floor before the clerk. Again the moderator said he was out of order. Dr. Patton appealed from his decision to the house, and his appeal was seconded by a number, at least a dozen voices. I seconded it, and so did others sitting around me. The moderator declared the appeal out of order, refused to put it to the house, and ordered the clerks to proceed with the roll. Dr. Patton then sat down. Mr. Krebs then read the roll, omitting the names of all the commissioners from twenty-nine presbyteries, viz. the twenty-eight belonging to the four excinded synods, and the Third Presbytery of Philadelphia. The moderator, after the roll was concluded, said; according to the usual form, that if there were any other commissions, from any part of the Presbyterian church, now was the time to present them. Dr. Mason, of New York, then rose, holding a bundle of papers in his hand, and said, "Mr. Moderator, I hold in my hand a number of commissions, which have been rejected by the clerks: I now tender them to the house, and move that the names be added to the roll." This motion was seconded. The moderator asked whether they were from presbyteries in the Presbyterian church, at the close of the General Assembly of 1837. Dr. Mason answered, that they were from presbyteries belonging to the synods of Utica, Geneva, Genessee, and the Western Reserve. The moderator replied, "We cannot receive them." Dr. Mason said, "I do most respectfully appeal from your decision to the house." I should have said, that he had already been declared out of order. This appeal was seconded by many voices, and the moderator declared it out of order, and refused to put it. The Rev. Miles P. Squier then rose in his place, and said, that he had been regularly commissioned from the Presbytery of Geneva, had handed his commission to the clerks, and they refused to receive it; that he now tendered it to the Assembly, and demanded his seat upon that floor. The moderator asked whether the Presbytery of Geneva belonged to the Synod of Geneva. Mr. Squier replied,

that it was within the bounds of the Synod of Geneva. The moderator said, "We do not know you," and Mr. Squier sat down. Here the Rev. John P. Cleaveland rose, and after a few remarks, moved a change of officers. He said, it was evident, from the refusal of the moderator and clerks to do their duty, that a constitutional organization of the Assembly could not, under those circumstances, be effected; that we had been advised by men learned in the law, that the organization must take place at that time, and in that house; and he moved a change of moderator, and nominated Dr. N. S. S. Beman to preside until a new one should be chosen. This was seconded, and Mr. Cleaveland put it, saying, "All those who are in favour of the motion, will please to say, aye." There was a loud and general "Aye." Then he said, "All who are against it will say, No," and I heard some murmuring, but no loud distinct "No." I understood the object of the motion to be to remove Dr. Elliott, and substitute Dr. Beman in his place. Mr. Cleaveland declared that the motion was carried, and asked Dr. Beman to take the chair. Dr. Mason and myself were nominated clerks, *pro tem.*, and the motion was put and carried. After my own election, I left my previous seat, and passed round near where Mr. Krebs, and Dr. M'Dowell sat, and walked down the broad aisle, near where Dr. Beman stood, that I might be ready to call the roll, which I held in my hand, if necessary. While I was thus passing down the aisle, Dr. Beman called for nominations for moderator of the Assembly of 1838. Professor Dickinson of Cincinnati, nominated Dr. Fisher, and the nomination was seconded. Dr. Beman asked, if there were any other nominations. None were made: the roll, therefore, was not called, but the question was decided *viva voce*. Dr. Beman said, "All who are in favour of Dr. Fisher's being the moderator will say aye, and there was a general "Aye." Then, "All who are against it will please to say, no," and I heard several loud "Noes." The usage of the Assembly is, when only one person is nominated, to vote *viva voce*, and when there are two nominations to call the roll. I have known such a question to be determined *viva voce*, in a number of instances. Dr. Beman declared the motion to be carried, and introduced Dr. Fisher to his place: he had no chair, but merely stepped aside. He reminded Dr. Fisher, that he was to be governed by the rules thereafter to be adopted by the Assembly. It is usual for each Assembly to adopt rules for itself. Those are commonly adopted which are in the appendix to the Constitution of the Church. Dr. Fisher then called for nominations for stated and permanent clerks, and Dr. Mason and myself were nominated. Dr. Fisher asked if there were any further nominations, but none were made, and he put the motion, and it was carried almost unanimously. I think there were some nays, but if so, they were not so distinct as before. The negatives came generally from the south-western part of the house, or from towards the west door—that part of the house occupied by the Old School party—by Mr. Breckinridge, Mr. Plumer, and their friends. I am positive they came from that side. There were negatives on both questions, I believe,

though I am not so positive of this, in regard to the last, as in regard to the motion for Dr. Fisher. I cannot say certainly, because there was considerable confusion in the house. There was but one nomination for each officer. The question upon the first motion, that of Mr. Cleaveland, I know was reversed; and I believe it was on all the subsequent motions. I know it was on two or three. A motion was made, that the Assembly should adjourn to meet forthwith in the lecture-room of the First Presbyterian Church. This motion was put and carried. After this, there was considerable confusion in the house. The question was reversed, but I think there was none against it. Dr. Fisher declared that the Assembly had adjourned to meet forthwith in the lecture-room of the First Presbyterian Church, and that, if any commissioner present had not yet handed in his commission, he could present it at that place. I do not remember the reading of any paper. Some reason was assigned for adjourning, as the confusion, or the difficulty of occupying that house. We left the church on Ranstead court, and removed to the lecture-room of the church on Washington Square. A few minutes after, or as soon as we were convened there, the roll was called, and we proceeded to business. Dr. Patton then presented the resolutions which he had offered in the church in Ranstead court—the same as those contained in the paper read here. These were put and carried. The General Assembly, of which I was clerk, continued in session about eleven or twelve days, in the church on Washington Square. The different motions, made in the church in Ranstead court, were all made by persons having an undisputed right to seats, having been reported as members, by the committee of commissions, excepting Mr. Squier. They all made their motions in a loud voice—louder than usual—so that they could be heard over the whole house. They were addressed to the whole house. I should think there was an opportunity for every member present to vote. The only thing that made it difficult to hear, was the noise at times made in the house. This did not commence until after Dr. Patton rose. The moderator called to order, and others around the moderator, cried "Order! Order!" a few times. The greatest confusion was when Mr. Cleaveland rose. There were a great many cries of "Order!" from those around the moderator, and from that part of the house, together with coughing, scraping, hissing, and hushing, yet not so loud but that Mr. Cleaveland could be heard throughout. Some efforts were made to keep down the noise. Some persons rose to their feet, and there was considerable confusion in the gallery. The noise commenced in the southern, and south-western portions of the house. The Old School occupied the seats in front, but they were most compact in the south-western corner. The lobby is under the pulpit, at the south end of the church, and from it there are two doors, one on each side of the pulpit, into the church. The clerks sit in that lobby, or vestry. Formerly these doors had always been left open; and persons who wished to get places near the moderator's chair, entered by them. I had never before known them to be locked. The door on each side of the moderator's chair was locked. The seats around the

moderator's chair, were all occupied by half past ten o'clock, but some persons could have stood in the vacant places. The locking of the doors compelled all who came afterwards to take seats further north. I have never before seen the members thus seated at that hour. The whole roll, embracing all the commissioners from one hundred and thirty-five presbyteries, was called, in the Assembly that met in the church on Washington Square, once a-day. I cannot state how many answered to their names the first day, but I think from one hundred and seventeen to a hundred and twenty. There were some upon the roll who did not answer. Afterwards the number of those that answered, was about a hundred and thirty, some ten or twelve having been subsequently received. I think altogether there were between a hundred and twenty-seven, and a hundred and thirty.

The plaintiffs' counsel inquiring of Mr. Gilbert respecting the election of the relators as trustees of the Assembly, and the respondents' counsel objecting to his being examined on that subject, plaintiffs read in evidence the following extracts from the minutes of 1838, pages 650 and 654.

Overture No. 4, was reported by the committee of bills and overtures taken up and adopted; viz., *Resolved*, That for the current year the Assembly will elect *six trustees* of the General Assembly of the Presbyterian Church in the United States of America.

Resolved, That the election of said trustees be made the order of the day for Thursday forenoon at 10 o'clock, in the manner prescribed and adopted by the Assembly in 1801, p. 198–9 of the Digest.

Thursday, May 24th, 9 o'clock. At 10 o'clock the Assembly proceeded to the order of the day, viz., the election of six trustees of the General Assembly. Messrs. Bogue, Brown, and Chapin were appointed to receive the ballots and report the result. The Assembly ascertained that no vacancies in the board of trustees have occurred by death or otherwise. They then proceeded to try whether they could elect any of that third of the number of trustees which they are permitted by law to change, by voting for a person to fill the place of the Rev. Ashbel Green, D. D., the first on the list. On counting the votes it was ascertained that all the votes were given for James Todd, who was accordingly declared by the moderator to be a trustee duly chosen in the place of Ashbel Green. In the same manner the Assembly proceeded to vote, and unanimously elected John R. Neff in the place of George C. Potts; Frederick A. Raybold in the place of William Latta; George W. M'Clelland in the place of Thomas Bradford; William Darling in the place of Solomon Allen; and Thomas Fleming in the place of Cornelius C. Cuyler; thus changing as many of the trustees as they are permitted by law to change. Whereupon James Todd, John R. Neff, Frederick A. Raybold, George W. M'Clelland, William Darling, and Thomas Fleming, were declared to be duly elected trustees of the General Assembly of the Presbyterian Church in the United States of America.

Mr. Gilbert cross-examined.—Interrogated by *Mr. Hubbell*, witness said: the vacant space in front of the pulpit, might be approached from the other doors. I passed through that space when I went round to act as clerk. I could get to any part of the house, after the doors by the sides of the pulpit were locked; but, as the aisles were crowded, it was not as convenient for a modest man to do so, as if they had not been locked. All others than modest men could get seats as well as if the doors had not been locked, but the nearest way to the front seats was through the lobby doors. There are four other doors to the church besides the ones that were closed. I believe, that when I arrived, all the doors by which the congre-

gation usually pass into the church were open. It is not customary, I believe, for them to pass through the lobby. The Assembly has met in that church, I think, seven or eight times. A mixed congregation of males and females, such as is usually found in a church, were seated in the galleries and in the back pews, on the floor of the house. There were clamorous expressions of applause from the galleries, and, perhaps, some from the floor of the house, after the motion for adjournment to the First Church. I did not see around where I stood, any who were not members of the Assembly. The brethren of the New School occupied such seats as they could get, and, very probably, there may have been some who were not members in the same seats. I do not recollect whether the clerks—Mr. Krebs and Dr. M'Dowell, came into the house after me or not. I left them in the committee room.

Interrogated by Mr. Preston.—I am not positive whether the moderator was seated, when Dr. Patton made his motion. The clerks were in advance of Dr. Elliott, and both he and they continued to occupy the same places, as long as I saw them. Those who were seated near the pulpit, to the best of my recollection, also remained there as long as I saw them. I do not know that our proceedings were entirely outside of the Old School. The greater portion of the Old School, intervened, in a compact mass, between us and Dr. Elliott. Dr. Beman was not conducted to the chair, but stood in the aisle, in the rear of the body of the Old School party. The seats of the moderator and clerks are generally in front of the members, but I have heard of an Assembly's having held its session in the street, without any clerks at all. The Assembly of 1837 met on the pavement at the gate of a church in this city. It is not usual to have two moderators of the Assembly at the same time. I have known, however, two sitting at the same time, both called moderators. In the year 1837, there was one in the street in front of the church in Spruce street, and another in the Central church; they were not in the same house. I have never known two persons to sit in the same house, both claiming to be moderators. I am sure that some of the Old School participated in our proceedings at the church in Ranstead Court. The mass of them did not go with us, but remained behind. The Old School, I believe, had a majority of members present on that occasion.

The meeting, at which the New School concerted their plan of proceeding, was not composed exclusively of New School men. No one was excluded. I saw there some who acted with the Old School afterwards.

[*Mr. Randall* objected to the witness's giving evidence in regard to the consultation meeting, as the relators had not been allowed to investigate the acts of individual members of the Old School party, but had been confined to the public acts of the Assembly of 1837. The subject was waved.]

I regarded all the members present in the Seventh Presbyterian church, as participating in our proceedings. I had supposed that we should have a strong vote against us, and was agreeably surprised to hear so few noes. The Old School men did not go with

us on our adjournment to the First Presbyterian church. We did not regard them as having any moderator or clerks.

Taking all the commissioners to the Assembly of 1838, I think there was a small majority of Old School men present. The proceedings of the consultation meeting were not exclusive of the Old School party; all were invited to attend.

[A colloquy of some length here ensued between the counsel and the court, and the witness then proceeded.]

I use the word unanimous according to the language of our judicatories. With us, when several are in favour of a motion, and, the question being reversed, there are none opposed, it is said to be carried, unanimously. No reference is had to the intentions of members. I used it according to legal intendment, and according to our constitution. It is impossible for any one to say whether a majority voted. The vote was very loud—louder than usual, and the voices numerous. I will not venture to say that a majority did vote. I do not know but that a minority voted. I am now speaking of actual voting.

[*Mr. Preston.* If a majority had voted against you, what would you have done then?

This question was objected to.

Judge Rogers. I do not think this a proper question.]

Direct examination resumed. The seats where members usually sit were entirely occupied, when I entered the house, so that members could have no place near the pulpit, unless they should stand in the aisles. There was no vacant pew, though perhaps a few individual seats here and there.

[*Mr. Preston.* A word of explanation, if you please. I understood you to say, that some of the Old School voted in the negative.

Mr. Gilbert. I did not say that some of the Old School voted; but that the voices came from the part of the house where they sat.]

I never before knew a moderator refuse to put an appeal from his decision. Our rules are express on this subject. Formerly the old rules of the Assembly were considered to be in force without being re-adopted. This was so until Mr. Breckinridge came into the Assembly, about five years ago. Mr. Breckinridge was the author of the regulation to re-adopt the rules at every session. I understand the old rules are in operation till new ones are adopted.

Rev. Dr. Erskine Mason called. *Interrogated by Mr. Randall.*—I was a commissioner to the General Assembly of 1838, from the Third Presbytery of New York, not within the bounds of the excinded. About half past ten o'clock on the third Thursday of May, I went to the church up Ranstead Court. As I was going up the court I met several individuals, by whom something was said in regard to seats inside. I went to the door facing the court, and looking in, saw persons thickly collected in the small aisle, I then went round to the door at the other end of the building, and walking down the middle aisle got as near the pulpit as I could; I don't recollect how many pews there were between me and the pulpit. I found the seats in front of the pulpit filled, and could not get nearer than the eighth or ninth pew. At the conclusion of the exercises, Dr. Elliott,

the Moderator of the Assembly of 1837, gave notice, that after the benediction he would come down and constitute the Assembly. He came down and took a seat in front of, and below the pulpit. He offered an introductory prayer, at the close of which Dr. Patton rose and addressed the moderator. He said that he held in his hand certain resolutions and a preamble which he desired to offer. The moderator declared him out of order, and that the next business was the report of the clerks. Dr. Patton replied that his resolutions would consume little time, and he would not debate them. The moderator said he was out of order. Dr. Patton said that the resolutions he wished to offer had reference to the formation of the roll. The moderator again declared him out of order. Dr. Patton appealed to the house, and his appeal was seconded. The moderator declared his appeal out of order, and said that the clerks had the floor. Dr. Patton reminded the moderator that he had the floor before the clerks. The moderator directed the latter to proceed with the roll. At its conclusion the moderator stated, that if there were commissioners in the house, whose commissions had not been presented, now was the time to present them. I immediately rose, and stated that I held in my hand certain commissions to the Assembly of 1838, that the commissioners to whom they belonged were present, that these commissions had been presented to the clerks of the last General Assembly and by them rejected; and moved, that the roll be now completed by adding the names of the commissioners from the presbyteries within the bounds of the Synods of Utica, Geneva, Genessee and the Western Reserve. The moderator asked if they came from presbyteries connected with the church at the close of the Assembly of 1837. I answered, that they came from presbyteries within the bounds of the Synods of Utica, Genessee, Geneva and the Western Reserve. The moderator declared me out of order. I then said, that, with all due respect to him, I must appeal to the house. My appeal was seconded, but the moderator declared it out of order, and refused to put it. After this the Rev. Miles P. Squier rose, stating that he had handed his commission to the clerks and that they had refused it, and now, tendering it to the house, he demanded a seat, and that his name should be put on the roll. The moderator asked from what presbytery he came. Mr. Squier answered, from the Presbytery of Geneva. The moderator asked whether that presbytery belonged to the Synod of Geneva: Mr. Squier answered, that it was within the bounds of the Synod of Geneva. The moderator replied, "We do not know you." Then the Rev. John P. Cleaveland, from the Presbytery of Detroit, rose and said, in substance, that as the Assembly could not be constitutionally organized, unless by the admission of all the commissioners present; as some of these commissioners had been refused, and as the moderator and clerks had not done their duty, he moved, that Dr. N. S. S. Beman take the chair.

This motion was seconded, and was put by Mr. Cleaveland, who said, "All those who are in favour of the resolution will signify it by saying, aye," and then reversing, "All those who are opposed will signify it by saying, no." Mr. Cleaveland declared Dr. Beman

elected. There were some who voted "no." I heard distinctly two or three noes. They came from the quarter of the house in front and to the right of the pulpit. One person in the pew immediately in front of me said, "No!" I don't know his name. Dr. Beman then stepped out of the pew in which he was sitting, and took his station in the middle aisle. At that time, some one nominated Mr. Gilbert and myself as temporary clerks. This motion was seconded and carried. I still had the commissions which I had offered in my hand, and acting as clerk, considered the commissioners to whom they belonged, of whom I had a list, as on the roll. Dr. Beman called for nominations for a moderator. Dr. Fisher was nominated, and no other person. Dr. Beman put the vote, and Dr. Fisher was chosen by a large majority. There were some votes in the negative, coming from the same quarter as before. Dr. Beman declared Dr. Fisher elected, and made way for him to take the place which he had occupied. Dr. Fisher took it and called for nominations for clerks. Mr. Gilbert and myself were nominated, the question was put, and we were elected. At that moment, Dr. Beman either read a paper, or made a statement, to the purport that that house could not be occupied by the Assembly, and moved that we now adjourn to meet, forthwith, in the lecture room of the First Presbyterian Church. This motion was put and carried, and Dr. Fisher gave notice of the adjournment, and said that any commissioners present, who had not yet handed in their commissions to the Assembly, should do so at the First church. Then the Assembly came to order in the lecture room of the church on Washington Square, and Dr. Patton offered the resolutions which he wished to offer before. I should here state, that all the commissioners from the western synods present were now on the roll, and several others were enrolled. Afterwards, the business proceeded in the usual manner.

In the church in Ranstead court, the moderator was further from me, than the body of the Old School party. Most of them were between him and me, and had as good a chance as he had, or a better one, to hear what was said. All the motions of which I have spoken, were seconded by several voices. I myself seconded several of them. The moderator asked me if the commissions which I offered, were from presbyteries belonging to the excinded synods. I answered that they were. He then said that they could not be received. I then made a tender of them to him. When Dr. Patton rose, there were a few calls to order, and when I got up, there were several. These calls came from that portion of the house occupied by the Old School members. When Mr. Cleaveland commenced his statement, there were loud cries of order, coughing and scraping, but these ceased before he concluded. The calls to order ceased before I got through. There was no material disturbance during the colloquy between the moderator and myself: at first there were some calls to order, but these subsided. All the motions put, were put in an audible voice, and seconded. Mr. Cleaveland's motion I know was reversed. That on the election of moderator I am sure was; and, to the best of my knowledge, that

on the choice of clerks also. I should think full opportunity was given to all the members present to vote. The scraping and hissing seemed to come from that portion of the house where the Old School were. Standing as I did, I could not see what took place in that part of the house; my attention was directed before me. When Mr. Cleaveland made his remarks, he faced the moderator. I also faced the moderator when I was on the floor. So did Dr. Patton and Mr. Squier. The mass of the Old School party was between me and the moderator.

Mr. Randall said that he would hereafter examine this witness on some points not immediately connected with the organization of the Assembly.

Cross-examination. Interrogated by *Mr. Preston*, the witness said: I am clerk of the General Assembly. I am not in possession of the paper read by Mr. Cleaveland, and do not know where it is. I do not know whether the paper on the minutes is that offered by Mr. Cleaveland. I did not prepare the minutes: Mr. Gilbert, the Permanent Clerk, prepared them. I never saw the paper, or read it. I was in the same pew with Dr. Beman. He sat at the door, and Mr. Cleaveland at the other end. I cannot recollect the others who were in the pew. I think a gentleman named Nixon was there. The pew was full. When I was appointed clerk, I took my station in the aisle. I stood—had no pen or ink, but had paper and a pencil. I had in my hand the commissions which I had tendered to the moderator, and a paper containing the roll of the members of the General Assembly, including those who had been rejected by the clerks. This roll was on two pieces of paper, one containing the names previously read by the clerk, and the other those from the western synods. I, in connexion with Mr. Gilbert, had made out this roll, partly from the report of the clerks, and partly from other sources, as from the information of persons who were commissioners. I had no commissions in my possession but those which I had offered. The others were in the possession of the clerks of the last Assembly. My own I had given to the clerks: that is, it had been given to them. The names of all the commissioners from our presbytery were enrolled in one commission. I considered the list which I held in my hand as the roll. That was my first act as clerk. I had the names on paper; and I considered that putting them on the roll was my first act. I had actually so far put them on the roll, that if it had been necessary to call it, I could have called all the names. That consideration was my first official act.

I did not report any roll, until we got to the First Church. The first roll had already been reported at the other house. I reported the additional names of the commissioners from the four excinded synods. Mr. Krebs had reported the former at the other house, and I presume the other commissions are in the possession of the clerks of 1837. I cannot say precisely how many were in the possession of the clerks of our house. They are not all here in this bundle. About a dozen were handed in after our adjournment, to the best of my recollection. Our roll was made up of those names which we had caught from the report of Mr. Krebs, with those

taken from these commissions, and from the ten or twelve presented afterwards. The officers were chosen by a large majority, I may say without hesitation, of all who voted. There is a rule contained in the appendix to the Book of Discipline, which says, that silent members shall be considered as voting in the affirmative. If but two voted in the affirmative, and one in the negative, a motion would be carried. I have no means for determining whether a majority of all the members present voted in the affirmative. I should not like to say that a majority did so vote; but I have no doubt that a majority voted one way or the other. I cannot say how many New School men retired from the Seventh Church. More than fifty-five or sixty: I should think more than seventy. I cannot state whether there were a hundred. I took no account until afterwards. I judged of the majority by the sound of the voices, and from the number who answered in the negative. I suppose that those persons who were afterwards in the Assembly with us, generally voted in the affirmative. This is one reason of my conclusion in regard to the majority.

The Court adjourned.

Monday morning, March 11th.

Cross-examination of Dr. Mason, continued.—Interrogated by *Mr. Preston.* I cannot say with certainty, whether the roll made up in the church in Ranstead court, was written by myself. I had made one, as far as I could, before the house met, and one was furnished by another person. I made mine as full as I could. I forget which of the two was used. The deficiency in it was supplied, as the clerks read. I took down names in two instances myself, but do not recollect that I took down more than two. It was well known beforehand who would be the commissioners—and their names had been published in the newspapers. The roll was not verified at the First Presbyterian Church, by the production of commissions. We had not the commissions which had been handed in to the clerks of 1837. These [the ones contained in the bundle which had been given in evidence] are not all the commissions which we had. The roll which we used in organizing the Assembly, was obtained from the sources which I have mentioned. It would have been our duty to examine the commissions, if they had not been examined by the regular clerks before. I did examine each commission which I had, attentively, according to the rules of the church. To the best of my recollection, I found them all regular. I do not remember finding any fault. In making the roll, I did not compare these commissions with the form prescribed. The constitution does not prescribe any form, or at least any form which is obligatory, which must strictly be adhered to. It gives a form, and then says, "this or a like form," shall be used. This [a commission from the Presbytery of Geneva having been handed to him] is one of those that I examined. I would pronounce it regular. I approved of it at that time.

I appealed, when the moderator refused to put my motion. I said that, "with the greatest respect for the chair, I must appeal from that decision." The right of appeal is certainly known to our constitution; for appeals are often made. I cannot recollect whether the right is expressly granted in the constitution. It is provided for in the regulations which have been made by the Assembly, and recommended by them to all the courts of the church. An appeal is made to every member present at the time in the house. When the General Assembly is organized, an appeal is made to the house as organized. I intended to make mine to all those who had commissions. All there, who held commissions, were unquestionably members of the Assembly of 1838, and my appeal was made to them. I made it to all the persons present, who had commissions: them I considered members of the Assembly of 1838. I intended to appeal from the moderator, to all the persons present who had commissions, whom I considered members of the Assembly. I am comparatively a young man, and therefore cannot speak with certainty as to the practice. I know it is very common in the General Assembly, to take an appeal to the body over which the moderator presides.

Our constitution will tell you, that Dr. Elliott was presiding in the organization of the Assembly, until a new moderator should be appointed. This is my opinion. A new moderator had not been appointed when I took my appeal. The new officers of the Assembly, as I stated yesterday, took their station in the middle aisle. They were all nearly in contact. Dr. Beman, when called upon, stepped out of the pew in which he had been sitting, and took his place in the middle aisle.

Dr. Beman declared Dr. Fisher elected. I cannot recollect whether Dr. Fisher was standing on the seat. The distance between the two was not great. Dr. Beman stepped back, and Dr. Fisher took his place. He did not call the Assembly to order, but called for business. I don't know that many were standing on the seats of the pews. These things were transacted as rapidly as they could conveniently be. I cannot say what Dr. Elliott was doing at this time. After Mr. Cleaveland's motion I did not pay particular attention to him, don't know whether he retained his seat, or whether he used the hammer, or called us to order. I cannot say that the New School party were generally standing up: some of them were. My attention was directed to what was passing around me, and I did not see the old moderator or clerks. I do not know that any proceedings were, during this time, carried on by them; didn't hear any business going on in that quarter; had the roll made out, and, while Mr. Krebs was reading, made notes with my pencil. There were, on the roll which was called at the First Presbyterian Church, the names of persons who did not appear till some days afterwards; but they were all on the roll reported by the clerks of 1837. I recollect that such was the case in regard to Mr. Boynton, an elder from the Synod of Albany; do not recollect that Mr. Martin and Mr. Fabrigue, from Salem Presbytery, did not appear at the opening of the Assembly. I don't remember at what time Mr

Glover, or Mr. Stewart, from Charleston Union Presbytery, appeared; recollect only the case I have mentioned; but think there were others of the same kind. Mr. Boynton was enrolled; but I don't know whether he ever took his seat with us. I cannot tell exactly how many took their seats in our General Assembly; but the number enrolled was not far from one hundred and thirty. Nearly the whole of these took their seats. I do not include those who remained in the church in Ranstead court. The whole roll included those. My opinion is that a majority of all on the full roll did not take seats with us.

I used to belong to the Synod of Albany, and therefore Mr. Boynton's name was impressed upon my memory.

I don't recollect whether Dr. Green's name was on our roll. He did not sit with us; nor Mr. Robert J. Breckinridge. The case which I mentioned was like one of these: Mr. Breckinridge is therefore another instance. I never attended the Assembly at the church in Ranstead court after we left there. I went once to the house, but the Assembly had adjourned. I think Dr. Phillips had been moderator next before Dr. Elliott. I do not know whether he was present. To the best of my recollection, the one next before him was Dr. William A. M'Dowell, but I don't know whether he was present. I don't recollect whether Dr. Witherspoon of South Carolina was the one before him or not. He was moderator either in 1835 or 1836. Each of them has held that office since Dr. Beman.

Interrogated by *Mr. Hubbell*, the witness said: Mr. Boynton's name was read by the clerks of 1837, and in this way I know that it was put on our roll. I saw afterwards their printed roll; Mr. Boynton's name was not on it. I do not recollect whether the the names of Mr. S. Glover and Mr. R. L. Stewart, elders from Charleston Union Presbytery, were on our roll. [Being pointed to the roll on the minutes, witness said] they *are* on the list. They did not attend our Assembly. I don't know how I got their names. I do not recollect from which presbytery Mr. Boynton came—I think it was either Londonderry or Newburyport. Messrs. Glover and Stewart never answered to their names, and did not present commissions. I had nothing to do with taking names off the roll after the Assembly was organized. I had something to do with the preparation of the minutes for publication. I cannot state whether I heard their names read from the roll of the clerks of 1837. If not on their roll, we had no reason for putting them on ours, and they ought not to have been put there. I don't recollect whether their names are on the printed roll of 1838. Mr. William W. Martin, and Mr. Henry L. Fabrigue, were on our roll; I don't know whether they were on Mr. Krebs's roll. I don't remember examining the commissions of either. Their names had been published. We had no authority to put down any but those on Mr. Krebs's roll. I can't say whether I took them from that; if not, I probably took them from the newspapers. Mr. Brayton, from the Presbytery of Oneida, I think presented his commission originally to me, and I examined it. I do not recollect in regard to Dr. James

Richards of Cayuga, but think his case was similar to Mr. Brayton's. I think I examined the commission of the Rev. Samuel W. Brace. He was from the Presbytery of Cayuga: Dr. Richards and he were in the same commission, but not as principal and alternate. They came in after the opening of the Assembly. We had the commission of Mr. Justin Marsh, of Marshall Presbytery. Mr. Adam Miller, of the Presbytery of Montrose, came to our body, in the First Presbyterian Church. There was some difficulty in regard to his commission. His case was referred to the Committee of Elections, and he was admitted. I do not remember Mr. Jotham Goodell. To the best of my recollection, we had the commission of Dr. John H. Haynes, an elder from the Presbytery of Troy. I cannot say whether Dr. Witherspoon was present in Ranstead court: I don't know him. I do not recollect that inquiry was made whether any person who had been moderator subsequently to Dr. Beman, was present; nor whether we called the names of Dr. Witherspoon and Dr. Phillips on our roll. They were both on it. They did not present their commissions to us. I don't remember whether I took their names from Mr. Krebs's roll.

Interrogated by Mr. Ingersoll. I recollect that the sexton of the First Church was at the other house, and that when we adjourned, he ran off before us. I saw him going on before us.

Mr. Wood, of counsel for the relators, here inquired of the witness: What complaints were made, in the Assembly of 1837, in regard to irregularities in the Synods of New Jersey and Albany?

Mr. Hubbell objected to the question.

Mr. Wood then asked: Were there any Congregational churches in those synods?

Mr. Hubbell still objected.

The plaintiffs then gave in evidence extracts from the minutes, 1837, page 496–7.

Dr. Cuyler, from the committee appointed to consider and report to the Assembly on the subject of citing inferior judicatories, presented a report, which was amended and adopted, and is as follows, viz:

The committee believe that, for the present, there is no urgent necessity to cite any inferior judicatories; and after what has been done toward the reform of the church during the present sessions of the General Assembly, they believe it will be best to wait for a time, without further decisive action, in the hope that those portions of the church against which serious charges are still made by common fame, will see the necessity of taking order on the subject, and doing, without delay, what truth and righteousness may require of them.

We deem it proper, however, to say, that several of the synods are so seriously charged, in several respects, that this Assembly would be wanting in faithfulness to itself, to them, and to the cause of Christ, as well as to the principles of justice and fair dealing, in carrying out its own principles, if it did not specially urge several of them to give prompt and particular attention to certain matters, in which they, or some of their presbyteries or churches, are specially charged. We, therefore, recommend the adoption of the following resolutions, viz:

1. *Resolved*, That the Synods of Albany and New Jersey be enjoined to take special order in regard to the subject of irregularities in church order, charged by common fame, upon some of their presbyteries and churches.

2. That the Synod of Michigan be enjoined to take special order in regard to the subject of errors in doctrine, so charged upon all its presbyteries.

3. That the Synod of Cincinnati be enjoined to take special order in regard to error in doctrine, so charged as being connived at by several of its presbyteries, and held by some of its members.

4. That the Synod of Illinois be enjoined to take special order in regard to errors in church order and errors in doctrine, so charged upon several of its presbyteries.

5. That, besides the general reference to the word of God and our standards, we refer the synods above named to the testimony of this General Assembly as to the nature of the errors and irregularities, intended by it, in these resolutions; and said synods are enjoined to take order on the subjects now referred to them for consideration and action, at their first stated meeting after this Assembly adjourns; and to report their doings herein, with whatever else seems to them necessary to elucidate the whole subject, in writing, to the next General Assembly.

6. And the said five synods are especially enjoined, and all other synods in our bounds are required, to cause to be laid before the next General Assembly, as far as possible, copies of all the abbreviated creeds and church covenants in use amongst their churches; which subject is also particularly commended to all our presbyteries, both in relation to the present demand, and with reference to the testimony of this Assembly on that subject.

Mr. Wood then said: Now I wish to have this matter explained.

The Court decided, that the inquiry whether the proceedings of the Assembly as to the excinded synods was impartial, was foreign to the case, the point to be decided having respect to their legality.

Dr. Mason resumed.—By direction of the Assembly of 1838, I went to Dr. M'Dowell, and demanded from him the books and papers of the Assembly, and the commissions that were in his possession. He declined giving me any paper. Mr. Cleaveland, preliminary to his motion, stated, in substance, that as it seemed impossible to organize the Assembly of 1838, under its present officers, since a number of commissioners had been refused their seats, and as it was necessary to proceed to its organization, he hoped it would be considered a matter not of discourtesy but of necessity; and he moved that Dr. Beman should take the chair.

This commission is the one which Mr. Squier presented. I never saw Mr. Boynton during the meeting of the Assembly. Mr. Krebs' roll might have contained the name, though it did not appear on the printed roll.

Sometimes the names of all the delegates from a presbytery are on one commission, and therefore, though one of the commissioners is not present, his name may get on the roll. I don't know how it was in this case.

Cross-examination resumed.—There was no written communication made to Dr. M'Dowell, in regard to the papers of the Assembly. Mr. Krebs, when I called on him, was not at home. I addressed a note to him, and received an answer.

Mr. Randall now called on Mr. Krebs for the original roll of the Assembly of 1838.

Mr. Krebs said: It is in the hands of Dr. M'Dowell.

Mr. Randall. While waiting for the roll, I will read in evidence a portion of the minutes of 1837.

Mr. Preston objected to the reading of extracts, unless the whole minutes were in evidence.

Judge Rogers. Each part that is pertinent to the issue I consider in evidence; and as to the pertinency of any part, the Court must determine.

The plaintiffs then gave in evidence the minutes of the organization of the Assembly of 1837, pages 411 to 415, as follows:

The General Assembly of the Presbyterian Church, in the United States of America, met agreeably to appointment, in the Central Presbyterian Church, in the city of Philadelphia, on Thursday, the 18th day of May, 1837, at 11 o'clock A.M.; and was opened with a sermon by the Rev. John Witherspoon, D.D., the moderator of the last Assembly, from 1 Corinthians, i. 10, 11: "Now I beseech you, brethren, by the name of our Lord Jesus Christ, that ye all speak the same thing, and that there be no divisions among you; but that ye be perfectly joined together in the same mind, and in the same judgment. For it hath been declared to me of you, my brethren, by them which are of the house of Chloe, that there are contentions among you."

After public worship, the Assembly was constituted with prayer, in the Lecture room of the Central Church, and had a recess until four o'clock.

At four o'clock the Assembly met.

The standing committee of commissions reported that the following persons present have been duly appointed commissioners to this General Assembly, viz.

[The roll of members follows.]

The committee further reported that Mr. David B. Ayres, a ruling elder from the Presbytery of Illinois, had appeared without a commission; and that the Rev. Bliss Burnap, of the Presbytery of Champlain, and Mr. Henry Brown, a ruling elder from the Presbytery of Lorain, had presented commissions without the signature of the moderator.

These cases were referred to Mr. Cleaveland, Mr. Murray, and Mr. Ewing, as a committee of elections.

Dr. Cuyler, Mr. A. White, and Mr. Symington, were appointed a committee to inquire whether a more convenient place can be obtained for the sessions of the Assembly.

The committee of elections reported in favour of receiving the members whose cases were referred to them; and it was ordered that their names be inserted in the roll of commissioners.

Rev. David Elliott, D.D., was elected moderator, and Rev. Horace S. Pratt, temporary clerk.

Rev. John M. Krebs was elected permanent clerk, in the place of Rev. Dr. John M'Dowell, elected stated clerk by the last Assembly.

Resolved, That the permanent clerk have printed, for the use of the Assembly, 1000 copies of the roll.

As evidence that the constitution does not require that the minister presiding at the organization of the General Assembly should have been previously a moderator, the plaintiffs here read from the Form of Government, chap. xii. sec. 7, p. 365, *Mr. Randall* remarking on the words "some other minister," as follows:

The General Assembly shall meet at least once in every year. On the day appointed for that purpose, the moderator of the last Assembly, if present, or, in case of his absence, some other minister, shall open the meeting with a sermon, and preside until a new moderator be chosen. No commissioner shall have a right to deliberate or vote in the Assembly until his name shall have been enrolled by the clerk, and his commission publicly read, and filed among the papers of the Assembly.

In this connexion, *Mr. Randall* said, he would also read from the appendix to the *book* called the Constitution certain rules, which the Assembly had recommended to be adopted by all the judicatories, but which were in no sense constitutional rules, and were adopted, or not, by each General Assembly, and by the other judicatories, as they saw fit.

General rules for judicatories.—1. The moderator shall take the chair precisely at the hour to which the judicatory stands adjourned: he shall immediately call the members to order; and, on the appearance of a quorum, shall open the session with prayer.

2. If a quorum be assembled at the hour appointed, and the moderator be absent, the last moderator present shall be requested to take his place without delay.

Rev. E. W. Gilbert, recalled by *Mr. Randall*, said: It was by a mistake of the printing committee that the names of Messrs. Martin and Fabrigue appeared on the printed roll. They were not on the previous record; but the committee took a wrong roll.

Cross-examination.—Interrogated by *Mr. Preston*, the witness said: The roll which I used was taken originally from that of Mr. Krebs, and amended by the addition of names from commissions appearing afterward. I took the roll as he read, by the assistance of such preparation as I had been able to make before. The names had been published in the Presbyterian: I took some from that, some from persons who held commissions, and some from other sources. Then while Mr. Krebs read, I watched, and erased or inserted names, according to circumstances. After he had finished, I could have repeated the roll, just as he read it. I mean to say that I corrected my roll, which had been prepared from the Presbyterian and other sources, by the reading of Mr. Krebs—made the corrections as well as I could—had not the commissions of all the members. Probably I had about a third of them. I think I saw the commissions of more than one half. They were handed to me by the persons who held them. I saw the commissions from all the excinded presbyteries, and many others, before they were presented at the Seventh Church. They were not submitted to me, as clerk of the General Assembly. I was acting in an official capacity—was clerk of the consultative meeting.

[*Mr. Preston* inquired whether it was as clerk of the meeting for consultation, that the witness saw those commissions? The counsel for the relators objected to the question, and the court ruled it out.]

They were not presented to me as clerk of any body. I was requested by some one, I cannot tell who, to look at them.

There was no formal request made by any organized body; but some one suggested that it would be best for us to see the commissions. By "us," I mean the delegates to the consultation meeting. We saw the commissions in the lecture room of the First Presbyterian church, in the hands of the members, previous to the meeting of the Assembly. I did not see them in the hands of Mr. Krebs. I did not see all, but I should say, not far from half—perhaps from one hundred and thirty to a hundred and forty. I cannot say whether I saw any of the commissions of the Old School, but think I did—using the term Old School here as designating a party in church politics. I had seen the paper which was presented by Mr. Cleaveland. The substance of it is on our records. The paper on the record, I think, is nearly the same, but not identical; perhaps it contains something taken from his interspersed remarks. It contains a few things which I did not myself hear. He held the paper in his hand, and read, interspersing it with remarks, some of which were to Dr. Elliott. Some things are in the record which I did not hear, though I thought I heard every word. I did not see the paper in its last shape. I am the recording clerk, and copied the minute from a paper presented, but it was not the one from which Mr. Cleaveland read.

Interrogated by *Mr. Hubbell*, the witness said: The insertion of the names of Messrs. Martin and Fabrigue, I have said, was a mistake of the printing committee. I requested them to insert the roll at a particular place, and they inserted a wrong one. I did not see the proof, and cannot say from what they printed. I furnished the roll for printing. There was a roll read at the opening of our Assembly, with those names upon it. This is not the roll completed by the clerks; there is that error in it. The names of these two men were called at the opening of our Assembly, and afterwards, perhaps for some days, but not very long. The error was discovered and corrected. I do not know that there is any necessity for inserting the roll on the minutes; it is customary to do so. I struck out the two names by erasure—I cannot say when. There was perhaps more than one copy of the original roll, and perhaps that occasioned the mistake. With my roll, which had not these two names upon it, before them, the printing committee probably took the two names from another roll. I struck their names off, because I found I had made a mistake. I saw a notice in the papers, that these gentlemen sat in the other Assembly. The names of Glover and Stewart, I must have understood, were on Mr. Krebs's roll. I think it very probable I made a mistake as to these two also. My recollection in regard to the matter is not very distinct. We called the names of all those who remained in the church in Ranstead Court, regularly, once a day, until the close of our session. I do not now recollect, whether, when I gave the roll to the printing committee, I knew that I had made a mistake as to Messrs. Glover and Stewart. So far as I remember, I had not discovered the error.

Mr. Wood requested the witness to look at the remarks of Mr. Cleaveland, as they are recorded in the minutes, p. 635, and read them aloud.

The witness then read as follows:

The Rev. John P. Cleaveland, of the Presbytery of Detroit, rose, and stated in substance as follows: That as the commissioners to the General Assembly for 1838, from a large number of presbyteries, had been refused their seats; and as we had been advised by counsel learned in the law, that a constitutional organization of the Assembly must be secured at this time and in this place, he trusted it would not be considered as an act of discourtesy, but merely as a matter of necessity, if we now proceed to organize the General Assembly of 1838, in the fewest words, the shortest time, and with the least interruption practicable. He therefore moved that Dr. Beman, from the Presbytery of Troy, be moderator, to preside till a new moderator be chosen.

The witness then continued. Mr. Cleaveland did not address the moderator by his name; his face was towards the moderator, but he did not say, "Mr. Moderator." I did not hear the word "interruption," and some others. He said, in addition to what is there recorded, that it was no matter in what part of the house the moderator stood. I don't recollect any other additional words. He had a paper, from which he read, and he interspersed the reading with parenthetical remarks. I supposed him to read the whole of the paper. This which I have just read is the paper, in substance. It contains every main idea of his speech, so far as I recollect.

Cross-examined.—Interrogated by Mr. Hubbell.—It is usual, in cases of an unusual or difficult character, or where there is any peculiarity, to appoint a committee to prepare a minute. This was done in the present case. The committee reported the minute, and it was adopted.

Rev. Samuel Fisher, D. D., called by the plaintiffs, and interrogated by *Mr. Randall*, said: I was a member of the Assembly of 1838, from the Presbytery of Newark, in the Synod of New Jersey. I attended the meeting on the 3d Thursday in May, in the Seventh Presbyterian church. I went about half-past ten o'clock, (am not quite positive as to the time,) handed in my commission to Dr. M'Dowell, in the committee-room, and then going round to the east door, walked down the side aisle. I found the seats near the pulpit occupied. I spoke to Dr. Green and others, and sat down on a bench in front of the pews; but finding this seat uncomfortable, I walked up the aisle about one-fourth of the distance from the front pew to the rear of the church, found a pew not yet full, and took a seat at the far end of it. Dr. Elliott, after concluding his discourse, gave notice, that, after the blessing had been pronounced, he would take the seat before the pulpit, and proceed to constitute the Assembly. Accordingly, he came down, and constituted the Assembly by prayer. As soon as he had prayed, Dr. Patton rose, and addressed him, saying that he had some resolutions which he desired to offer. The moderator told him he was out of order; that the first business was the report of the clerks upon the roll. Dr. Patton replied that his resolutions related to the roll, and he was very desirous to present them at that time. The moderator told him he was out of order the second time, and directed the clerk to proceed with the roll. Dr. Patton appealed from the decision, and his appeal was seconded. The moderator declared the appeal out of order, and refused to put it to the house; said that the next business was the report upon the roll, and that the clerks had the floor. Dr. Patton said that he had the floor before the clerks. The moderator told him he was out of order; and he then sat down. The clerk finished the roll, and stated that there had been some informal commissions presented; I think it was at this time a committee of elections was appointed. Dr. Mason then rose, and presented a resolution to this effect: that the names of the commissioners from the four Synods of Utica, Geneva, Genessee, and Western Reserve, should be added to the roll; stating that they had been presented to the clerks, and by them refused. He was called to order. Then a conversation took place between him and Dr. Elliott. Dr. Elliott asked, whether those commissions came from presbyteries within the bounds of, or belonging to, the Presbyterian Church at the close of the sessions of the Assembly in 1837. Dr. Mason replied, that they were within the bounds of the four synods, repeating their names again. The moderator said, "they cannot be received." Dr. Mason replied, that he must, respectfully, appeal to the house from that decision. His appeal was seconded; but the moderator declared it to be out of order. Dr. Mason then held up the bundle of commissions, and, I think, demanded that the names should be

put upon the roll. He was again pronounced out of order; and he sat down. Immediately, Rev. Miles P. Squier rose, on the opposite side of the aisle, and held up a commission, which he said he had from the Presbytery of Geneva. He said it had been presented to the clerks, but they had refused to receive it. The moderator asked if the Presbytery of Geneva belonged to, or was connected with, the Synod of Geneva. Mr. Squier answered, that it was within the bounds of the Synod of Geneva. The moderator replied, "We do not know you." Then Mr. Cleaveland, from the Presbytery of Detroit, rose, with a paper in his hand, but did not read all his remarks from the paper. I sat in the next pew to him, and had seen the paper before. He prefaced by saying, that whereas the moderator and clerks had refused to receive a number of commissions from different presbyteries to the Assembly, and had repeatedly refused to perform the duties incumbent upon them, so that the Assembly could not be regularly organized; and as we had been advised by counsel, learned in the law, that the Assembly must be organized at that time, and in that place, therefore he moved that Dr. Beman should be moderator, (as I understood it,) of the preliminary meeting. This motion was seconded, put to vote by Mr. Cleaveland, and carried by a large majority. Dr. Beman stepped out of the pew, and walked up the aisle (the width of three or four slips) a short distance from me, and stated, that the next business would be the election of clerks. Dr. Mason and Mr. Gilbert were nominated; the nomination was seconded, and the question put, and carried by a large majority. Afterwards he stated, that the next business was the election of a moderator. Some person nominated me; the nomination was seconded, and the question was put, and carried by, what I esteemed, a large majority. I rose from my seat —but did not stand on the seat, that is not my habit—I walked to the front of the pew, and into the aisle, within a few steps of where Dr. Beman stood. When Dr. Beman declared me elected moderator, he turned towards me, and told me that I should be governed by the rules which the Assembly should adopt. I took the station which he left, said that the next business was the choice of clerks, and called for nominations. Dr. Mason and Mr. Gilbert were nominated and none others. I put the question, in a distinct and loud voice, and it was carried by a large majority. I said, "All those who are in favour will say, aye;" and afterward, "Those opposed will say, no." I used very few words. After the clerks had been appointed, a motion was made to adjourn to the First Presbyterian church. This was seconded, and put, so that it could be heard all over the house, and it was carried. I then announced, that if any persons had not presented their commissions they should present them at the First Presbyterian church. We went to the First Church, and conducted our business as usual.

I sat looking toward the south-western portion of the church, and heard all that passed. I have detailed the facts as correctly as possible. By a majority, I mean what is usually called so, in our ecclesiastical judicatories. There, when a question is voted upon *viva voce*, if there are one hundred ayes, and but ten noes, the

motion is said to be carried by a large majority. It is not known whether all vote. If the roll is called, account is taken of the vote of each person present. On Dr. Beman's nomination, there seemed to be about ten or twelve noes: they appeared to come from the quarter where the brethren—I don't like to call them the Old School—sat. My position was on the boundary line between the two ranges of pews, and I was looking toward the south-west part of the house. There was one negative on my left hand, coming from a pew occupied by our brethren of the Old School. The others came from the quarter which has been so often mentioned. The resolutions could have been heard by any body disposed to hear. The most dense portion of the Old School sat in the south-west corner of the house. The moderator was south of the great body of those gentlemen, though some were partially behind him. I have been a minister of the Presbyterian Church thirty years this spring, and have attended the General Assembly about once every three years, making in all eleven or twelve times. I am conversant with the rules of the Assembly. Where but one person is nominated to any office, the question is taken *viva voce*. Where more than one, the roll is invariably called. I have never known, in any Assembly, a refusal to put an appeal. I should have supposed that no moderator would have assumed such a power to himself.

Cross-examination.—Interrogated by *Mr. Preston*, the witness said: I had never previously been moderator. I don't recollect that I saw Dr. Witherspoon present. I did at the time see Dr. Phillips. Dr. Beman had been moderator. I cannot state in what year—probably about 1831. Dr. Witherspoon afterwards appeared on the roll as a member of the Assembly. My nomination was seconded. A call was made for other nominations, but there was no reply, in my hearing. Dr. Beman announced my election, and stated to me that I was to be governed by the rules which the General Assembly should adopt. He stood with his face directed toward the south-east corner of the house, it being turned partly towards the old moderator, and partly towards me. He sat in the pew next behind me. He walked north two or three slips—(as the oblong pews are called at the east, to distinguish them from the square ones.) When he announced my election his face was towards me. When he called for nominations, he addressed the preliminary meeting, to which he stood in a quartering direction. The mass of the New School brethren were north of me, on both sides of the aisle. Dr. Beman sat near the front of the New School brethren, and not in their centre. The largest portion of those of the Old School was in the south-west corner. The densest mass of the New School were collected in my rear. When Dr. Beman announced that I was chosen moderator, I walked towards him, with my back to Dr. Elliott. When I had taken my station, I did not address the moderator, but the meeting. I stood quartering towards Dr. Elliott, my arm resting on the west side of the pew, as I am a little lame. By turning a little, I could see the great mass of both the New and Old School brethren. I was at the east

end of the pew in which I sat, and Mr. Cleaveland was in the pew behind me. There were some persons east of him in the slip. When he made his suggestion or statement, his face was turned towards the moderator, but he did not address the moderator. He first made a preamble, which was followed by his motion. He put the motion to the Assembly. It is usual for a moderator to take his seat near the pulpit. [Being asked by *Mr. Preston*, why he did not take the usual place for the moderator after his election was announced, the witness replied :] A paper was put into my hands, signed by the president of the trustees of the church, giving permission for the house to be occupied by an Assembly to be organized under the moderator and clerks of 1837, but by no other. No disturbance was wished, and I did not know but an attempt to take the chair, might create one. I did not know but the trustees had placed men there, to prevent my taking it. It is usual to take that seat in organizing the Assembly, but I don't know but it would have produced a greater violation of order to attempt to take it, than to omit it. It is unusual to organize the Assembly standing in the aisle, but not altogether without precedent. *I* thought it imprudent and unbecoming to attempt to take the chair under the circumstances. The resolution did not, that I know of, refer to that chair in particular, more than to any other part of the house. It was from motives of prudence that I did not take it. I took the station that I did, in order that there might be no interruption in organizing the Assembly. It could thus be done more speedily, and with less disturbance. My reasons were prudential ones. I thought it very possible that Dr. Elliott, although he is a very polite man, would not resign the chair.

Something was going on in the other part of the church, during these proceedings. It was a great deal of noise and confusion. When Dr. Patton offered his resolution there was considerable noise. This was partly behind the moderator, and around him. While Mr. Cleaveland had the floor, a part of the time there was a great noise. Some one said to the moderator, "Why don't you put him down?" and there was coughing and scraping. After the motion to appoint Dr. Beman moderator, there was apparently a calm. The brethren of the Old School looked on in a kind of silent amazement. There was no further out-breaking of noise, until notice of the adjournment and the announcement to commissioners, who had not yet presented their commissions, had been made: then there was a great shout, and clapping and hissing from the gallery, which I had not anticipated, and which I regretted at the time, considering it unsuited to the time and place. We did not obey the cries of order; we acted on the principle that we had superseded the moderator and clerks, and were going on under another organization. There were calls of order from members of the body, but we did not obey those. We paid no attention to cries of order, before the Assembly was fully organized. The number of members whose names were upon our roll, before we left Philadelphia, was about two hundred and eighty. I did not say the New School roll, but the roll of the Assembly. Most of them

were present at the first meeting, but we received some afterwards, more than one hundred, I should think, voted on the question of adjournment. The voting on the different questions was louder than was necessary or proper, but there was no other disturbance in our part of the house. When these proceedings began, most of the members were sitting, but after I stepped into the aisle, some rose from their seats. I noticed on the west side, some who had got up on the seats. I cannot say that the most were on their feet. I cannot tell what length of time elapsed from Dr. Beman's taking his stand in the aisle, until the adjournment, but I suppose there was time enough to put all the motions: I should think not less than ten minutes. The proceedings were carried on with considerable rapidity—as fast as they could be distinctly attended to. Our object was to get through as speedily as we could with propriety. The design of all, I presume, was to make the time as short as was consistent with the orderly attainment of our object. When we went out, I presume we left the body that had sat before me, with Dr. Elliott and Mr. Krebs, in their places, but I did not look back. I don't know how many went with us into the First Presbyterian church. Some time afterwards we had about one hundred and thirty—perhaps a few more or a few less: I am not positive.

Mr. Preston asked the witness, Was your election entirely unexpected to yourself?—but the question was ruled out.

Mr. Preston. I wish to ask an explanation of Dr. Fisher as to the paper of Mr. Cleaveland, of which he has spoken. Mr. Cleaveland said, that "we had been advised by counsel learned in the law." Who did he mean by "we"?

The question was objected to, but the Court admitted it, and the witness proceeded:—A number of gentlemen felt themselves aggrieved by the acts of the Assembly of 1837, I among the rest. I consulted a lawyer, and so did others, to find how we might get our rights. And I and others were informed by lawyers, that our Assembly must be organized at that time and place. We went individually to different lawyers, in different parts of the country, as I in my own neighbourhood, others in New York, and others in Philadelphia, and were individually advised. I don't know that there was any concert in the matter. Those aggrieved sought how they might recover their rights. I had been admitted to a seat, but I felt that when an old brother, such as Dr. Richards, President of the Seminary of Auburn, was excluded, I was aggrieved. When any one member suffered, I suffered.

Re-examined by *Mr. Randall*, the witness said: There was, at all times, a constitutional quorum present in our Assembly. Nineteen, I believe, is the number required to form a quorum: or fourteen perhaps it is. I was thinking at the moment that it had been changed to nineteen.

Cross-examination resumed by Mr. Preston. The witness said: We called the roll every morning—the whole roll, including the names of the gentlemen who remained in the church in Ranstead court. I cannot tell how many ever answered. No investigation

on this subject was made in the Assembly. I stated this morning that nineteen were a quorum; but I find that the rule requires only fourteen or more, one-half thereof being ministers. This rule is applicable to the organization of the Assembly, but no greater number is ever indispensable, so far as I know. I don't know, except from the constitution, what number is required for a quorum; but from the constitution, I should say that with fourteen we could always transact business. I have known synods and presbyteries to carry on their business without a majority being present. I can say, with a good degree of confidence, that some of the last acts of the Assembly of 1835, were performed without a majority being present, of those who had been on the floor. The roll is called every morning unless this is dispensed with. At the dissolution of the Assembly I believe it was not called. I think at many of the Assemblies where I have been, the roll has not been called at the close, or the absentees marked. It is a general practice, but there have been many exceptions to it. I was ordained by the West Consociation of Fairfield county, Connecticut, and there I remained for four years. I received a call to preach to the Presbyterian congregation at Morristown, thirty years ago this spring, and had the usual constitutional questions put to me, which I answered. My ordination in Connecticut was by a consociation composed of clerical and lay-delegates. The General Associations of Massachusetts, Connecticut, and New Hampshire, still continue to exist.

Direct examination resumed by Mr. Randall. The witness said: It is usual for clergymen to join the Presbyterian church in the same way that I did. I could mention a number of such instances, where they have come from bodies in correspondence with the General Assembly. Dr. Cuyler and Dr. Junkin were received in this manner. It is not customary to re-ordain in any case, but they go through a formula of examination, if they do not come from bodies in correspondence with the Assembly. Ordination in our church is the setting apart to the gospel ministry, by prayer and the laying on of the hands of the presbytery. If a person thus ordained has no charge, he is styled an evangelist. When a person not ordained is called to a congregation, he is first ordained, and then pronounced to be installed. When he has already been ordained, the ceremony of installation is performed, and the questions are put, but there is no laying on of hands, and no re-ordination. I do not know whether Dr. Janeway was in the Dutch church before he entered the Presbyterian. I joined the latter church in 1809, and he was then a member. He was pastor of a church in Philadelphia, and I think clerk of the General Assembly. Ordained clergymen, on joining the Presbyterian church, are never re-ordained, though they are sometimes examined.

Rev. Robert Adair, called by plaintiffs, interrogated by *Mr. Randall*, said: I am a minister of the Presbyterian church, and pastor of a church in Fourth street, between Arch and Market; we are worshipping temporarily in the Academy. I attended the Assembly of 1838; went to the place, the Seventh Presbyterian church, or the Tabernacle, not very long before the meeting. The house

was full; it was crowded; but I succeeded in getting a seat about midway of the church, on the west side of the middle aisle. At the close of the religious exercises, the moderator announced, that immediately after the benediction, he would constitute the Assembly, and accordingly he came down and constituted it with prayer. After it was thus constituted, Dr. Patton of New York rose, and intimated that he had some resolutions which he wished to offer. I don't know precisely what he said. The moderator told him he was out of order, as the first business was the report of the clerks upon the roll. Dr. Patton said, that his object was to complete the roll. The moderator replied, that the clerks were on the floor. After this there was more conversation between them, and Dr. Patton appealed to the house. The moderator declared the appeal out of order, and Dr. Patton took his seat. The clerks then proceeded with the roll. After they had ended, Dr. Mason rose, with a bundle of papers in his hand, and said something to the moderator in regard to what they were. I don't recollect what he said, but that he had a bundle of papers of which he made a tender. After some questions had been asked, to which he responded, the moderator pronounced him out of order. Dr. Mason said, that, with great deference to the chair, he must appeal from that decision. The moderator told him his appeal was out of order, and he took his seat. Dr. Elliott then announced, that if there were any commissioners who had not presented their commissions, that was the proper time to present them. Mr. Squier then rose, and intimated that he had handed his commission to the clerks, and they had refused it; and he now claimed a seat. A conference took place between him and the moderator, after which the latter said to him, "We do not know you, sir," and Mr. Squier took his seat. Mr. Cleaveland then rose, and after some remarks, the purport of which I don't know, made allusion to the importance of securing a constitutional organization, at that time and place. He then moved that Dr. Beman should be temporary moderator, and this motion was put and carried. Dr. Beman came out of the pew into the middle aisle, and said that the next. or the first business was the nomination of clerks. A nomination was made of Dr. Mason and Mr. Gilbert; the question was put, and was carried. Afterwards the choice of a moderator was announced as the next business, and nominations were called for. Dr. Fisher was nominated, and the question was put and carried. So as to the appointment of regular clerks. Dr. Mason and Mr. Gilbert were nominated, and the question was put and carried. After this, a motion was made to adjourn, and this also was carried. Dr. Fisher then announced, that the Assembly would now proceed to the First Presbyterian church, and that if there were any commissioners who had not presented their commissions, they should avail themselves of that opportunity to present them. I can't say whether all these questions were put distinctly, and in an audible voice; my impression was that they were. It appeared to me at the time, that they were put in the usual mode of presenting

questions. I have known other moderators to put questions less distinctly and audibly than these were put.

The plaintiffs here read from the minutes of 1835, to show the practice of transacting business without a majority of the members of the Assembly being present and voting; from page 16, showing that on a question, as to the choice of a new stated clerk, there were two hundred and twenty-two votes, and two persons present excused from voting—ayes 98; nays 124; and from page 32, showing that on a question relating to ruling elders, there were ayes 76; nays 15; in all, only 91 votes.

Mr. Adair continued: I could not see what number of members voted. My position was about midway from the pulpit, on the west side of the middle aisle. I heard some negative voices. They seemed to come from the direction of the moderator, or from a point a little to the south of south-east. I don't know whether I was sitting north or south of Dr. Fisher. I was about opposite to Dr. Beman, when he came out into the aisle. There were ladies in the pew immediately in the rear of me. I cannot say that the noes came from a part of the house distinct from that from which the ayes came. My impression was that they came from some persons in the aisle. They seemed to come from a point a little south of south-east from myself. I was the second person from the door of the pew.

Cross-examination.—Interrogated by *Mr. Ingersoll*, the witness said: I came out of the church with the body of my friends. They came out promiscuously, as a congregation usually do. I do not recollect whether I was in the lead of the column. I was not a member of the Assembly of 1838. I accompanied to the First Presbyterian Church those who removed. I cannot say how long it was from the time that Dr. Beman took his station, till the adjournment took place. My interest in the proceedings was so absorbing, that I could not take note of time. When the moderator declared the appeal out of order, no appeal was taken from his decision. In our courts nothing of this kind was ever heard of.

[The following colloquy here ensued.]

Mr. Ingersoll.—How could Dr. Mason have manifested acquiescence in the moderator's decision, more clearly than by his taking his seat?

Mr. Adair.—There was an usurpation of authority on the part of the moderator, that precluded any attempt to recover the rights of the members, without resorting to an appeal to the house. The rights secured by our book had been invaded.

Mr. Ingersoll.—Suppose a member had moved on some subject not connected with the business, as, for instance, "That you, Mr. Moderator, should take a drink of water;" the moderator decided the motion out of order, and an appeal from that decision out of order, what then?

Mr. Adair.—The house would treat such a person as a lunatic; but here there was a pertinence in the resolution offered.

Mr. Ingersoll.—O yes, that is your opinion, but I differ from you,

though perhaps I do not know so much as you do of the *lex parliamenti.*

Mr. Adair.—I have never heard of such a thing, as an appeal from the judgment of the presiding officer, that an appeal was out of order.

Interrogated by Mr. Ingersoll, the witness continued: In our movement from the house, there was a confusion and uproar in the galleries, but I do not recollect anything of the kind on the part of the members of the Assembly. By their conversation, I should judge there was a great deal of excitement among them, but there was nothing indecorous; they only seemed excited and very much interested. I can't say whether any preparation appeared to have been made beforehand, when I entered the First Church.

Interrogated by Mr. Hubbell.—There were others besides members on the floor of the church in Ranstead Court, both males and females, as there always are at the opening of the Assembly. There were spectators sitting among the members, as usual in the morning, other arrangements not being made until afternoon. I felt at liberty to take any seat I found unoccupied. The house was unusually crowded at an early hour, but I have seen it crowded commonly on such occasions. The galleries were filled. I entered first at the north-east door, and then at the door immediately north of the pulpit. I had before been up in the gallery, and had taken my stand by the organ. From there I saw seats below that were more convenient, and availing myself of this information, I went down and took one of them. I could estimate the number of negative voices only by the sound. The negative was much smaller than the other. I sat one seat from the aisle. Mr. Cleaveland was a little east of south-east from me, when he made his motion. I mingled among the members in the First Presbyterian Church, on the outer part, among the lobby members as they are called. A place for the lobby members was not marked out at that time: I do not know whether any was designated afterwards. I don't recollect whether there was any discussion, on our arrival in the First Presbyterian Church, in regard to these proceedings. I believe the Assembly was constituted with prayer, and went on regularly to constitute the roll, and to vote on Dr. Patton's resolutions.

Re-examined by Mr. Randall.—I have never, in an ecclesiastical body, known a case of a moderator's refusing to put an appeal.

[*Mr. Sergeant* then interrogated the witness and the following colloquy ensued.]

Mr. Sergeant.—May not an appeal, under some circumstances, be out of order?

Witness.—I think it may.

Mr. S.—Whose business then is it to declare an appeal out of order?

Wit.—I have no experience in reference to that matter.

Mr. S.—Suppose an appeal is out of order, does it not belong to the moderator to declare it?

Wit.—This would be making the moderator judge in his own case.

Mr. S.—But if an appeal is out of order, who is to decide in the first instance?

Wit.—The house will decide; they will say the appeal is out of order; but I have gone about to the limits of my knowledge on these points.

Mr. S.—I want to know whether it is not the business of the presiding officer to decide in the first instance, that an appeal is out of order?

Wit.—No, Sir; the house must decide.

Mr. S.—Do you mean to say that the General Assembly is different from all other deliberative bodies?

Wit.—We have certain rules, and I don't know how they compare with those of other bodies.

Mr. S.—Suppose an appeal is out of time; suppose that it is not made until the next day after it should be made—how then?

Wit.—The moderator must decide in the first instance, and the good sense of the man who makes the appeal will prevent any difficulty.

Mr. S.—You mean to say, that the moderator must decide in the first instance, and that the good sense of the man must afterwards help him somehow or other—do you?

Wit.—Our books make an appeal always in order.

Mr. S.—Is there nothing said as to the proper time and place?

[*Mr. Preston* here took up the colloquy.]

Mr. Preston.—If a moderator decides an appeal out of order, who is to determine the propriety of his decision?

Wit.—The house must decide; and in such a case, if the moderator refused, the clerks ought to put the question. The sole question that would then come before the house, would be in regard to the right of appeal.

Mr. P.—Suppose I made a motion, and the moderator declared it out of order, and I then appealed, and my appeal also was declared out of order, what question would go before the house.

Wit.—I cannot answer: these matters are beyond my province. Such a case has never occurred. It would require the opinion of some of our aged patriarchs.

Mr. P.—It actually occurred in this instance. Had the gentleman a right to put any other question to the house, than that in regard to the moderator's decision?

Wit.—The question should be either to reverse or to confirm the moderator's decision.

Mr. P.—Did the question put by Mr. Cleaveland either reverse or confirm Dr. Elliott's decision.

Wit.—The house was not reached: it did not get access to that appeal. The moderator declared the appeal to the house out of order. There was no appeal from him on that question. The house did not decide on the point of order.

Mr. Randall handed to the witness, and requested him to read, which he did; as follows:

No. 29 of the "General Rules for Judicatories." "If any member consider himself aggrieved by a decision of the moderator, it shall be his privilege to appeal to the judicatory; and the question on such an appeal shall be taken without debate." The witness then proceeded: I thought it impossible that an appeal should be declared out of order. No time is specified for an appeal from the decision of the chair; an appeal is always in order. I know of no usuage giving a clerk a right to put a question; I only supposed such a case.

Interrogated by Mr. Preston.—These rules are usually adopted at the commencement of the session of each Assembly. I suppose they were adopted in the First Presbyterian Church, but I am not certain.

Dr. Cathcart, recalled.—After an appeal is made, it is sometimes withdrawn, but if the appellant persist in wishing to have it put, the moderator is obliged to put it. I never knew a contrary instance till in the Assembly of 1838. When an appeal is put and prevails, the moderator's decision is reversed. This was an extraordinary case. Neither the moderator or clerks had any right to reject any commissions. It was for the house to decide whether the commissions were valid, though it is true that the Assembly of 1837, attempted to bind the Assembly of 1838, hand and foot.

The plaintiffs read in evidence the following resolution from the minutes of 1837, p. 498.

"*Resolved*, That calling the roll previously to dissolving the Assembly, be dispensed with."

The plaintiffs then called *Mr. Archibald M'Elroy.* Interrogated by *Mr. Randall*, witness said—I am connected with the public press of this city: with the United States Gazette. I was present at the organization of the General Assembly, in Ranstead Court, on the 17th day of May last. The moderator had nearly finished his sermon, when I came to the church. When the moderator, Dr. Elliott, had finished his sermon, he announced, that he would come down and proceed to organise the Assembly; which he did by prayer. After the prayer, Dr. Patton arose, and requested permission to offer a paper, which he held in his hand. The moderator told him that he was out of order, as the first business was the report of the roll. Dr. Patton stated, that the paper had reference to the completing of the roll, and appealed from the decision of the moderator. The moderator pronounced the appeal out of order. Dr. Patton then took his seat. The clerk then reported the roll, which, as I afterwards ascertained, had upon it upwards of 200 names. The moderator then said, that if there were any commissions which had not been presented to the clerks, now is the time to present. Dr. Mason rose, holding in his hand certain commissions, which he said he was anxious to offer. The moderator asked him where they were from. He replied, from the Synods of Utica, Geneva, Genessee, and the Western Reserve. The moderator declared him out of order. Dr. Mason appealed, and the moderator decided that the appeal was out of order. Some conversation then passed be-

tween them, which I do not recollect. Mr. Squier then arose, and said, that he had presented his commission to the clerks, and it had been rejected by them; and he now demanded his seat. The moderator decided that he was out of order. He appealed; and the same course as before, was gone through. A conversation then ensued, which I did not understand.

Mr. Cleaveland then rose, with a paper in his hand; which he stated had relation to the organization of the Assembly; the substance of which has been given in evidence by others. After he had finished reading, he moved that Dr. Beman be appointed moderator, until a new one should be chosen; which motion was seconded, and carried. Dr. Beman took the chair, and stated that the first business was the nomination of clerks. Dr. Mason and Mr. Gilbert were nominated and elected clerks. After this, he said the next business was the election of a moderator. This was gone through with, also, in the usual way; and Dr. Fisher was elected moderator of the General Assembly. After the election of moderator, Dr. Mason and Mr. Gilbert were elected stated and permanent clerks; and after this, Dr. Fisher announced that the General Assembly had adjourned, to meet in the lecture-room of the First Presbyterian church. During some of these motions, there was considerable noise and confusion. I was not seated at all. I was standing in the eastern aisle, about one third of the way up the aisle. I did not observe Dr. Beman's position before he took the chair. I was to the northward of him, after he moved into the aisle and took the chair, as moderator. I moved across the aisle, and stood on the seat of one of the pews. I did not see Dr. Beman: a number of persons were between him and me. I did not see Dr. Beman, and others who acted with him, come into the church. I came in after the sermon had commenced. They were in the house before me.

I was standing in the eastern aisle, about one third of the way up, when Mr. Cleaveland rose; but, as a number of persons rose shortly after he commenced speaking, by which my view was obstructed, I changed my position; and afterwards stood on a seat in the pew. I heard all the motions put distinctly. I heard some of the questions reversed. The best of my recollection is, that they were all reversed; but I cannot say positively as to the particular ones. I heard several voices in the negative. A gentleman requested the moderator to let them proceed. After that, there was no noise: the noise had subsided at the time the motion was put.

Question by Mr. Ingersoll.—In what part of the house was the gentleman who requested the moderator to let them proceed?

Witness.—He was in the southwest part of the house.

Mr. I.—Did you see that gentleman?

Wit.—I did not see him—but I heard his voice.

Mr. I.—Did you know the gentleman?

Wit.—I knew his voice.

Mr. I.—Who was the gentleman?

Wit.—It was the Rev. Robert Breckinridge, of Baltimore.

Examination resumed.—When the General Assembly adjourned to the First Presbyterian Church, I think it was about 12 o'clock. I did not go there with them. I staid at the Seventh Church, in Ranstead court, about ten or twelve minutes after they left it. I went to the First Church some time afterwards. I attended every day during the session. I cannot say certainly from which part of the house the negative voices came. I heard the motions made, and the questions put, very distinctly. Mr. Cleaveland was about half way up the church, and I six or eight pews lower down: probably not so many. I was to the east of him. I first stood in the east aisle; then on the seat of a pew on the west side of this aisle. Mr. Cleaveland was south-west of me, in a diagonal direction. My position was about the same as regards the others. Mr. Cleaveland, I think, was a little farther from me than Dr. Patton or Dr. Beman.

There was some noise whilst Mr. Cleaveland was speaking: but the noise had gradually subsided, so that when he put his motion, there was very little, if any noise. All was still and quiet at the time Mr. Cleaveland's motion was put; and there was but little noise afterwards, when the other motions were put. I heard all the motions distinctly. The noise consisted in the moderator's calling to order, and rapping with his hammer, which continued until the gentleman in the other part of the house requested the moderator to let them go on. It was during the time when Mr. Cleaveland was reading, or shortly after, that this gentleman addressed the moderator, and said, in a loud voice, "Oh, let them go on." The moderator then sat down. This gentleman was in the south-west part of the house. I did not see him, but knew his voice. It was Mr. Breckinridge, of Baltimore. This stopped the hammer. After this interposition, the moderator was quiet, and the hammer too.

Cross-examination. Interrogated by *Mr. Hubbell.* I am a member of the Franklin street church—Mr. Adair's. Franklin street is west of Franklin square. We worship in the old Academy. I came to the Seventh Church, near the conclusion of the sermon—probably about 12 o'clock. I remained perhaps ten minutes at that church, after the others had gone, and did not then go to the First Presbyterian Church. I attended for the purpose of taking notes of the proceedings. I attended both places every day. I did not hear a mingling of "ayes," and "noes" on any of the questions. Some of the persons around me were members, and some spectators. Those on my left were principally members, and those on my right, spectators: the most of the latter were ladies. None of the spectators, that I know, joined in the voting. I did not vote on any of the questions. I think I may safely say, that none who voted, were spectators merely. I cannot say positively, that all who voted, were members. I saw a number of persons among the spectators, whom I knew; but I cannot mention any of their names at present. All, with very few exceptions, were seated, when I went to the church. After the proceedings commenced, a number of persons

rose in my neighbourhood. I was not seated at all. I was standing, on a seat part of the time. I stood up on the seat of the pew, that I might see and hear what was passing at the time. When I took my place on the seat of the pew, it was about the time that either Dr. Patton or Dr. Mason was speaking, or shortly afterwards. There were some others standing on the seat of the pew I occupied. This was after I had altered my position. I altered my position, that I might see and hear better. When Dr. Beman took the chair, he was ten or fifteen feet from me. I did not take especial notice. When Mr. Cleaveland made the motion that Dr. Beman should take the chair, I did not see him. Several persons were standing between him and me, at that time. I cannot state precisely the distance Mr. Cleaveland was from me when he made his motion. He was not standing on a seat. I think all the persons between Mr. Cleaveland and myself, were standing on their feet. There may have been twenty or fifty, or more, between us. I did not pay particular attention. Some were standing on the seats, and some on the floor. I do not recollect that I took any pains to look at Mr. Cleaveland. I might have been writing or thinking, at that time, and therefore could not see him. I frequently write and think at the same time—and sometimes talk, too. I was neither writing nor talking at this time. I got upon the seat to see and hear better; but took no especial pains to see. In order to have seen Mr. Cleaveland, I should have been obliged to have gone nearer to him, or to have requested those who were standing between us, to sit down. I cannot say whether those standing on the seats, were members or spectators. Those immediately engaged in the organization, were all standing on the floor of the house.

Rev. Amasa Converse, called by the plaintiffs, interrogated by *Mr. Randall*, said: I am from Virginia—am a minister of the Presbyterian Church. I was present at the organization of the General Assembly on the 17th of May, 1838. Previous to the meeting of the Assembly, and I think on the day of its meeting, I went to the church in Ranstead court, between the hours of 9 and 10 o'clock in the morning. When I arrived at the church there appeared to be a recess of the body convened there. The Rev. Dr. M'Pheeters occupied the place of moderator or chairman, and in the course of a few minutes called the meeting to order, and gave notice to those not members of it, that the convention would sit with closed doors, and requested them to leave the house. I then left the house. I returned before the sermon was preached, and found the house densely occupied. I then went into the gallery, but found that also densely filled with ladies and gentlemen. I returned to the lower part of the church, and found a seat under the gallery north of the door. After the sermon, Dr. Elliott announced that he would proceed to organize the Assembly, and came down to the front of the pulpit, and made a prayer. Dr. Patton then rose and proposed to offer certain resolutions. The moderator declared him out of order; then some conversation ensued, which I did not hear because of the noise around me. Dr. Patton, in a respectful

manner, appealed from this decision. The moderator declared the appeal out of order, and refused to receive it; and Dr. Patton took his seat. On his being seated, the clerk read the roll, or a part of it; after which, the moderator announced from the chair that if any commissioner had not been enrolled, that was the proper time to present his commission. Dr. Mason then rose with some papers in his hand, saying that he held certain commissions, and moved that the roll should be amended, by the addition of the names from them. There were cries of order, I think from about half a dozen persons, when Dr. Mason made his motion, which the moderator declared to be out of order. Dr. Mason said, "With great respect for the chair, I appeal to the house;" but Dr. Elliott declared the appeal out of order, and Dr. Mason took his seat. Then the Rev. Mr. Squier, rising, demanded his seat in the house. The moderator asked from what presbytery he came. He answered, from the Presbytery of Geneva. The moderator asked if that presbytery belonged to the Synod of Geneva; and he replied, that it was within the bounds of that synod. The moderator said, "We do not know you, sir." Mr. Squier then took his seat. Mr. Cleaveland then rose, and after making a few prefatory remarks, in substance that the General Assembly must be constitutionally organized at that time and place, moved that the Rev. Dr. Beman take the chair, until a new moderator should be chosen. This motion was put, and carried by a large majority. Dr. Beman took the chair accordingly. The question was reversed, and there were a good many noes. Nominations for clerks were then called for, and the Rev. Dr. Mason and the Rev. Mr. Gilbert were nominated; the question was put, and they were elected. Then nominations for the moderator of the Assembly of 1838 were called for. Dr. Fisher was nominated, the question was put by Dr. Beman, and he was elected by a large majority; and according to my recollection, there were several noes when the question was reversed. The next nominations were for stated and permanent clerks. I do not think that I heard Dr. Fisher put this question. There was, at the time, some confusion in the part of the house where I stood, and I was looking another way. After this election, there was a motion made to adjourn to the First Presbyterian Church. This motion was put and carried. I am not confident, but think, that Dr. Fisher after the adjournment, announced, that if any commissioners had not been enrolled, they should repair to the place of adjournment. A scene of confusion then arose in the galleries, and clapping and hissing from every side of the house. About one half of those who occupied the places where the members of the General Assembly sat, immediately left the house. I next saw those who retired, at the church on Washington square.

Some misunderstanding here arose between the witness and the examiner, and a colloquy among the counsel ensued; after which the witness proceeded.

Cross-examination. Interrogated by *Mr. Hubbell,* the witness said: I went to the church to hear the sermon. I went, at half

half past nine, to meet some friends, the Rev. Mr. Hurd, of the Synod of Mississippi, and some persons who were classmates of mine in college, twenty years ago. I staid perhaps ten or fifteen minutes after the adjournment of the General Assembly to the First Presbyterian Church; or I might not have been there more than five minutes. I do not know that I heard Mr. Breckinridge's remark requesting the moderator to let them proceed. I heard some one make the remark, but I cannot say who it was. I did not hear the remark with sufficient distinctness to repeat it. I was not a delegate to the Assembly. I heard Mr. Cleaveland make a statement, and it was in substance that which I have stated in my narrative: I cannot repeat the very words. None of the spectators, to my knowledge, participated in the voting. There were very few spectators among the members under my observation. I did alter my position; several rose, and myself among them. I do not recollect at what part of the business this was, but I think it was when Mr. Cleaveland was reading. Some rose around me, but I do not think there was a general rising in the part of the house where I was. In the extreme north end of the church, there were some standing up on the seats, back of the commissioners. I saw among these, no persons that I recognized as commissioners, but I do not undertake to say that I recognized every commissioner in the house. I don't know whether the spectators generally went away with the retiring body. Many went away, but a good many remained when I left the church. I did afterwards attend, as a spectator, the sessions of the body that remained. I reside, at present, in this city. I then resided in Richmond, Virginia. I originally came from New Hampshire. I belong to a presbytery in Virginia, and have no ecclesiastical connexion with any presbytery here. I am editor of "The Religious Telegraph and Observer," published in this city. I edited the same paper in Virginia. I have commented and expressed my opinion on the excinding measures, but not on the party. I have both written and spoken my opinion in regard to the proceedings which are now the subject of litigation.

Tuesday, March 12th.

The plaintiffs called *Mr. Charles H. Dingee.* Interrogated by *Mr. Randall*, the witness said: I was a spectator at the opening of the General Assembly of 1838. I went to the church about twelve o'clock. I stood nearly the whole time in the north gallery of the church, in front of the organ, nearly central of the house east and west. When I went there the preparatory religious services were nearly ended. The General Assembly was constituted with prayer, as usual, after which the Rev. Dr. Patton offered his resolutions. The moderator declared the resolutions to be out of order, and refused to let them be read. Dr. Patton remarked that his resolutions related to the formation of the roll. The moderator said they were out of order, and the next business was the report of the clerks. Dr. Patton appealed from the decision of the chair. That appeal was seconded. The moderator said the appeal was out

of order, and the clerk had the floor. Dr. Patton stated to the moderator that he had the floor before the clerk. The moderator directed the clerk to proceed. The roll was then read, I think, by Mr. Krebs. After the roll was read, Dr. Erskine Mason moved that the names of certain commissioners, whose commissions he said he held in his hand, be added to the roll. The moderator declared the motion to be out of order. Dr. Mason appealed from the decision of the chair, which appeal was seconded. The moderator said the appeal was out of order, and Dr. Mason sat down.

Then the moderator announced that if any commissioners to the General Assembly were present who had not yet presented their commissions, then was the time to present them. The Rev. Miles P. Squier then rose and informed the moderator that he had offered his commission to the clerks, who had refused it, and he demanded that his name be entered on the roll. Mr. Squier was asked, I think, whether he belonged to the Presbytery of Geneva, and whether that presbytery was within the bounds of the Synod of Geneva. Mr. Squier answered in the affirmative. The moderator then said "We do not know you," and Mr. Squier took his seat.

Then Mr. Cleaveland rose and said, that as the moderator and clerks have refused to do their duty, it becomes necessary to organize the General Assembly at this time and in this place. He stated that such advice had been given by counsel learned in the law, that the constitutional organization of the General Assembly could only be made then, and in that place, that he did not wish to make any disturbance, that therefore, in the fewest words, and in the shortest time possible, they would proceed to organize the General Assembly. He therefore moved that Dr. Nathan S. S. Beman be moderator until another moderator should be chosen. When he put the question, a large number answered *Aye*. Dr. Beman then took his station in the aisle of the church. A motion was then made that Dr. Erskine Mason and Mr. E. W. Gilbert, be the clerks, which was agreed to. Mr. Cleaveland held a paper in his hand, but did not read it. He certainly did not read from it. From my position in the gallery I looked over him, and I am certain that at no time did he appear to be reading from the paper which he held in his hand.

The questions were moved and taken both affirmatively and negatively. They were decided in the affirmative. There were a few votes in the negative. I then left the gallery, and went down into the middle aisle of the church. The question of adjournment was put by Dr. Fisher just after I got down, and was carried. I have no recollection of hearing any noise at the time of Dr. Beman's election. There was one "aye," which had a peculiar sound, and was considerably louder than the rest. I heard the question put distinctly. It was put in an audible voice. I know that it was reversed. I should think any person in the house could have heard it. Mr. Cleaveland, when he made his motion, was standing in a pew on the middle aisle. I saw him when he made the motion, and heard him distinctly. He faced the moderator when he commenced

speaking, and then turned his face in a south-west direction. He had papers in his hand, and I could see when he referred to them.

Cross-examination.—Interrogated by *Mr. Hubbell,* the witness said: Very soon after Mr. Cleaveland addressed the moderator, he turned his face. When he arose, he commenced speaking with his face in the direction of the moderator. He appeared to me to address the house, through the moderator. I am not positive, but think that he had got through with the preamble before he turned his face from the moderator. I left the gallery soon after the clerks were chosen; can't say that it was immediately after. There was no other business entered into, that I know of. I went into the body of the house as soon as I could get there.

Question.—Was there any obstructions in your way from the gallery to the body of the house?

There were some obstructions in the way. There were some ladies going down out of the gallery. I suppose it took me two or three minutes to get in. The question was put on the motion for adjournment while I was on the floor of the house. It passed while I was there. I think Dr. Beman faced the south, inclining to the west, but I am not positive about that. Dr. Beman was presiding when the question of adjournment was taken. I was not personally acquainted with Dr. Beman, but I knew him, as I had seen him occasionally. I have heard him preach repeatedly.

Question by Counsel.—You say you heard Dr. Beman put the question?

Witness.—I heard him distinctly.

Question.—Did he reverse the question on his motion?

Witness.—I am not positive that he reversed the question, though I think he did. I was, at the time, anxious to get out of the house. He put the question in an audible voice, and spake loud enough to be heard distinctly all over the house. I was not very near to him; I was, perhaps, twenty-five feet from him. I had a very distinct view of him at the time. I think the greater part of Mr. Cleaveland's preamble was before he turned *obliquely* to the moderator. He said, that the moderator and clerks having refused to do their duty in the organization of the General Assembly, it became necessary to proceed to the constitutional organization, which they would do in the fewest words and shortest time possible. I know Mr. Cleaveland when I see him, very well. I had known him before, by sight. He is a large man; he is not very tall: I don't know his age. From his appearance I should judge his age to be about thirty-five. I am not certain in what language he reversed the question. He spoke in a loud voice; he don't speak low generally. As near as I recollect, there was but one response, and that was "*aye.*" He seemed somewhat agitated when he commenced speaking, but did not appear so when he made his motion. I did not observe that the paper shook very much. His voice, when he commenced, was somewhat peculiar, and I thought it indicated some degree of agitation.

Cross-examination.—Interrogated by *Mr. Ingersoll,* the witness said: I did not take notes of the proceedings at the time. The

little agitation which I noticed was at the commencement of his preamble. It had no relation to the order of his proceeding, nor did he appear to be confused. I attend the Third Presbyterian Church in this city—Mr. Brainerd's, formerly Dr. Ely's. There was no urgency for my getting out of the Seventh Church, except that I wanted to go to the other church and get a seat. I can't say how many were standing on the seats. I did not get to the other church before any body else, but went rather in advance of the main body, and obtained a seat. I think I saw the sexton unlock the door of the First Presbyterian Church before I got there. I can't say positively whether I spoke to him in Ranstead court, or whether I saw him there. I have no recollection that I heard Mr. Cleaveland say that he had been agitated.

Mr. Randall said, that as the witness had made a small mistake, confounding the names of certain persons, he would point out the way in which the mistake had been unawares committed, that it may be now corrected.

Objection was made by *Mr. Ingersoll*—but *Mr. Randall* persisted.

Mr. Randall repeated the question: "When you stated that Dr. Beman put the question for adjournment, did you mean Dr. Beman or Dr. Fisher? Now recollect."

Witness.—Certainly I said Dr. Fisher, or meant to have said so. If I said otherwise, it was a mistake. I recollect distinctly that it was Dr. Fisher.

Mr. Randall.—It was Dr. Fisher, then, and not Dr. Beman who put the question of adjournment?

Witness.—Yes, certainly. I thought I had before so stated. On my way down from the gallery I heard the name of Dr. Fisher mentioned. There were some ladies coming down the stairs at the same time I was. I did not hear Dr. Fisher nominated as moderator, nor any thing but his name. I did not distinctly hear whom the announcement came from, but I think it was Dr. Beman mentioned his name. The landing of the stairs, in the gallery, is in the house, the foot of them in the lobby. I think no person in the lobby voted. I do know Dr. Fisher; when I came into the body of the church he was standing in the middle aisle, a little more than half way down from the pulpit. Dr. Beman, while he acted as moderator, stood near the same place which Dr. Fisher afterwards occupied. My recollection is a little indistinct in regard to their position, but I think that it was as I have stated. I cannot say positively when I first heard that Dr. Fisher was elected moderator, but it was after I came down from the gallery. I supposed that Dr. Fisher was moderator from the fact of the position he occupied, and his putting the question of adjournment. I did not merely infer it from circumstances. I supposed so from the facts I have mentioned. I was told that Dr. Fisher was elected moderator after I left the Seventh Church. I did not at first state that Dr. Fisher was appointed moderator; at any rate I did not intend to make such a statement. I wish to testify to the truth, and to state nothing but the truth. If I have made any mistakes they were unintentional, and arose from the manner in which the questions were propounded

to me by the counsel. I had no expectation of being called to testify on these subjects: and it is a good while since the occurrences, and I may have forgotten some particulars.

Dr. Fisher recalled; interrogated by *Mr. Randall*, said: For thirty years, during which I have been acquainted with the proceedings of our Presbyterian judicatories, it has been the uniform practice, which I have never known departed from, that when a motion has been made, the moderator is the judge, in the first instance, whether it is in order. In that case, the moderator puts the question to the house. If the moderator think the motion out of order, it is proper that he should so decide. The member making the motion may then appeal from the judgment of the moderator to the house. As to his right to appeal there can be no question, and it is the imperative duty of the moderator to put the appeal to the house. In our ecclesiastical courts, from the highest to the lowest, so far as I know, there has been no other mode of proceeding. There would be an end to all order if this rule were not observed. The moderator can never be the final judge of his own decision. If he persist in refusing to put an appeal, he virtually abandons his office.

The witness was here interrupted by *Mr. Preston*, who objected to his giving his opinion in relation to the matter, and said it was merely the argument of the witness.

In answer to a question of *Mr. Preston*, the witness said: I never knew of an appeal upon an appeal. Such a thing would be perfectly absurd. I have known, perhaps, a thousand appeals, but never an appeal from a decision that an appeal was out of order.

Interrogated by Mr. Sergeant.—I never knew of any such thing, and am satisfied that there never has been any such occurrence in the proceedings of the Presbyterian Church. I do not know how two questions of equal grade can come before the house at one and the same time. I heard some of the questions that were asked Mr. Adair, and some of them I did not hear. I was attending to the conversation of a friend, during part of the time.

The plaintiffs then read in evidence, from the general rules of judicatories appended to the constitution, Rule 9: "The moderator may speak to points of order, in preference to other members, rising from his seat for that purpose; and shall decide questions of order, subject to an appeal to the judicatory by any two members."

Also, from Jefferson's Manual, sec. 9—Title, Speaker: "A speaker may be removed at the will of the house, and a speaker *pro tempore* appointed." 2 *Grey*, 186. 5 *Grey*, 134.

Also, from the same Manual, sec. 18—Title, Order in Debate: "In parliament, all decisions of the speaker may be controlled by the house." 3 *Grey*, 319.

The *Rev. Eliakim Phelps* recalled. Interrogated by *Mr. Randall*, witness stated: I am a minister of the Presbyterian Church. I have been a minister about ten years. I have taken an active part in the concerns of the Presbyterian Church during the whole, or nearly the whole of that period. I was a member of the Assembly in 1831, 1834, and 1835, and was present at that of 1836, a part

of the session of 1837, and most of that of 1838. I am acquainted with the locality, generally, of the two parties in the church. I can state, in general terms, that the presbyteries of Pennsylvania are generally such as are denominated Old School. Those presbyteries composed of those called New School men, are more generally situated in the northern and western parts of the church. There are some, however, in the south-west, and some in the south. Taking a comparative view of their contiguity to Philadelphia, where the sessions of the General Assembly are held, the Old School party have an advantage over the New.

Judge Rogers inquired, What does the witness mean by that?

Witness answered: I mean that the Old School men live nearer to Philadelphia, where the General Assembly meets, than the New School men do.

Interrogated by *Mr. Sergeant*, the witness said: There is an exception in the case of the Third Presbytery of Philadelphia, situated in the city and liberties; but the statement I made is correct as regards the state of Pennsylvania, as a whole.

The Third Presbytery contains sixteen churches, the other two presbyteries, taken together, I think include ten or twelve churches. There was a church connected with them in the southern part of the city; but it is said that the house has been sold to the Catholics. I do not know, however, how that is. The Third Presbytery is New School.

If the commissioners from the four excinded synods had voted in the General Assembly of 1838, I think there would have been a majority of the whole number of commissioners in favour of Dr. Patton's and Dr. Mason's motion, and opposed to the excinding acts. From a careful examination of the roll of the commissioners to that Assembly, a knowledge of the views of the presbyteries from which they came, and of the expressed opinions of individual members, I have computed, that on those questions the votes would have stood about one hundred and forty, and one hundred and thirty-six. Of course the counsel and court understand, that I do not pretend to know the hearts of men; but I judge from the known views of a portion of the presbyteries, and from the best information I could collect in regard to others. I cannot say, without reference to data, how many presbyteries were unrepresented in the Assembly of 1838.

Objection was made by counsel to some parts of this testimony, and a colloquy ensued between *Mr. Randall* and *Mr. Preston*, which resulted in nothing bearing on the case.

The witness proceeded: I can say something near how many commissioners were absent, whose presbyteries were reckoned on one side or the other.

Question by Mr. Randall.—If every presbytery in the United States of America had had a full representation in 1838, or were now fully represented, which party would have the majority?

Objection was made to this question by *Mr. Preston*. He said that if the counsel were suffered to run into this course of investigation, if an inquiry as to the number of the two parties is to be

made, most gladly would we enter into it, but the inquiry appears to be wholly irrelevant to the issue of this case. And the question, moreover, could not be answered by the witness of his own knowledge.

Mr. Randall.—I ask for his judgment only, or opinion, and will limit the inquiry to the Assembly of 1838.

Judge Rogers.—The inquiry must be confined to the number of those actually assembled in 1838. Some other tribunal must decide the other question.

Cross-examination.—Interrogated by *Mr. Preston*, the witness said: I did not state that the members of the Old School party had superior facilities for getting to Philadelphia, to those of the New School party; but I stated that they generally had the advantage in point of contiguity. I did not say they had greater facilities for getting there. I have no knowledge of the fact. I do not know enough about that matter to form a judgment, to be given under oath. I am Secretary of the Philadelphia Education Society, which is a branch of the American Education Society. The parent Society is in Boston; there is a co-ordinate Society in New York, one in Philadelphia, and another in Cincinnati. I am commissioned by the Philadelphia Education Society. This is an auxiliary to the Central American Education Society, which embraces all of the United States out of New England, except a portion of Michigan, and perhaps a part of Ohio. I cannot say that the Board at Boston is the chief. The Central American Board makes annual reports and quarterly returns to it, but is independent as to the appropriation of funds. I was not originally ordained in the Presbyterian Church. I was ordained in 1816, and have been in the Presbyterian Church about ten years. I formerly had a pastoral charge in Geneva, in the western part of the state of New York, which is within the bounds of the excinded synods. I have not resided within the bounds of those synods since they were excinded. In prosecuting the duties of my office, I am led as far as Pittsburg and Erie, and once a year have been as far south as Richmond. The mails come in about four days, or a shorter time, from Geneva to Philadelphia. I am not prepared to say what are the comparative facilities for reaching Philadelphia from the different points named. In answering the question, in regard to the advantages of contiguity or distance, I meant to include the whole Presbyterian Church.

Mr. Preston.—How are the presbyteries of Virginia divided, between the Old and New Schools?

Mr. Phelps.—There are some presbyteries of both kinds in that state. The Presbytery of the District of Columbia, I understand, is partly in that state. I have understood, that in the whole Synod of Virginia, the Old School have a small majority.

Mr. Preston.—Has not the Old School the majority in the Southern States, taken collectively?

Judge Rogers.—I think these matters are irrelevant; it is necessary, for the sake of both the court and jury, that I should interpose.

Mr. Preston.—The witness has sworn that the Old School have the advantage in point of contiguity. Now, in explanation of this,

I propose to examine the witness, as to the presbyteries in the whole tract of the Southern and Southwestern States.

Mr. Randall.—We mean to follow up the testimony offered, by evidence, to show that the Old School majority was merely accidental, and did not show the numerical strength of the parties.

Judge Rogers.—So I understood, and that is exactly what I wish to prevent. I consider it irrelevant to the question at issue.

Mr. Randall proposed also to offer evidence as to the comparative means of intercourse.

Judge Rogers.—It is no matter whether one party of the Church is more or less contiguous than another.

The plaintiffs now offered in evidence chapter 10th of the Form of Government of the Presbyterian Church, section 7—also, the statistical table annexed to the minutes of the General Assembly of 1837, page 523; showing that the Presbytery of Newburyport, belonging to the Synod of Albany, had but two Presbyterian Churches; that the other ministers of said presbytery, amounting in all to sixteen, were generally pastors of Congregational Churches. Also, the same minutes, page 618, to show that there were belonging to the Presbytery of Charleston Union twenty-eight ministers, and but eight Presbyterian Churches; while there were eight Congregational and several Independent Churches receiving the labours of the ministers of said presbytery.

The plaintiff's counsel further offered in evidence extracts from the minutes of the General Assembly, to show that at so late a period as 1835, only two years before the excision of the four synods, the assembly had not learned to regard any of its synods or presbyteries as sustaining any such relation to the plan of union, as that its abrogation would at all affect their integrity; and that they did not, at that time, entertain the opinion that the annulling of the plan should in anywise interfere with the existence or lawful operations even of churches which had been formed on that plan.

Mr. Randall remarked: The court and jury will bear in mind that on page 26 it is stated that the *whole* of the report was adopted. I have read the parts which are pertinent to this case.

1835. *Minutes, p.* 13.

The unfinished business of the morning was resumed, viz: the consideration of the Overture No. 16; which was committed to Dr. Miller, Dr. Hoge, Dr. Edgar, Mr. D. Elliott, Mr. M'Ilhenny, Mr. Stonestreet, and Mr. Banks.

Id. p. 26.

The consideration of the report on Overture No. 16 was resumed. The sixth general resolution being under discussion, the consideration of it was postponed to take up a substitute, which being read and discussed, was adopted. The seventh and eighth general resolutions of the report were then adopted. The preamble was adopted. The question was then taken on the whole report as amended, which was adopted, and is as follows:

The committee to whom was referred the Memorial and Petition of a number of Ministers and Ruling Elders of the Presbyterian Church, and certain other papers relating to the same or allied subjects, beg leave to report;

That they have endeavoured to deliberate on the said memorial and petition, and other papers committed to them, with all that respect which the character of those from whom they come could not fail to inspire; and with all the calmness, impar-

tiality and solemnity which the deep importance of the subjects on which they have addressed the Assembly, so manifestly demands. * * *

The committee, therefore, as the result of their deliberations on the documents committed to them, would most respectfully recommend to the Assembly the adoption of the following resolutions, viz: * * *

6. *Resolved*, That this Assembly deem it no longer desirable that churches should be formed in our Presbyterian connexion agreeably to the plan adopted by the Assembly and the General Association of Connecticut in 1801. Therefore, Resolved, That our brethren of the General Association of Connecticut be, and they hereby are respectfully requested to consent that said plan shall be, from and after the next meeting of that Association, declared to be annulled. And, Resolved, That the annulling of said plan shall not in anywise interfere with the existence and lawful operations of churches which have been already formed on this plan.

7. *Resolved*, That this General Assembly see no cause either to terminate or modify the plan of correspondence with the Associations of our Congregational brethren in New England. That correspondence has been long established. It is believed to have been productive of mutual benefit. It is now divested of the voting power, which alone could be considered as infringing on the constitution of our Church, by introducing persons clothed with the character of plenary members of the Assembly. It stands, at present, substantially on the same footing with the visits of our brethren from the Congregational Union of England and Wales; and in the present age of enlarged counsel, and of combined effort, for the conversion of the world, ought by no means to be abolished. Besides, the Assembly are persuaded, that amidst the unceasing and growing intercourse between the Presbyterian and Congregational Churches, it is desirable to have that intercourse regulated by compact, and of course, that it would be desirable to introduce terms of correspondence even if they did not already exist. * * *

Plaintiffs' counsel called the *Rev. Oliver Wetmore*, to show the unjust practical operation of the excinding acts, that the persons excluded from the church by these acts, were so excluded merely by reason of their location, of the circumstance of their residence, at the time of the adoption of these acts, within certain geographical limits.

The witness, interrogated by *Mr. Randall*, having testified—I am a minister of the Presbyterian Church, and have been for about thirty years; belong to the Presbytery of Oneida, and have here some of the records of that presbytery;

Mr. Randall requested him to look at those records, and say whether the Rev. Dr. Carnahan, now President of Princeton College, was ordained by that presbytery.

The interrogatory was objected to by *Mr. Hubbell.*

Mr. Randall. We wish, in illustration of the point proposed to be established, to take the case, merely as examples, like which there are a multitude of cases, of two venerable gentlemen, ministers in the Presbyterian Church. We would show that Dr. Carnahan, introduced into the ministry and ordained to the sacred office by the Presbytery of Oneida, one of the excinded portions of the church, by the mere circumstance of his receiving a call to a station without the bounds of that presbytery, and becoming President of the College at Princeton, in the Synod of New Jersey, is untouched by the act of excision; while Dr. Richards, for many years a prominent Presbyterian minister in the same Synod of New Jersey, by the mere circumstance of being called to preside over the seminary at Auburn, within the infected district, becomes obnoxious to the excinding acts, and is detruded from the church. In other words, that mere *locality*, at the time of the excinding acts, deter-

mines the Presbyterianism of the ministers of this church, or their title to continue in its pale, without any question whether their ordination had been regular and constitutional or otherwise.

Mr. Hubbell said he saw nothing inconsistent or unconstitutional in the matter. If the excinding acts seemed to bear hard upon any individual, all he had to do was to report himself to a regular presbytery, and he would of course be received. This must be the case, agreeably to the resolution of the General Assembly of 1837, and if any individual would not comply with this requisition for gaining readmission to the church, he must remain out always. The requisition was reasonable, and it is their own obstinacy, and no act of ours, that excludes them from the communion of the church. But we insist that nothing shall be given in evidence except what is legitimate and relevant to the issue. It is on this ground principally that we object to the testimony on this point.

After a protracted colloquy between the counsel on the subject of admitting this testimony *the Court* ruled that as it was designed merely to show the practical results of the excinding acts; these, any farther than they appeared in the documents given in evidence, could more properly be shown in argument on the construction of the acts, than by testimony as to particular cases.

The plaintiffs then gave in evidence the minutes of 1837, page 442, showing, said *Mr. Randall*, that on Friday afternoon, June 2d, the Rev. Norris Bull was elected a member of the Board of Education, to serve four years. On the Monday following, the act excinding the Synods of Utica, Geneva and Genessee was passed, (Id. p. 444,) by the operation of which Mr. Bull was excluded from the church, as he belonged to the Presbytery of Rochester, in the Synod of Genessee, which appears from the same minutes, page 541.

Mr. Ambrose White was then called on the part of the plaintiffs to prove that the relators duly applied for admission to their seats in the Board of Trustees and were refused.

Interrogated by Mr. Randall, the witness said: I was a member of the Board of Trustees of the General Assembly, and attended a meeting of the board in the month of June, shortly after the rising of the Assembly. At that meeting, the relators in this case, applied for admission to seats in the board as trustees. All the relators applied while I was present, except Mr. Neff. They presented the evidence of their appointment, and the members present refused to recognize them as trustees. A resolution to that effect was passed, from which I dissented.

Cross-examined by Mr. Preston, the witness said: I am considered as belonging to the New School party. I believe there is no doubt about my being correctly placed there. I have been somewhat active in these proceedings.

The plaintiffs now read from the Form of Government, chap. 3d, sect. 2. (Of the officers of the church.)

The ordinary and perpetual officers in the church are Bishops or Pastors; the representatives of the people usually styled Ruling Elders and Deacons.

Also chap. 8, (Of church government and the several kinds of judicatories).

Sect. 1. It is absolutely necessary that the government of the church be exercised under some certain and definite form. And we hold it to be expedient, and agreeable to Scripture and the practice of the primitive Christians, that the church be governed by Congregational, Presbyterial and Synodical Assemblies. In full consistency with this belief we embrace in the spirit of charity those Christians who differ from us, in opinion or practice, on these subjects.

2. These Assemblies ought not to possess any civil jurisdiction, nor to inflict any civil penalties. Their power is wholly moral or spiritual, and that only ministerial and declarative. They possess the right of requiring obedience to the laws of Christ; and of excluding the disobedient and disorderly from the privileges of the church. To give efficiency, however, to this necessary and scriptural authority, they possess the powers requisite for obtaining evidence and inflicting censure. They can call before them any offender against the order and government of the church; they can require members of their own society, to appear and give testimony in the cause; but the highest punishment to which their authority extends, is to exclude the contumacious and impenitent from the congregation of believers.

The plaintiffs further read in evidence from the Assembly's Digest, pp. 28, 29, an extract from the minutes of the General Assembly of 1791. Vol. i. p. 42, as follows:

Sect. 2. No Corresponding Members can be admitted into the Assembly. Upon motion it was agreed, That, whereas this Assembly, copying the example of their predecessors, have admitted several ministers, who are not commissioners, to join in their deliberations and conclusions, but not to vote on any question; and although this Assembly has been much indebted to the wise counsels and friendly assistance of these corresponding ministers, nevertheless, on mature deliberation, it was *resolved* as the opinion of this house:

1. That no delegated body has a right to transfer its powers, or any part thereof, unless express provision is in its constitution.

2. That this Assembly is a delegated body, and no such provision is in its constitution.

3. Although such admission has hitherto produced no bad consequences, it may, nevertheless, at some future day, be applied to party purposes, and cause embarrassment and delay.—Wherefore, *Resolved*,

4. And lastly, That the practice of this Assembly in this case, ought not to be used as a precedent in future.

An extract from the minutes of the General Assembly of 1793 (vol. i. p. 77,) was here read in evidence by the plaintiffs from the Digest, p. 323.

Sect. 5. No person to be condemned without due notice of the accusation against him.

It was *Resolved*, as the sense of this house, that no man or body of men agreeably to the constitution of this church, ought to be condemned or censured, without having notice of the accusation against him or them, and notice given for trial.

The plaintiffs then read in evidence from the minutes of the General Assembly of 1821 and that of 1822 the proceedings connected with the union of the Associate Reformed Church with the General Assembly of the Presbyterian Church.

[See previous reference to this subject on page 84 of this report.]

Minutes of 1821, *p.* 9.

The committee appointed to confer with a committee from the Associate Reformed Synod, presented as their report the following minutes of proceedings, viz:

The committee appointed by the General Assembly of the Presbyterian Church, and the committee appointed by the General Synod of the Associate Reformed Church, to confer with respect to an union of the two bodies, met at the house of Jonathan Smith, Esq. The Rev. Dr. Green was chosen chairman of the meeting,

and the Rev. John Lind, secretary: The business was introduced with prayer by Dr. Green.

On motion of Dr. Blatchford, seconded by Dr. Mason, it was resolved, unanimously, as the judgment of the conferring committees, that an union of the two churches is both desirable and practicable.

The following articles were then proposed, and unanimously approved as the basis of such an union:

1. The different presbyteries of the Associate Reformed Church shall either retain their separate organization, or shall be amalgamated with those of the General Assembly, at their own choice. In the former case they shall have as full powers and privileges as any other Presbytery in the united body, and shall attach themselves to the synods most convenient.

2. The Theological Seminary at Princeton, under the care of the General Assembly, and the Theological Seminary of the Associate Reformed Church, shall be consolidated.

3. Whereas moneys to the amount of between nine and ten thousand dollars, which were given to the General Synod of the Associate Reformed Church, and of which the interest or product only was to be applied to the support of a Theological Seminary, were necessarily used in the current expenses thereof; which moneys so expended were assumed by the synod as its own debt, at an interest of seven per cent.; the united body agree to make a joint effort to repay the same, and will apply the interest accruing thereon to the maintenance of a *Professorship of Biblical Literature*, in the Seminary at Princeton, analogous to that which now exists in th Associate Reformed Church, and until such professorship shall be established, th said interest or product shall be used for the general purposes of the seminary.

4. The Theological Library and Funds belonging to the Associate Reform Church, shall be transferred, and belong to the Seminary at Princeton.

These articles having been approved, were ordered to be transcribed and sig and a copy of them transmitted to the General Assembly of the Presbyt Church, and the General Synod of the Associate Reformed Church, respectiv

The meeting was closed with prayer by the Rev. Ebenezer Dickey.

All which is respectfully submitted.

Ashbel Green, Samuel Blatchford, John M'Dowell, Henry Southard, Benjamin Strong, J. M. Mason, Ebenezer Dickey, John Lind, William Wilson, Joseph Cushing.

The foregoing report having been read, and duly considered, was unanimously adopted.

Ordered, that the committee of conference on this subject wait on th Synod of the Associate Reformed Church, and inform them of the adoption of th articles of union on the part of this General Assembly.

Minutes of 1822, *p.* 11.

The following communication from the General Synod of the Associate Reformed Church, was received and read, viz:

Resolved, That this Synod approve and hereby do ratify the Plan of Union between the General Assembly of the Presbyterian Church and the Associate Reformed Church, proposed by commissioners from said churches.

Extract from the minutes of the General Synod of the Associate Reformed Church of Philadelphia, 21st May, 1822.

JAMES LAURIE, *Moderator.*
J. ARBUCKLE, *Clerk.*

Resolved, That a copy of the above resolution, authenticated by the moderator and the clerk, be immediately sent to the General Assembly of the Presbyterian Church, and that Rev. Ebenezer Dickey and Dr. Robert Patterson be a committee to wait upon the Assembly with said resolution.

J. ARBUCKLE, *Clerk.*

The committee from the Synod of the Associate Reformed Church appeared in the Assembly, and the resolution was read.

Whereupon, *Resolved*, That the Assembly receive this communication with great pleasure; and the Rev. Jonas Coe, D. D., the Rev. Thomas M'Auley, L. L. D., the Rev. William Gray of the Presbytery of New York, and Mr. Divie Bethune, were appointed a committee to wait upon said synod; and, inasmuch as the different presbyteries under the care of the synod, cannot appoint delegates to attend the

present General Assembly, cordially to invite all the delegates to the synod to take their seats in this house, as members of the Assembly.

Resolved, moreover, That the committee aforesaid be directed to request the members of said synod to attend this Assembly on to-morrow, at 4 P. M., that we may, unitedly, return thanks to Almighty God, for the consummation of this union.

Rev. Erskine Mason, D. D., was here recalled by the plaintiffs.

Interrogated by *Mr. Randall*, the witness said: I never knew an instance of the reordination of ministers coming from other denominations into the Presbyterian Church. My father was an ordained minister of the Associate Reformed Church, and came into the Presbyterian Church under the union of 1821 without a reordination. The same rule is observed in regard to ministers coming from other countries. There are instances of this character in the Presbytery of New York.

Cross-examined by *Mr. Preston*, the witness said: the Second Presbytery of New York, which came into this church from the Associate Reformed Church, under the union of 1821, has never required ministers coming from other bodies to subscribe to our Confession of Faith. They do not use it themselves, as it was not required by the terms of the union between the two churches. The book of the Associate Reformed Church is that under which they act. The two books differed in some particulars in the Form of Government. I do not certainly know that the Confession of Faith is the same in all points. I believe that it is substantially the same as the Westminster Confession. I was a member, formerly, of the Second presbytery, but now belong to the Third presbytery. The Form of Government of the Associate Reformed Church is Presbyterian. It has sessions of ruling elders. Foreign ministers, that is, those coming across the Atlantic, are subjected to an examination and to a probation of a year, before they are received by the Third Presbytery of New York. We require in the Third presbytery an acknowledgment of the Confession of Faith of the Presbyterian Church.

Re-examined by *Mr. Randall*, the witness said: The part of the Westminster Confession of Faith in relation to civil magistrates has been altered by both the Reformed and the Presbyterian Churches. The difference was not material. I do not recollect distinctly what.

The constitution of the Associate Reformed Church was now given in evidence.

Mr. Randall proposed to give in evidence the testimony of Dr. Green, in the case of Duncan against the Ninth Presbyterian Church. Dr. Green being one of the respondents in this case, the counsel for the relators proffer here his testimony in that suit, as unquestionable evidence, and decisive against the respondents in that case. *Mr. Ingersoll* would shortly favour him with his notes taken on that occasion, when he would recur to the subject again. With this exception he now closed the case for the relators.

The testimony for the relators having closed, Mr. HUBBELL opened the case for the respondents, as follows:

May it please the Court—Gentlemen of the Jury: You have been engaged nearly a week, in listening to a series of attacks, (so to speak,) made by the witnesses, and the counsel of the relators, upon the party which I and my colleagues have the honour to represent; and we have been compelled, by the decorum of the court, to sit and silently endure it. I cannot flatter myself, that these attacks have made no impression prejudicial to my clients. You would be more or less than human, had they not. I only ask you now, to give *me* your undivided attention, while I shall endeavour to obliterate these impressions, by stating succinctly, the *true* history of this controversy. I engage to satisfy every candid mind, of the purity of my clients' motives, and of the justice and legality of their proceedings.

In order properly to preface our defence, it will be necessary to analyze the case made, or attempted to be made by the relators.

It seems to have divided itself into two heads of charge or inquiry. First, the Acts of the General Assembly of 1837, called by our adversaries, affectedly and *ex industria*, "The acts of excision," but which, according to a fairer nomenclature, should be called "declarations of disconnexion or disowning acts;" for by these acts, certain synods were simply pronounced to be no part of our church. Second, the process of organization of the General Assembly in 1838, by which our adversaries assert, that they have possessed themselves of the sceptre, and by which they claim to be the true succession.

As regards the first of these points, the relators, (as far as I can gather their meaning,) consider it merely ancillary to the second, and indeed, his honour only admitted testimony on this first point, as explanatory of that adduced, or to be adduced, on the second. In other words, the relators have attempted to show, that certain commissioners to the General Assembly of 1838, were excluded from their seats, in furtherance of certain acts of the General Assembly of 1837, and assuming the infirmity of those acts, to deduce from thence the invalidity of this exclusion in 1838. This distinction must be carefully observed, as I shall presently demonstrate to you, that the relators are compelled, by the necessity of their own case, to admit, that notwithstanding those acts of alleged dismemberment, passed by the General Assembly of 1837, that Assembly retained its constitutional, unimpaired existence, up to the last moment of its session.

As regards the relators' second point, it is also to be observed, that they do not contend that the exclusion by the clerks, from the General Assembly of 1838, of the delegates, from the presbyteries in the four synods, violates the organization of 1838. They apparently admit that the Assembly of 1838, like that of 1837, might have existed or lived, without the vivifying presence of those delegates. They merely contend that the exclusion was unlawful, and seek in its unlawfulness a justification for certain ulterior operations,

which they now declare to have been a *removal* of the offending officers, but which were, as we shall show, adopted by them with a different view and purpose.

They contend that the General Assembly had a right to remove the clerks who excluded these delegates, and the moderator, who, as they assert, refused to allow the Assembly to correct the misconduct of the clerks in this particular; and although they admit that a clear majority of the members, approved the conduct of the clerks and the moderator, yet, as this majority sat indignantly silent, when Mr. Cleaveland made a disorderly motion, if motion it may be called, and treated it as a tumult and an outrage, they must have been considered to have voted affirmatively. In other words, that this was a vote of the house, setting up an opposing organization, and committing suicide upon its own.

When their case is divested of all extrinsic circumstances, it resolves itself into this one narrow and truly absurd position, viz. "*That the majority, when they meant 'No,' and declared their meaning in every possible mode, but the use of that monosyllable, must be construed to have meant 'yes.'*" As we conceive, all the other evidence, by which you have been wearied, is foreign to this cause; and this will be apparent, when you reflect that the power of the Assembly to remove its officers, if it exist at all, is not confined to the exigency of their misconduct, but may be exercised at the pleasure of the Assembly, with or without reason, "*stat pro ratione voluntas.*" Our adversaries maintain that the Assembly did remove these officers: if it did, why then have days been wasted in the attempt to prove that they were deserving of removal?

They may, perhaps, mean to say, "these officers committed a wrong, and a majority of the members upheld them, it was therefore licenseable for the minority to practice this legerdemain, although it is manifest it could only have succeeded by surprise, misconception, and error."

If the members from the disowned synods have been injured, (which we deny,) surely there was some method by which they and their favourites might have brought this question of their right to seats in the Assembly, before the tribunals of the country, without the indecorous proceedings which took place in 1838, and without destroying the rights of those opposed to them. But, as we fear, they have been governed by another spirit, (engendered no doubt by honest but mistaken motives,) and have sought to make a profit from this supposed injury. Not content with regaining their own rights, they seek to usurp those of others.

Such, gentlemen, is the case of the relators. We have endeavoured to restrict them to what we consider the true issue formed by the pleadings. His Honour, however, has not sustained these endeavours, and we have submitted, as we hope with grace, to his decision, although it entails upon us the necessity of being as discursive as the relators have been.

This unhappy Church has been for years a house divided against itself. Its dismemberment might therefore have been predicted long before the catastrophe occurred. This division is not a mere

logomachy, or war of words, as the counsel for the relators has asserted, but a wide variance in tenets. Tenets so dissimilar, that, like liquids of different gravity and consistency, they cannot be commingled. It is a substantial difference on some of the most affecting subjects of human consideration.

Our party are for a strict adherence to the doctrinal standards of the Church. Their party accept them only for substance of doctrine. They cannot and do not dispute *our* Presbyterianism, but *theirs* is of a more equivocal character, though they decline from the standards in different degrees of departure. Some of them are nearly right, others are widely wrong.

Our doctrines are taught at the Seminary of Princeton, in all their purity. That institution has, from its origin, been the principal seat of orthodoxy. There it is taught with fidelity, defended with zeal, and adorned with learning. The other party have their seminaries, where their peculiar views are inculcated, and from whence they are diffused with indefatigable diligence.

Permit me to point out a few fundamental differences of tenet.

One principally to be marked, for it is the root of many others, is an abstract opinion in regard to theology itself. We maintain that it emanated from the Almighty, in his revelations, in a state of entire perfection. That it sprung from the mind of the Deity in its full developed, adult proportions, and knew no infancy, or youth. Our adversaries, on the contrary, maintain that theology is an advancing, improveable science. That the old formularies of the Christian faith are too antiquated for this enlightened age!

Another subject of difference is the effect of Adam's sin, or fall, upon his posterity. Our party maintain that the sin of Adam is imputed to his posterity—that it is made *their* sin. We subject our mere human reason to the unequivocal teachings of holy writ, and for an explanation humbly wait the great teacher, death. Our adversaries, on the contrary, maintain that the sin of Adam is not *imputed* to his posterity, and made *their* sin, but, that by Adam's fall, it is made absolutely certain and necessary, (in some incomprehensible manner) that each and all his posterity *will* sin.

Another subject of difference is one which no human being, whether philosopher or Christian, can contemplate with indifference. It is the power of the Deity over our moral nature. Our party maintain that he is almighty, not only over the physical, but the moral constitution of man, and that by a single act of his will he can make his creature good, how deeply soever that creature may be immersed in depravity and crime. The other party have sought to limit Omnipotence, and say, "thus far shalt thou go, but no farther." They maintain that a man may be bad against the will of the Deity, and the only means by which he can change him is by moral suasion, or by the inciting exhibition of motives.

Another great subject of difference is the nature of the sacrifice upon Calvary; the true understanding of the Atonement, and the effect of the sufferings of Christ. We maintain that it was a satisfaction of the violated law; a tribute to Divine justice, by which a righteous God was propitiated. That Christ became our substitute,

and underwent death for *us*. That the merits of Christ, his obedience, in the fulfilment of the law by his voluntary death, is imputed to our race through faith; that is, to the believers of our race, in the same manner that the sin of Adam was imputed to us. On the other hand, our adversaries deny the doctrine of imputation, and contend that he was always a placable God, and ready to bestow pardon as soon as governmental justice would permit. They deny that his law requires an infinite victim, or that Christ yielded himself as such a victim, or bore the penalty of the law. They maintain that justification is merely pardon, and the condition, faith.

Another great topic of difference is the subject of regeneration or conversion, or the precise process or plan by which the heart of the sinner is changed. We maintain that it is merely an act of Omnipotence. That the sinner has no ability of his own to concur in that work; that his change is an act of God's grace, and that it may be instantaneous. They, on the contrary, maintain, that since the atonement of Christ, the sinner is competent to his own regeneration, and that the process is gradual.

Such, gentlemen, are the *summa vestigia*, or general outlines of this great dispute, which has caused the separation of this Church. A cordial re-union is impossible. A separation has been effected and made permanent for the sake of peace and religion. This is that great dispute which has abrupted friendships, divided families, and engendered strifes. It is in your power to rebuke this heaving tumult of the passions, and bid them be tranquil for ever.

Such, gentlemen, was the state of the parties, and such the distractions of this Church, when the session of 1837 commenced. It was well known throughout the land, that a great struggle would occur at this session. The parties, therefore, put forth their strength at the election, and the decided majority of the Old School party on the floor of this Assembly, leaves no doubt that they were and are the predominant party in this church; and that the principles of theology, which they acknowledge are the true tenets, in the opinion of a majority of true worshippers in this Church, and that the doctrines of their adversaries are heretical. Nor was this majority accidental, for it was even more decided in the Assembly of 1838, when, the relators will admit, every nerve had been strained by both parties, to acquire the mastery of numbers.

I say that a great struggle was anticipated. For it was known that two systems of theology existed in the church, and both could not be permitted to be taught in an institution expressly formed to preserve uniformity of creed. This church having adopted a standard of faith or a system of holy truths, it admits no double construction of them. They can have but one meaning, and if there be doubt as to what that meaning may be, the constitution of the church refers that doubt to its great council, which has power authoritatively to settle that doubt, and to declare what the church shall teach as the true construction of the standards.

Form of Government, chap. XII., sec. v.

"To the General Assembly belongs the power of deciding in all

controversies respecting doctrine and discipline; of reproving, warning, or bearing testimony against error in doctrine."

From the decision of this great council, there is no appeal, and when the General Assembly declares a doctrine heretical, it must no longer be heard in a Presbyterian church. Its maintainers must either conform to this decision, or go elsewhere and form new associations: of which they may, at their pleasure, make what are heresies, when compared with our standards. This decision of the General Assembly, is the decision of the majority of that Assembly, and hence it results, (however harsh it may seem,) that the construction which the majority put upon the standards, is orthodoxy, and that of the minority is heresy. This power is necessary to, and inherent in every church establishment, or it ceases to be a church, call it what you please. This decision may be given either in the process of a judicial trial, and be the sentence upon an individual heretic, or it may be an abstract declaration of the Assembly, or "bearing of testimony" against heretical doctrines.

In whatever form this declaration of the Assembly may be given against a particular opinion, that opinion is heresy, and must be abandoned by the faithful. The malcontents have no alternative but submission or secession.

This uniformity of opinion is neither impracticable nor difficult. This church itself existed nearly half a century, in harmonious and halcyon repose. The two parties which now distract it are, (each being contemplated by itself,) of homogeneous materials, and capable of forming a peaceful church.

That nothing might be left undone which Christian charity seemed to require, upon a proposition emanating from a member of our party, a committee was appointed, consisting of five members from each party, for the purpose of negotiating an amicable separation. The effort failed by the fault of our adversaries, for, although they admitted that "the experience of many years has proved that this body is too large to insure the purposes contemplated by the constitution," and that "in the extension of the church, over so great a territory, embracing such a variety of people, difference of view in relation to important points of church policy and action, as *well* as *theological opinion*, are found to exist," and that "a division will be of vital importance to the best interests of the Redeemer's kingdom:" (I cite their language, Minutes of 1837, page 432:) yet they imposed one condition, to which no true lover of the church could submit—viz: that the church should be *destroyed*, and two new churches created from its fragments! We allowed them their own terms in regard to their share in the property of the church—nay, had they asked it all, it would have been given to them; but, as the majority, as the possessors and representatives of all the old seats of Presbyterianism, as the party who confessedly and rigidly adhered to her standards, we asked to be allowed to maintain the succession of our fathers! Our adversaries would only grant us peace upon the condition that we should destroy all for which we had hitherto been contending!

It will now be my duty to explain to you the real character of

the much abused transactions of 1837, by a studied misnomer, called, the acts of excision, viz: the resolutions of the Assembly of that year, declaring the Synods of the Western Reserve, Utica, Geneva, and Genessee, to be no part of the Presbyterian Church.

When the great controversy, which I have described, was at its height, attention was drawn to an imposthume which had long afflicted the church, but which, being filmed over and disguised, had hitherto escaped detection. I mean New England Congregationalism, which had insidiously undermined the Presbyterian constitution, and was the fatal source of all these errors in doctrine, which afflicted our church.

The New School party is emphatically a New England party, it being composed, in a great measure, of New Englanders, or their descendants. New England Calvinism is not Presbyterianism; they are Congregationalists or Independents, and are the lineal or collateral descendants of the English Independents, who, under the guidance of Cromwell, drove out Presbyterianism, after Presbyterianism had driven out Episcopacy. Our New England brethren are proverbially shrewd, acute, indefatigable, and ambitious, and are seldom introduced into our institutions without becoming masters of them. The party which I represent, have long apprehended a design in their adversaries to convert the funds, the institutions, and above all, the name, of this venerable church into the means of furthering this peculiar system of theology, and various other projects of their own.

The instrument by which they have obtained admittance into our church, is a certain plan or agreement of Union between this church and the Congregational Association of Connecticut, adopted in the year 1801, which admits Congregationalists, upon certain terms, which I shall presently describe, into the bosom of this Presbyterian institution.

The essence of Presbyterianism is a government by ruling elders, and the profession of Calvinistic doctrines. A church which is deficient in either of these elements, is not a Presbyterian church. The doctrines are, of course, considered of divine origin, and the government by ruling elders is deemed not less so, and, therefore, it is not capable of change or modification. The constitution of this church is strictly Presbyterian, both in these particulars, and also in all the other details of its government. The primary government is the church session, composed of ruling elders, elected by the congregation for life, ordained by a regular process, and pledged to our written Confession of Faith, and of the minister who is ordained in a similar manner, by the presbytery, which is the next highest tribunal. The church session may try any member of the congregation, for ecclesiastical offences, with an appeal to the presbytery, but the church session cannot try or dismiss the minister. When once ordained, this clerical officer holds independently of his congregation, and is only amenable to his presbytery. The Congregational system has no church session composed of ruling elders, elected and ordained for life. It wants this essential, and, as we believe, apostolical feature of Presbyterianism. The government

of the Congregational Churches, is vested in the whole of the male members of the church. They elect their own ministers, and depose them at will. They have no Confession of Faith. Each church is independent of all others, or only connected in associations for mutual advice. In the Presbyterian Church there is, on the contrary, a regular system of connexion and subordination. Above the church session, and controlling it by appeals and otherwise, is the presbytery, which has ecclesiastical rule over a territory containing several churches. All the ministers, and a representative ruling elder from each church within this territory, compose the presbytery. These presbyteries are the constituent bodies, which are represented by delegates in the General Assembly. The synods are judicatories superior to the presbyteries, embracing a wider territorial jurisdiction, but as they are not represented in the General Assembly, are no more in the church polity, than an appellate judicatory.

Here, gentlemen, let me pause, and request you to observe the effect of this constitution of things. The delegates to the General Assembly are elected by the presbyteries, and the delegates who compose the presbyteries, must be ruling elders from the churches. Of course, it results, that if there be any thing vicious and unconstitutional in the primary delegation, that is from the churches to the presbytery, it will affect and vitiate that from the presbyteries to the General Assembly. If the churches should send mere laymen, instead of ordained elders to the presbyteries, these presbyteries are viciously constituted, and the delegates from such presbyteries to the General Assembly, are elected by a false and unconstitutional constituency.

On the apex of this pyramid of subordinate tribunals, sits that august body, the General Assembly. It unites the wisdom of all, and by the weight and pressure of its authority, keeps the inferior parts in their true position, and preserves the beautiful symmetry of the whole.

But the Plan of Union marred this structure, for it provides, among other things,

"That if any congregation consists partly of those who hold the Congregational form of discipline, and partly of those who hold the Presbyterian form, we recommend to both parties, that this be no obstruction to their uniting in one church, and settling a minister. And that, in this case, the church choose a standing committee from the communicants, whose business it shall be to call to account every member of the church who shall conduct himself inconsistently with the laws of Christianity, and to give judgment on such conduct. And if the person condemned by this judgment, be a Presbyterian, he shall be at liberty to appeal to the presbytery; if a Congregationalist, he shall be at liberty to appeal to the body of male communicants of the church: in the former case, the determination of the presbytery shall be final, unless the church consent to a further appeal to the synod, or to the General Assembly; and in the latter case, if the party condemned shall wish for a trial, by a mutual council, the cause shall be referred to such council. And

provided, the said standing committee of any church, shall depute one of themselves to attend the presbytery, he may have the same right to sit and act in the presbytery as a ruling elder of the Presbyterian Church."—*Assem. Dig. p.* 298.

This Plan of Union was adopted at the solicitation of the Association of Connecticut, and it was intended as a temporary provision to foster the formation of churches on the frontier, "with a view to prevent alienation, and to promote union and harmony in those new settlements which are composed of inhabitants from these bodies."—*Dig.* 297.

Every provision of this Plan of Union which I have read to you, is a violation of the constitution of the Presbyterian Church. It introduces into the body of the Presbyterian Church, whole congregations of communicants who have not professed our standards of faith—who are not governed by ruling elders—and who are, therefore, not Presbyterians. It enables congregations to send unordained lay delegates to the presbyteries. It takes away from Presbyterians the right of appeal from the decisions of the presbyteries. It introduces into the body of the church persons who are not subject to the tribunals of the church. If the Presbyterian form of government, in its essential features, be of divine origin, (which is the faith of our church,) then these alterations in its essential structure, would, under any circumstances, be without warrant or foundation, but considered simply as human institutions, their alterations were void, because not submitted to the presbyteries.

"Before any overtures or regulations proposed by the Assembly, to be established as constitutional rules, shall be obligatory on the churches, it shall be necessary to transmit them to all the presbyteries, and to receive the returns of at least a majority of them, in writing, approving thereof."—*Form of Gov. p.* 365.

They will be void, too, in the consideration of this civil tribunal, as conflicting with the act of the Legislature of Pennsylvania, incorporating the "Trustees of the General Assembly of the *Presbyterian* Church in the United States of America." The power of electing these trustees being given to "the ministers and *elders* forming the General Assembly of the Presbyterian Church."

Besides, the direct unconstitutional provisions in this Plan of Union, it was made the cover of various other unconstitutional practices. This plan provides, in the section read, for mixed churches; but pure Congregational churches, without any intermixture of Presbyterianism, owing to the laxity produced by this Plan of Union, sent their unordained lay delegates to the presbyteries, and were admitted.

When controversy called attention to the subject, it was ascertained that, by means of this Plan of Union, and the abuses that originated with it, there were, in the bounds of the Synod of the Western Reserve, one hundred and nine churches, out of one hundred and thirty-nine, purely Congregational or mixed. And in the Synods of Utica, Geneva, and Genessee, two-fifths of the churches were Congregational or mixed. Here was this vast body of Congregationalists, although denying our standards, rejecting and

scoffing at our form of government, and in no wise subject to our discipline, or to our tribunals, yet participating in our counsels, voting upon our questions of faith or doctrine, and actually inflicting upon us the discipline of a code, whose authority upon themselves they utterly deny. They were themselves conscious of the absurdity of their claims, and of our submission to them, and therefore, in the statistical reports which they made to the Assembly, disguised themselves under the name of *Presbyterian churches.*

In the great struggle which was anticipated between the parties thus divided, it was the determination of those whom I represent, that none but Presbyterians should participate, and in this determination originated the acts, in regard to which there has been so much clamour. That the purpose was just, constitutional, and proper, none who have heard my statement can doubt. The question now to be agitated is, whether the means used to effect that purpose were equally commendable.

These means were, the passing of a resolution by the General Assembly, abrogating the Plan of Union, as unconstitutional and void from its origin, and certain acts disowning the Synods of the Western Reserve, Utica, Genessee, and Geneva.

Our adversaries have thought fit to represent these acts as tyrannical, because, (as they assert,) they disfranchised 500 ministers, 599 churches, and 60,000 communicants. This statement has been so often repeated, and so many changes have been rung upon it, that you will perhaps be surprised to hear me assert that it is untrue. I will presently prove to you, that no minister, church, or communicant, has been disfranchised by these acts.

Our adversaries have also thought fit to represent these acts as a condemnation, without hearing, of 500 ministers, 599 churches, and 60,000 communicants; this is also untrue.

These acts were simply requisitions made by the General Assembly, upon the presbyteries and churches within the bounds of these synods, that they should ask such Congregational churches, as, under the Plan of Union, or by falsely representing themselves to be Presbyterians, had gained access to the judicatories of the church, to adopt our form of government, or if they refused, then to shake them off. So far from disfranchising 599 churches, none were to be excluded from our connexion, if they would adopt our form of government; or, in the case of their obstinate nonconformity, the measure would result in the exclusion of but two hundred and sixty-nine churches, or thereabout, that being the estimated number of Congregational churches in the bounds of these synods. The residue of the 599 churches being Presbyterian, were in no substantial manner affected by these acts. As to the 509 ministers, they were not, in the least degree, the subject of these measures, for none of them were Congregational; the clergy of this district having, almost without exception, caused themselves to be ordained as Presbyterians, preferring, no doubt, the more stable tenure of office which that institution afforded them. These disowning acts simply required of them to leave one presbytery and go to another most convenient to themselves. As regards the 60,000 commu-

nicants, if the churches in which they worshipped did not choose to adopt the Presbyterian form of government, each individual had but to enter the nearest Presbyterian church, and claim the benefits of communion. As regards them, those denounced acts merely require them not to continue to worship in churches which would not adopt our discipline and order.

That such is the true operation of these acts, will be apparent to any unprejudiced man who will peruse them.

They are, perhaps, unskilfully drawn, and if but part of them be read, they seem to justify the aspersions of our adversaries; but if the whole be read together, then the injustice which has been done to us will be apparent.

"That in consequence of the abrogation by this Assembly of the Plan of Union of 1801, between it and the General Association of Connecticut as utterly unconstitutional, and therefore null and void from the beginning, the Synods of Utica, Geneva, and Genessee, which were formed and attached to the body under, and in execution of this Plan of Union be, and are hereby declared to be out of the ecclesiastical connexion of the Presbyterian Church in the United States of America, and that they are not in form or in fact an integral portion of said church."

He that should stop here, would perhaps deceive you and himself, but let us continue.

"That inasmuch as there are reported to be several churches and ministers, if not one or two presbyteries, now in connexion with one or more of said synods, which are strictly presbyterian in doctrine and order, be it therefore farther resolved, that all such churches and ministers as wish to unite with us, are hereby directed to apply for admission into those presbyteries belonging to our connexion, which are most convenient to their respective location; and that any such presbytery as aforesaid, being strictly Presbyterian in doctrine and order, and now in connexion with either of said synods, as may desire to unite with us, are hereby directed to make application, with a full statement of their cases, to the next General Assembly, which will take proper order thereon." From this it is manifest that the nature, character, and object of these acts are just what I have asserted, and no more. No Presbyterian minister is injured, unless it be an injury which entitles him to turn his paracidal hand against his church, that the General Assembly has removed his connexion from one presbytery to another, and that other of his own selection. No Presbyterian church is injured, unless it be an injury to detach them from one presbytery and annex them to another. I have not heard from our adversaries, how these removals were injuries, except that by the statutes of the church, when a minister removes from one presbytery to another, he is bound to undergo an examination on practical religion! Would it not be as well for the church, that all its pastors should undergo such an examination periodically? It certainly can be no great hardship, when the ministers themselves select the presbyteries to which they will apply. As regards the presbyteries in these synods, which are strictly Presbyterian in doctrine and order, a kindly provision

is made for them. But were it otherwise, it would be a matter of indifference, for when the churches and ministers are provided for, all that equity and justice require is fulfilled; the presbyteries are merely artificial bodies, and incapable of having rights apart from those of their constituents. They are, it is true, in some sense, the constituent bodies of the General Assembly, but that is merely in the sense of electoral colleges, sending delegates to represent, not their own rights, but those of their constituents. Thus I have demonstrated, that, by these acts, no essential part of the Presbyterian Church was excinded, except at their own election and by their own obstinacy. These acts do not *compel* the presbyteries, churches and ministers, to continue their connexion with us, but merely by requiring from them an act of adhesion, put it in the power of the malcontents, to retire and voluntarily relinquish the connexion with us. With the same view, the disowning acts contain the following provisions:

"That the General Assembly has no intention, by these resolutions, to affect in any way the ministerial standing of any members of either of said synods; nor to disturb the pastoral relation in any church; nor to interfere with the duties or relations of private Christians in their respective congregations; but only to declare and determine according to the truth and necessity of the case, and by virtue of the full authority existing in it for that purpose, the relation of all said synods, and all their constituent parts, to this body and to the Presbyterian Church in the United States."

It was contemplated, as I have said, that the Presbyterians in these synods might prefer their Congregational Associations to ours; this declaration was therefore adapted to such a contingency. It leaves them a complete church system, should they choose to declare their independence. These acts did not go into those synods, presbyteries, and churches, and expurge them of Congregationalism, and thus reduce them to a fragmentary state; but by acting upon whole synods, they benevolently gave these churches the option of our communion, or of a separate organization of their own, ready to their hands, in synods, presbyteries, and churches. And here let me observe, that we are in the habit of calling our church *the* Presbyterian Church, whereas, it is more properly *a* Presbyterian Church; connexion with us is not necessary to Presbyterianism. There may be, and are in this country other churches essentially Presbyterian, which are unconnected with us. Those churches which might retire from our connexion would not thereby lose their Presbyterian character, if otherwise entitled to it.

Many clergymen and churches within these synods, have conformed to the requisitions of the disowning acts, and are now in full connexion with our Church. The mass of them have refused to comply. They met in convention, and determined to reject the means of restoration which we pointed out to them, and resolved to cast themselves upon us with their burthen of Congregationalism; and now as a means of tyrannizing over us, falsely represent that we have tyrannized over them.

The other untrue representation, with which our adversaries have

endeavoured to excite passion and prejudice against us, is, that we have condemned 599 churches, 509 ministers, and 60,000 communicants, without a trial, or an opportunity of defence. I have just demonstrated that it is only the Congregational portion of these 599 churches, and 60,000 communicants, which has been affected by these acts. This action of the General Assembly to expurgate Congregationalism bears no resemblance to a *condemnation*, and it would have been impossible to have subjected the obnoxious churches to a trial. Try them! for what? For being Congregational in their order? That certainly is no crime. Try them! They do not acknowledge your jurisdiction; they participate in governing you by sending their lay delegates into your judicatories, but they are not subject to your tribunals. The only tribunal to which they are subject by the Plan of Union, is their own congregation! Thus they must try themselves, if they are tried at all! and the only appeal from this tribunal is to the Association to which they belong. But perhaps the presbyteries must be tried for admitting Congregational delegates. Until the Plan of Union was abrogated, this was no offence, the presbyteries were, by the existing laws, bound to receive these delegates. It is only then by continuing to admit such delegates, after the abrogation of that plan, that they would become obnoxious to censure; in other words, the abrogation of the Plan of Union made it necessary for the presbyteries to purify themselves of Congregationalism, and this is substantially the whole effect of these disowning acts. The entertaining of these Congregational delegates was no crime, before the abrogation of the Plan of Union, for which there could be a trial, and the disowning acts prevented its becoming a crime thereafter. The General Assembly has unquestionably the power to create presbyteries and synods; as to the latter, it is expressly given by the constitution, and as to the former, it is a power of necessary implication, and has been repeatedly exercised without question. If the General Assembly has power for the convenience of the church, to erect presbyteries and synods, she has necessarily the power to dissolve or destroy them, when the like convenience requires it. Had the General Assembly dissolved those synods and presbyteries, and declared the churches and ministers within their bounds to be united to the adjacent synods and presbyteries, all must have admitted that this was a constitutional proceeding, and we should have had no clamour of disfranchisement and condemnation without hearing. How does our proceeding differ from this? I have shown that we have substantially united all the *Presbyterian* churches and ministers to the adjacent presbyteries, we have, however, excluded the Congregationalists; in this consists the distinction, if there be any; our right to exclude them rests upon the unconstitutionality of the Plan of Union. If that arrangement was unconstitutional and void, the party who claims the benefit of it is not to be tried and condemned for his unconstitutional claim, but the party from whom is sought performance of the illegal arrangement, may refuse on the ground of its invalidity and unsoundness. This is substantially what the General Assembly has done.

It were a waste of time to discuss whether the powers of the General Assembly are judicial or legislative. She here acted in the mere simple and uncomplicated character of a party to an arrangement, called upon to fulfil that arrangement, but declining because the arrangement was illegal and void. These acts may be justified in another aspect. The General Assembly is a representative, deliberative body, and entitled to determine upon the qualifications of those who may claim membership. This is not only the general law in regard to such bodies, but has been for years the practice of this very Assembly. The constituency of this Assembly is peculiar: it consists not of natural persons, but of artificial bodies. The right to determine claims of membership involves the right to decide the qualifications of the electors, and, if those electors be artificial bodies, to ascertain their legal organization. When these artificial bodies admit into their structure materials of an unqualified and vicious nature, may not the Assembly require the expurgation of these materials?

The Plan of Union I have demonstrated to be unconstitutional. It is sought, however, to maintain it, and supply the want of the jurisdiction of the presbyteries by their long acquiescence. An unconstitutional statute remaining on the statute book unused and inactive, would not be considered as acquiesced in, because it is not repealed. It is its use and effects that may be the subject of acquiescence. Before this presumption arises, it must be shown, that the parties acquiescing were aware of the facts and events which they are to be construed to have approved. These Congregational Churches have grown up insidiously and in disguise, and until recently were unknown to the great majority of the presbyteries. Under such circumstances there can be no acquiescence. Had these churches represented themselves in the statistical reports which they presented yearly to the General Assembly, as Congregational, we should have yearly acquiesced; but when in these reports they have represented themselves to be Presbyterian churches, we can only be construed to have acquiesced, by being construed to have disbelieved them. We will, however, put it on higher grounds; the incorporating act is for the benefit of a *Presbyterian* Church, and nothing short of the power of the Legislature can make it, in whole, or in part, Congregational. The government by ruling elders, according to the faith of this church, is of apostolical and divine institution; the action or acquiescence of the presbyteries may change the constitutional *rules*, but cannot alter the essential doctrines of the church, which claim a heavenly origin.

But whatever may have been the infirmity of these proceedings in 1837, they, by the confession of our adversaries, did not destroy the Assembly of that year. On the contrary, it continued its legal existence up to the last hour of its session, when it was regularly and constitutionally dissolved, and was from thenceforth to be accounted with things that were, and are not. For by the constitution of this church, the General Assembly is a deciduous body. It endures but one session, and the General Assembly of any one year is not a continuation of the General Assembly of the preceding year,

but a new and independent body. The succession, the principle of identity is preserved in the church itself, and not in the General Assembly. Hence at the end of its session, the moderator pronounces it dissolved, and calls *another* for the ensuing year, and proclaims the time and place at which such ensuing Assembly shall meet.

"Each session of the Assembly shall be opened and closed with prayer. And the whole business of the Assembly being finished, and the vote taken for dissolving the present Assembly, the moderator shall say from the chair, 'By virtue of the authority delegated to me, by the Church, let this General Assembly be dissolved, and I do hereby dissolve it, and require another General Assembly, chosen in the same manner, to meet at ——— on the ——— day of ——— A. D.'" *Form of Government, Chap.* xii. *Sec.* viii.

When, therefore, on the 8th day of June, 1837, the Assembly of that year resolved:

"That this General Assembly be dissolved; and another General Assembly, chosen in like manner, be required to meet in the Seventh Presbyterian Church, in the city of Philadelphia, on the third Thursday of May, 1838, at 11 o'clock, A. M.," and "the moderator dissolved the Assembly accordingly." That Assembly ceased to exist for good or ill, and the Assembly of 1838 came together with authority, powers, and faculties unimpaired by any acts of the preceding Assembly. Particularly in the matter of admitting or rejecting members, and deciding on their qualifications, &c., it was bound to take no directions from the preceding Assembly. The members of the General Assembly of 1838 may not have been, and in point of fact many of them *had* not been members of the Assembly of 1837. You will presently see, gentlemen, the important bearing of these considerations. I have said that our adversaries have recognized the continued legal existence of the Assembly of 1837, down to the last day of its session. Among the many proofs of this fact, let me select two. The New School organization, if organization it can be called, commenced with Mr. Cleaveland's declaration. "We have been advised by counsel learned in the law, that a constitutional organization of the Assembly must be secured at this time and in this place." Now as it was the very last resolution of the General Assembly of 1837, to fix that time and place for the organization of the Assembly of 1838, this proceeding of Mr. Cleaveland clearly recognizes the capability of that Assembly to do legal and valid acts, after the members from the four synods were excluded. Again, the General Assembly of 1837, after disowning the Synod of the Western Reserve, elected three trustees to supply vacancies which had occurred in the Board of Trustees. Now it is manifest, that if this disowning act was a dismemberment of the church, and the excluding or excision of a material part of the corporation, then this decision was invalid. The members so excluded endeavoured to treat it in that light, and gave notice to the trustees not to recognise any orders which might be made upon them by this dismembered Assembly for the disbursement of money. But the New School Assembly of 1838 thought otherwise; for when they

were about electing the relators as trustees, they expressly declare that there were no vacancies in the board. A declaration which would have been untrue, had the Assembly of 1837 been incapable of valid action after the supposed dismemberment. Nor was this a *mere* declaration, for by the standing rules it is provided "When the day of election arrives, the Assembly shall ascertain what vacancies in the number of the eighteen trustees incorporated, have taken place by death or otherwise; and shall first proceed to choose other members in their places." *Assembly's Digest, page* 199.

The declaration of the New School Assembly to which I allude, is in these words. "At ten o'clock the Assembly proceeded to the order of the day, viz. the election of six trustees of the General Assembly. Messrs. Bogue, Brown, and Chapin, were appointed to receive the ballots, and report the result. *The Assembly ascertained that no vacancies in the Board of Trustees have occurred by death, or otherwise.*" *New School Minutes of* 1838, *p.* 654.

I have taken pains to prove this position for two purposes; first, to show, that if the disowning acts were unconstitutional and void, they did not destroy the General Assembly, and make it a *hæreditas jacens*, into which any straggler might enter and become the occupant: and, secondly, to show that, as the organization of 1837 continued valid after the removal of the members from the synods in question, so the Assembly of 1838 might, also, be validly organized, upon the principle of their exclusion.

I have endeavoured to demonstrate, that the General Assembly of 1837 was entirely dissolved at the close of its session. And that the Assembly of 1838 was a new and independent body, for the obvious purpose of demonstrating that the proceedings of 1838 must stand or fall by their own intrinsic merit or demerit, and can derive neither detriment nor aid from the preceding session, except so far as the proceedings of any anterior year form a precedent, or rule of action, to be respected and obeyed by the ministerial officer, for the time being, until the succeeding Assembly shall, in the exercise of its free and unshackled independence, abolish such rules.

Now, let us examine the proceedings of 1838. The relators have brought witness after witness, to prove that the clerks rejected the members from the four synods; that Mr. Patton moved to have their names added to the roll, that his motion was declared out of order; that he appealed, that his appeal was declared out of order; that Dr. Mason made a motion to the same effect, which was also dedeclared out of order; that he appealed, and his appeal was declared to be out of order; that Mr. Squier demanded his seat in the house, and that his demand was refused; and that Mr. Cleaveland rose, and declared, as the reason for the step he was about to take, that the members from the four synods had been *refused* their seats, and, then, treating the chair as vacant, moved that Dr. Beman should take it; that this motion was carried by the acclamations of their partisans, no one voting in the negative, and also, several succeeding motions, by which a complete set of officers were created, and the virtue, (as they maintain,) entirely extracted from the old organization, under the former officers, who were left sitting in

their places, holding their barren sceptres, divested of all real authority. Now, I will undertake to demonstrate, both from the relator's testimony, and that which we will produce on our side, that the whole of these proceedings, from the beginning to the end, were a series of the most ridiculous blunders. That these gentlemen came into the Assembly, with a programme of conduct to be pursued, but that the exigency which they anticipated did not occur, and yet they performed their premeditated parts, and left the incongruities to subsequent explanation.

By the constitution of this church, the presiding officer, called the moderator, and the clerks of the preceding Assembly, act as the officers of the succeeding Assembly, until it is organized, and chooses officers of its own. Previously to the year 1826, after the moderator had made his opening prayer, the commissioners presented their commissions to the clerks, who read them publicly, and then enrolled them. And, until such reading and enrolment, the commissioners had no right to sit, speak or vote as members of the Assembly. In that year, an amendment to the constitution was originated, which afterwards received the sanction of the presbyteries, by which the commissions, instead of being publicly read, were to be examined merely, and certain standing rules were adopted, regulating the manner and process of this examination. They are in these words:

"1. Immediately after each Assembly is constituted with prayer, the moderator shall appoint a committee of commissions.

2. The commissions shall then be called for and delivered to the committee of commissions, and the person delivering each, shall state whether the principal or alternate is present.

3. After the delivery of the commissions, the Assembly shall have a recess until such an hour in the afternoon as will afford sufficient time to the committee to examine the commissions.

4. That the committee of commissions shall, in the afternoon, report the names of all whose commissions shall appear to be regular and constitutional, and the persons whose names shall be thus reported, shall immediately take their seats and proceed to business.

5. The first act of the Assembly, when thus ready for business, shall be the appointment of a committee of elections, whose duty it shall be to examine all informal and unconstitutional commissions, and report on the same as soon as practicable."

Subsequently the stated and permanent clerks were appointed to be a standing committee of commissions, under the foregoing rules. And the commissioners were directed to present their commissions to this committee, before the commencement of the session in the morning, and the committee were thus enabled to make up their report for the morning session.

I will now read to you the only constitutional provision which bears upon this subject, and then we shall be prepared to measure the conduct of our adversaries by these standards.

"No commissioner shall have a right to deliberate or vote in this Assembly, until his name shall have been enrolled by the clerk; and

his commission examined and filed among the papers of the Assembly." *Form of Government, chap.* xii, *sec.* 7.

Now it appears that the commissioners from the four synods presented their commissions to the committee of commissions, who had the power, by the 4th of the above rules, to reject them, if they did not deem them constitutional. They, though by no means bound by the proceedings of 1837, except as a precedent, (it being the opinion of the highest tribunals of the church on the constitutionality of these commissions,) reject them as unconstitutional. Notwithstanding they were at liberty to decide otherwise, they gave this judgment, and being a competent tribunal, their decision could only be reversed by the General Assembly, according to a system provided by these rules. The General Assembly confides this review to a committee of elections, and it is the first business of the Assembly to appoint this committee. Now you will observe that the committee of commissions are only bound to put the names of such, as in their judgment, have regular and constitutional commissions on the roll, the others they simply reject, and they must be brought before the house, like other business, by the motion of some member, and the moderator will refer the same to the committee of elections as soon as that committee is appointed. We shall show you that the committee of commissions advised them thus to apply to the house. A practice has sprung up of reporting irregular commissions in a separate roll and thus to bring them to the notice of the house which refers them to the committee of elections, but this, you will observe, is no part of these rules, and is a mere practice of convenience adopted by the clerks. We shall prove to you that the clerks debated between themselves the point whether these rejected commissioners ought to be presented to the house by them, or whether they should be presented by some member. The latter opinion, which is a strict adherence to the rule, prevailed. Now here let us pause and inquire whether these clerks have committed any breach of duty. To them is referred, by the standing rules of the house, the question of the constitutionality of all commissions which are presented to them. They may make a weak or erroneous judgment, but that is no crime! Were they influenced or affected by the disowning acts of 1837? It is most likely that they were; is that a crime? That those disowning acts deprived them of the exercise of their judgment we deny, but we would have considered it the height of arrogance had those officers disregarded the opinion of the highest tribunal in the church; it was but a decent respect to the majority of that body to submit the correction of their errors, if there were errors, to the judgment of the house. On this act of the clerks our adversaries base the right to remove them, which, they say, they subsequently exercised. The right to remove the moderator, they attempt to deduce also from his misconduct (as they call it) in his treatment of Patton, Mason and Squier. Now what is the real account of this matter, both as the relators have shown it upon *their* testimony, and as we shall more fully develope it in *ours*? And first, immediately after the moderator, Dr. Elliott, had opened the Assembly with prayer,

Mr. Patton rose and said he had certain resolutions in his hand which he wished to offer. He did not read the resolutions, and the moderator was entirely ignorant of their contents. His decision, therefore, cannot be ascribed to any opposition to their matter. He decided that they (and so would have been his decision as to any other resolution) were out of order, as the first business was the formation of the roll. The propriety of this decision no one in his senses can doubt. The rules of 1826, which I have read to you as they originally stood, consider the house so absolutely inane and incapable before the roll is reported, that they direct it to be adjourned from the time the commissions are committed to the clerks, until they are ready to report. And the constitution itself provides, that no member shall be allowed to deliberate or vote until he is enrolled. Until, therefore, the roll is reported, as no one is entitled either to deliberate or vote, who is there to entertain a motion? Mr. Patton, after committing this solecism, still persisted and thereby betrayed a remarkable unacquaintance, in himself and the party whose organ he was, of the structure of this body. He appealed from this just decision. To whom did he appeal? The appeal must be to some persons who can deliberate and vote upon that appeal. But the roll not being reported, there were none entitled to deliberate and vote; in other words there was no house to which the appeal could be made. The moderator, properly, therefore, declared that appeal out of order. Mr. Patton took his seat and acquiesced in the decision. The roll was then reported, and thereupon, the moderator made a proclamation or call for any commissions which had not been presented to the clerks, and stated if there were any such, now was the time to present them. A usual formula and a remnant of the original practice under the rules of 1826.

Rule II.—"The commissions shall then be called for, and delivered to the Committee of Commissions."

This practice was subsequently modified, as you have already learned, by delivering the commissions to the clerks, composing the Committee of Commissions, before the meeting of the General Assembly: but it was deemed judicious to retain the old practice of calling for commissions at the opening of the Assembly, lest some from inadvertence, misapprehension, or want of opportunity, should not have presented their commissions to the clerks. Although the clerks have read the roll, yet the roll is not completed, and the house ascertained, until this proclamation has been made, and a reasonable opportunity given to assent to it. The essential nature of this proclamation to the well ordering of the house, even in the opinion of our adversaries, is made manifest, by the fact, that the first act, performed by the New School moderator, after he was installed, was to make this very proclamation. While this call, by Dr. Elliott, was pending, and one commissioner, at least, was coming forward to avail himself of it, Dr. Mason rose, and disregarding the business which already possessed the house—(for he did not pretend that his application was responsive to that call)—disregarding that standing rule of order, which provides that the very first business of the house shall be the appointment of a Committee of Elections,

he moves that the names of certain commissioners, whose commissions had been presented to the clerks, and rejected by them, should be added to the roll. Notwithstanding the manifest disorderly nature of this motion, the moderator, Dr. Elliott, acted with great moderation and composure. Instead of absolutely, and at once declaring the motion out of order, as he had reason to suspect, that the commissions so offered were from the disowned synods, he inquired, and ascertained that fact, and then carefully qualifies his rejection of the motion, by saying, it is out of order, *at this time.* That the rejection of the motion might not be construed into a rejection of the men, he carefully qualifies it, so as to show that the *order* only of the motion was objectionable, and that the time would come, when it would be receivable.

Here let me interrupt the flow of events, to state, that it is manifest that it was not the intention of the officers to exclude these commissioners from access to the decision of the house, in this case. The clerks told them to apply to the Assembly. The moderator told Dr. Mason that a time would come for their presentation. And there cannot be a reasonable doubt, that if presented to the house, after the appointment of a Committee of Elections, they would have been referred to that committee; and such of them as could have demonstrated that they came from pure presbyteries, would have been admitted to their seats; there would have been no pretence to exclude them. Even the disowning acts invite such to come to the Assembly of 1838, and take their seats. As to those whose primary constituency were Congregational churches, they would have had their case decided on by a majority of the house, entirely uncontrolled, and unshackled, by the proceedings of 1837; and if the conjectures of Mr. Phelps, one of the relators' witnesses, which you have heard given in evidence, be right, then the majority would have admitted them. For he assures us, that many Old School members would have voted for their admission, so as to make a majority in their favour. But to return to Dr. Mason: not abashed by the impropriety of his motion, he appealed, and the moderator refused to put that appeal. Here is the very head and front of our offending. The motion may have been wrong; at all events, the moderator was constitutionally authorized to decide it to be wrong, but the refusal to put the appeal, was, say they, an usurpation, an act of tyranny, and breach of privilege! That an appeal may be out of order, will not be denied. For instance, an appeal must be made immediately, upon the decision complained of; if other business is allowed to intervene, the right of appeal is gone, and he who should attempt to make an appeal under such circumstances, would have it rejected by the moderator. If there be one such case, there may be others; and no stronger case than the one I am discussing, could be suggested: for, by putting the appeal, in order to avoid the violation of Dr. Mason's privilege, he would have violated the privilege of others. The roll was in the process of being completed; a call had been made for persons who were present with commissions, to come forward and qualify themselves for voting, by being enrolled. The physical performance of

this act required some lapse of time. We are informed by the evidence, that there was one commissioner, Joshua Moore, who was in the act of availing himself of the moderator's invitation, when Dr. Mason rose. Had there been fifty in that predicament, some time must have elapsed before the last, in the succession of fifty, (for the enrolling must be done successively,) could have been qualified to vote. Might not such fiftieth commissioner, or even Joshua Moore, if he stood alone, have said, "Submit no question to the house, until I am qualified to participate in the same. The roll is not yet complete." And such was the principle of the rejection of the appeal; the roll was not yet complete, and the house had not yet been ascertained. The clerks had reported such as had presented their commissions, and whom they deemed entitled to seats: the moderator was about adding to them, by his proclamation, such as had unquestioned commissions, but had not availed themselves of the previous opportunity.

But suppose this honest, well meant decision, was erroneous, and a breach of privilege, what flowed from it? We understand that Dr. Mason acquiesced in it: he sat down without complaint, and another application to the moderator from one of their own party (Squier) followed. This question of the breach of privilege is entirely an after thought. The subsequent proceedings of Mr. Cleaveland are so plainly opposed to numerous rules of the house, and the principles which govern every deliberative body, that our adversaries are constrained to seek some extraordinary justification for this extraordinary conduct; and they think they have found it in this supposed breach of Dr. Mason's privilege. But I will presently show you that none of the ulterior proceedings had any connexion with this supposed breach of privilege. But there is, however, an intermediation between Dr. Mason and Mr. Cleaveland, which must first be explained. Mr. Squier rose and demanded his seat in the house. The moderator had now official notice, that the four synods had been excluded from the roll; for the roll had been read. He therefore inquired, if he, Mr. Squier, belonged to those synods, and having ascertained that he did, told him that he did not know him, that is, no one had a right to address that house but enrolled members, and that its officers could not recognize any others. This reason, you must be satisfied by this time, was conclusive; and so Mr. Squier thought, for he did not attempt to appeal. Mr. Squier should, upon every principle of order, have asked some enrolled member to present his application.

Up to this time, gentlemen, it is manifest that the General Assembly of 1838 had rejected no appplicant for the rights of membership. If, assuming the unconstitutionality of the disowning acts, there had been fault or misconduct in attempting to enforce them, that fault or misconduct was entirely in the clerks. The moderator had certainly done nothing but to enforce the rules of order. But, supposing, for the sake of the argument, that he had, by his conduct, been endeavouring to carry out these acts, no sanction had been given by the house to this conduct, or the conduct of the clerks.

The New School party had convened in caucus before the meeting of the General Assembly, and had resolved,

"That should a portion of the commissioners to the next General Assembly attempt to organize the Assembly without admitting to their seats commissioners from all the presbyteries recognized in the organization of the General Assembly of 1837, it will then be the duty of the commissioners present, to organize the General Assembly of 1838, in all respects according to the constitution, and to transact all other necessary business consequent upon such organization."

Now this furnishes a key to their whole proceedings. "Should a portion of the commissioners to the next General Assembly attempt to organize," &c., a *portion*, no matter whether that portion were great or small, the majority or the minority, "It will then be the duty of the commissioners present to organize in all respects according to the constitution," says the resolution. That is the commissioners, other than these included in the *portion*, will organize, admitting the commissioners attempted to be excluded by the *portion*. In other words, should the *portion* be the majority, the minority will organize according to their notions of the constitution, and claim to be the true house. This was the design of our adversaries; and when the clerks rejected the commissioners from the four synods, the attempts of Messrs. Patton, Mason, and Squier, were made for the purpose of forcing the house, or the *portion* or majority of the house, into a concurrence in that rejection, which would establish the postulate, this resolution and plan of action had assumed. But owing to the remarkable unacquaintance of these gentlemen, with the rules of the house, they made their attempts at improper periods of time, and therefore were prevented from obtaining the vote of the house on these rejections. They however dashed on in the career which they had prescribed for themselves. Mr. Cleaveland rose and read a paper which he had prepared, in accordance with the resolution of the caucus, which paper stated "that as the commissioners to the General Assembly of 1838, from a large number of presbyteries had been refused their seats; and as *we* had been advised by counsel learned in the law, that a constitutional organization of the Assembly must be secured at this time and in this place, he trusted it would not be considered as an act of discourtesy, but merely as a matter of necessity, if *we* proceed to organize the General Assembly for 1838, in the fewest words, the shortest time, and with the least interruption practicable." He then moved that Dr. Beman be the moderator to preside till a new moderator be chosen. Now you will observe, that not a word is said about a breach of privilege by the moderator, in refusing to put Dr. Mason's appeal to the house, not a word about removing him for misconduct, but Mr. Cleaveland's motion is founded altogether on the assumed fact, that certain commissioners had been refused their seats. It is true that the clerks had refused to enrol them, but neither the house nor any portion of the commissioners, had sanctioned that act. The exigency, contemplated in the caucus resolution, had not therefore arisen. Mr. Cleaveland's motion was, in conse-

quence, based solely upon the acts of the clerks, which could only be properly reviewed by an appeal to the house, but which he undertook to review in another method, that is, by considering them and the moderator as nonentities, and by organizing the Assembly anew from its original elements. His motion, to put Dr. Beman in the chair, was received with loud shouts of "Aye!" from their partisans. They appointed clerks, and a permanent moderator, in the same way, and adjourned to the First Church, where they sat, assuming to be the General Assembly, and elected the relators as trustees. When they had time to cool, they saw that they had not accomplished their design; that upon their own principles, no portion of the house had rejected the commissioners in question; that they had punished the majority, for the fault of the clerks, without giving that majority an opportunity of reviewing and correcting the decision of the clerks. They would, therefore, have been put to that shame, which is always the punishment of unsuccessful rashness, had it not been for one bright thought! Before I introduce this to your acquaintance, let me call your attention again to the caucus resolution. They resolved in effect, that should a portion of the commissioners attempt to organize, omitting the members from the four synods, that they, our adversaries, would organize, admitting them. Now, it is manifest, that if this portion were the majority, and should vote upon the questions put by these self-styled constitutional organizers, they would vote them down, and thus defeat their intended *constitutional* organization. It is, therefore, necessarily involved in this resolution, that these sticklers for our constitution would treat the interference of the *portion*, that is, the majority, by vote or otherwise, in their attempt at constitutional organization, with entire inattention and disregard. Well might one of the members of this caucus (as you have it in proof) exclaim upon the adoption of this resolution, "we have passed the Rubicon."

We asked the witnesses of this party what they would have done, had the Old School majority, (a clear, confessed, undoubted majority) voted in the negative on Mr. Cleaveland's motion? The relators' counsel instantly objected to the question, and the Court sustained the objection. We have not, therefore, the benefit of an answer, but if you examine the caucus resolution on which Mr. Cleaveland's motion was based, you will be convinced that they would not have regarded any negative vote from the Old School party. In other words, the motion was addressed to the New School party, and as they were pledged to vote affirmatively, they could easily be distinguished.

But the Old School party put them to no such strait; they sat indignantly silent, or only opened their mouths to cry order. And it is upon this conduct that the bright thought is formed which has given our adversaries a topic for their sophistry. The 30th of the general rules for judicatories provides:

"Silent members, unless excused from voting, must be considered as acquiescing with the majority."

The position of our adversaries now is, that the moderator committed a breach of privilege by refusing to put Dr. Mason's appeal,

he thereby forfeited his office, and any member had a right to move the house for his displacement. That Mr. Cleaveland's motion was such in substance, and as the silent members are to be accounted to have voted affirmatively, that motion was carried by an unanimous vote of the house. They make no complaint of the Old School party in the house, but the offence was entirely the moderator's, committed against the whole house, and the whole house joined in punishing him.

These new positions are infinitely more infirm, when duly considered, than those which preceded them. They are, moreover, censurable as disingenuous. It is stealing a march upon, and outgeneraling us; a species of strategy, licensable in war, but not to be practised by the grave ministers of a Christian church.

It would exhaust your patience, to enumerate the fatal objections to these positions. Let a few suffice.

The intendment that he, who sits silent, votes in the affirmative, can only arise, when the question is properly and legally proposed. No man is bound to treat a disorderly motion otherwise than as a disorder.

Now, here was a motion proposed confessedly under the most extraordinary circumstances, and he who relies upon its efficacy, must prove it to have been strictly legal.

The first objection which I shall take to it, is, that it was in direct opposition to the stated business of the house. The standing rules of 1826, providing, that the first business which the house shall transact, after the report on the roll, shall be the appointment of a committee of elections, to whom shall be referred the commissions rejected by the clerks or committee of commissions. A standing rule, intimately connected with the privileges of the members; for while the appointment of this committee is suspended, members entitled to seats, through the action of that committee, are deprived of their privileges as members.

To this, a feeble answer is returned, that the refusal of Dr. Mason's appeal was a breach of privilege, and questions of privilege are always in order. I trust I have demonstrated, that the rejection of that appeal was rightful. But let us assume, for the argument's sake, that it was a breach of privilege. Did it justify Mr. Cleaveland's proceeding? There was no connexion between the two. Dr. Mason had a right, and perhaps another for him, to bring his question of privilege, immediately, and distinctly before the house, and obtain his redress, even by the expulsion of the offending officer. If so brought forward, it would have been intelligible, and all would have voted advisedly; but it did not entitle him, or any other for him, to bring a foreign matter, out of its order, before the house. Did Mr. Cleaveland bring this question of privilege before the house? What was the grievance that he alleged to be the cause and justification of this truly extraordinary motion? We have his very words, "That as the commissioners from a large number of presbyteries had been refused their seats," &c. On this account, and for this reason, and to redress this injury, he made his motion. Was there the slightest intimation from which any member of that

house, who had seen Dr. Mason take his seat quietly; who had seen Mr. Squier, a gentleman in the same connexion of party and counsels, intervene, and introduce another matter—I say, was there any intimation to such member in Mr. Cleaveland's motion, written and prepared with a formal preface, before he had come to the house, and, of course, before Dr. Mason's appeal had been rejected, and before it could be known that it would be rejected, except by the spirit of prophecy, that his motion was intended as a measure of penal visitation, for the rejection of that appeal?

The form of government prescribes, "That the moderator is to propose to the judicatory every subject of deliberation that comes before them." "He shall, at a proper season, when the deliberations are ended, put the question and call the votes." "In all questions, he shall give a concise and clear statement of the object of the vote; and the vote being taken, shall then declare how the question is decided." *Chap.* xix. *Sec.* 11. Now Mr Cleaveland's proceedings were a violation of every one of these constitutional provisions. An individual rises in the rear of the members' seats, makes a motion which he does not address to the moderator, assumes the office of moderator, and puts the question himself, the real incumbent of the office of moderator still holding the seat of office, and up to that moment acknowledged by all parties to be the real moderator. Nay, the first part of Mr. Cleaveland's preface being addressed to him, for he commenced by saying, "Mr. Moderator," but afterwards turned from him, and addressed himself to the audience. This individual, under these circumstances, and under calls to order from the moderator, proposes a question himself, and calls for votes, and declares the result. The whole of this proceeding, thus suddenly and unexpectedly started, is completed in the lapse of a few seconds; and yet it is seriously contended, that the majority, whom it is conceded were opposed to the measure, by this silence legally concurred in the measure; and it is to be accounted as passed by their votes. The party who resorted to this proceeding were prepared and drilled; they not only understood what was to be done, but who was to do it. To their adversaries, it was all surprise; and, as one of the relators' witnesses has expressed it, they sat in amazement. Can such silence be acquiescence? But if they did understand the matter, were they bound to vote upon a motion not put by the constitutional organ to the house? Our adversaries' answer to this, is, that it was a question for his own removal, and therefore it would be improper to require *him* to put it to the house. Should we concede this position, still Mr. Cleaveland was not the proper person to put the question: the practice of this body, and the established parliamentary usage has settled, that should any question arise touching the moderator, speaker, or chairman, or whatever else may be the designation of the presiding officer, the motion must be put to the house by the *clerk*, and no man is bound to notice a motion put otherwise. But to this our adversaries answer, that the clerks were as deep in fault as the moderator, and would not have put the motion. Were they asked to do it? It does not appear that they would have refused, a sense of duty often, for the honour of our

race, overcomes individual predilections. I am speaking, now, the language of our adversaries, and assuming that right and duty is on their side. If Mr. Cleaveland had stated his motion, and requested the clerks to propose it to the house, and they had refused, the house would then have fully understood its purpose, and been prepared to vote upon it, when, as a dernier resort, Mr. Cleaveland proposed it himself. As regards the moderator, they assert that the question pertained to his own removal, and that it would have been absurd to require him to put it to the house. Without acquiescing in the logic of this position, we say, that this reason, good or bad, did not apply to the clerks, whose removal the question did not agitate.

But this question was not only proposed unconstitutionally, by an improper person, but the subject matter was improper; it being to call Dr. Beman to the office of moderator; for a rule of order provides, "If a quorum be assembled at the hour appointed, and the moderator be absent, the last moderator present shall be requested to take his place without delay."

Now it is in proof, that there were present at the time of Mr. Cleaveland's motion, three gentlemen who had held the office subsequent to Dr. Beman. This gentleman had already once felt the inflexibility of this rule. I cite from the minutes of 1835.

"A motion was made to reconsider the vote by which Dr. Beman was called to the chair, on the ground that many persons voted in the apprehension that Dr. M'Dowell, the moderator immediately preceding, was not in the house." Dr. Ely, the stated clerk, put the question, "All who are in favour of sustaining the resolution, by which Dr. Beman was called to the chair, will signify it by saying, aye." The motion was lost, and Dr. M'Dowell, the last moderator present, took the chair.

The answer that our adversaries make to this objection, is, that this rule does not apply to extraordinary cases, like that we are discussing, but only to the ordinary cases of the absence of the moderator of the last year. The word is *absent*, but if the moderator be physically present, but disabled by misconduct, he is legally absent. If the occasion was extraordinary, why make it more so by extraordinary expedients? The constitution and rules supply a method of conduct for almost every possible exigency. If Dr. Elliott had vacated his chair by his misconduct, every one would have understood a call upon the last preceding moderator present to take the chair. No one would have mistaken the operation for a revolution or secession, for its strict conformity to rules, would have argued its being a submission to the laws.

And now, gentlemen, you will observe the deceptive nature of this whole process, to those who were not admitted to the secret. A resolution is passed at a caucus, and promulgated, that our adversaries were about to organize an opposition Assembly, which they would claim to be the true Assembly. Mr. Cleaveland rises, and reads a paper, purporting to emanate from a party. "*We*," says he, "have been advised by counsel learned in the law." Who had been advised by counsel? Not the Old School, but the New School! He then further states, or reads, that the same "we," that

had been so advised by counsel learned in the law, that is, the New School party, would proceed to organize the Assembly, with the least "interruption" possible. Interruption to whom? Certainly, to the Old School party; that *portion* of the commissioners spoken of in the caucus resolution. If Mr. Cleaveland meant, as they now assert, to address this resolution to the whole house, (I have given you my reasons already for disbelieving this,) he certainly did it in a very deceptive way. Will any man have the audacity to assert that the Old School party would have remained silent, had they been fairly informed of the use that would have been made of their silence? The effect given to silence, by the rules of the General Assembly, was only intended for ordinary occasions. When a question is put by the usual officer, in the usual form, there is but one alternative, aye or no—and silence may be reasonably construed into acquiescence. But when the presiding officer, and a member, comes into collision, and the one calls for the ayes and noes, and the other cries *order*, is it not as, or more reasonable, to construe silence into obedience to the cry of order, which merely requires silence, than into an affirmative vote? Aliud est dicere aliud tacere, is the dictate of common sense. He that, under the extraordinary circumstances of this sudden, rapid, indirect, ambiguous motion, would take advantage of our silence, must show that we were not surprised, that we were not deceived, that we were not mistaken, and that our silence was a deliberate concurrence. You will not, nor will this Court, permit these solemn things to be made a mockery; nor these important rights to turn upon a quibble!

Another fact ought not to be omitted, in examining into the intentions of our adversaries, in making these movements. We maintain that they intended to organize another Assembly, not by our votes, but against our votes, and to maintain that theirs was the real Assembly. That the position, now assumed by them, that they organized by our votes and are the continuation of the same Assembly which commenced its organization under Dr. Elliott, is an after thought. Now hear a further proof. A written copy of a resolution was handed to Dr. Beman, in these words:

"Resolution of the Trustees of the Seventh Presbyterian Church, adopted May 7th, 1838:

"*Resolved*, That the General Assembly of the Presbyterian Church, which is to convene in Philadelphia on the 17th instant, and which shall be organized under the direction of the moderator and clerks officiating during the meeting of the last General Assembly, shall have the use of the Seventh Presbyterian Church, during their sessions, to the exclusion of every assembly or convention which may be organized during the same period of time."

Upon the receipt of this paper, the pseudo Assembly adjourned to the First Presbyterian Church; thereby distinctly acknowledging that they were not the General Assembly which organized under the moderator and clerks of 1837. Various other acts of theirs denote the same foregone conclusion. Their moderator did not demand the chair, but retired to the nethermost part of the

building and stood in the aisle, his party crowding too much around him. Their clerks did not demand the roll, nor take the clerks' seats, but performed their important functions standing, and without implements of writing.

We shall show you, that their whole proceeding was carried on in tumult and disorder. That the important motion, made by Mr. Cleaveland, was not reversed so as to give us an opportunity of voting had we desired it. We will bring forward every commissioner within our reach, who was present on that occasion, and they will tell you that such was the noise, the clapping of hands, the hissing, and other disorderly manifestations, from the mixed crowd on the floor of the house and in the galleries that they could not, and did not hear.

I have now, gentlemen, gone through the case which we shall exhibit to you. I have stated what we shall prove, and have, at the same time, pointed out the conclusions which we seek to maintain by that proof. Before, however, I leave the subject, permit me to remark, that any language which I have used, which may savour of asperity, has been used impersonally. I respect the gentlemen of the party, against whom I am called to act professionally, both as individuals and as ministers of the Gospel. They will, however, permit me to point to one particular in which, I fear, *they* have acted with harshness. Why is it, that almost the first act that was done, under their new organization, was the removal, from office, of the venerable patriarch of this church? Out of eighteen trustees, whom they might have removed, why did they attack him first and make him the first defendant in a proceeding, criminal in its form? A reverend father, who was named and constituted trustee, by the act of incorporation itself, and who has been continued, for forty years, amidst all the vicissitudes of party. Does this not betray some bitterness of feeling? To the fluctuating faith of their party, does not this inflexible example prove a reproach? He has stood for years, in the consistency of his Doric simplicity, a land-mark, from which might be measured the deflections of erratic opinion.

Ours is, perhaps, gentlemen, the unpopular party. There may, perhaps, be some severe and uninviting features in our faith. It is, however, of too high and inflexible an origin to be accommodated, at will, to the prejudices of the many. We count not upon the approbation of the light and frivolous, but, I am convinced, that all thinking and discreet men will unite with us in a fervent aspiration, that our visible church, the ark of a pure theology, may endure till that great day, when the angel of the Apocalypse shall raise his hand to heaven and swear, that time shall be no longer.

Mr. Hubbell having concluded his opening on behalf of the respondents on Wednesday, P. M., March 13th, then offered in evidence in support of their case from the minutes of the General Assembly of 1837, page 350, [See page 59 of this report.]

Section 3d of a protest against the abrogation by the Assembly of the "Plan of Union."

The respondents now called the *Rev. John M. Krebs.*

Interrogated by *Mr. Hubbell*, the witness testified: I am a minister of the Presbytery of New York, I reside in the city of New York, and am pastor of the Rutgers' street Presbyterian Church in that city, in connexion with the Presbytery of New York. I was permanent clerk of the General Assembly of 1837, and also of that of 1838. Dr. John M'Dowell, of Philadelphia, the stated clerk of the General Assembly, and myself, were the Committee of Commissions. The difference between the stated and permanent clerks is this. The latter makes up the journal of the Assembly from day to day, reads it, and keeps the papers until after the dissolution of that body, when he hands them over to the stated clerk. The one is the writing clerk, and the other the depositary of the records. There is also another clerk elected at the meeting of the Assembly, who is called the temporary clerk, whose business is to assist the permanent clerk. His office ceases with the dissolution of the Assembly. The Committee of Commissions, as I said, consists of the permanent and stated clerks. Some weeks previous to the meeting of the Assembly of 1838, Dr. M'Dowell and myself had published, over our signatures as clerks, in several religious newspapers, a notice, that between four and five o'clock on the afternoon of the day previous to the meeting, and between nine and eleven o'clock on the morning of the meeting, the Committee of Commissions would be in attendance, to receive and examine commissions.

In preparation for the pressure of business usual at the opening of the Assembly, I had prepared a blank form before I left New York, embracing the usual opening minute with a list of the synods and presbyteries, to which I might attach the names of persons who might present commissions. These were our preliminary arrangements. In this blank roll the names of one hundred and twenty or perhaps one hundred and thirty commissions were received by us on Wednesday afternoon the 16th of May. Every person presenting a commission is asked, Are you the principal or the alternate named in this commission? The principal is the one first named, and then to provide for his absence, another is appointed, who in any emergency may take the seat. If any one answers that he is the alternate, we make an arbitrary mark, to designate the very man who presented the commission. The clerks, as a committee of commissions, insert the names of those whose commissions we approve, on the roll. A large number were inserted on the morning of the next day. The roll, as completed by Dr. M'Dowell and myself, contained the names of about two hundred and twenty, perhaps two hundred and fourteen commissioners, and four or five were not included on account of informality or some circumstance on which we could not decide. We made a separate report in relation to these informal commissions. Those commissions which had any defect we kept separate from the others in order to refer them to the Committee of Elections, which committee is appointed as the first business in order at the opening of the Assembly. This committee is appointed from amongst those members of the house whose seats are undisputed, to examine and report on the informal or defective commissions.

The first business, according to a standing rule of the General

Assembly, is the appointment of this committee. Of those commissioners which presented their commissions to us on the evening of Wednesday, there were not more than five New School men. The others presented their commissions next morning. Those who presented their commissions on Thursday morning, were both New School men and Old School men. Their commissions were examined, and, so far as found correct, were enrolled. I cannot give the precise order of events; but some time in the morning of Thursday, Rev. Albert Barnes and Rev. Mr. Brainerd presented their commissions from the Third Presbytery of Philadelphia. We told them that we could not receive the commissions. Mr. Barnes expostulated with Dr. McDowell; but Dr. M'Dowell told him that we could exercise no discretion on the subject; that we could not receive a commission from that presbytery, which had been dissolved by the General Assembly of 1837; that the Assembly itself, and not its officers, must now decide the matter. The Rev. Miles P. Squier also presented a commission, purporting to be from the Presbytery of Geneva, which we also refused to receive, telling him that the Assembly of 1837 had declared the synod to which his presbytery belonged, no part of the Presbyterian Church; that his remedy must be in the Assembly, and not in its officers. Mr. Squier, I think, observed to Mr. Barnes, "Your case is different from ours; you have been dissolved." He replied, "I beg your pardon, sir; but you are mistaken."

[The counsel for the relators objected to the witnesses going into these conversations between Mr. Barnes and Mr. Squier.]

Several others presented commissions of a similar character, which we refused to receive. Rev. Dr. Richards presented one; and to him we gave the same answer, that we had no right to receive the commission; no liberty to decide his case, unless further orders were given to us by the Assembly. We treated all alike, from the four synods, were very civil, and told them that their only remedy was in the Assembly.

Next we were met by a very respectable deputation, one of whom was Mr. Squier, who said they were authorized to offer the commissions from the presbyteries within the four excinded synods, and to demand that they should be received. We answered, that they could not be received or enrolled, and gave an absolute refusal. One gentleman asked whether, "We could not," meant, "We would not." I replied, (being well acquainted with him,) in a pleasant manner, that we did not intend to be abrupt, but if he preferred that, I *would not* receive it. Rev. Mr. Aikin, of Cleveland, asked those standing by, to take notice of the refusal. I observed, that this was not necessary; that if he chose, we would endorse the refusal upon the commissions. He said, "We shall complain to the Assembly." I answered, that that was just what we wished: that their remedy was in the Assembly, and it would meet the next hour. I recollect nothing more in regard to the meeting of the Committee of Commissions.

Being interrogated as to the locking of the door, the witness said: We occupied a small room under the pulpit: from it two doors, one on each side of the pulpit, opened into the body of the

church. On each end of the room are two large doors, one opening into the court in which the house stands, and the other into the grave-yard. On Wednesday and Thursday, we found the disposition of persons to press through the little doors by the side of the pulpit, was a great annoyance. They interrupted us, while attending to commissioners who presented themselves. I repeatedly locked the door that opened from the session-room into the grave-yard, and that on the left side of the pulpit, as you face the audience. My table was near that door. When any one wished to enter, I, perhaps not being so kindly disposed as I should be, refused to open it. The room may be eight or ten feet wide. The five large doors opening into the body of the church were open, and one of the little doors from the session-room constantly so. The door by which we sat was closed, in order to prevent the room from being made a passage-way. Application was made for admission by Old School men whom we excluded. It is probable that we refused admission to some of the New School men also, as we excluded a number, telling them to go round by the other doors. We drew no line of distinction. Our purpose was simply to prevent interruption to our business in relation to commissions and the completion of the roll. Public worship commenced at 11 o'clock. A. M. We remained in the room during the time occupied by the sermon, and went on with the examination of commissions. This appeared absolutely necessary, as a number of commissions had not yet been examined, and we could not otherwise have completed the roll in season for the Assembly. We entered the church by the door which had been locked, as before stated, about five minutes before the religious exercises were closed. I think they were singing at the time I entered the body of the church, the prayer after the sermon being over, and the moderator still in the pulpit. I took my stand by the clerk's table, which is under the pulpit, and just beneath the moderator's chair, which is raised from the floor. The table is appropriated to the business of the clerks, and is from four to five feet long. My position, ordinarily, is at the head of the broad aisle, with my back to the audience and my face toward the moderator, for the convenience of writing. I stopped before I reached my seat, and took a station on the west side of the table, facing the audience: I cannot say whether I sat or stood. I never before had seen the house so crowded. The galleries and the floor were very full. I either sat or stood on the west side of the table, facing the audience, until Dr. Elliott entered the chair, as moderator. I was present during the constituting prayer, immediately after which Dr. Elliott called on me to report. But I did not speak, as I saw Dr. Patton on the floor, and heard his voice, saying, "Moderator, Moderator," two or three times. At the same time a voice fell on my ear, calling on me to go on with the roll—and Dr. Elliott told me to go on; but I remained quiet. Dr. Patton said, that he wished to offer certain resolutions, and to take the sense of the house upon them without debate. The moderator told him he was not in order, as the first business was the report of the clerks upon the roll. Dr. Patton said, that he had the floor before

the clerks. The moderator replied, that the first business was the report on the roll. Dr. Patton said, I must take an appeal from your decision to the house. The moderator said that he was out of order; for, as there was no house in existence, there could be no appeal. I was still waiting until the floor should be cleared, and silence restored. The precise terms of this colloquy I do not pretend to give, but only the substance. Dr. Patton sat down, and I proceeded to report the roll, as clearly and distinctly as I could. I also reported four or five informal commissions, which had been presented but not enrolled, that they might go to the Committee of Elections, which it was usual to appoint then. I did not report the commissioners from the excluded synods. We did not think we had a right to do so.

I ought to state, however, that there was a difference of opinion between Dr. M'Dowell and myself, in regard to this subject. I supposed it our duty to receive and report, but not to enrol them. He thought that we should not receive them, any more than commissions from any strange body which was not Presbyterian: that their only remedy was in the Assembly. He being older than myself, I yielded my assent, though retaining my opinion. I believed then, and I believe now, that we ought to have received them, and reported on them, stating the circumstances. Dr. M'Dowell would not consent to this, and I accordingly made such a report as he would consent to. After the roll had been read, the moderator announced that those persons whose names had been reported, were to be considered as duly elected members of the General Assembly; and added, that if there were any other commissioners present, who had not had an opportunity of handing in their commissions, now was the time to present them. Dr. Mason rose, and, holding a bundle of papers like that here exhibited, and which I presume is the same, said, that he offered certain commissions from the presbyteries within the bounds of the four disowned synods; that he had offered them to the clerks, who had rejected them; and now moved that the roll should be completed, by inserting the names of the commissioners to whom they belonged. He did not call them, however, the *disowned* synods; perhaps he named them. This is the substance of what he said. The moderator said to him, "Your motion, sir, is out of order at this time." Dr. Mason said, that, with great respect, he must appeal to the house from that decision. The moderator replied that his appeal was out of order, and Dr. Mason obeyed him, and sat down: that is, he sat down when the moderator told him his appeal was out of order. Then Mr. Squier rose, on the opposite side of the aisle from Dr. Mason, and said, (I do not recollect the whole of what he stated,) that he had a commission from the Presbytery of Geneva; that he had offered it to the clerks, and it had been refused; and that he now tendered his commission and demanded his seat on that floor. The moderator inquired whether that presbytery was within the bounds of the Synod of Geneva, or, of the disowned synods; I do not recollect precisely which. Mr. Squier answered, that it was. The moderator then said, "We do not know you, sir." It was at this

point that Mr. Cleaveland rose, and began to read a paper; what it contained, or what he said, I cannot tell. There was a noise of calls to order. The moderator called to order; and the members about me cried "Order, order." If I recollect any thing at all of what Mr. Cleaveland said, it was something about *legal*. I thought he used the word "legal," and it was the only one impressed upon my memory. I do not recollect any thing more. I can only give my impression of what he was about.

Mr. Meredith objected to the witness' saying more, as he had stated that he recollected nothing more.

The *Court* said: The witness may state what he recollects.

The *Witness* proceeded: I don't recollect any thing else distinctly; I don't know what Mr. Cleaveland said. I did not know then, what he said, and had only a confused notion from having caught the word legal, or something of that sort; but it is all darkness to me. I was looking on, endeavouring to see and hear. My recollection is, that Mr. Cleaveland gradually turned round, until he faced the western wall. While he read, there were calls to order from the moderator, and those near him, mingled with the waving of hands, and the voices of some saying "Hush, hush!" These things continued for a little while. The reason that I did not, and could not hear, was, that there was too much noise. I should observe that by this time, during the colloquy between Mr. Squier or Dr. Mason and the moderator, I had moved round to the place which I usually occupied, a little stool, without a back, so that I could face either the audience or the moderator. Mr. Cleaveland's reading, or speaking, or whatever it was, continued; I could hear his voice mingling with the others. Then there was a sort of confused buzz, and the next distinct sound, overtopping all the rest, was a loud "Aye!" Very rapidly after, at so small an interval that I could not pretend to mark it, but very quickly, in rapid succession, there was another loud "Aye!" I heard no motion, nor did I hear any question put. I think, at this time, the cries to order were not so frequent as they had been. My attention was particularly directed to the place where Mr. Cleaveland stood, but many persons were now standing up between me, as I stood on the floor, and the actors in the scene, and shut them out entirely from my view. I had risen, and was standing, looking sometimes towards the moderator, and sometimes back again. I think I heard a third "Aye!" and that very loud, and a few "Ayes" distinct from the mass, in a very shrill key. I had no idea at the time to what these "Ayes" were a response. I endeavoured to hear in order to record the proceedings—as clerk, to catch the motion, if I could hear any. Well, the next thing I recollect was a general movement towards the east door of the church of the body of men around Mr. Cleaveland. I could see, as they moved off, some putting on their hats, and some jumped over the partitions intervening between the two ranges of pews. One person returned from the door, as near as I could see, and shouted out, that the General Assembly of the Presbyterian Church would meet in Mr. Barnes's lecture-room immediately. I don't know that it was Dr. Fisher. I don't know whe-

ther it was he or not, but I think it was not. It was a notice given by some person who returned, for the information of the persons assembled there. I don't recollect the exact words of the notice. The persons engaged in this affair having moved off, the tumult subsided, and the Assembly became quiet. I am a little near-sighted, but this defect is repaired by artificial means. I hear very well. The Assembly continued to sit in the Seventh Church about two weeks, or longer. The session certainly continued at least two weeks. The great body of those who acted with Mr. Cleaveland moved off down the aisle very regularly; I speak of but a few persons who had their hats on, and jumped over the backs of the pews. A mass of men moving off in that way must have made some noise. During the time that the *tumult* continued, (this word, which I use without intending any disparagement, conveys the very idea that the scene impressed upon me at the time,) a motion was pending for the appointment of a Committee of Elections. Whether this motion was made before Dr. Mason rose, or while Mr. Cleaveland was on the floor reading, I can't say. It was certainly one of the two. The noise was very great. Some called to order, and others said, "Hush! let them go on." The moderator said, we would wait till the tumult should subside, and the house become quiet, and then proceed to business. The moderator merely sat still in his chair, or perhaps he rose. I kept in my place, waiting until we could go on. After the departure of the mass to which I have referred, the appointment of a Committee of Elections was made, to whom were referred all the doubtful commissions. This was the first business done after their departure. I don't recollect any thing else that was done then. I cannot tell the length of time that elapsed after Dr. Patton arose. There was the interval, between Dr. Patton and Dr. Mason's rising, of my reading the roll. From Mr. Cleaveland's rising till the departure of his friends from the church, was, I should think, four or five minutes. I have no distinct impression as to the time: I was very much amazed, and looked on in great wonder. Dr. Elliott had made a call for commissions when Dr. Mason rose. I cannot say whether the motion for the appointment of a Committee of Elections was made after Dr. Mason, or after Mr. Cleaveland rose. I did not hear any "Noes" on Mr. Cleaveland's motion. I did not myself vote: I was not a member of the Assembly. The gentleman who asked me whether by "I *could* not," I meant "I *would* not," was the Rev. George Duffield. He was not a commissioner, but having come merely with his friends, he interposed. Mr. Duffield had been for five years my pastor, and it was on the ground of my familiarity with him, and without meaning to be uncivil, that I told him, that if he liked that form of expression better, I *would* not. I have with me the roll that I called. [Witness here produced papers.] This is the original paper, the blank prepared by me before I left New York. The roll as reported and read by me, contained the names of two hundred and fifteen members. Afterward were added five other names from commissions that were defective, informal, or irregular, making in all, two hundred and twenty. These last were

referred to the Committee of Elections, and on their report were entered on the roll, with the exception of a minister and elder from the Presbytery of Greenbriar, a new presbytery, which had been erected by the Synod of Virginia, and was formed by a division of the Presbytery of West Hanover. Their commissions were referred back to the Committee of Elections, that they might inquire concerning the regularity of the establishment of the presbytery. Again they reported, and both were admitted. Two hundred and twenty therefore were reported that day. The commissioners so enrolled had all presented their commissions to us. No name was on the roll for which we had not a commission in our hands, nor unless we were satisfied that the commissioner was present. I did not call the roll in the morning, after they had retired to the First Church; but on the opening of the Assembly in the afternoon, a motion was made to call it, to see how many answered, and to mark the absentees. Of those whose names were on the roll, there answered one hundred and fifty-two. I speak to the best of my recollection of numbers, about which I took pains to inform myself. They are recorded in that manuscript, or in the subsequent part. The minutes occupy five or six books of twelve sheets each. There were recorded present one hundred and fifty-two, and sixty-eight absent. On the next morning, three of these sixty-eight appeared, and requested that their presence might be recorded. These were Dr. Green, Mr. King, and Mr. Snowden. They had been enrolled and present the day before. Mr. King was either an elder or minister: both the others were ministers. They had been present on Thursday morning; and their absence at the time of calling the roll was excused, because of the inclemency of the weather, and their feeble health. Of the remaining absentees, two others subsequently appeared, and voted on several propositions which came before the Assembly up to the time of its dissolution. I saw them, and heard them vote and speak. I don't know whether they went off with the party that retired to the First Church. They were the Rev. Elipha White, and the Rev. Mr. Magruder, of Charleston Union Presbytery. No notice was taken of their subsequent appearance: they made speeches and voted. At the dissolution of the Assembly, Mr. White came and had his mark removed from the roll, saying that he had been out only a few minutes.

There were subsequently added to the roll the names of *four* commissioners. One of them was Mr. John Green, who first attended on the ninth day of the session. Another was the Rev. A. W. Lion, a commissioner from the Presbytery of Arkansas, who first attended on the twelfth day of the session. On the eleventh day of the session, the two commissioners from the Presbytery of Salem, in the state of Indiana, Rev. Wm. W. Martin and Henry L. Fabrigue, attended for the first time. The names of these *four* commissioners were not inserted on the original roll. They appeared before the Committee of Commissions, and that committee having approved their commissions, added their names to the roll. We were not authorized to inquire why they were not in attendance at an earlier day. They are accountable to their own presbyteries

for their attention to the objects of their appointment. I think, however, that when they appeared, I inquired of them what had happened to detain them. Messrs. Martin and Fabrigue arrived late, and looked sick. During the calling of the roll, to mark absentees, Mr. Scott was inquired of, or he himself rose to state, why he did not answer to his name. I think Mr. Scott was afterwards present, and that his case is referred to on the minutes. The names of these two were upon the original roll. Mr. Scott asked permission to state his reason: he did not answer to his name, but got up immediately afterwards. I do not recollect what reason he assigned for not answering to his name when called on the roll.

The examining counsel asked the witness when Mr. Scott first appeared.

Objection was made to the minute investigation into which the counsel appeared to be going, respecting the attendance of individuals.

The objection was sustained by the Court, but subsequently waived by the plaintiff, and the witness proceeded:

Mr. Scott attended on the Assembly on that afternoon. I have no personal acquaintance with him, and should not know him if I saw him. The minute which I have referred to, that relating to Mr. Scott's explanation, was written by Mr. Crane, the temporary clerk. The minute does not state his reason. On a subsequent day, but on what occasion I don't recollect, Mr. Eagleton rose, when his name was called, and said that he did not feel at liberty to acknowledge that as the Assembly. He did not say that he had joined the other: I understood him to repudiate both. Dr. Hill was one of the two hundred and twenty. He was marked absent on the afternoon of the first day, and that is all that I know about him. Mr. Jamieson was marked absent, and that is all I know about him. Mr. Ralph Smith was also marked absent, and I know nothing further in regard to him; I mean of my own knowledge: I am not speaking of rumours, or information subsequently received.

Cross-examination.—Interrogated by *Mr. Meredith*, the witness said: The papers in my hand are not mere memoranda, made by myself, of the occurrences of the organization of the Assembly; I will tell how they were made up. At the opening of the Assembly in the afternoon, I read the minute I had prepared of the occurrences of the morning, and proposed to notice, in a general way, that a disturbance had taken place. It was objected to. It was said, that it was not usual to notice transactions which led to nothing; as when a resolution had been debated, and withdrawn, it was not customary to insert it on the minutes; it had been abortive. It was said, during the remarks on the correctness of the minutes, that my report should not stand. I think it was at the same time, though my recollection is a little confused, that a committee was appointed to prepare a minute, which should give a full account of the transaction. My account was very concise, merely stating that Dr. Mason made a motion, which was declared out of order by the moderator; that then a scene of confusion occurred, and that after the tumult subsided, we proceeded to business. A committee, the

record does not state whom, was appointed. I recollect that Dr. Nott and Dr. Elliott were on the committee; these two I recollect, and perhaps might remember others, if there names were suggested. I think a minute was made of this appointment. I am sure that I made a note with my pencil on the margin of the rough minutes, that that was the place where it should be inserted. It is very customary for the Assembly, when not satisfied with a minute, to appoint a committee to prepare one, to take the place of the clerk's. In such case, all I have before made is erased or cut out. That was the way here. There is no record here of the appointment of the committee. This record is the prepared minute. It is inserted, as you see, on different coloured paper from that which I brought from New York.

Interrogated by *Mr. Wood*, the witness said: I do not remember who moved the appointment of a committee of elections. I presume the motion was seconded. I made a minute of it at the time. I am in the habit of making full records, if possible, at the time, and if not, notes to be filled up afterwards. I am not confident whether the motion was made while Mr. Cleaveland, or while Dr. Mason was speaking. My strong impression is, that Dr. Mason was on the floor, and that the proceeding was interrupted by the noise. I cannot tell certainly, whether it was made while Dr. Mason was on the floor, or after he sat down, or after Mr. Cleaveland rose. I don't know whether the moderator was in order, when he made proclamation, that if there were any who had not yet presented their commissions, they should hand them in. I don't know: you must ask him. I have no doubt of it. This proclamation preceded the appointment of the Committee of Elections. The appointment of this committee was not made until after Mr. Cleaveland's motion.

Mr. Joshua Moore's commission was presented after the proclamation of the moderator, and after the appointment of the committee. He did not present it until after the election of a new moderator. The record, in regard to this matter, is wrong; it was not made in my presence. I will say now, what was done in this matter. The record, in regard to Mr. Moore, was contained in the report of Dr. Elliott. Mr. Moore did not come to me, until after the election of the moderator. I informed Dr. Nott that, at a certain stage of the business, Mr. Moore's commission was presented; and he inserted my information in the wrong place. There was, in the Assembly of 1838, some action on the excinding resolutions of 1837; but no other, that I know of, than what is contained in the "famous three acts," as they are commonly called. The excinding resolutions were not reversed. There was no action, either to reverse or to affirm them, except in what are commonly called "the famous three acts:" these acts were adopted on the report of the committee for the pacification of the Church. I cannot interpret these acts: they are very long. I do not know whether they treat of the four synods as excinded synods. I merely know, in a general way, that they provide for the incorporation with the church, of all in those synods who should prove to be purely Presbyterian in doctrine.

By Mr. Meredith.—Some days the roll was called, and some not. At the end of the sessions of the Assembly, it was called; and all who were absent without leave, were so marked. Very few, perhaps from six to ten, had obtained leave of absence.

In answer to an inquiry of the Court, the witness said: I cannot say, whether the motion to appoint a committee of elections was made while Dr. Mason was on the floor. Part of the time, I was attending to my ordinary business, and, at other times, was looking towards the interruption.

Re-examined by *Mr. Preston*, the witness said: It is usual, shortly after the Assembly is organized, to appoint a standing committee of four or five members on leave of absence. If any member wishes to go home, he applies to them, and, if they think proper, they give him leave, and report the fact, at the first opportunity, to the house. I think a few asked leave of absence; I cannot say certainly, how many, for I have nothing to guide my recollection.

The defendants called *Dr. Wm. W. Phillips.*

Interrogated by *Mr. Hubbell*, the witness said: I am a minister of the Presbyterian Church of the Presbytery of New York. I was a commissioner to the General Assembly of 1838. I was present at the opening of the General Assembly on the 17th day of May of that year. I occupied a pew next to the wall of the church at the bottom of the pulpit-stairs. The place which I occupied was near the south-west corner of the house. From the close of the religious exercises, and after the moderator had opened the meeting of the Assembly with prayer, a very short time elapsed until Dr. William Patton arose and made his motion, stating that he desired to offer certain resolutions which he held in his hand. The moderator stated to him that his motion was out of order at *this* time. He presented himself to the house, and addressed the moderator, saying "I hold in my hand certain resolutions which I desire to offer for the consideration of the Assembly." The moderator told him, "you are out of order. The first business is the report of the clerks on the roll." Dr. Patton said his resolutions had relation to the roll. The moderator then said, "your motion is out of order at this time." He appealed from the decision, and the moderator pronounced the appeal to be out of order, as he said there was then no house to appeal to. Dr. Patton then took his seat, and the moderator directed the clerks to proceed with the report on the roll. The report was read by Mr. Krebs, the permanent clerk. Dr. Erskine Mason arose, and addressing the moderator, said he held in his hand certain commissions which he wished to have added to the roll. The moderator asked whether they had been presented to the clerks, and whether the commissioners therein named were from presbyteries which were belonging to or in connexion with the General Assembly of the Presbyterian Church, at the close of its session in 1837. Dr. Mason replied that they were from the presbyteries within the bounds of the four Synods of Utica, Geneva, Genessee, and Western Reserve. The moderator then said, your motion is out of order, as it was commissions of a different kind were called for. Dr. Mason then said that he would respectfully appeal from

the decision of the moderator. The moderator decided that the appeal was out of order. Mr. Squier then rose, and said he held in his hand a commission which had been tendered to the clerks, and which they had refused to receive, and that he now tendered it there, and demanded his seat as a member of that house. The moderator inquired of him what presbytery his commission was from. Mr. Squier replied that it was from the Presbytery of Geneva. The moderator then said, "*We do not know you, sir.*"

Mr. Cleaveland then rose, and read a paper, the contents of which I did not hear distinctly, though I heard some detached sentences. I heard him say "Counsel learned in the law," and something concerning the organization of the General Assembly in the shortest time possible. I could not hear all. There were incessant calls to order from the moderator and several members. Although I had determined to keep still, I found myself twice saying in an under tone, I hope we shall have order. Some extended their hands, and said "Hush, hush," and some said "Oh shame! shame!" I could see Mr. Cleaveland from where I stood, and heard him make a motion, as I understood it, that Dr. Beman take the chair. I heard a vote of "aye!" very loud, and one shrieking voice above the rest. The members in the neighbourhood where I sat did not vote on his motion. Immediately, there was a movement in the aisle, and Dr. Beman came out of the pew. I heard a motion made for the appointment of clerks, but do not recollect that I heard their names. I heard no reversal of the questions, and no negative votes. I did not hear the name of Dr. Fisher nominated as moderator, nor knew I that he had been appointed until I was so informed next day. I think I heard the motion for adjournment. I heard no prayer. I am not certain in regard to the adjournment, for a proclamation of the adjournment was afterwards made at the several doors of the church. I do not know by whom the proclamation was made. The movements in these proceedings were very rapid. I am not able to judge how long, but should say that the whole time occupied, from the period when Mr. Cleaveland rose to the time of their adjournment, was not more than *five* minutes. It may have been longer; but every thing was done as rapidly as possible. During this time there was much confusion. From the time of the motion for Dr. Beman to take the chair, some were standing, some rushed into the aisle, and most of these remained standing. My impression is, that there were some *ayes* came from the gallery. The place that I occupied was, I think, one step above the floor. I was obliged to stand, it being painful for me to sit; on this account I chose that position, which I occupied during most of the time that the General Assembly was in session. Those who retired, went out in a crowded manner, very rapidly. There was a great press, whether by members of the body, or others, I cannot say. There was a great dust after they got out of doors. There was a rising in the gallery, manifesting great interest. There may have been a noise there; indeed, there must have been, from the persons who occupied it rising from their seats, coming forward, and looking over. I suppose the Old School party were generally

in the part of the house near where I was. We had occupied the house from nine o'clock in the morning, for prayer and consultation, and remained in the seats which we had then taken until the closing of the Assembly. I heard no votes from the Old School, upon any of the questions put by members of the other party. There were cries of order from the different individuals among them, as well as from the moderator.

Cross-examination.—Interrogated by *Mr. Meredith*, the witness said: I was not ordained as a minister of the Presbyterian church. I was ordained by the Associate Reformed Presbytery of New York, in the year 1818, but was installed, in 1826, as pastor of the First Presbyterian Church in the city of New York. I came into the Presbyterian Church in 1822, in accordance with the Plan of Union agreed to between the Presbyterian Church and the Associate Reformed Church in that year. I was not re-ordained when I came into the Presbyterian Church. The Associate Reformed Church united with the General Assembly of the Presbyterian Church, and was acknowledged as a constituent part thereof. The Associate Reformed Church was Presbyterian; quite as much so, we thought, as the General Assembly. The Confessions of Faith and Catechisms were essentially the same. Both adhered to the Calvinistic creed. One of the conditions of this union, agreed to, was, that we of the Associate Reformed Church should retain our distinct organization as a presbytery. There may have been some slight difference in the phraseology of the two Confessions of Faith, but there was no substantial difference; they were substantially the same. The Westminster Confession and Catechisms are the standards of both.

Question by Mr. Wood.—Was there not some difference in the mode of administering the rite of baptism, and in receiving the communion, as prescribed by the Confession of Faith of the Associate Reformed Church.

Witness.—There was a slight difference, I think. I still use the form I always have, in the admission of members, and in baptism. I suppose these forms do differ from those of the General Assembly. There is a directory in the book of the Associate Reformed Church. I did not continue to use this directory, but have used that of the General Assembly since I was installed. I have not changed my doctrinal views at all, but continue to refer to the same Confession of Faith, and Catechism, because they are the same in both denominations.

Mr. Meredith handed to the witness the book of the Associate Reformed Church, and requested him to see if that, (pointing to an article in the book,) is the act of adoption of the Confession of Faith by the Associate Reformed Church.

Witness said there was subsequently, I think, an alteration in that part which relates to civil magistrates. I think this is not the Confession now used. The doctrines are essentially the same; indeed, the Confession is the same, with the difference mentioned. I am not prepared to answer whether this is the act of adoption. The Confession was subsequently changed in the particular which

I have noticed; perhaps there was another act of adoption at that time.

The defendants called *Mr. Stacy G. Potts.* Interrogated by *Mr. Hubbell,* the witness said: I reside in the city of Trenton, New Jersey. I was in Philadelphia in May, 1838. I was present at the organization of the General Assembly on the 17th day of that month. I went to the church in Ranstead court, directly from the steamboat, about half an hour before the commencement of the preliminary religious exercises. I took my seat in one of the wall pews toward Fourth street. I entered at the east door of the church, and took my seat beyond the centre of the church from the moderator's chair. Every thing was perfectly quiet until the religious exercises had closed, and the moderator had taken the usual station occupied by him when presiding over the deliberations of the General Assembly. Shortly afterwards, a gentleman arose and made some remarks, but the noise at the time prevented me from hearing what passed. In a short time he took his seat. I then heard the clerk, as I supposed, call over the roll of the General Assembly. There was then another interruption by a gentleman whom I did not know. From that time the confusion in the part of the house where I was, increased greatly. My view was so intercepted by the people standing up that I could not see what was going on. As I perceived that it was a scene of some interest, I endeavoured to ascertain what was going on, but could not. I then got up myself and remained standing in my place. The first sound which I could distinctly understand was a very loud "*aye,*" which came from different parts of the house, and, I think, from the galleries, and from females. I shortly afterwards heard another very loud "*aye.*" I did not hear any motion, nor knew what the aye meant. It appeared to be expressing a visible assent to something. I was located so that I could not hear what was going on, but I saw several individuals move into the aisle. It was impossible to hear, where I was seated, a syllable of what was spoken in ordinary language. I did not know one person in the vicinity where I stood, and cannot tell whether any person voted who was not a member. I think there were two or three *ayes,* at short intervals: two or three votes were taken in this way. I heard no question proposed during the whole time. I think that I heard a few scattering *noes* on one occasion. Whether this was on the first or subsequent questions I don't know. I saw a crowd near the centre of the church. I was located in a wall pew, a little farther toward Market street. The ends of the pews are against the wall. The next thing which I noticed was a general movement toward the doors. In a very short time after this they went out. Immediately afterwards a gentleman presented himself at the door and proclaimed, in a loud voice, that the General Assembly of the Presbyterian Church had adjourned. He made a similar proclamation at three doors of the church. At the third door, appearing to be a little hoarse, he cleared his throat and repeated it very loudly. I heard no motion for adjournment; nothing at all of it.

Cross-examined.—Question by Mr. Meredith.—You belong to the Old School party, I suppose.

Witness.—I am a member of the Old School Church at Trenton.

Defendants called *Dr. William Harris.* Interrogated by *Mr. Hubbell,* the witness said: I attended in the church on Ranstead court, on the 17th of May, 1838, as a spectator. I stood in the west aisle, near the south-west corner of the church, in front of Dr. Phillips, and near him. I heard the moderator call the house to order, and state that the first business was the reading of the roll. He directed the clerk to read, but the clerk did not begin immediately, and a gentleman rose, saying that he had a resolution to offer. He premised his remarks by "Mr. Moderator." I was not personally acquainted with the gentleman, but learned that it was Dr. Patton. The moderator said, "Sir, you are out of order at present." The gentleman said, "I appeal from your judgment, sir." The moderator decided that the appeal also was out of order, and Dr. Patton sat down, and the clerk proceeded to read the roll. When he had finished, another gentleman rose, who, as I learned from a bystander, was Dr. Mason. He said that he had some commissions to offer, which had been presented to the clerks and refused. Dr. Elliott asked him where the commissions were from. He answered, I think, that they were from the Synods of Utica, Geneva, Genessee, and the Western Reserve. Dr. Elliott then said, "Sir, you are out of order at present." Dr. Mason replied, "Mr. Moderator, with due respect, I must appeal." The moderator said that the appeal was out of order. A third person, who, I learned, was Mr. Squier, then rose. He said he had a commission to offer, which had been rejected by the clerks, from the Presbytery of Geneva. The moderator asked him whether that presbytery was in the Synod of Geneva. Mr. Squier answered that it was. The moderator said, "Sir, we do not know you." Afterwards a fourth gentleman arose, whom I knew to be Mr. Cleaveland: I had seen him before in the General Assembly. He was in a diagonal direction from me, and so far distant that I could not hear distinctly all he said; but I heard distinctly the words, "by the advice of counsel learned in the law," and "about to proceed to organize the Assembly." After a few remarks, he began to read. The moderator called him to order, but he continued. The moderator called him to order three or four times, but he proceeded. Dr. Elliott called to order again, rapped on the desk with his hammer, and then sat down. Mr. Cleaveland moved that Dr. Beman, or Beecher, should take the chair, and said, "Those who are in favour will say, aye." There was a general "Aye!" in the part of the house where Mr. Cleaveland was. After that I did not distinctly hear any motion, but the words, "Those who are in favour will say, aye," and then the "Ayes" very distinctly. I did not hear Mr. Cleaveland's question, or any other, reversed. I did not hear any negative votes. It was a confused, tumultuous scene. The tumult arose from the cries of "Aye!" in an unusual loud voice, from persons standing on the seats, and from the whole Assembly being in disorder. Nearly all the Old School members were sitting in their seats: there were a few stand-

ing up on either side of the pulpit, near the wall; but all those in the main body of the house were seated. They did not join in the votes. There were some few around me, who said, in an under tone, "I hope we shall have order," and "What a shame!" or something of that kind.

Cross-examination.—In answer to a question by *Mr. Randall*, the witness said: I am an elder in the Tenth Presbyterian Church, in this city, Mr. Boardman's church.

Defendants called the *Rev. Samuel B. Wilson, D. D.* Interrogated by *Mr. Hubbell*, the witness said: I attended at the organization of the General Assembly of 1838. I attended as a commissioner. I was present in the church in Ranstead court on the day and at the time of the organization. I sat on the first row of seats, nearest where the moderator stands. I sat on the west side of the middle aisle, on the front seat.

Mr. Hubbell.—Did you see or hear Mr. Cleaveland when he was speaking?

Sitting as I was, with my face to the moderator, I did not see him rise, but I heard a gentleman whom I was told was Mr. Cleaveland, speaking or reading something, but I could not understand what it was. I could only hear pretty distinctly some of the first words which he said. Very soon after he commenced the moderator called him to order, and repeated his call to order more than once. Another member, one who sat near me, also rose and called him to order. This produced confusion, which prevented me from hearing what he said. Some part of what he said I heard, and some I did not hear. Perhaps I should here explain another reason for my not hearing. There was a considerable commotion in that part of the house where Mr. Cleaveland stood, at times after he was called to order and persevered. Some persons standing on the floor, and some, as I suppose, standing on the seats, altogether made a good deal of noise. I do not think that I could state distinctly any proposition made by Mr. Cleaveland. I heard him but indistinctly. I am not able to say that any thing was proposed distinctly. But it appeared that something had been proposed, as there was a vote taken. I heard the vote distinctly; a number of unusually loud "Ayes," and one voice much louder than the rest, as has been stated by others. I heard no reversal of the question. I do not recollect that I heard any voice saying "No."

Question by Counsel.—Did you endeavour to hear Mr. Cleaveland?

Witness.—I cannot say that I did endeavour to hear him. I could not have heard him if I had tried.

Counsel.—Did you vote?

Witness.—I did not vote.

Mr. Hubbell.—Why did you not endeavour to hear?

This question was objected to by the opposite counsel.

Judge Rogers.—You may ask whether he had an opportunity of voting.

Mr. Ingersoll.—I will put the question in this form: Were you prevented, by any circumstance, from voting?

Dr. Wilson.—I could not have voted, for no enunciation of a question reached my ears. I believe my hearing is as good as usual.

Mr. Ingersoll.—I now propose to ask, whether, if he had heard a motion made, not by the chair, but by some person out of the chair, he would have voted?

Objection was made to this question.

Judge Rogers.—You must confine yourself to what was actually done.

Examination continued.—My back was towards Mr. Cleaveland when I first heard him speak, but I naturally turned, to get a view of him, and hear what he said. When I turned, I think he was reading from a paper in his hand. I thought he did not hold it very firmly in his hand. Partly from his agitation, and partly from the noise, I had but a confused idea of what he said. I was near the division line between the two ranges of pews. The confusion and tumult, after this, increased, particularly in the back part of the house. I can't say that I heard any thing more, distinctly, the confusion was so great. I can say, only, that there was some kind of voting, but I don't know upon what questions: for so far was I in the dark, that I didn't know that Dr. Fisher was chosen moderator until it was reported next day. There was a rush of some persons into the aisle, after Mr. Cleaveland commenced. The adjournment took place with continued noise and tumult; the noise, for a little while, was considerably increased, by persons descending from the galleries, as those who formed the religious body in the First Church, passed out of the doors below.

Cross-examined by Mr. Meredith.—I am a minister, and was a member of the Assembly of 1838. I am one of the Old School party.

The defendants called the *Rev. Samuel Miller, D. D.*

Interrogated by *Mr. Hubbell*, the witness said: I was present at the organization of the General Assembly of 1838, but was not a commissioner. I was on the south-west side of the church, about twenty or twenty-five feet left of the moderator, I was standing on the floor. Mr. Cleaveland rose, holding a paper in his hand, which he seemed to be attempting to read. There were cries of order. He began in a loud tone, but seemed to experience great difficulty in proceeding. I believe that he did not read it all. The contents of the paper, so far as I heard them, were, that they had been advised by counsel learned in the law, that at that time and place, they must organize an Assembly, and they would proceed to do it with as little interruption, in as short a time, with as few words as possible, and that he hoped they would not be considered as acting in a discourteous manner. He then made his motion to call Dr. Beman to the chair. There was at this time considerable tumult and disorder and calls of order. What Mr. Cleaveland said, did not by any means appear to be distinctly uttered. With the exception of a few calls to order, the disorder was in that part of the house occupied by the speaker. I heard no vocal utterance except these calls to order in the part of the house where I was. Neither

proposition was reversed; the *nays* were not called for on either vote. After moving, without reversing the question, that Dr. Beman take the chair, I think that he made a similar motion without reversing the question, that Dr. Mason and Mr. Gilbert be appointed clerks. After this Dr. Beman went into the aisle and moved a little down the aisle and appeared to place himself in the position of a presiding officer. Those engaged in these transactions moved down the aisle towards the door opposite the pulpit. I then heard an indistinct sound but I heard no distinct articulation after this. What was the result, or what occurred after he took the chair, I am unable to testify of my own knowledge. I am not able exactly to define the position of the Old School party, but the great part of them occupied that part of the house in which I was, and the corresponding part on the right side of the moderator, together with the front pews. I think that I was in the midst of them. I did not hear a vote from any of the Old School party. So far as I could hear there was not an Old School man in the whole house who voted. I did not hear any negative votes on either motion. I think there were some in the galleries voted. When the vote of *aye* was given, there was something in its character which satisfied me that some of the votes came from the gallery. There was a lightness and shrillness of voice which did not appear as coming from considerate, serious and dignified men. There was certainly a character about it to which I was altogether unaccustomed. It would be difficult to make an estimate of the time occupied by these transactions as the whole movement was so thrilling. But I suppose that the time occupied was not more than five or six minutes. I did not learn that Dr. Fisher had been appointed moderator until the next day, and I was not at all sensible of that part of the operations. I suppose that the General Assembly has been held ten or fifteen times in that church, but this is only a rude guess. I think I have been a member of the Assembly, in that house, half a dozen times. The fixtures are always in the same places. They are put up I suppose by the janitor, at the direction and the expense of the General Assembly. I know the janitor was always considered the proper man to be called upon, to get a chair for any individual that needed one, and he always did it.

Cross-examined by *Mr. Meredith*, the witness said: I have no pastoral charge, am a professor in the Theological Seminary at Princeton. I remained the whole time in the same place. Do not recollect crossing over to speak to the moderator, and am persuaded that I did not. I am entirely confident, that I did not pass hastily to the moderator, and ask him not to permit them to be organized: no such thing occurred. If it had occurred I am sure that I should recollect it.

Dr. Wilson, re-called by respondents, said: Dr. Elliott's reply to Dr. Mason, when he made his motion, was, "It is not in order at this time." I think those were the exact words.

Cross-examined by *Mr. Randall.*—As soon as the Committee of Commissions had made their report, the moderator called for other commissions. It was immediately before Dr. Mason rose, that he

had made this announcement. He had called for commissions that had not been presented, but Dr. Mason, in his explanation, said, that those he offered had been rejected by the Committee of Commissions. The kind which he offered was not that that was called for.

Mr. Meredith.—Was it not commissions which had not been enrolled that the moderator called for?

Witness.—I am not certain that it was not, but I believe that by this the same thing would have been understood. I cannot say, but I think that it was not commissions which the committee had rejected.

By Mr. Meredith.—I was not a member of the committee to prepare a minute of these transactions. I presume that I approved of the minute.

Mr. Meredith.—What was the exact phraseology used by the moderator, when he made the call for other commissions?

Witness.—I have no distinct recollection of the phraseology of the moderator. I cannot tell what were the exact words which he used, when he made the call for other commissions.

Rev. Isaac V. Brown, called by the respondents.

Interrogated by *Mr. Hubbell*, the witness said: I am a clergyman in communion with the Presbyterian Church. I was not a commissioner to the General Assembly of 1838. I attended at the organization. I was located immediately in the rear of Mr. Cleaveland, about five feet distance from him. There was one pew between his and mine.

(Witness here explained the position which he occupied, to the jury, by reference to a plan of the church which was exhibited on the occasion.)

I am not certain as to the door I came in at, but as to my position in relation to that of Mr. Cleaveland, I am perfectly certain. Mr. Cleaveland rose with a paper in his hand. I did not hear him say "Mr. Moderator." His back was towards me at the time, and his face to the moderator. I did not hear his precise language. He turned a little round from the chair toward the right, which gave me an opportunity to see the handwriting of the paper which he held in his hand, and also to hear what he read. I can mention distinctly the main points contained in the paper read by Mr. Cleaveland nearly in their order. He stated that "we are about going to form a new body. He then expressed an apology for the interruption which he made. He said they were going to do it in the shortest time, and with the fewest words possible. He further said, that they were going to do it in consequence of the advice of counsel learned or eminent in the law. One or other, or both forms of expression, he certainly used. He said their object was to obtain certain legal advantages. These were his words as he uttered them, and that is about the substance of what I recollect. Then immediately, and hastily, he moved that Dr. Beman should take the chair, and immediately put the question. There was no reversal of the question, I am very confident; I heard nothing like it. There was not time, between the first and second motion, to admit of it. When

he moved that Dr. Beman should take the chair, there was a very tumultuous response of "Aye!" in certain parts of the house. I think there were votes from the gallery, voices that clearly manifested that they did not belong to members of the General Assembly. They were shrill and squeaking, more like female voices, from the north-west end of the house, in the rear of the body. There was a considerable volley from that quarter, and some were very like female voices, or, if not so, came from minor youth. There was a very promiscuous assembly, of all sexes, and all ages. There were a few gentlemen occupying the seats immediately in my rear whom I did not know. I heard no negative votes at all. After this a motion was made for the appointment of clerks. I heard the name of Dr. E. W. Gilbert, and Dr. ———, the name I could not distinguish, nor who made the motion, owing to the confusion at the moment, producing some embarrassment; but I supposed, by the sound of his voice, it was made by the same man. That motion was put and carried in the same manner, but without reversal. Immediately after, there was a sudden call or explanation, the words of which I do not remember, but the object of it was, to produce a movement among those who acted in the scene, towards the north-western, or the western part of the house. Immediately there was a very hasty rush towards that part. There was an assembly thus created very speedily, at a distance from the focus of their previous operations of about twenty-five feet. I endeavoured to ascertain the distance, and, without success, what they were doing. I rose up, and got on the seat, to discover, if possible, what the seceding members were about. I listened as closely as I could, but the noise and tumult were such, as to prevent my hearing any thing at all. In a very few minutes there was a loud outcry, first near the central point of the body, again at the outskirts, and near the east door, giving notice that the body which had recently organized, were about retiring to another church, Mr. Barnes's church, I think; I don't know the style it goes by in this city. I heard Dr. Mason's motion relating to the documents, which he held in his hand. Dr. Elliott replied to him, "You are out of order at this time," distinctly and emphatically; these were the very words.

Cross-examined by Mr. Meredith.—I have no pastoral charge at present. I reside at Lawrenceville, in New Jersey. I am estimated a member of the Old School party.

Witness.—Have you any further questions to ask me?

Mr. Randall.—Nothing further.

Rev. Nathan G. White, called by the respondents.

Interrogated by *Mr. Hubbell*, the witness said: I was a delegate to the General Assembly of 1838. I am a clergyman, settled in M'Connelsburg, in Carlisle Presbytery, of which I am a member. I attended at the organization, on the 17th of May. I was in the eastern part of the church, about four pews from the moderator, on the east side of the middle aisle, next the door of the pew opening into that aisle. Mr. Cleaveland was two pews behind me. He rose with a paper in his hand, and after stating something, appeared to read from the paper. I supposed him to have uttered about one

sentence, before I heard what he was saying. About a moment had elapsed. He said, "as we have been advised by counsel learned in the law, that a proper and constitutional General Assembly cannot be organized except at this time and in this place, or house." This was the only sentence which I heard continuously. Then he made something like an apology, and used the words "discourteous," and "short time;" but there was then considerable noise. I thought perhaps he did not read all that was on the paper, because, although he spoke words loud enough for me to hear, they were not heard continuously, so as to form a sentence. At this time he was turning his face towards the middle aisle, and away from me. He then made a motion that Dr. Beman should take the chair, and just as he made it, a number near and around him rose, and immediately I heard a very loud "Aye." I then heard Mr. Gilbert and Dr. Mason nominated for clerks. I did not hear the motion for Dr. Beman to take the chair reversed. I heard no negative voices. Immediately after the loud "Aye," the names of Mr. Gilbert and Dr. Mason were mentioned for clerks, the same person putting the motion, to which there was a very loud response of "Aye." This motion was not reversed. I mean, I heard no reversal. Then, for a moment or so, there was a low murmuring of voices, after which I heard again a very loud "Aye." Soon after, those who were standing in the aisle, and on the seats, and even on the backs of the pews, as some of them were, commenced moving towards the door, and out of the house, in a very hurried manner. When, as I suppose, about one-third or one-half of these were out of the door, I heard a loud cry at the door, that the General Assembly of the Presbyterian Church had adjourned, to meet in the First Presbyterian Church, on Washington Square. This was repeated by a middle-aged looking man, standing in the lobby, and was also repeated by him, or some one else, at the other doors. The cries of "Aye" came principally from persons standing in the immediate neighbourhood of Mr. Cleaveland, and also from some standing in a north-west direction from me. I had now turned round, with my face toward Mr. Cleaveland. I cannot say certainly that any of the ayes were from the gallery. There was noise in the gallery, on the west side of the house. I heard Dr. Patton make a motion; that is, he held certain papers in his hand, and said he wished to offer a resolution. Dr. Elliott said he was out of order, that the first business was to hear the roll, as it had been made out by the clerks. Dr. Patton replied, that his motion had reference to the roll, and that it could be put in a moment, as he wished the question taken without debate. The moderator declared him out of order. Dr. Patton said that he must appeal from the decision. The moderator said that the appeal also was out of order, as there was no house, and as the first business was the report of the clerks upon the roll. He then directed Mr. Krebs to proceed, and Mr. Krebs reported his roll. As soon as he had done with the report, the moderator stated that if there were any commissioners from churches within our bounds, who had not yet had an opportunity of presenting their commissions to the clerks, now was the time to present

them. Then Dr. Mason of New York, rose and said, that he held in his hand certain commissions. He had a bundle of papers in his hand, which he held out, and said, they had been refused by the clerks, and that he now tendered them, and moved that the names should be enrolled, and the commissioners allowed to take their seats. The moderator asked where the commissions were from. Dr. Mason answered, that they were from the four Synods, naming them, of Utica, Geneva, Genessee, and the Western Reserve. The moderator replied, you are out of order at this time, as the call was made for commissions of a different character.

Cross-examined by Mr. Meredith.—I am attached to what is denominated the Old School party.

Mr. Samuel P. Wilson called by the respondents. Interrogated by *Mr. Hubbell*, the witness said: I am a theological student of the Princeton Seminary. I belong to the Old School party—if I may be considered worthy of that honour.

Counsel. You all belong to the Old School party there, I suppose.

Witness. I can't say. I attended at the organization of the General Assembly of 1838. I attended as a spectator. I had a companion with me, a young man; his name was Twitchell. My position in the house was in the gallery, near to the place occupied by the moderator. When I came into the house, I passed through the recess into the graveyard, and entered the house by the side door. After a few minutes, I went into the gallery, by the side of the pulpit. My companion went with me, or at least we sat together. I remember the motion being made by Mr. Cleaveland, that Dr. Beman act as moderator until a new moderator should be chosen. I recollect that he rose, holding a paper in his hand, with his face, at first, towards the moderator, from which he commenced reading —or certainly appeared to read. During the time, whilst he was reading, or speaking, he turned, so that his side was toward the moderator and his face toward me, and concluded by saying, "I move that Dr. Beman be moderator," or "take the chair." I did not hear the motion seconded, but took for granted that it was, as it was put, and there was a loud affirmative vote of aye. I did not hear the question reversed. My impression at the time was, that it was not reversed. I heard no negative votes. I did not make any memorandum at the time with my pencil, but remarked to my companion, that the question had not been reversed. My impression was very strong, but I will say, merely, I did not hear it. The next thing that I heard, after the gentleman, whom I subsequently learned was Mr. Cleaveland, had put his motion, was a motion that Dr. Mason and some one else, should be clerks. He put this motion, I thought at the time; and I still think that he did, but I did not hear it put. The first thing that I heard after the names, was the response of "aye." I did not hear him propound any question, except at first. I heard the response of "aye," but no reversal, and not any noes. There was no change in Mr. Cleaveland's position, when he made the last motion, but there were a number of persons around him, who had risen to their feet. Then I observed a person moving out of the pew, and up the aisle, and a gentleman

next to me informed that it was Dr. Beman. He stood facing the moderator, about one-half of the way down the aisle from the pulpit. What he was doing, I don't know; I could see his lips move, but could not hear what he was saying. There was considerable confusion by this time in the house. At first it was noise, but after Dr. Beman took his position, it was rather a buzz, and a confusion of voices, than any loud, clamorous noise. The next thing I was aware of, was a general movement of those persons engaged in these proceedings, and a number of the spectators, towards the north door. After the great mass of them had reached the door and passed through, the Rev. Mr. Beecher, of Jackson Seminary, in Illinois, announced, in a very loud tone, that the General Assembly would meet in the First Presbyterian Church. The same was repeated by a second person at the side door, by a person somewhat advanced in life. It was not Dr. Beecher. I have seen Mr. Eliakim Phelps here, and I think it was he; that is my impression.

Counsel. I wish now to turn your attention to the time when Dr. Patton rose. State what then took place.

Witness. When the moderator called for the reading of the roll by the clerk, Dr. Patton rose. I cannot tell which rose first, he or the clerk, who was under me. He said that he had certain resolutions, touching the roll, which he wished to offer. The moderator told him he was out of order, as the next business was the reading of the roll by the clerks. Dr. Patton said that his motion referred to the completion of the roll, I don't profess to give his words exactly, and that he wished it put without debate. The moderator said that he was out of order. He appealed to the house. The moderator told him that the appeal was out of order. Dr. Patton sat down, and the clerk proceeded with and finished his roll. The moderator stated, that those whose names had been read by the clerks, were to be considered as members of the Assembly, and that if there were any persons, who had not yet presented their commissions to the clerks, now was the time to do so. Upon that, a gentleman, who I was informed was Dr. Mason, rose, and moved that the roll should now be completed, by the addition of the names of certain commissioners. He said that their commissions had been presented to the clerks, and rejected. The moderator inquired if they were from bodies in connexion with the Presbyterian Church, at the close of the Assembly of 1837. Dr. Mason said that they were from the bounds of the Synods of Geneva, Genessee, Utica, and the Western Reserve. The moderator declared that they could not be received, and were out of order. Dr. Mason said, that, with respect for the chair, he must appeal. The moderator told him the appeal was out of order. Dr. Mason then tendered the commissions, and, I think, demanded that the names should be put upon the roll. I don't know whether I have given the exact language of the moderator's replies; only the substance is impressed upon my mind. The moderator, at this time, repeated his call for commissions; and Mr. Squier, as I was told it was, rose at that moment and stated that he had a commission from the Presbytery of Geneva, which he had presented to the clerks, and which they had rejected

or refused. He demanded a seat on that floor, and that his name should be put on the roll.

Cross-examination. Questioned by Mr. Meredith.—Were many of the students of the Princeton Theological Seminary in town at that time.

Witness.—I can't say positively, but as it was a period of vacation at the Seminary, I think, a number of the students, as well as some of the professors, were present in the city at that time. They were in and out of town occasionally and frequently, so that I cannot tell how many of the students were present, nor how many were in Philadelphia on any particular day. I should not think that a majority of the professors were here.

Hon. Walter Lowrie called by the respondents. Interrogated by *Mr. Hubbell*, the witness said: I was present at the organization of the General Assembly of 1838. The position I occupied was a seat nearly against the south-west door of the church, through which is the passage into the graveyard. I sat in one of the pews which are placed against the wall of the house. After the General Assembly was opened with prayer, the moderator, Dr. Elliott, announced that the first business was the report on the roll by the Committee on Commissions, and he called on the clerks for the report. Dr. Patton rose and stated that he wished to submit a motion. He did not state the motion, but he held in his hand a paper, which I presumed to contain the motion. Dr. Elliott told him he was out of order, as the first business was the report on the roll. Dr. Patton stated that his resolutions had relation to the roll. The moderator decided that he was out of order at that time. Dr. Patton said that he must respectfully appeal from that decision to the house. The moderator decided that his appeal was out of order. I do not recollect that any reason was given why the appeal was out of order. Dr. Patton sat down. The moderator directed the clerk to proceed with the roll, and Mr. Krebs read for a considerable time. When he ceased reading, the moderator announced that if there were any commissioners present who had not handed their commissions to the clerks, it then was the proper time to present them. Dr. Mason, as I afterward understood it was, rose at about that time and presented the commissions, as he stated, of a number of commissioners from certain presbyteries. Perhaps he named them as being presbyteries of the *four* Synods of Utica, Geneva, Genessee, and the Western Reserve. He tendered these commissions to the moderator, stating that they had been presented to the clerks, but not received. The moderator informed him that he was not at that time, or not now, in order; which his *ipsissima verba* were, I can't tell, but one or the other. Dr. Mason said that he must, respectfully, take an appeal from this decision. The moderator pronounced the appeal out of order, because the business immediately before the house was, to receive those commissions that had not yet been presented, if any such there were. After that, or before, a gentleman rose, who, I was told, was the Rev. Mr. Squier, saying, that he had presented his commission to the clerks, and that they had refused it. I am not certain whether he

rose before or after Dr. Mason. He tendered the commission, and claimed a seat as a member of that house, from the Presbytery of Genessee. The moderator asked him if that presbytery belonged to the Synod of Genessee. He said that it did. The moderator replied, "Sir, we do not know you." It was the Synod of Geneva, not Genessee. I confound the two frequently, because I do not know their locality, except from indistinct recollection of the geography of that part of the country. I think it was immediately after this that Mr. Cleaveland rose. At the moment that he rose, I got up and stood on the seat. As it was a back seat, I could do this without the appearance of disorder. I had a full view of Mr. Cleaveland. He had a paper in his hand, and, apparently, commenced by reading. I heard but about three or four lines of the paper. The first, I did not hear; but I distinguished these words: "We have been advised by counsel, learned in the law, that, to secure a constitutional organization, and certain legal rights, it is necessary to organize at this time and place; which we will proceed to do in the shortest time possible." Before he had proceeded this length, there were calls to order, from the moderator and from others. After these words, I heard nothing more, distinctly, partly on account of the noise, partly from his hurried enunciation, as he was in a great hurry at first, and the calls to order seemed to hasten him, and partly by reason of individuals around him rising. After he had ceased reading, he moved that Dr. Beman should take the chair, and immediately propounded the affirmative of the question. He was answered by the persons in his neighbourhood and behind, with a very emphatic "Aye." He said, "I move that Dr. Beman take the chair." The question was then propounded: "Those in the affirmative will say, aye." I did not hear the question reversed; and I would say, and say distinctly, that the reverse was not put. It might have been put, in a lower tone of voice, and I not have heard it from my position. But the proceedings which immediately followed did not leave time for it to be put, even in a whisper. I would not thus swear to a negative, but that the want of time is sufficient proof. I have been accustomed to deliberative assemblies. For seven years I was in the Senate of this state, for six years in the Senate of the United States, and eleven years I was secretary of that body. The immediate proceeding to which I refer was, the motion that Dr. Mason, and another person, whose name I did not hear, should be clerks. By that time, the noise in the neighbourhood of Mr. Cleaveland, and the rising around him excluding him from view, I did not hear the question put. I heard nothing but a response, like the first. It was a very earnest and hurried response. I thought there were two or three voices from the gallery. I heard nothing of this on the first question. I did not hear, distinctly, any question after that. Others were put, but what they were, or who put them, I did not hear. I thought that the person had moved nearer the door who put them, but persons rose between, and shut them out from my view. I heard no negative responses. All the votes I did hear were around Mr. Cleaveland. I don't know what testimony has been before given; I have

just come into the court-room to-day. During the time these questions were passing, a member rose, and asked Dr. Elliott if nothing could be done to restore order. The moderator said that he had called to order, and made what efforts he could, that he supposed the scene would soon be at an end, and the house restored to quiet. This member was the Rev. Robert J. Breckinridge. I could not measure the time that elapsed from Mr. Cleaveland's rising till the adjournment, except by ideas. It was such a hurried scene, that, without looking at a watch, I could not give the time a name. The whole transaction passed in extraordinary haste. I did not hear of Dr. Fisher's appointment until the next day. When I went home, I told the family where I staid, that Dr. Beman had been chosen moderator. They said, the next day, that it was Dr. Fisher. I told them, then, any man might be mistaken, for I was looking on, and had seen nothing like it. I suppose I would be set down as an Old School man. I was not a member of that Assembly, but the members were all around me. I sat there by courtesy. I had business with all the members of the Assembly, and took any seat I found vacant.

Cross-examined.—Interrogated by *Mr. Wood.*—I was not a member of the Assembly of 1838; but I was the year before. I hold the office of corresponding secretary of the Board of Foreign Missions of the Presbyterian Church.

Re-examined by *Mr. Ingersoll.*—I was elected by the Board to that place, in the fall of 1837, the time when the Board commenced its existence.

Interrogated by *Mr. Preston.*—I was elected, before I resigned my place in the Senate, corresponding secretary of the Western Foreign Missionary Society, which was transferred, in 1837, to the General Assembly.

Thursday morning, March 14th.

Dr. William Phillips, recalled by the respondents, testified: I was moderator of the General Assembly in 1835, which was since Dr. Beman was moderator. I believe Dr. Witherspoon was present at the organization of the General Assembly in 1838. He had been moderator since Dr. Beman was, viz. in 1836. Dr. Beman was moderator in 1831, I think.

Respondents called *Mr. Jerome Twichell.*

Interrogated by *Mr. Hubbell*, the witness said: I am a student of the Princeton Theological Seminary. I went there from Miami University, Oxford, Ohio. I was from Cincinnati, in Ohio, originally; am a member of the Second Presbyterian Church there, under Dr. Beecher. I attended the organization of the General Assembly in 1838. When I came into the building, I took a seat on the right side of the church, near the door which leads into the grave-yard. I staid there a short time, and then went into the gallery. There were several vacant seats around me where I first sat. There were also several vacant seats on the right of the pulpit. It was nearly *eleven* o'clock. Dr. Elliott was then in the pulpit. It was before the sermon commenced. I think I first took a seat

on the right side of the aisle, but shortly afterwards I moved back, as several ladies were standing. I afterwards saw a gentleman standing, gave him my seat, and went into the gallery, near the pulpit. Mr. Samuel Wilson was with me. I saw the moderator, Dr. Elliott, come out of the pulpit, and taking his station in front, open the General Assembly with prayer. He then said that the next business was to read the roll. Shortly after this, Dr. Patton rose to offer certain resolutions which were in his hand. The moderator said, "You are out of order at this time, sir, inasmuch as the first business is the report of the clerks on the roll." Dr. Patton then said that his resolutions related to the roll, and he was willing to have them passed upon without remark. The moderator decided that he was out of order. Dr. Patton appealed from the decision. The moderator decided that his appeal was out of order, as the house was not yet organized. Dr. Patton then sat down. The moderator then directed the clerk to proceed with the reading of the report on the roll. Mr. Krebs read the roll accordingly. Immediately after this, an individual, whose name I afterwards learned was Dr. Erskine Mason, rose, with a bundle of papers. Previous to this, however, the moderator announced, that if there were any commissioners present who had not presented their commissions to the clerks, now was the proper time to present them. Dr. Mason said he held in his hand certain commissions which had been presented to the clerks and refused. He then moved that the roll be completed by the addition of the names on these commissions. The moderator asked if they were from presbyteries in connexion with the General Assembly at the close of the meeting of 1837. Dr. Mason replied, that they were from presbyteries belonging to the Synods of Utica, Geneva, Genessee, and the Western Reserve. The moderator said, "*we can't receive them at this time.*" After Dr. Mason had taken his seat, a gentleman rose, whose name I have since learned, and stated that his commission had been refused by the clerks, and that he now presented it, and demanded his seat in the General Assembly. The moderator asked him from what presbytery he came. He replied, from the Presbytery of Geneva. The moderator asked if the Presbytery of Geneva belonged to the Synod of Geneva. The gentleman replied, that the Presbytery of Geneva was within the bounds of the Synod of Geneva. The moderator then said, "*we do not know you, sir.*" The gentleman then took his seat. I afterwards learned that the gentleman's name was Mr. Squier.

I believe I have omitted one declaration of the moderator to Dr. Patton. He said there could be no appeal, because there was no house to appeal to. Next an individual rose, whose name I afterwards learned was Mr. Cleaveland, holding a paper in his hand, from which he appeared to read. The first part of what he read or spake, I heard distinctly. The latter part I did not. It was to this amount: Whereas, the rights of certain commissioners have been violated in their being refused their seats as members of the General Assembly, it therefore becomes necessary to organize the General Assembly at this time and in this place. I distinctly heard

something like the word "*discourteous.*" There was considerable noise and confusion at the time. The next thing I distinctly heard, was something like B——. I supposed, at the time, the word was Beecher. I thought that he said Dr. Beecher, who was sitting beside Mr. Cleaveland; but I could not be certain, as all I heard was "*Dr. B.*" Soon after this, there was a very loud vote in the affirmative of some question which I did not hear. The next thing that I saw, for I could not hear any thing except the cries of "*order, order,*" and some gentleman saying "I hope we shall have order," the moderator distinctly responded that the confusion would soon be over, that he had tried to preserve order, and that he hoped the members would keep their seats. The next thing which I saw, was several individuals going into the aisle near the pews occupied by Dr. Beman, Dr. Mason, and Mr. Cleaveland. In several places in the house there were individuals standing up, and considerable rustling of dresses, and noise occasioned by persons rising in the gallery. Those whom I have mentioned, went into the aisle about this time, and I heard distinctly after they had gone some distance into the aisle, affirmative responses to something which I did not hear. In a short time, a great part of the persons in the gallery, and on the floor below, including ladies and others, left the house. I could not distinguish members from others. About this time there was a general clapping and some hissing, which I supposed to proceed from the audience, rather than the actors in the scene. After they had generally left the house, Mr. Edward Beecher came back to the door, and proclaimed in a very audible voice, that the General Assembly of the Presbyterian Church had adjourned to meet forthwith at the First Presbyterian Church. The same was proclaimed at the side door of the house, by some one whom I did not distinctly see nor recognize, but still I heard him distinctly. Another individual then repeated the proclamation at the other doors of the house, that the General Assembly had adjourned. The *first* vote on Mr. Cleaveland's motion, I saw him and heard the affirmative distinctly. I heard no negative votes. I did not hear a reversal of the question. I cannot affirm that I heard any votes from the gallery. But the votes arose in a body, and I can't say from what part of the house they came. I cannot say how long it occupied them to go through with these transactions. But it was a very short time. It was a time of deep excitement. I did not know of Dr. Fisher's being elected moderator at that time. I was informed afterwards that he had been.

Rev. Varnum A. Noyes was called by the respondents.

Interrogated by *Mr. Hubbell*, the witness said: I am a clergyman of the Presbyterian church. I was not a delegate to the General Assembly of 1838; I reside in the Western Reserve in the northern part of the State of Ohio. I belong to the Presbytery of Wooster. I did belong to the Presbytery of Medina in 1837. I previously belonged to the Presbytery of Cleveland. The Presbytery of Medina is within the bounds of the Synod of the Western Reserve. I am somewhat acquainted with other presbyteries in the Western Reserve. I have some acquaintance with the Presbytery of Portage belonging to the Synod of the Western Reserve, also that of Cleveland.

Mr. Hubbell asked, as to the Presbytery of Medina, how is it constituted as regards Congregationalists and Presbyterians?

Mr. Meredith asked for what purpose the counsel had introduced the inquiry?

Mr. Hubbell.—Our purpose is to prove that this presbytery is principally composed of Congregational churches, and to follow up the inquiry by other proof of other witnesses that other presbyteries are composed of a majority of Congregational churches.

Mr. Meredith.—I object, because the inquiry is totally irrelevant to the issue of this cause. Suppose it were proved that in the whole of the excinded presbyteries there is a majority of ministers who are pastors of Congregational churches, and that a single presbytery is composed entirely of ministers, who are pastors of Congregational churches, what effect would it have, seeing the ministers and not the churches compose the presbyteries?

An extended colloquy ensued.

The counsel for the respondents urged the admission of the testimony for the sake of showing such an admixture of Congregationalism in the churches connected with the excinded synods, as to justify the acts of excision and the exclusion of the commissioners from the presbyteries within those synods. The relators, on the other hand, contended that if the admixture were proved, it could not affect the integrity of the presbyteries, as they existed independent of the churches and were erected in the constitutional manner, by the proper judicatories; and that if it were otherwise, it was not competent to the party of the respondents, now, to adduce evidence of a vice which might have been cause of a judicial trial in the church court, thereby to justify the excision of these bodies *without a trial.* It was too late, they contended, to set up such a defence even in the church courts, much less could it be brought into this case before the civil tribunal.

Judge Rogers ruled that the evidence was inadmissible, and said, the proceedings of the Assembly of 1837 were admitted in explanation of those of 1838. I then did not, and still do not understand, how we could do without them. I then thought that the proceedings of 1837 were necessary to the defendants' case, and I still think so. But with the reasons of these proceedings we have nothing to do. We are to determine only what was done; the reasons of those who did it are immaterial. If the acts complained of were properly and constitutionally within the jurisdiction of the Assembly, their decision must be final, even though they decided wrongfully. The civil courts have enough to do without interfering with such questions.

The respondents called the *Rev. Francis M'Farlane.* Interrogated by *Mr. Hubbell*, the witness said: The General Assembly has three Boards: the Board of Education, the Board of Missions, as it is called, for domestic missions, and the Board of Foreign Missions. The Assembly has no connexion with the Home Missionary Society, though some years ago they recommended the Home Missionary Society to the patronage of their churches. The Assembly has no connexion with what is styled, I think, the Central Education So-

ciety. I am Corresponding Secretary to the Board of Education, attached to the General Assembly. I have here some of the books of that board. Our register contains the names of the young men assisted by the board, and our leger, the sums paid to all these young men.

Judge Rogers inquired, what has this to do with the case?

Mr. Hubbell informed the Court that he designed to rebut the evidence which Mr. Randall had exhibited the other day from the statistical tables, &c.; to show that the contributions then exhibited were made in obedience to a resolution of the Assembly, requiring the presbyteries to report their contributions, not only to the boards of the Church, but to all charitable societies; and that, in those years, when, from the extracts read, the presbyteries referred to, would appear to have contributed largely, but a few hundred dollars of these contributions were appropriated to the Church funds.

Judge Rogers.—The extracts read by Mr. Randall were offered to prove, merely that these presbyteries were part of the Church, and as such, recognised by the General Assembly in the act of receiving funds from them; and it is entirely immaterial, whether only one dollar, or ten thousand dollars were contributed.

The respondents called *Mr. Thomas Evans.* Interrogated by *Mr. Hubbell,* the witness said: I attended the General Assembly in Ranstead court, and was present at its organization in May, 1838. The position which I occupied was one of the side pews in the south-west gallery. I never was in the house but once before. I saw Mr. Cleaveland rise. He held in his hand a paper. I was told that it was Mr. Cleaveland, but I did not know him. I have resided for nearly twelve years in one of the southern states, and am therefore a stranger in this city. His face was towards the moderator when he rose, but he turned round as he read or spoke. I could not hear distinctly what he said, nor whether he read from the paper, or spoke independently of it, though I thought he read from it. I heard his voice, but could not understand what he said. The moderator called him to order, by rapping with his hammer, and otherwise. A number of other persons also cried "Order! order!" I was in the first seat in the gallery, near to the pulpit. Mr. Cleaveland was located on the floor, almost opposite to me. I am confident I did not hear what he read, that is, I did not hear it so as to understand any part thereof. There was a confusion at the time, which prevented me from understanding him. I heard his voice merely. After his reading what he did from the paper, he proposed that Dr. Beman act as temporary moderator. He stated that he wished those in favour to signify it by saying aye, when there was a loud vote in the affirmative. I did not hear any *noes.* Immediately Dr. Beman stepped into the aisle. The question was not reversed. I took particular notice of this at the time. From what I had heard out of doors, I expected to hear it voted down. After the General Assembly had adjourned, I recollect stating to a gentleman, that the question was not reversed. I am not only confident of this, I may say positively that I know it. Dr. Beman, as

I said, stepped into the aisle. Mr. Cleaveland, I think, had occupied the same pew with Dr. Beman, Dr. Beman sitting by the door. After Dr. Beman took his station in the aisle, a motion was made by some one, I think by Mr. Cleaveland, that Dr. Mason and another gentleman act as clerks, and the question was carried by a very loud "Aye." Dr. Fisher was then named by some person as moderator of the Assembly of 1838, and the nomination was seconded. The motion was then put and carried. There was a very loud affirmative voice. There was then a motion made, I think, that those in favour of these proceedings should retire or adjourn, to the rear of the house; I am not certain which. Accordingly, a great many persons went towards the end of the house, and formed in the middle aisle, I should think about half way from the pulpit. Some were at this time standing on the seats in or near the middle aisle of the church. I am unable to state accurately what was said after that. I heard nothing distinctly, except that the General Assembly had adjourned to the First Presbyterian Church; to Mr. Barnes's church, was reiterated. There was considerable confusion at the time, which prevented me from hearing. I saw, in the north-east corner of the house, several persons clapping their hands, as though in applause of what was going on; the names of all of them I did not know, though I think I could know some of them. I should say that every one whom I knew appeared to belong to the respectable portion of the community. I don't know to which party they belong. I heard a loud "Aye" in the case of Dr. Beman; that is, on the question of appointing him temporary moderator. Several persons around me, and one young man in the gallery close by me, on my left hand, voted "No." This young gentleman was the one from whom I learned the names of the different parties. There were ladies in the gallery: I cannot say whether they were silent. Those around me appeared so. While the body was retiring, there was great applause, I recollect distinctly. I keep a hat store in this city, and attend the Tenth Presbyterian Church, Mr. Boardman's. I am a communicant of that church. I think I had then handed in my certificate, from the First Presbyterian Church of Augusta, Georgia, of which I had before that time been a member.

Cross-examined by Mr. Randall.—I think my papers were handed in before, and that I was admitted afterwards. Mr. Boardman's church belongs to the Old School party, and to the Second Presbytery of Philadelphia. I profess to be a Presbyterian. I think I have sympathized with the Old School, believing myself nearest the truth in sympathizing with them. I have been influenced by nobody in these sympathies.

Rev. Henry A. Boardman, called by the relators. Interrogated by *Mr. Hubbell*, the witness said: I am pastor of the Tenth Presbyterian Church in this city. I was not a delegate, but attended at the opening of the General Assembly of 1838. The position which I occupied was a pew in the south-west part of the church, on the right hand of the moderator's position; that is, to one facing him. I don't remember whether I was in the seat which binds against

the wall of the house or in the next one to it. These seats are raised a single step above the floor of the church. Mr. Cleaveland rose, facing the moderator, with a paper in his hand, and commenced reading, in the manner which has been pointed out by several witnesses. He made some remark which I did not understand. I heard nothing, which I can now remember, except the words, "*counsel learned in the law.*" Whether those words were in the paper or prefatory remarks, I do not know. His eyes were closely fixed on the paper. Mr. Cleaveland's countenance was flushed, and he appeared much agitated. His frame and voice trembled. He turned gradually as he read, till he faced the west side of the house. The moderator called him to order and rapped with his hammer repeatedly, and there were cries of order from a number of the members around me, who used various expressions; some cried "*Shame, shame,*" and I heard one or two gentlemen say, "Let him go on." At this time some rose on their feet, and there were some standing on the seats, which prevented me from seeing Mr. Cleaveland. I however heard him make a motion something like this, that Dr. Beman be appointed moderator. I am not positive that those were his words, but what he said was something equivalent to what I have mentioned. He called for the yeas, saying that those in favour would say, aye. There was then a very loud "Aye." He did not reverse the question, on his nomination of Dr. Beman. I distinctly heard the next question, and he did not reverse it either. I speak with entire confidence, because I spoke of it frequently afterwards. I supposed that the omission to reverse the question arose from embarrassment. Shortly after this there was a movement of several persons toward the north door in the middle aisle. After this they were completely obscured from my view by the intervention of persons who were standing on the floor, on the seats, and even on the backs of the pews. I heard not what passed, except a hum or buzz, and then a loud and tumultuous "Aye," from a number of voices, and one voice sounding high over all the rest. I did not know at the time that Dr. Fisher was appointed moderator, and denied it when I first heard it afterwards. Soon after the responses of "Aye," the actors in the scene rushed toward the north door of the church. I supposed from what I saw that they were leaving the house. At length there was another movement toward that and the east door, and a person appeared at the door, and in a very loud, shrill voice, proclaimed that the General Assembly of the Presbyterian Church had adjourned, to convene immediately in the First Presbyterian Church, which excited a smile. This was repeated at the east door of the house. Whether the person who made this proclamation went round and put his head in at the east door, I don't know. The house was very much crowded until part of the spectators went away. As far as I can judge, the greater part staid with us after they left the house. According to the best of my recollection, I did hear a few "Noes" on the first question, but not in response to Mr. Cleaveland. They appeared to be simultaneous or intermingled with the "Ayes," or immediately, in quick succession, afterwards. The "Noes" did not

come from my part of the house. They appeared to come from the same vicinity as the "Ayes." Perhaps some of them might have come from the gallery. None of the Old School party, so far as I know, voted on either of the questions.

Mr. Hugh Auchincloss, called by the respondents, interrogated by *Mr. Hubbell*, said: I attended the organization of the General Assembly of 1838; was a commissioner from the First Presbytery of New York; was located in the south-west corner of the church; am not a clergyman; am a ruling elder. Dr. Mason had scarcely sat down before Mr. Cleaveland rose up and commenced reading a paper. It appeared to me that he did not address the moderator. I could not distinctly hear what he read from that paper, but I heard him say, "I move that Dr. B—— take the chair." I did not distinctly hear whether he said Dr. Beman or Dr. Beecher. A number of persons immediately responded "Aye," in a very loud voice. I heard no negative voices, nor did I hear any one of the questions reversed, and knew not what they were: I only inferred that, for I did not hear. On the second question I am positively certain that there was no negative vote. Neither of the questions was reversed. Of this I am positive. I distinctly heard voices from the gallery saying "Aye." They went out of the house in a very disorderly manner, as it appeared to me. These proceedings passed very rapidly. I suppose they did not occupy more than five minutes, if as much. The moderator's answer to Dr. Mason was, "You are out of order at this time." Those were the exact words used by the moderator. I am positively certain; I cannot be mistaken. I did not hear Dr. Fisher's name mentioned, and did not know that he had been elected moderator until next morning. I did not vote on any of the questions.

Cross-examination.—Interrogated by *Mr. Randall*, the witness said: I belong to the Duane street Church in the city of New York. We have no party there. The question was never agitated in our church. We range under no banner but the Presbyterian banner, the banner of the cross. We are certainly an Old School church. The noise and confusion and tumult at the time prevented me from hearing what was going on, when Dr. Fisher was appointed moderator.

Mr. Meredith.—I understand you to say that you are Old School men?

Witness.—We are of the Old School, as the New School party call us.

Mr. Meredith.—Do you know by whom those terms were first used?

Witness.—They were first used by the New School party, in the General Assembly of 1831.

Counsel.—Are you quite sure that they were first used by the New School party?

Witness.—I will refer you to my respectable friends on the other side. Perhaps they can give you the information. I am very proud to be ranked with the Old School.

Mr. Meredith.—Do you know who first used that term?

Witness.—I do not know, but believe it first came from the neighbourhood of my respected friend here (Dr. Peters.) The term has been used a long time.

Respondents' counsel here read in evidence, from the Assembly's Digest, page 118, the second of "three articles" selected from the Plan of Union adopted by the Synods of New York and Philadelphia in 1758, from the minutes of the United Synod, page 3, as follows:

II. That when any matter is determined by a major vote, every member shall either actively concur with, or passively submit to, such determination; or, if his conscience permit him to do neither, he shall be at liberty modestly to reason and remonstrate, and peaceably withdraw from our communion, without attempting to make any schism; provided, always, that this shall be understood to extend only to such determinations, as the body shall judge indispensable in doctrine or Presbyterian Government.

Mr. William Wilson, called by respondents' counsel, interrogated by *Mr. Hubbell*, said: I was a delegate from the Presbytery of New Brunswick, to the General Assembly of 1838. I attended at the opening of that Assembly in May.

(Witness here described, as several others did, the position which he occupied in the house, by referring to a plan of the church presented by counsel.)

I was on the west side of the centre aisle, six or seven pews from the front, next the pulpit. I am a ruling elder of the Presbyterian Church. Mr. Cleaveland was close by where I sat. He had some paper in his hand, which he attempted to read. He said he meant no discourtesy, but that "we have been advised by learned counsel that this is the place in which we must organize." I did not know who "we" meant. I sat by the door of the pew, next the aisle. He was called to order by the moderator. Several voices near the moderator, and in different parts of the house, called him to order, and one person urged him to proceed. It was in a low, but seemingly earnest tone, urging him to go on. In the course of his remarks, he moved that Dr. Beman take the chair, which was seconded by some person, who I did not know, in the same quarter. When he had put the motion, there was a very loud "*Aye*," which rung through the whole church. From the manner of the sound filling the whole house, my impression was that some of the voices came from the galleries. The calls to *order* were repeated and continued. The moderator used his mallet, and used some words which I did not exactly hear, and finally sat down. Dr. Beman, who sat at the door of the pew with Mr. Cleaveland, then came out of the pew into the aisle, and passing down the aisle a little space, took his station there. I did not hear the question on his motion reversed. I am certain I was so near him that I should have heard it, if it had been reversed. *It was not reversed.* There was then a move further back in the house. Dr. Beman was then between the mass which seemed to be moving back and the moderator's chair. I heard the calls to order. They were very loudly made. That is the chief that I can tell, as I kept my seat for the whole time. I heard noise, confusion, and very loud "ayes," but no "noes." I did not vote. I heard afterwards the voices, which appeared to be much nearer

the north door of the house. A great number had then gone out of the house. An individual proclaimed that the General Assembly of the Presbyterian Church would meet at the First Presbyterian Church, on Washington Square, *immediately* or *forthwith*. I knew nothing about Dr. Fisher's being elected moderator, except that I heard it by common fame. The whole of this movement occupied but a very few minutes, perhaps not more than five. Its manner was very hasty, and the proceedings were had with great rapidity. A gentleman in the same pew with Mr. Cleaveland, and whom I was informed was Dr. Wm. Patton, made a motion. He was on the side of the aisle just opposite to where I sat. I recollect that gentleman arose, after the moderator had opened the Assembly with prayer, and stated that then was the time for the clerks to proceed with the roll. He offered a paper, which he stated to be in connexion with the roll. The moderator declared it to be out of order at that time. He appealed, and the moderator, for the same reasons that he had declared the first motion to be out of order, declared the appeal to be out of order. I understood him so. I may not have given the exact words. Another gentleman presented a paper of the same kind after the roll had been read, which the moderator declared to be out of order. The vote taken on the question was a shout of "*aye*." The whole was conducted in a peaceable manner, that is, I mean actually peaceable; but it was not conducted in an orderly manner. When these two gentlemen arose, I mean the first two, I considered them orderly. I believe that I have stated all that I know. The first question was put to the house. I did not hear any others put. I did not act with them. It was necessary to pay very close attention, in order to understand what was going on; and I presume that much of the time there were some present that did not hear the transactions. There was considerable applause when they retired, something like cheering. I could observe at the same time numbers in the gallery moving toward the place where they went.

Here the defendants' counsel offered in evidence and read from the minutes of the New School Assembly of 1838, p. 663–7, a part of the pastoral letter, as it is called, and the court decided at the instance of the opposite counsel that the whole was to be considered in evidence. It is as follows:

Pastoral Letter to the Churches under the care of the General Assembly.

Beloved in the Lord.—It is well known as a matter of history, that the Presbyterian church in our nation commenced in the union of pious natives and foreigners of Congregational and Presbyterian origin. These differences, in her early and feeble state, occasioned no interruption of her peace and efficiency. But as her members increased, they produced contentions, which resulted in the violent expulsion of one synod by another, and a separation of seventeen years.

The terms of reunion were, a subscription of the Confession of Faith, "as containing the system of doctrine taught in the Holy Scriptures," notwithstanding any such "scruples with respect to any article or articles of said Confession, as the presbytery or synod shall judge not essential or necessary, in doctrine, worship or discipline;" and "the synod do solemnly agree that none of us will traduce or use any opprobrious terms of those who differ from us in those extra essential and not necessary points of doctrine, but treat them with the same friendship, kindness and brotherly love, as if they had not differed from us in such sentiments."

By this "plan of union," the peace of the church was restored, and her prospe

rity augmented, though from some circumstances the administration of her policy was continued without envy, in the hands of the immigrant Presbyterian portion of the church.

When the tide of population began to roll westward, and the territories of our church were fast filling up with pious emigrants from the East, a proposal was made by the General Assembly of our church to the Association of Connecticut, to permit the union of the same church of Presbyterians and Congregationalists in the new settlements, for the greater facility of supporting and extending the institutions of religion. This union, so congenial with the spirit of the gospel, exerted for a long time an auspicious influence, in the extension of Presbyterian churches from the Hudson to the Mississippi.

But at length, in the mysterious providence of God, it came to pass that the very causes of our prosperity became the occasions of disaster. For, in the rapid multiplication of new states and Presbyterian churches, it soon became apparent that native American Presbyterians must unavoidably become a majority of the church; and though the slight variations of doctrine and policy created no alarm while the helm of power was supposed to be safe, the prospect of its passing to other hands created a strong sensation.

About this time a plan of union was formed with the Associate Reformed church, and a considerable accession was made to our church from that body; and, soon after, the system of ecclesiastical organization commenced for the administration of the charities of the church, with increasing unfriendliness to voluntary associations, till the one was established and the others were disclaimed and opposed.

During the progress of these movements, the slight shades of doctrinal difference, always known and permitted to exist in the church, before and since the adopting act, and recognized in every form, as consistent with the Confession of Faith and the unity of the Spirit in the bonds of peace, became the occasions of alarm, and whisperings, and accusations, and at length of ecclesiastical trials for heresy; while doctrines and measures unknown to the confession were selected as tests of orthodoxy.

As the results of these efforts to change the terms of subscription and union, the General Assembly of 1837, "convinced that a separation of the parties was the only cure," and "that a separation by personal process was impossible, or, if possible, tedious, agitating and troublesome in the highest degree," proceeded without charges, citation, witnesses or a judicial trial, to separate four synods and one presbytery from the Presbyterian church. In these circumstances, apprised by counsel of the unconstitutionality of the disfranchising act, and advised of a constitutional mode of organization, we did, in a meeting for consultation and prayer, on the 15th day of May, 1838, send the following proposal to a large number of commissioners to the Assembly met in another place, viz:

"Resolved, That while we regard with deep sorrow the existing difficulties in our beloved church, we would fondly hope that there are no insurmountable obstacles in the way of averting the calamities of a violent dismemberment, and of securing such an organization as may avoid collisions, and secure the blessings of a perpetual harmonious action."

"Resolved, That we are ready to co-operate in any efforts for pacification which are constitutional, and which shall recognize the regular standing and secure the rights of the entire church, including those portions which the acts of the last General Assembly were intended to exclude."

"Resolved, That a committee of three be now appointed, respectfully to communicate the foregoing resolutions to those commissioners now in session in this city, who are at present inclined to sustain the acts of the last General Assembly, and inquire whether they will open a friendly conference for the purpose of ascertaining if some constitutional terms of pacification may not be agreed upon."

While this proposal was under consideration, it was resolved by the meeting,

"That, should a portion of the commissioners to the next General Assembly attempt to organize the Assembly, without admitting to their seats commissioners from all the presbyteries recognized in the organization of the General Assembly of 1837, it will then be the duty of the commissioners present to organize the General Assembly of 1838, in all respects according to the constitution, and to transact all other necessary business consequent upon such organization."

To our communication we received the following answer:

"The committee on the communication from 'the meeting of commissioners,' now in session in the lecture room of the First Church, presented the following preamble and resolutions, which were adopted: viz.:

Whereas the resolutions of 'the meeting,' whilst they profess a readiness 'to

co-operate in any efforts for pacification, which are constitutional,' manifestly proceed upon the erroneous supposition that the acts of the last General Assembly, declaring the four Synods of the Western Reserve, Utica, Geneva and Genessee out of the ecclesiastical connexion of our church, were unconstitutional and invalid, and the convention cannot for a moment consent to consider them in this light; therefore,

Resolved unanimously, That the convention regard the said overture of 'the meeting,' however intended, as founded upon a basis which is wholly inadmissible, and as calculated only to disturb that peace of our church, which a calm and firm adherence to those constitutional, just, and necessary acts of the last General Assembly, can alone, by the blessing of Divine Providence, establish and secure.

Resolved, That, in the judgment of the convention, the resolution of the last General Assembly, which provides, in substance, that all churches and ministers within the said four synods, which are strictly Presbyterian in doctrine and order, and wish to unite with us, may apply for admission into those presbyteries belonging to our connexion which are most convenient to their respective locations; and that any such presbytery as aforesaid, being strictly Presbyterian in doctrine and order, and now in connexion with either of the said synods, as may desire to unite with us, are directed to make application, with a full statement of their case, to the next 'General Assembly, which will take order therein,' furnishes a fair and easy mode of proceeding, by which all such ministers, churches, and presbyteries, within the said synods, as are really desirous to be 'recognized' as in regular standing with us, and as proper parts of our 'entire church,' may obtain their object without trouble and without delay."

By this answer, all prospect of conciliation or an amicable division being foreclosed, we did, after mature consideration and fervent prayer, proceed, at a proper time and place, to organize, in a constitutional manner, the General Assembly of 1838; which, being accomplished on our part, without violence or tumult, the Assembly adjourned to the First Presbyterian Church.

During the session of the Assembly, on Wednesday, May 24th, the following resolution was passed, viz:

"Resolved, That this body is willing to agree to any reasonable measures, tending to an amicable adjustment of the difficulties existing in the Presbyterian Church, and will receive and respectfully consider any propositions which may be made for that purpose."

Beside these overtures for peace, influential members of the Assembly held personal conference with members of the other body, till it was ascertained that there was no hope of an amicable settlement of differences.

In the retrospect of this mournful history, we are compelled to regard the excision of the four Synods and the Third Presbytery of Philadelphia, with the setting up a new test of doctrine and measures, as an exercise of power by the Assembly unknown to the constitution, and dangerous to the purity and liberty of the church, perpetuating to an accidental majority unlimited and irresponsible power, and affording to minorities only such protection as may be found in passive obedience and non-resistance.

We could not fail to perceive, in a General Assembly concentrating in itself legislative, judicial, and executive power, and dispensing the discipline, the honours, and the copious revenues of the church, the elements of an ecclesiastical organization, which, with less pretension in the beginning, had once, for more than ten centuries, subverted the liberties and rolled back the civilization of the world.

To have acquiesced in such concentration of irresponsible ecclesiastical power and patronage, would have been to abandon the constitution of the church, which we had solemnly engaged to defend; to expose large amounts of property to diversion from its intended use, to subject the churches to a wide-spread, vexatious litigation; to abandon to aggression and division, a large and efficient body of concordant churches with their pastors; to surrender rights of conscience, and free inquiry, and charitable enterprise, to an organization never recognized by Heaven as their keeper, or clothed by our constitution with their power; and, finally, to throw apparently the example of our extended and powerful church—the patron, hitherto, of constitutional liberty—on the side of those elements of strife and violence, which already so powerfully agitate the nation.

We love and honour the Confession of Faith of the Presbyterian Church, as containing more well-defined fundamental truth, with less defect than appertains to any other human formula of doctrine, and as calculated to hold, in intelligent concord, a greater number of sanctified minds than any which could now be formed;

and we disclaim all design, past, present, or future, to change it. But it is not the Bible, nor a substitute for the Bible, nor a stereotyped page, to be merely committed to memory, by unreflecting, confiding minds, without energy of thought, and a prayerful, faithful searching of the Scriptures. It is itself an illustrious monument of the independent investigation of the most gifted minds, and breathes and inspires the spirit which formed it.

We impute to our brethren no intention of producing the results which we anticipate from their measures, but good intentions do not change the nature or avert the mischiefs of erroneous principles and injurious actions. It is a matter of history, that some of the greatest calamities of the church have flowed from principles and innovations introduced by good men, and with the best intentions.

And now, beloved brethren, we beseech you to unite with us in thanksgiving to God, for the harmony, and kind feeling, and decision, which have pervaded our deliberations and action, and for those wide-spread and exuberant effusions of the Spirit the past year, which, amid unusual sorrows, and fears of deserved judgments, have caused the tide of spiritual prosperity to flow deep and broad, the expression of sovereign mercy and the pledge of future love.

It is our desire and expectation that ye will persevere in well doing, and not be seized with any sudden amazement, through manifold temptations and trials of your faith and patience, and that you will not be moved away from the gospel which ye have heard, and the "form of sound words" and salutary discipline, so influential in our past prosperity.

We exhort that fervent charity be maintained among you, and a spirit of prayer for the continued presence and power of the Holy Spirit, and devotedness to those labours which God especially employs for the promotion of revivals of religion, the great end of all means, and the comprehension of all spiritual good.

But while these things are faithfully done, we pray you that other duties of imperious obligation and urgent necessity be not neglected; particularly that your charity for Home and Foreign Missions, and the education of a holy ministry, and for all our long-cherished voluntary associations, be not suffered to decline, but rather to flow on with augmented power, and faith, and prayer.

That especial care be taken to send and sustain a full representation of the Church, as a means of a mutual communication of knowledge, the culture of confidence, and the production of wise counsels.

And now, brethren, we commend you to Him who is "able to keep you from falling, and to present you faultless before the presence of his glory with exceeding joy, praying "that ye might be filled with the knowledge of his will, in all wisdom and spiritual understanding, that ye might walk worthy of the Lord unto all pleasing, being fruitful in every good work, and increasing in the knowledge of God; strengthened with all might according to his glorious power, unto all patience and long-suffering with joyfulness."

"Now our Lord Jesus Christ himself, and God, even our Father, which have loved us, and given us everlasting consolation and good hope through grace, comfort your hearts, and establish you in every good word and work."

SAM'L FISHER, *Moderator.*
ERSKINE MASON, *Stated Clerk.*

Philadelphia, May 25th, 1838.

The Counsel for the respondents proposed next to read in evidence, from the minutes of the General Assembly of 1837, to establish the position that a wide difference of opinion obtained between the two parties in "doctrinal tenets."

Objection was made, on the ground that the investigation was irrelevant. The Counsel for the relators claiming that no such difference as alleged existed, that they were prepared for an investigation of the subject, but considered it as precluded by early decisions of the Court, and by the very nature of the case now pending.

Mr. Hubbell, for the respondents, alleged that he considered it an important part of their case, and had accordingly given it prominence in his opening speech.

Judge Rogers.—I know that you did so, and I then notified you that it had no possible bearing on this case. We have nothing to

do with differences of doctrine between these parties. No doubt there may be differences, but their consideration does not belong to us here, in this court.

The Counsel for the respondents next read in evidence, to show the irregularity of the proceedings of the New School in their organization in 1838, certain rules of the Assembly, pp. 16–18, of the *Digest*, "Chap. 2. Of the annual organization of the General Assembly," as follows:

Section 1. Immediately after public worship, on the day appointed for the meeting of the Assembly, the moderator takes the chair; and having called the commissioners to order, offers prayer to Almighty God for his direction and blessing.

Sec. 2. The moderator then calls for the commissions; which being delivered to the clerk, and publicly read, a list of the commissioners is made out, in the order of the presbyteries.

RULE.

The Assembly having proceeded to business without attending sufficiently to the order prescribed in the constitution, respecting the commissions of the members; and having been led into that inattention by precedents in the former sessions of the General Assembly; it was thought necessary to declare: That the business ought not, in future, to be entered upon by the Assembly, until the commissions delivered to the clerk shall have been publicly read, according to the express letter of the constitution.—1791. Vol. I. page 26.

Sec. 3. The list of the commissioners present being completed, a new moderator is chosen.

Sec. 4. A moderator having been duly chosen, the former moderator before he resigns his seat, addresses him and the Assembly thus:

Sir—It is my duty to inform you, and announce to this house, that you are duly elected to the office of moderator in this General Assembly. For your direction in office, and for the direction of this Assembly in all your deliberations, before I leave this seat, I am to read to you and this house the rules contained on the records of this Assembly; which I doubt not will be carefully observed by both, in conducting the business that may come before you.

[Here the moderator is to read the rules, and afterwards add,]

Now, having read these rules, according to order, for your instruction as moderator, and for the direction of all the members, in the management of business, praying that Almighty God may direct and bless all the deliberations of this Assembly for the glory of his name, and for the edification and comfort of the Presbyterian Church in the United States—I resign my place and office as moderator.—1791. Vol. I. p. 30

Mr. Hubbell.—This Digest is dated 1820. This was the rule of the Assembly before the alteration to which the witnesses have testified. We now offer from the same book, pp. 24–27.

Section 9. GENERAL RULES for regulating the proceedings of the Assembly, which are read by the moderator before he resigns his seat to his successor.

I. The moderator shall take the chair at the hour to which the Assembly stands adjourned; shall immediately call the members to order; and on the appearance of a quorum shall open the session with prayer, and cause the minutes of the preceding sessions to be read; and on every adjournment shall conclude with prayer.

II. The moderator may speak to points of order, in preference to other members; rising from his seat for that purpose; and shall decide questions of order, subject to an appeal to the house by any two members.

III. The General Assembly, at every meeting, shall appoint a Committee of Bills and Overtures, to prepare and digest business for the Assembly. Any person thinking himself aggrieved by this committee, may complain to the Assembly.

IV. Petitions, questions relating either to doctrine or order, intended to be brought before the Assembly for decision, and in general all new propositions, tending to general laws, shall usually be laid before the Committee of Bills and Overtures, before they be offered to the Assembly.

V. The Assembly shall also, at every meeting, appoint a committee, to be styled the Judicial Committee: whose duty it shall be to take into consideration all appeals and references brought to the Assembly; to ascertain whether they are in order,

to digest and arrange all the documents relating to the same; and to propose to the Assembly the best method of proceeding in each case.

VI. A motion made, must be seconded, and afterwards repeated by the moderator or read aloud, before it be debated: and every motion shall be reduced to writing, if the moderator, or any member, require it.

VII. Any member, who shall have made a motion, shall have liberty to withdraw it, before any debate had thereon: but not afterwards, without leave of the Assembly.

VIII. On questions of order, adjournment, postponement, commitment, or the previous question, no member shall speak more than once. On all the other questions, each member may speak twice, but not oftener, without express leave of the house.

IX. When a question is under debate, no motion shall be received unless to amend it, to commit it, to postpone it, for the previous question, or to adjourn.

X. The previous question shall be in this form, *Shall the main question be now put?* and until it is decided, shall preclude all amendment and farther debate of the main question. If the previous question be decided in the affirmative, the debate on the main question may proceed: but if it be decided in the negative, the effect shall be to arrest the discussion, and to produce an indefinite postponement of the main question.

XI. An amendment may be moved on any motion, and shall be decided before the original motion.

XII. If a question under debate contain several parts, any member may have it divided, and a question taken on each part.

XIII. Every member, when speaking, shall address himself to the chair; and shall treat his fellow members, especially the moderator, with decency and respect: If a member act disorderly, it shall be the duty of the moderator, and the privilege of the other members to call him to order.

XIV. A question shall not be called up, or reconsidered, at the same sessions of the Assembly at which it has been decided, unless by consent of two-thirds of the members who were present at the decision.

XV. Any member, who may think himself aggrieved by a decision of the General Assembly, shall have his dissent or protest, with his reasons, entered on the records of the Assembly, or filed among their papers, if given in before the rising of the Assembly.

XVI. If any member act indecently, or disorderly, contrary to these rules, the moderator shall reprove, or otherwise censure him, as the Assembly shall judge proper: and if any member shall think himself denied of any right, or unjustly blamed by the moderator, he shall not speak disrespectfully to him, but modestly require the decision of the house in the case.*

Respondents called the *Rev. William S. Plumer.* Interrogated by *Mr. Hubbell*, the witness said: I was a delegate to the General Assembly of 1838. I attended the organization; was a commissioner from the Presbytery of East Hanover, in the State of Virginia. The Presbytery of East Hanover includes in it such portions of the Presbyterian Church as are within the tide-water district of Virginia, excepting that part lying north of the Rappahannock river, and there it includes two counties on the eastern shore. My residence is in Richmond. I was at the church when the Assembly met, in the early part of the morning of the 17th of May last. I suppose I came there about 9 o'clock. I know all the doors of the church; three of those at which the congregation usually enter were open from 10 o'clock, and I think were not closed at all that

* These rules remain as they were adopted by the Assembly in 1789, except that No. IX. was slightly altered in 1791, and No. IV. in 1819, when No. V. was inserted.

[It is proper here to remark, however, that since about 1833, each Assembly adopts the rules for itself after the election of moderator.]

morning. I occupied, in the house, a position a little at the left of the moderator, as he sat in the chair which he usually occupies. I did not sit in one of the pews, but on a chair in the area in front of the pews, and near to the moderator. This plan of the house which has been exhibited here, is not exactly correct. That portion of the front pews which is represented on the plan as being circular, is now cut off in such manner that it is straight and at right angles with the aisle. Dr. Witherspoon was present, and sat not far from me, on the right of where I sat. Dr. Phillips was not far from me on the left; perhaps about ten feet. Dr. Miller, Dr. Harris, and Dr. Breckinridge, were all in the neighbourhood where I sat. Mr. Krebs sat not far from me, at the side table nearest to me. Dr. Samuel P. Wilson, one of the witnesses, was also near me, in a position which he described the other day. James C. Wilson, of Virginia, sat near me. When the moderator descended from the pulpit and took his station in front of it, in the usual manner, to organize the Assembly, he took the chair, and stated that the first business would be the hearing of the report of the Committee on Commissions. The clerk, Mr. Krebs, was then standing. He did not, however, instantly commence reading the roll. He, however, had his papers with him. Before he had commenced reading it, Dr. Patton rose and stated that he had certain resolutions which he wished then to offer. The moderator, Dr. Elliott, told him that he was out of order, as the first business which must necessarily be taken up was the report of the committee on the roll. Dr. Patton replied that his resolutions related to that very subject. The moderator said, "You are out of order, sir, at this time," or "as the house is not yet organized;" something conveying that idea. Dr. Patton said he would appeal, and the moderator said the appeal was out of order. Dr. Patton then sat down, and the clerk, Mr. Krebs, proceeded to read the report on the roll, and having completed it, as I suppose, Dr. Mason, sitting on the middle aisle, six or seven pews from the front, rose and said that he moved, or that he wished to move, that certain commissions which he held in his hand should be entered on the roll. I should, however, state that previous to this, the moderator had announced that if there were any persons present who had commissions which they had not presented to the clerks and had them enrolled, they would now present them, in order that the roll might be completed. It was immediately subsequent to this call, that Dr. Mason rose and stated that he wished the names of the commissioners whose commissions he held in his hand, and then presented, to be placed on the roll, or that their commissions should be examined and they enrolled. The moderator asked him what presbyteries those commissions were from; and Dr. Mason replied that they were from the presbyteries within the bounds of the four Synods of Utica, Geneva, Genessee, and Western Reserve. The moderator replied that they could not be received, or, "You are out of order at this time." I think the latter was the expression he used, but am not positive. At this time Dr. Mason seemed to be greatly embarrassed, but did not manifest it except by his agitation and a tremulousness of his voice. He

said, very politely, that, with great respect for the chair, I must appeal from its decision. The moderator told him he was out of order. Dr. Mason then sat down, and to some one in the pew made a remark which I am not certain that I heard, and therefore do not state it. I am not certain whether I gathered it from hearing him at the time, or from report since. Dr. Mason stated that these commissions had been presented to the clerks and refused by them, and that he was desirous to get them on the roll. As soon as Dr. Mason had taken his seat, Mr. Squier rose and stated that he had a commission from the Presbytery of Geneva, and demanded that his name be placed on the roll, or words to that effect. The moderator asked what presbytery he came from. Mr. Squier replied that he came from the Presbytery of Geneva. The moderator then asked if the Presbytery of Geneva belonged to the Synod of Geneva. (*Belonged* was his word.) Mr. Squier replied that the Presbytery of Geneva was within the bounds of that synod. The moderator then, waving his hand, said, "We do not know you." I was reclining at the time against the table, with my head about five feet from the floor. I heard a member nearly opposite to me, after a little consultation which attracted my notice, move the appointment of a Committee of Elections. I am not certain that the motion was seconded; my impression is that it was. I will state the business that was going on, according to my recollection. Before the motion was announced by the chair, the interruption began. I noticed a little stir amongst some of the members, and observed Dr. Beecher, and Dr. Taylor of Connecticut, sitting together, I think in the next pew behind Mr. Cleaveland. They were moving their hands, and saying, "Go on, go on." I think that I heard them say the words. They were certainly waving their hands, but am not positive that I heard the words. I am certain that I could not be mistaken as to their gestures. About this time, Mr. Cleaveland, of Detroit, in Michigan, rose, and first pronounced a few words which I did not hear distinctly. He did not address the moderator, nor any other person. He spoke in his usually clear and loud voice. Mr. Cleaveland usually speaks very clearly and distinctly. His face was toward the moderator, and he began with "Whereas;" but he turned his face toward the opposite side of the aisle, and his voice became lower, and toward the close I could not hear what he said. I heard him say that he did not wish to be discourteous. I could hear the words, "a constitutional organization must be obtained at this time and place," and "in accordance with the advice of gentlemen learned in the law." I heard his apology, that he hoped it would not be considered discourteous, and I thought that I heard, "least interruption and shortest time possible." Thus much was from his paper. I then heard what I supposed to be his voice, (for it had now lost its usual clearness and energy, and was tremulous and agitated,) saying, "I nominate Dr. B——;" Beman, I supposed it was at the time; or, "I move that Dr. Beman." To what he nominated him, I did not know. I somehow had the idea distinctly lodged in my mind that the name of Dr. Beecher had been used, at some time after Dr. Beman was

nominated, but to what I did not hear. Whether I mistook that for Fisher or Beman, I cannot say. After the nomination of Dr. Beman, I did not hear any thing, until what would seem to have been an affirmative vote, which, for loudness, I may confidently say that I never heard equalled on the hustings of a Virginia court. I am certain that it might have been heard the whole distance across Washington Square, at any quiet period of the twenty-four hours.

Question by Mr. Meredith.—Do you mean to be understood as saying that the individual could have been heard the whole distance from the Seventh Presbyterian Church in Ranstead court to the further side of Washington Square?

Witness.—I did not say, nor did I intend to say, that he could have been heard from Ranstead court to the further side of Washington Square. But what I said was, that he could have been heard across Washington Square. I am not certain who this stentor was. I thought it was a small gentleman, mounted on the back of a pew, upon the little riband at the top. Why I thought so I cannot tell. The gentleman was not facing me, and I did not know him. The back part of his hair indicated that he was an old man, considerably older than myself.

[The court adjourned while the witness was on the stand. At the opening of the court in the afternoon, Mr. Plumer resumed.]

I closed this morning, my account of the circumstances attending the first vote on the motion of Mr. Cleaveland. So far, I have told all that I saw, but I do not suppose that I saw all that transpired, for there was a dense mass of people standing up, many of them on the seats of the pews. From this time I heard no more nominations, and even as to that of Dr. Beman, I may be mistaken. There were three or four very loud responses of "*aye*," but I could not tell to what they were responses. Not long after the last "*aye*," there was a movement towards the north end of the church, down the aisle from the moderator. The persons who had been acting in this scene, removed to a considerable distance, possibly twenty feet. I afterwards heard nothing distinctly, until a gentleman, whom I took to be President Beecher, but if it was he, he had changed his apparel since I had travelled with him, a few days before, came to the middle door, and proclaimed very loudly, that the General Assembly had adjourned to meet in Mr. Barnes' church forthwith. There were two other announcements of the same thing, by, I think, some person of a different voice. The next one was at the east door, at the north end of the house. The last annunciation was at the door nearest the pulpit, on the moderator's right, and the east side of the house. I saw, about this time, some clapping of the hands, and heard some hissing, in the gallery. I do not know whether any persons in the gallery voted or not. No person near me voted. I could not have voted, if I had wished to. I could not hear the question, so as to enable me to vote intelligently. I did not hear any reversal of the questions put by Mr. Cleaveland. I firmly believe that there was not any reversal of the questions; if there was, I certainly did not hear it. The next "*aye*" came so soon, that it confirmed my impression, for no time

was allowed to put both the negative and another motion. Of course, any answer in regard to the time occupied by these proceedings, must be exceedingly vague. My impression that day, when conversing on the subject, was, that it did not exceed five minutes. I took no note of time by my watch, nor did I think about time; my attention was occupied with what was going on. I now know Mr. Joshua Moore. He sat in the General Assembly in the Seventh Presbyterian Church. After the moderator had called for commissions, I saw Mr. Moore come to the clerk's seat, but what he said or did I don't know. I first learned that Dr. Fisher was appointed moderator, some time after the proclamation had been made at the doors, that the General Assembly had adjourned, whether that day or the next, I cannot be certain. I was elected moderator of the Assembly which sat in the church in Ranstead Court that year.

Cross-examination.—Interrogated by *Mr. Randall*, the witness said: I became acquainted with Mr. Cleaveland some years ago in Boston, Massachusetts. Mr. Cleaveland is ordinarily very prompt in his manner of doing business. I think that when unembarrassed, he would put a question as quickly as any other man, with an equally stout voice. I do not think my estimate of the length of time that these proceedings occupied, is testimony. If he said "All those who are in favour will say Aye," and "All those who are opposed will say No," he could say it as quick as I have done. The book requires, that the question should be stated when it is put. I ought perhaps to state, as descriptive of the witness, that I am editor of "The Watchman of the South." That paper was established in August, 1837; and has taken an active part in the discussion of the Assembly's proceedings of that year. It was for the purpose of sustaining those proceedings, among others, that the journal was established.

Rev. David Elliott, D. D., called by the respondents.

Interrogated by *Mr. Hubbell*, the witness said: I presided as moderator at the opening of the General Assembly of 1838, having been the moderator of the previous General Assembly of 1837. Immediately after the religious exercises were concluded, I announced from the pulpit that I would proceed, as soon as the benediction should be pronounced, to constitute the General Assembly with prayer. And that for this purpose I would take the chair under the pulpit which is usually occupied by the moderator when presiding in the General Assembly. I did so, and, accordingly, having offered prayer, I then called on the clerks to report the roll of members, if they had one formed. Before the call was complied with Dr. Patton rose, and stated in substance, or to this effect, that he wished to present certain papers which he held in his hand, or to offer certain resolutions to be acted on by the house. I replied that he was out of order, as the first business was the report of the Committee of Commissions on the roll. He said these resolutions related to the roll, and that they would occupy but little time, or to that effect. At this time the clerk, Mr. Krebs, had risen, or he was then standing on my left. I directed him to proceed with the reading of the roll, and about that time Dr. Patton

took his seat. Mr. Krebs read the roll, and, having some papers in his hand, presented some commissions, as he said, to the moderator, which were laid on the desk where I sat. I then announced that those persons whose names were read would be considered members of the house, and continuously, that if there were any other commissioners present who were in connexion with the General Assembly of the Presbyterian church, who were not enrolled and who had not had an opportunity of presenting their commissions, they could now have an opportunity to present them and be enrolled. A gentleman whom I did not then know, but whom I afterwards understood was Dr. Mason, of New York, rose, I think it was at this time. He held a roll of papers in his hand, which he said were certain commissions which had been presented to the Committee on Commissions and by them refused, and that he now presented them and moved that their names be added for the purpose of completing the roll. I asked him where those commissioners were from, or if they were from presbyteries which were in connexion with the General Assembly of the Presbyterian church. I am not sure which expression I used, but one of them. He replied that they were from presbyteries within the bounds of the Synods of Utica, Geneva, Genessee and Western Reserve. I then stated to him that he was out of order at this time, or now, using one or the other of these forms of expression. He said, that with great respect for the chair, he must appeal from the decision. I remarked that the appeal was also out of order at that time. Mr. Squier then rose. (I did not recognize him at the time, though I had formerly been acquainted with him.) He stated that he held in his hand a commission from the Presbytery of Geneva, which had been tendered to the clerks or Committee of Commissions, and refused by them, and that he now demanded his seat in the Assembly. I asked him if that presbytery was within the bounds of the Synod of Geneva. He replied that it was. I replied, "*We do not know you, sir.*" He made some reply which I do not recollect, and sat down without pressing the matter any further. I then repeated my call for the same kind of commissions which had not been presented to the Committee on Commissions. Before the last words of this call were out of my mouth, Mr. Cleaveland rose, and commenced either reading or speaking, I can't say which; but he had a paper before him, in both hands, towards which he looked. Whether he made some prefatory remarks, or began with reading, I do not know. He was frequently called to order. Several persons, around me, called "order," in the tone usual in the Assembly. Mr. Cleaveland, however, continued to read. I would say, at this time, that during the whole of his reading, and until after the vote on the nomination of Dr. Beman, I called "order" at short intervals. I did this, believing it to be my official duty as moderator. He did not address the chair, as I understood. Either simultaneously with the rising of Mr. Cleaveland, or, as I rather think, a little after, and after a cry of order, some person rose, and moved that we should proceed with our regular business, by appointing a Committee of Elections, to whom the informal commissions might be referred. The motion I

entertained as an officer of the Assembly, and announced it, but it was not acted on.

This was doing while Mr. Cleaveland was reading or speaking, and diverted my attention from him, and I did not, for that reason, hear all that he said. What I heard was to this effect. After some remark, about not being able to get on with the business, and reflections on the chair, as I thought, he said something of their being advised by counsel learned in the law, and securing a constitutional organization; but these things were not in juxtaposition. Then towards the close, I heard the phrases, "not discourteous," "fewest words and shortest time possible," or something to that purport. He then moved that Dr. Beman should take the chair, or be moderator, I don't know which. After this he put the question, "Those in favour of the motion will please to say aye," or words to the same effect. There was a very loud response; some of the voices I regarded as unusually loud, and there were a few dragging votes. I hardly know how to express what I mean. There was a general burst of voices, and then a few in the rear, "aye, aye." I have an indistinct recollection of a few noes, simultaneous with the ayes, either from the gallery, or some other quarter of the house. I can't say whence they came, but they were simultaneous with the ayes. Upon this vote of aye, I saw Dr. Beman move out of the pew of which the location has already been described, six or eight pews from where I sat, into the centre aisle. As he moved out a number of persons from both sides of the same aisle passed into it, simultaneously with him. They fell into his rear, and turned their backs upon me; and the mass closing up, in a very short time my view was obstructed. What then passed I do not know. They seemed to recede the distance of a few pews. At this time, there was a simultaneous rising, and great excitement in the north part of the house. From about the position that Dr. Beman left, the great mass were on their feet. There were a number standing on the seats of the pews, and some, in my judgment at the time, on the pew backs. I remember, that there was a small man on the back of a pew, supporting himself on the shoulders of those in front of him, and my impression was, that he said "aye" louder than any one else. I had continued to call order during this period. Some gentleman said, "Is it not possible to have order?" or "Can we not have order?" I said I had done all I could, and it appeared that the confusion could not last long. One member, if not more than one, requested that we should wait a little until order could be restored. I then made an announcement to the General Assembly that the business would be suspended until the interruption and tumult subsided. I made this announcement as audibly as I could. Up to this time I had been standing. When I made this announcement I sat down, as it was evident the members could not hear at present. The suggestion came from the neighbourhood of the west door. I considered it altogether as an *ex parte* organization. I was about to put the question on the appointment of the Committee of Elections, when the request was made that the business should be suspended until the tumult had subsided. I then made the an-

nouncement that the business was suspended for the present, and I sat down, as I stated before. After this I heard several ayes, successively, but did not hear any motion, except on the nomination of Dr. Beman. While I was thus seated, the members around the chair, for a considerable distance in front, were quiet in their seats. After some little time, the actors in the scene of disorder began to move towards the north door, and there being a large mass of people in the centre aisle, several passed over the pews to the north-east door. As they passed out somebody proclaimed, in a loud voice, first at the north door, and afterwards at the other doors, successively, that the General Assembly adjourned to meet forthwith in the First Presbyterian Church. I am unable to state how long the whole of these proceedings occupied, but according to the best of my judgment and recollection, I should say that it was from *four* to *six* minutes. I did not look at my watch: I therefore cannot say positively, but that is my belief. I ought to have stated, that, at the time they passed out, there was a great increase of noise. There was clapping, and some hissing, though not much, from the galleries. Most of the sounds seemed to be of approbation. After they had left the house, we proceeded to appoint a Committee of Elections, and to the other business of the house. I did not hear Mr. Cleaveland's motion reversed. I recollect when, about the time Mr. Squier sat down, the clerks having closed their report, and the announcement in regard to other commissions having been made, there was a commissioner, or a person claiming to be such, who stated that he came from some presbytery, and had a commission, for which he seemed to be searching in his pocket, but did not find it, and said that he must have left it at his lodgings. I said, when he had it, the Committee of Commissions would attend to that matter. He declared, I think, that he had the commission in the city, but that he had left it at his lodgings. I cannot say certainly, whether this was Mr. Moore. I have some acquaintance with that gentleman, but my attention at the time was diverted, and I cannot say who it was. The commission was not afterwards presented to me, but I know that Mr. Moore subsequently took his seat. I ought, perhaps, to make a statement which may, for aught I know, have some bearing on the case, in regard to a subsequent transaction. After the house was fully organized, I was appointed one of a committee to draft a minute in regard to the organization. The history of this transaction I will give, if it is desired.

The counsel for the respondents said they did not desire it.

The witness urged considerations of duty, and the obligations of his oath, which he "thought, perhaps, made it imperative" on him "to relate the transactions referred to."

The counsel remonstrated, and the witness at length yielded and retired from the stand.

Respondents' counsel then proposed to read from the docket of the Supreme Court, of July term, 1838, [to show that the party of the relators had other forms of redress for their supposed grievances, which, he urged, they ought to have pursued rather than this,] the entries of suits brought by Miles P. Squier, Henry Brown, and

Philip C. Hay, against the moderator, clerks, and others of the Old School Assembly.

The opposite Counsel objected to this testimony, and the Court decided that it could not affect the case.

Mr. Ingersoll, of counsel for the respondents, then said, that Dr. Elliott (the last witness on the stand) still felt himself bound, by the oath he had taken, to state some particulars to which he alluded at the close of his testimony, but which he was at the time prevented, by the counsel, from stating. Under these circumstances, he did not think that they had a right to close the mouth of Dr. Elliott, and on his behalf, therefore, he requested that the witness might have opportunity to proceed with his statement.

Dr. Elliott then resumed: It is my impression that there were some other items in that transaction, besides those mentioned on the record. A committee was appointed to form the minute. Afterwards, Dr. Nott and myself were added to that committee, and we retired to make up our report. Dr. Nott took a pen, and told me to look over him while he was writing, and whenever I thought proper, to make any suggestion. Accordingly I did so, and suggested a number of particulars; but Dr. Nott replied, that it was not important to mention every particular, but that a general sketch, if true, was all that was necessary. I acquiesced, though I thought that several of my suggestions should have been attended to. I proposed to say, that the noise had been disreputable, but Dr. Nott observed, that the less said about that, the better. There is nothing in the record which is not true. I am willing to abide by that as far as it goes, but it is defective, and in giving evidence, I have thought that additional particulars ought to be related.

The counsel for the relators here withdrew their objection to the reading of the entries from the docket, offered by the respondents' counsel, *Mr. Randall* remarking, that as the respondents thought it so important as to make it a ground of exception to the decision of the Court, the relators did not regard the subject of any consequence, and as it would occupy but a few moments to read the record, it would, perhaps, be best to hear them read. The Court consented, and the record was read, as follows:

Supreme Court, July Term, 1838.

J. Randall, *Meredith,* 56 *Bradford*, d. b. e. *Kane*, d. b. e. 25th July, 1838. *F. W. Hubbell,*	Miles P. Squire, vs. David Elliott, John M'Dowell, John M. Krebs, William S. Plumer and Robert J. Breckinridge.	Summons in case exit May 31, 1838. "Summoned."
J. Randall, *Meredith,* 57 *Bradford*, d. b. e. *Kane*, d. b. e. 27th July, 1838. *F. W. Hubbell.*	Henry Brown vs. Same Defendants.	Summons in case exit May 31, 1838. "Summoned."

J. Randall. *Meredith.* *Bradford*, d. b. e. *Kane*, d. b. e. 27th July, 1838. *F. W. Hubbell.*	58	Philip C. Hay, vs. Same Defendants.	Summons in case exit May 31, 1838. "Summoned."

In connexion with the remarks of counsel, respecting the introduction of these entries from the docket, the Court intimated that it was not the practice to note decisions, respecting the introduction of testimony or collateral questions which arose on the trial, as excepted to, unless exception were actually taken at the time; and that otherwise the decision was regarded as acquiesced in, or submitted to.

The counsel for the respondents expressing some surprise at this, and remarking that, owing to the supposition that it had been the practice in that Court to note every decision as excepted to, as was the practice in some other courts, they had omitted to request the Court to note any exceptions of the many which they supposed they should take in a certain contingency.

Judge Rogers remarked, that they should lose no advantage from having acted under this misapprehension; but might consider every point on which he had decided adverse to their wishes, as *now* raised and decided. Their exceptions should be noted accordingly, and after this explanation, there could not be the slightest difficulty.

Respondents now offered to introduce a series of witnesses, to show, that they, being clergymen within the bounds of the four disowned synods, have, according to the provisions of the act of 1837, applied to neighbouring presbyteries, and have been admitted into them. *Mr. Hubbell*, saying: the witnesses are here, and are prepared to testify that they have availed themselves, without difficulty, of the provisions of that act; but, perhaps this testimony falls within your Honour's previous exclusion.

Judge Rogers, said: I do not see the pertinency of this evidence. It cannot alter the character of the original acts.

Mr. Hubbell. Will your Honour then please to note an exception. The witnesses offered, are Rev. Varnum Noyes, John V. Hughes, Edwin Bronson and William H. Snyder.

Mr. Boardman re-called by the respondents, said: After the moderator's call for commissions, the Rev. Joshua Moore went up to the clerks' table and presented a commission. I know only, that this was subsequent to the call made by Dr. Elliott. It was, I think, while either Mr. Squier or Mr. Cleaveland was on the floor, though I am not positive. On reflection, I think it was after Dr. Mason had taken his seat. I cannot speak positively as to the time.

Rev. Robert J. Breckinridge called by the respondents. Interrogated by *Mr. Hubbell*, said: I was a commissioner to the General Assembly of 1838, from the Presbytery of Baltimore. I attended the organization of the General Assembly. I did not hear any questions put by Mr. Cleaveland, Dr. Beman and Dr. Fisher. I did not know what the motions were, and would not have voted on them if I had known what they were. I was present (in the Seventh

Presbyterian Church) from the time when Dr. Patton rose till the adjournment. I have heard various statements in regard to the time that elapsed from Mr. Cleaveland's rising, till the adjournment. I can only say, that it was a very short, and a very confused space of time. I should say, that from the time, when Mr. Cleaveland rose, until the confusion subsided, after the New School party had left the house, not more than three or four minutes passed. I have been in poor health, which has prevented my attendance here, and do not know who have been sworn. I, therefore, cannot answer, whether all the members of the Assembly of 1838, who are present, have been examined. Dr. Alexander W. Mitchell was a member, and I think I heard him say, that he had not been sworn. I heard a part of Mr. Cleaveland's paper. My position was as one or two gentlemen have described it. I was at some distance from Mr. Cleaveland. I heard nothing distinctly, after he moved that Dr. Beman should take the chair. I recollect that Professor Maclean was a commissioner, and he has not been sworn. I did not hear Mr. Cleaveland put any other question than that on the nomination of Dr. Beman, and if I had been disposed, I could not have voted intelligently upon any motion but that. Whether this motion was reversed, or not, I don't know. I do not know whether any of the other questions were reversed: I heard no vote except the *aye*. To the best of my recollection, I heard no negative vote on any question. It is probable that my perceptions were influenced by the state of my own mind.

Cross-examination. Interrogated by *Mr. Randall*, the witness said: I probably did not give as much attention to the proceedings, as I should if I had viewed them in a different light.

Dr. Alexander W. Mitchell, called by the respondents. I was a commissioner to the General Assembly in 1838. My position was nearly opposite to the east door, on the west side of the east aisle. Mr. Cleaveland was in a pew opening on the east side of the middle aisle, on a line with that in the rear of the one in which I sat; my seat was therefore one pew in advance of the line of his. I was about half way up from the door of my pew, and he about two-thirds of the way up his. He rose, and made some observations, but whether speaking or reading from a paper I do not know. At this moment my attention was diverted to a gentleman in the pew before me. When I turned again Mr. Cleaveland's back was towards me. That which diverted my attention was, a gentleman, in the pew immediately in front of me, standing on the seat. I asked him if he was a member, and he said he was. [The witness here asked if he should proceed, and objection was made to his relating individual conversation.] When Mr. Cleaveland finished, he was facing the north-west. He moved that Dr. Beman should take the chair or be moderator. I don't know which. There was a loud response of "aye." The gentleman on the seat in front of me answered in a very loud voice. I don't believe that the negative of the question was put. I did not hear it called for. I heard no negative votes, but there was a great deal of noise and confusion in that part of the house. I did not vote on Mr. Cleaveland's mo-

tion. I did not consider that I had either part or lot in the matter. I regarded it as disorderly. I did not consider anything to be before the house at that time. The moderator cried "Order!" and a great many in the pew with me called to order. I did not myself call. After the vote of aye, Mr. Cleaveland made another motion for the appointment of temporary clerks. I understood him to nominate Mr. Gilbert, whom I had seen before, and Dr. Mason, of whom, until that day, I had no knowledge. I did not hear the question reversed. I do not believe that it was reversed. I think I should have heard if he had reversed the question, as I was contiguous to the place. Afterwards there was an "aye," in about the same tone as before. The man on the seat in front of me yelled to it. His "aye" was not given in the manner usual in deliberative assemblies. I should say that it was more like the yell of an Indian, than of a white man. The next thing I observed was, that Dr. Beman moved out into the aisle. There were a number of others moved into the aisle at the same time he did. Others rose on their feet and remained, some standing on the floor and some on the seats. I then sat down. I heard the ayes called two or three times. I remember their going out of the house. Immediately after they left the house some person announced at the doors of the church, in a very loud voice, that the General Assembly of the Presbyterian Church had adjourned to meet forthwith in the lecture room of the First Presbyterian Church. It was not the little man who yelled like an Indian. This proclamation was repeated two or three times to the best of my recollection. The first that I knew of Dr. Fisher's appointment was either that afternoon or the next morning. The whole of these actions occupied but a short space of time. I suppose five minutes or thereabout.

Mr. Preston.—Did you hear any response from the gallery.

Witness.—I can't say that I did. There was a confused noise in all that part of the church.

Respondents called *Mr. Alexander Symington.* Interrogated by *Mr. Hubbell,* the witness said: I was a delegate to the General Assembly of 1838. I was a lay delegate. I attended at the organization. I sat on the west side of the house, nearly opposite to where Mr. Cleaveland was. I heard him, or rather I saw him, when he rose. I heard him commence reading or speaking. I heard a good many words at the time, but not having charged my memory with them, I am unable to give an explicit and particular account of all that was said. I heard him say "Counsel learned in the law." I also heard the word "discourteous." I heard him put the question as to the appointment of Dr. Beman as moderator. I heard the vote in the affirmative on that question. I can't say that the question was not reversed; all that I can say is, that I did not hear it reversed. I am unable to say *now* whether I heard any negative votes. I did not vote. I did not vote on any of the questions put by Mr. Cleaveland, or subsequently put by Dr. Beman or Dr. Fisher. I did not hear the motion for Dr. Fisher's appointment at all. I did not know of it till the afternoon session; but think I learned it during that day, some time in the day; I can't say when.

Respondents next called *Mr. William Hamilton.* Interrogated by *Mr. Hubbell*, the witness said: I attended at the time of the organization of the General Assembly of 1838, on the 17th day of May last, at the Seventh Presbyterian Church, in Ranstead Court. I saw a gentleman, whom I afterwards understood was Mr. Cleaveland. I saw him when he first rose; he appeared to be reading a paper which he held in his hand; at any rate, he appeared to be looking at it. I did not hear a motion made. I was on the east side of the church, a little to the north of the east door. I could not hear what Mr. Cleaveland read or said. There was only one gentleman whom I knew in my vicinity, though there were numerous persons there around me where I sat. I heard a cry of "aye" after he had read a part of the paper. Whilst he was reading, he turned round from the moderator. I could not see nor hear him distinctly. The response of "aye" was very loud, and one voice much louder than any of the rest. The person whom I knew, and several others in the pew in which I sat, and in that immediately before me, voted "aye." The person alluded to, was the only one whom I knew in the vicinity where I was. It was the Rev. Mr. Duffield, formerly of Philadelphia. When he said "aye," his face was turned toward Mr. Cleaveland, so that I could see the side of his face. He was sitting before me at the time. Mr. Duffield then struck his cane down on the seat quite violently, and said to another gentleman sitting by him, that "It was done according to law, as slick as it could be." He repeated this three times to those around him, and seemed highly pleased. Afterwards they moved, and went toward the north door of the house, but I continued to sit. I heard them cry "aye" another time, but do not recollect at present what it was about. After a great part were out of the house, I heard one gentleman cry in a very loud voice, that the General Assembly had adjourned to meet forthwith in Mr. Barnes' church. I am not certain whether he said Mr. Barnes' church, or the First Presbyterian Church. His proclamation was thrice repeated at the other doors. I do not know who made the proclamation the first and second times, but it was repeated the third time at the east door, directly before me, by Mr. Eliakim Phelps.

Cross-examined by Mr. Randall.—Were you a commissioner?

Witness.—I was not a commissioner: I was a spectator.

Mr. Randall.—Did you know the Rev. George Duffield?

Witness.—I had seen him sitting in the General Assembly of 1837, amongst the members.

Mr. Randall.—Did he take part in the proceedings in 1837.

Witness.—I don't know.

Mr. Randall—How often have you ever seen Mr. Duffield in the course of your life?

Witness.—I have not seen him more than *four* or *five* times.

Mr. Randall.—Did you ever speak to him?

Witness.—I never did.

Mr. Randall.—Are you certain that the person you described was Mr. Duffield?

Witness.—I am confident that it was.

Mr. Randall.—Are you certain that Mr. Duffield struck on the seat with his cane?

Witness.—I said that he had a cane, and struck on the seat several times with it.

Mr. Randall.—Did he ever carry a cane before?

Witness.—I don't know.

Mr. Randall.—Did you ever see him have a cane at any previous time?

Witness.—I don't recollect that I did.

Mr. Randall.—Do you know that Mr. Duffield is in this city at present.

Witness.—I do not.

Mr. Randall.—Do you not know that he is at present at Detroit, in the state of Michigan?

Witness.—I am ignorant as to that.

Mr. Randall.—Had Mr. Duffield any pastoral charge whilst he resided in this city?

Witness.—I am not certain, but I meant to say that he had no pastoral charge here at this time. Such is my recollection, though I may be mistaken, as to that point.

Respondents called *Mr. Joseph B. Mitchell.* Interrogated by *Mr. Hubbell*, the witness said: I was present at the organization of the General Assembly of 1838. I am cashier of the Mechanics' Bank, in this city. I was first located opposite to the south-east door of the house, but afterward stood in the aisle, except for a few minutes, when I went round to the clerks' table. Mr. Cleaveland's position was three or four pews to the north of me, perhaps ten or twelve feet distant. I saw Mr. Cleaveland rise. He was apparently reading a paper. I did not hear the language it contained, though I understood his object. He was at first with his side towards me, and his face to the moderator, but I think that he afterwards turned. Persons rising between us, in the confusion I lost sight of him, and do not recollect seeing him at the conclusion of his exordium. I heard something, which I understood to be a motion, but I did not hear it distinctly. I think Dr. Beman's name was mentioned. Whether the motion was made by Mr. Cleaveland or not, I can't say. I took it for granted that it was for moderator or chairman, that his name was mentioned. I immediately heard a response of "aye," in a very loud tone. The noise in the house increased. I did not hear the question reversed. I am certain that there were no negative votes in the part of the house where I was. I did not hear any negative votes. There might have been some in the north-west part of the house, but there were none in the region that I occupied. I did not hear any. I heard a number of persons say "aye." I did not hear Dr. Fisher's name mentioned. I think I heard that he had been elected moderator on the succeeding day.

Cross-examination.—Interrogated by *Mr. Randall*, the witness said: The last of my brother's official acts was with the New School. When I last saw him, he sympathized with that school, and was said to be the author of a protest, in the Synod of Virginia, against

the proceedings of the other party. I don't like party names, but I am ranked on the Old School side.

Rev. S. Beach Jones, called by the respondents, interrogated by *Mr. Hubbell*, said: I attended the General Assembly of 1838 as a delegate from the Presbytery of Mississippi. I was present at the organization of said Assembly, in Ranstead court. I was in the fourth or fifth pew from the moderator, on the west side of the middle aisle. I was about twelve or fifteen feet from where Mr. Cleaveland was seated. His position was diagonally across the house from me, and in the sixth or seventh pew from where I sat. I saw him reading a paper. Although I was so near to him, I did not hear distinctly what he read. I heard a motion from him: it was that Dr. Beman be moderator or chairman. There was rather a tumultuous cry of "ayes" in answer. I heard no reversal of the question, though I was within a short distance of him. I don't think that I heard any "noes." There were certainly none in my region, and I considered it in the body of the house. He then made a motion for the appointment of clerks. I do not know that I heard the names of the gentlemen. I presume I did hear their names, but I should not like to say positively. They were strangers to me. The party or body of men who took part in these proceedings, particularly the leaders, seemed to be congregated near the middle aisle, around where Mr. Cleaveland was. There seemed to be a nucleus in the aisle, around which they congregated; but of this I cannot speak positively. I heard nothing distinctly afterwards, except "ayes," and an announcement that the General Assembly had adjourned to meet immediately in the First Presbyterian Church, on Washington street. What it was that passed, I did not certainly know, but it was a scene of much excitement and tumult. I cannot say how long this scene continued, but it was of very short duration. I did not hear Dr. Fisher nominated as moderator. I knew nothing of it at the time. I first heard that Dr. Fisher was elected moderator, either that afternoon, as I was returning to the General Assembly, or the next day: I think it was that afternoon. I did not vote. I had no opportunity to vote as I should wish.

Cross-examination.—Interrogated by *Mr. Randall*, the witness said: I still belong to the Presbytery of Mississippi, unless I have been recently dismissed, as I requested to be. I now reside at Bridgeton, in New Jersey, ministering to a congregation belonging to this presbytery, to which I requested to be dismissed. I presume that I am now dismissed from the Presbytery of Mississippi, to that of Philadelphia, but have no certain knowledge that such is the fact.

Mr. Samuel Agnew, called by the respondents, interrogated by *Mr. Hubbell*, said: I was not in commission to the General Assembly of 1838, but attended its organization. I was situated near the south-west door. I saw Mr. Cleaveland rise with a paper in his hand. He seemed to read it, amidst a great deal of confusion. I did not hear it; the confusion was so great, that it was impossible for me to hear it. I heard him make a motion that Dr. Beman take the chair, or preside. I heard him put the question in the affirma-

tive on this motion. I did not hear him reverse it. My impression is, that it was not reversed. The succeeding motion was so quickly made, and the question put thereon, that there could not have been time for a reversal. There was, at that time, much confusion and considerable noise. After this a number of motions were put, or at least "ayes" taken. Many persons were standing in the church, some on the floor, and some on the seats in the pews. What followed I did not hear distinctly, owing to the tumult and confusion. I did not hear the motion made to put Dr. Fisher into the chair. I heard the proclamation of an adjournment made at the doors of the house. I heard some votes from the gallery. I think the whole proceedings occupied not more than five or six minutes, though it might have been ten minutes or more. I can't tell how long the proceedings occupied with any precision.

Cross-examination.—To what church do you belong?

Witness.—I am a member of Dr. M'Dowell's church, generally called the Central Church, in this city.

Respondents called *Mr. Edward C. Norris.* Interrogated by *Mr. Hubbell*, the witness said: I attended the organization of the General Assembly of 1838, in Ranstead court. I took my station in the south-west door of the church, near to the pulpit; I mean the door next to the grave yard. I saw Mr. Cleaveland rise. He held a paper in his hand, and appeared as if he was reading from the paper. He read in a very loud voice. His voice was very loud, clear and distinct. I could distinctly hear every thing which he read, but do not now remember what it was. When he finished reading the paper, as I presumed, he nominated Dr. Beman to act as chairman. I heard a very loud affirmative; I should think from the galleries as well as the lower part of the house. I do not recollect hearing the question reversed, or any negative votes. Dr. Beman rose, and took his station in the middle aisle. Mr. Cleaveland's face was toward the moderator. The next thing that I heard, was two persons nominated as clerks, but by whom they were nominated, I did not know. The next thing that I heard distinctly, was the motion that the General Assembly do now adjourn, to meet again in the First Presbyterian Church, on Washington Square. Then they rose up in a body in the rear of the building, and, together with many from the galleries, went out of the house. There was then a proclamation made and repeated at the several doors of the church, in a loud voice, that the General Assembly of the Presbyterian Church (in the United States of America, I think, was added) had adjourned to the First Presbyterian Church.

Mr. Hubbell.—How long time did these proceedings occupy?

Witness.—I am not positive, but I think that they did not occupy more than twenty or twenty-five minutes.

Cross--examination.—I was standing part of the time between the stove and the door, and partly in the door among those most remote from Mr. Cleaveland of any persons in the house. There were some outside. I was further from Mr. Cleaveland than most of the members of the General Assembly.

Mr. Meredith.—Did you hear the motions at the distance you were from him?

Witness.—The motions which I heard were in a very loud, clear, and distinct voice. They could easily be heard where I was.

Mr. Meredith.—Were you a member of the General Assembly?

Witness.—I was not a member; I was there as a spectator.

Mr. Meredith.—Are you a member of the Presbyterian Church?

Witness.—I am not a Presbyterian; I am an Episcopalian.

Mr. Meredith.—Did you feel a particular interest in the proceedings?

Witness.—I had no particular interest in the proceedings. I went there merely out of curiosity to see what they were about, and hear what was going on.

Professor John M'Lean called by respondents, interrogated by *Mr. Hubbell*, said: I was a commissioner to the General Assembly of 1838.

Mr. Hubbell.—Did you hear Mr. Cleaveland's motion?

Witness.—I did not hear it distinctly. I heard a motion somewhat to this effect: "I move that Dr. B——," I thought at the time that it was Dr. Beecher, but heard afterwards that it was Dr. Beman. This was all that I heard of the motion. I heard the "aye" very distinctly. I did not hear the question reversed. I did not hear any negative votes. I did not vote myself. I had no opportunity if I had been disposed to vote. I am perfectly willing to say what I would have done. I would not have voted if I had had the opportunity. I have no distinct recollection of clerks being nominated. Whether I heard it or not, I can't say positively. Subsequently, I heard nothing. Till the afternoon, or next morning, I supposed that it was Dr. Beecher who was called to the chair.

Cross-examination, by Mr. Randall.—Did you not, in a discussion which afterwards took place in your Assembly, in relation to a report of a committee, oppose the adoption of that report because it contained the words "*tumult and violence*" as descriptive of the proceedings of the New School party?

Witness.—I remember opposing the adoption of the words "tumult and violence" which were in the report alluded to. However, I can't say as to the word "tumult." I recollect distinctly opposing the word "violence," apprehending it to be of ambiguous import, that some might understand by it, that there had been personal violence, something like an assault and battery, and farther, because I thought we ought to state the simple facts, without characterizing them.

Mr. Randall.—Did you not say, in the course of that debate, that there had been as little disturbance amongst the New School members as there could have been in such a case, or under such circumstances?

Witness.—I used words of somewhat analogous import. I said it was true there had been violence, in the sense intended, but no violence, in the sense in which the word might be understood. I made a remark also to this effect: that there had been as little disturbance by the members of the New School party, as had been

possible, in that state of things. The word tumult was not retained, by the casting vote of the moderator: my impression is, that I was in a very small minority. My object was to have a simple narrative of what had occurred, without any comment. I respected the motives of my brethren of the New School. I thought that the tumult could not be charged on them, though they were the occasion of it.

Re-examined by Mr. Ingersoll, witness said: There were loud exclamations of "aye," and there was great excitement. My remark was, that the disturbance was not greater than was natural under such circumstances. I thought the proceedings disorderly, of course; I have never thought otherwise. It was a violation of the rules of order. My object was, to defend the motives of my brethren. Towards the conclusion of the scene, there was clapping and some hissing.

By Mr. Randall.—I did not know any of the individuals who clapped or hissed, but supposed the clapping was in approbation, and the hissing in disapprobation.

Mr. Randall.—Is it not more probable that the opponents of the New School men would make a noise to interrupt them, than that *they* should interrupt themselves?

Witness.—As an abstract proposition it may be so.

By Mr. Hubbell.—I am not aware that there was disorder among the Old School.

By Mr. Randall.—I think some of the commissioners were disorderly, but I saw no clapping or hissing from any member of the Assembly. There was certainly disorder. I supposed it was a *disorder* to form an ex-parte organization. The voices of the New School, in voting, were altogether above the pitch necessary to being heard.

Mr. Meredith.—Was it not necessary to speak loud in order to be heard?

Witness.—It was a perfect scene of confusion. I suppose it was necessary to speak loud, in proportion to the noise, in order to be heard. The voice naturally rises in loudness with excitement.

By Mr. Preston.—I am confident that Mr. Duffield was not a member of the Assembly.

Mr. Randall.—He was not: the record shows that.

Mr. Charles F. Worrall, called by the respondents, interrogated by *Mr. Hubbell*, said: I was present as a spectator at the organization of the General Assembly of 1838. I went into the house about nine o'clock in the morning. I heard Mr. Cleaveland make his motion. I was in the east gallery, in the front pew of those that ascend from the pulpit. Mr. Cleaveland rose, having a paper in his hand, after having consulted with two or three persons near him. He commenced reading, or looked at the paper as if he were reading. After he began, he turned round with his face toward the west side of the church. I could have heard nearly all that he said, but my attention was distracted by the confusion in the house, so that I cannot tell exactly what he said. His preamble was very similar, I think, to that of Dr. Patton. During the reading, he

turned round, till the side of his face was towards me and his back almost to Dr. Elliott. He appeared very much agitated. Some of his words were those so often proved already, that counsel learned in the law had informed them, that it was necessary, that morning, to organize themselves, and that they would accordingly do it in the fewest words and the shortest time practicable. He was then facing the north-west corner of the house. In the same breath, Mr. Cleaveland moved that Dr. Beman should be appointed to the chair, and put the motion. By this time all north of Mr. Cleaveland arose. Some were standing on the seats, and some on the tops of the pews. Immediately I heard a general yell of "aye!" and there was one "aye" louder than the rest. It was Dr. Beecher, of Cincinnati, Ohio, who made the loud yell. The side of his face was towards me, and so far as I could tell, it was Dr. Beecher. There was a good deal of clapping and hissing about this time. There was also some votes in the gallery on both sides of the house. The motion was not put in the negative, and was not reversed. The motion for the appointment of clerks was put without a negative. Dr. Beman then requested that they should retire to the back part of the house. He stepped out of the pew into the aisle, but at the same time other persons rushed out of the pews on both sides. He then called for motions. A motion was made by some one of them, I don't know who, that Dr. Fisher be moderator; and Dr. Beman put the question, without reversing it that I heard. Dr. Mason and Mr. Gilbert were then nominated as clerks, and without loss of time the question was put, without reversing it so far as I heard. It was then moved that they adjourn to meet again at the First Presbyterian Church. The motion was put. I heard no negative on this motion, though there were a few "noes" simultaneously with the "ayes." It was then announced at the several doors of the church successively, that the General Assembly of the Presbyterian Church in the United States of America had adjourned, to meet again immediately, in the lecture-room of the First Presbyterian Church; and the whole body, and a part of the audience, about one-third, went out as rapidly as possible, at the north door of the church. It was Dr. Edward Beecher who made this proclamation. The proclamation was made in a loud voice, and was, that the delegates should attend at the First Presbyterian Church, and there present their commissions. The proclamation was repeated two or three times. The appointment of a Committee of Commissions, moved some time before, was now under consideration, and Mr. Breckinridge on the floor.

Cross-examination.—Interrogated by *Mr. Randall,* the witness said: I live at Princeton, in New Jersey. I am a native of Lancaster county, in this state; am now a student of theology in the seminary at Princeton. Dr. Beecher, at the time he made the loud cry of "aye," was standing on the seat, partly on the back, of the same pew in which Mr. Cleaveland was, or of one near it. I was almost right over his head; have never lived in the same town with Dr. Beecher; had seen him and heard him make several addresses in the meetings at the First Church. I had never seen him be-

fore that visit to Philadelphia, and have not since. I feel confident that it was Dr. Beecher, but possibly might be mistaken. I am as confident of its being he as I could be, after having seen him only a few times. I know, by report, that Dr. Beecher is now in the West, that he is not here. I should think the person I took for him was about sixty years of age. Dr. Beecher's manner is rather mild.

Mr. Ingersoll, for the respondents, called the attention of the Court to certain testimony (the reporter did not understand what it was) which had been rejected, and which he still desired to introduce.

Mr. Randall said: Reduce your proposition to writing, and perhaps we shall not object to it.

After a short colloquy between the counsel, the subject was waived.

Mr. Randall.—As the counsel on the other side have taken so great pains to throw a doubt over the subject of a reversal of the questions put by Mr. Cleaveland and others, in the organization of the Assembly, we shall be under the necessity of offering some rebutting evidence. No point, we believe, is capable of being more firmly established by human testimony than that.

But first we must have Mr. Hamilton to explain his testimony in regard to Mr. Duffield.

Mr. Randall then called Mr. Hamilton, and being informed that he had left the Court, said he must then require him at the hands of the opposite counsel in the morning.

Mr. Meredith.—It is of no consequence at all.

Mr. Hubbell, on behalf of the defendants' counsel, here intimated that they did not know of any further testimony to be introduced by them, yet as it was now late, he was desirous not to close until next morning. He wished the case to be left open, that they might have the opportunity of offering such documentary testimony as they might have omitted, though he did not know of any. He said they did not intend to offer any other oral testimony.

The Judge assented, and the Court adjourned.

Friday morning, March 15.

Rev. John M'Dowell, D. D., re-called by the respondents, said: On the evening of the 16th of May, and during the morning of the 17th, we received, in the Committee of Commissions, two hundred and twelve commissions. These names were enrolled by us, their commissions being unexceptionable. We also reported seven others, to be examined by the Committee on Elections. There were three of these without their commissions, viz: From the Presbytery of Montrose, the Rev. Adam Millar; from the Presbytery of Bedford, the Rev. Robert G. Thomson; and from the Presbytery of Richmond, a Mr. Elliott. From the Presbytery of New Castle, General Cunningham, a ruling elder, whose commission wanted the signature of the moderator. From the Presbytery of Londonderry, the Rev. Ephraim P. Bradford, whose commission wanted the signature of the clerk. Two persons from the new Presbytery of Green Brier, in Virginia, Mr. David R. Preston, minister, and Mr. Thomas Beard, elder: making in all, two hundred and nineteen. If it be proper in

this place, I can tell how it was in regard to Mr. Moore. When the moderator called for commissions not yet presented to be brought forward, immediately, or soon after, Mr. Moore came and laid his commission on the clerks' table. It was examined by the committee after the other body had withdrawn, and we reported his name. I am confident that he presented it that morning. His name is on the minute as one of those called and recorded present, in the afternoon. In the afternoon, one hundred and fifty-four answered to their names. These included six of the seven, whose commissions had gone to the Committee of Elections. That committee was appointed directly after the body of the New School had retired, in the morning. Sixty-eight did not answer to their names. Two of these, Messrs. White and Magruder, of Charleston Union Presbytery, afterwards acted with our Assembly. Three, Dr. Green, and Messrs. Snowden and King, had not yet come in, and were recorded absent. The number of sixty-eight was thus reduced to sixty-three. Of those marked absent, Mr. Scott rose, gave his reasons for not answering, and I believe withdrew and went home. That left but sixty-two. I do not know that Mr. Scott went home; he did not afterward act in our Assembly. Of the one hundred and fifty-four who answered to their names, Messrs. Rankin and Crothers, from the far west, expressed a wish not to be considered as acting with that body, and withdrew. At the close of the session, when the roll was called, according to custom, we found fifty-seven absent without leave, all being of the number of sixty-eight recorded absent before. Four members joined our Assembly, arriving after the first day, one on the ninth, two on the eleventh, and one on the twelfth day of its sessions, making the whole number who acted with that Assembly, one hundred and sixty-one. I was not a member of the Assembly. Dr. Witherspoon was present in the Assembly at its opening. He was the moderator immediately preceding Dr. Elliott, Dr. Phillips immediately preceded Dr. Witherspoon. I suppose that Dr. Wm. A. M'Dowell was present, though not a member. He had been moderator in 1833. There were others present who had been moderators. Dr. Green had been. I had been moderator. Dr. Beman was moderator in 1831. I was appointed stated clerk in the year 1836, after Dr. Ely resigned. Before that, I held the office of permanent clerk, or scribe of the Assembly, from 1825 to 1836. In 1837 I held both offices, and was alone on the Committee of Commissions.

Cross-examination.—Interrogated by *Mr. Randall*, the witness said: When the roll was called, at the close of the Assembly, fifty-seven were marked absent. It was either fifty-seven or sixty-seven. I am perhaps mistaken in the number. I may possibly have made a mistake in counting them.

[*Mr. Randall* here handed the witness the Old School minutes of 1838, page 47, requesting him to count the list of absentees, and tell how many there were. After repeated counting, the number was stated by the witness to be sixty-five.]

Mr. Hubbell.—Had Dr. Hoge been moderator since Dr. Beman?

Dr. M'Dowell.—I am not able immediately to say.

Mr. M'Lean having asked permission to explain his testimony, said: I have been informed, that my testimony might be misunderstood. I was asked, whether I had not said, that there was as little disorder as possible under the circumstances. I answered in the affirmative, but did not mean that it should be inferred, that there was little or no disorder. I meant only that, considering the business in which they were engaged, they made as little disturbance as could be expected. Part of the disorder which I referred to, was made by Mr. Cleaveland. He read a disorderly paper, and did not obey the moderator when called to order. Then a number of persons rose, and went toward the north door. They stood in the aisles, on the seats, and on the backs of the pews. I was unable to hear the questions put, and did not vote.

The respondents here closed, and the plaintiffs introduced rebutting testimony, as proposed last evening.

Rev. Wm. Hill, D. D., recalled by plaintiffs, said: I think there was sufficient time given for a reversal of Mr. Cleaveland's first motion, that for the appointment of Dr. Beman. I think that I am not mistaken when I say that it was reversed. I think I may say it *was* reversed. I will give my reasons. When Mr. Cleaveland was about to put the question, we had then arrived at a most critical period of the proceedings. It was the most deeply interesting to me of any part of the whole transaction, because it was the incipient step in the organization. My feelings of interest were wrought up to a pretty high degree, and the proceedings engaged my whole attention. I paid peculiarly strict attention to what was going on. I was entirely neutral as regarded the controversy, having refused to attach myself to either party. I had opposed a separate organization in a meeting of consultation which had been previously held.

Mr. Randall.—We cannot go into the history of the previous meeting, but you may state the ground on which you were unwilling that a separate organization should take place.

Witness.—That is precisely what I was going to state. I had determined to take no part in the proceedings; nor did I take any part therein. I was entirely neutral. And I was opposed to a separate organization because I apprehended that such a course would lead to results much more painful than what I witnessed. I anticipated a scene of actual *violence*, and could not conjecture how far that violence might be carried. I did not suppose that the Old School party would suffer their measures to be defeated. I did not know but collision would ensue, amounting to a scene of tumult and violence. I feared that a riot would be the consequence. This was my full expectation, and I dreaded the result. My whole attention was drawn to the proceedings, of course. When Mr. Cleaveland made the motion that Dr. Beman should take the chair, he put the affirmative; "All those who are in favour will say aye." At this moment I was particularly attentive to the Old School brethren, casting my eyes over them, to see what they would do. There arose a simultaneous burst of ayes, some of them, I thought, indecorously and offensively loud, but I know not from whom, in a single instance. I kept my face toward Dr. Elliott. Afterwards there

fell in a few scattering ayes. They appeared to come from back of me, but I did not turn around. Mr. Cleaveland, as, from the first, he had intended to do all in the shortest time possible, reversed the question very quickly: I don't know that all the scattering ayes had ceased when he reversed it. I heard a few scattering noes, principally from the direction of the Old School brethren, a few from the south-west, and some from immediately in front of me in the south part of the house. I was surprised at this, because I expected a thundering "no!" I was surprised that there had been any negatives, unless there had been more. I thought they were not well trained, at any rate. I supposed that if they voted at all they would have tried to vote the others down, as they claimed to be the majority. For these reasons I think I can't be mistaken in my recollection.

I know Dr. Beecher, and saw him that day: he sat in the pew immediately before me. During all these transactions he sat perfectly still, and behaved with decorum. If he voted in the affirmative, it was not distinguishable from the other voices in that neighbourhood. If he did vote at all, it was not in a very loud or remarkable tone of voice. He is, I believe, at present, in Cincinnati, not here on the ground. He is very much of a gentleman in his deportment. I could not be deceived in regard to him, for I sat directly back of him. Mr. Cleaveland and Dr. Patton were in the pew in front of me, and Dr. Beecher sat in the same pew. Mr. Cleaveland was so near me, that I could have laid my hand on his shoulder as he rose. I was as favourably situated for hearing as I could have been; hence I infer, that I could not be mistaken in the case.

Cross-examination. Interrogated by *Mr. Preston*, the witness said: I was surprised at hearing any "noes," unless there were more. I had expected that the noes would be of another character, and was agreeably disappointed. I had anticipated events, and feared that a great riot would take place. From personal knowledge I really cannot say whether the Old School had a majority. I suppose that the majority must be very small either way. I know they claim to have had a majority, and I rather suppose that it was the fact.

Mr. James R. Gemmill, called by relators, interrogated by *Mr. Randall,* said: I attended the church in Ranstead court on the day of the organization of the Assembly of 1838. I was leaning on a pew, near the south-west door, just under the gallery, not far from the moderator. I saw Mr. Cleaveland rise, but did not hear much of what he said, distinctly, because of the noise around me. In the neighbourhood where I was, there was a great deal of scraping with the feet, stamping, and other unseemly noises. I saw a great number of the Old School members around me. I saw none others that I knew in that pew, or in the vicinity where I was. I recognized several persons whom I knew at the time. One of them was Mr. —— Latta. Another was the Rev. Mr. Boardman, pastor of the Tenth Presbyterian Church in this city. There were other gentlemen near and around me whom I recognized at the time, but I

cannot now give their names. I merely state what I know. I did not consider their conduct as becoming gentlemen—much less reverend divines and ministers of the gospel. * * * I did not know all the gentlemen near me. William Finney I think was one of them, though I might be mistaken, as I had not seen him for several years. Some of them scraped with their feet and stamped on the floor, and there was considerable other noise in that neighbourhood. This was whilst Mr. Cleaveland was speaking or reading. His face was, at first, toward the moderator, that is, when he first commenced. I spoke to some of the gentlemen around me, and asked what was the necessity for making so much noise. I knew some of them to be ministers, and said to them, that I thought that was pretty conduct for clergymen, and asked them if they had not better hear what the gentleman who was reading had to say. One of them observed "yes, they had better do so."

Cross-examination. Interrogated by *Mr. Hubbell* and *Mr. Preston*, the witness said: I turned and said, this was pretty conduct for clergymen; that I thought they might hear what the gentleman had to read. I was not a member. I am not a member of any church, and felt that it was rather assuming for me to rebuke them, but I thought their conduct justified me, and I wanted to hear. I attend the First Presbyterian Church, Mr. Barnes'. I knew but few of those near me. Mr. Boardman was two or three pews off, and so was Mr. William or James Latta. The one whom I took for Mr. Finney, was the nearest to me that I knew. My face was towards the moderator. I did hear scraping among these gentlemen. I addressed those nearest to me. Mr. Boardman was a pew or two off. I took those near me to be ministers. My observation was a general one, it was not addressed to Mr. Boardman, or to Mr. Latta, or to any one in particular. I don't recollect whether they two were near enough to hear it. There was a tumult through the house. I cannot say that it was confined to the Old School party, but I understood, that those near me were the Old School. They generally acted with the Old School party. I saw some there, who had acted with the Old School in 1837. Mr. Latta was such a one. I think all near me were Old School, as well as I could recognize them. I am not positive about any whose names I did not know. I should not call it a riot: there was scraping and coughing. I was twenty or thirty feet from Mr. Cleaveland, and there did not appear to be as much noise near him, as about where I was. [Witness here described the positions by reference to the plan of the house.] I heard Mr. Cleaveland put his motion notwithstanding the noise, and I heard a loud response of "aye." I afterwards heard five or six "noes," I should think, in the part of the house where I was. The ayes were in parts of the house farther north. I should think them abundantly competent to carry the question. They were numerous. I changed my position and went north, after the vote was taken. I worked my way through the crowd in getting there, with difficulty.

Mr. Ingersoll.—Are the pews or aisles of that church carpeted?

Witness.—I don't know, I rather think there is a brick pavement.

Mr. Preston.—How happened you in the first place to get into the neighbourhood of Mr. Boardman and Mr. Latta, in the midst of the Old School men?

Witness.—It was merely by accident, so far as I know. I went in just before Dr. Elliott finished his sermon, and entered from the grave-yard. My going to that quarter of the house was purely accidental. Indeed, it was accidental that I went at all. I had some business up Market street, and I merely stopped in out of curiosity to see what was going on. I had understood there was to be some fuss. I anticipated as much, as they had been quarelling for some time. I thought I would like to see and hear what was passing.

Some question being raised respecting the correctness of the witness in regard to Mr. Latta, *Mr. Randall* said, the minutes show that Mr. Latta was a member of the Assembly, both in 1837 and 1838.

Plaintiffs called *Mr. Elihu D. Tarr.* Interrogated by *Mr. Randall*, the witness said: My profession is the same as your own. I attended at the organization of the General Assembly of 1838, in Ranstead court. I sat three or four pews behind Mr. Cleaveland. I heard him put the motion that Dr. Beman take the chair as moderator. He put it clearly and distinctly. I heard the "ayes" from a large number of persons. I heard the question reversed. I distinctly heard the reversal, and heard a few "noes" in the north-west part of the house directly afterward. I was surprised at the vote, as I had understood that the Old School party had the majority, and was surprised that they did not vote the motion down. This caused me to take more particular notice. I am confident that I cannot be mistaken. It was from the south-west part of the house that the noes came. Did I before say "north-west?" As I looked toward the pulpit, they came from my front, and to the right of that.

Cross-examination. Interrogated by *Mr. Preston*, witness said: I am certain that I heard the noes distinctly. I have attended the legislature of this state. There were probably from three to half a dozen noes, but I did not count them. I heard the question put in regard to the clerks, and if my recollection serves me, there were more noes on that than on the former question; but about this, I am not so certain. I think certainly there were answers in the negative, but whether more or not I can't tell. To the best of my recollection, the question was reversed, on each of the motions. They were all reversed. I distinctly heard the reversal. The negative was put on all the questions which were put by Mr. Cleaveland, Dr. Beman and Dr. Fisher. I heard the motion made in regard to Dr. Fisher, but don't recollect whether there were any noes on that vote. I can't say whether there were any or not. I was in the neighbourhood of and surrounded by the New School party, and was very near Mr. Cleaveland. Up to the time of the General Assembly of 1838, I did not, strictly speaking, belong to either the Old or the New School party, though I inclined to the Old School. The proceedings here and those of the majority in the Assembly of 1837 determined me. I am now opposed to the

Old School party, and a decided advocate of the New School proceedings. I was formerly a member of the Presbyterian church of which Mr. Winchester was the pastor, afterward of Mr. Boardman's, and I am now a member of Mr. Rood's church. Mr. Rood, my impression is, belongs to the Third Presbytery of Philadelphia, but I cannot say certainly. When I removed to the Northern Liberties, I went to his church, without asking whether he was New or Old School.

Mr. James W. Paul called by plaintiffs. Interrogated by *Mr. Randall*, the witness said: I am a member of the bar. I attended the organization of the General Assembly of the Presbyterian Church, in May, 1838. I was in the gallery, immediately in front of the organ. I heard Mr. Cleaveland put his motion. I distinctly heard the motion put, and the vote in the affirmative and negative. I am satisfied that the question was reversed. The "ayes" were uttered very loudly, and the "noes" in a lower tone of voice. They were few and scattering. I am fully satisfied that the question was put in the negative. Such was my impression at the time. I think I cannot be mistaken in saying that the question was reversed. Knowing Dr. Beman to be a very prominent man in the New School party, I thought it very strange that such a nomination should pass without a stronger opposition from the Old School men. There is no question that there was sufficient time for the question to be put and reversed, if put rapidly, though the interval was not long between the affirmative and negative vote.

Mr. Randall.—You say that there was time, if the reverse of the question was promptly put?

Mr. Ingersoll objected to this as a leading question.

Mr. Randall.—If the reverse was promptly put, was there time for it?

After a short colloquy between the counsel, the witness continued. My recollection is, that there was ample time for the reversal. But I did not expect to be called to testify as a witness, and therefore did not charge my memory with what passed. I speak from recollection merely. I am a member of the First Presbyterian Church —Mr. Barnes' Church.

Hon. Henry Brown called by the relators. Interrogated by *Mr. Randall*, the witness said: I attended the organization of the General Assembly of 1838. I heard Mr. Cleaveland make his motion, and put the question thereon. I heard him reverse it very distinctly. I am absolutely certain that I heard him reverse the question. I cannot be mistaken in this. I sat on the west side of the east aisle of the church, one pew east of Mr. Cleaveland, and two or three north of him. The question was put distinctly, in a very clear voice, and might have been heard all over the house. There was immediately a very loud "aye," and one individual responded aye much louder than any other. Mr. Cleaveland then reversed the question, I should say, with despatch, but not so rapidly as to prevent him from speaking very distinctly and clearly. I have known a question to be reversed more rapidly than this was. After he reversed the question, I heard several *noes* on

the west side of the house, and to the south of where I sat, and two or three in the eastern part of the house, one of them very near to me. I am confident that I heard him distinctly put and reverse the question, and that there were several "noes." I was a member of the General Assembly of 1837 and of that of 1838, from the Presbytery of Lorain, in the Synod of the Western Reserve. I acted with the body which held its sessions in the First Presbyterian Church during its session of about two weeks. There was a man near me who voted aye very loud.

Mr. Randall.—Did you know him?

Witness.—I was not acquainted with him previous to that time, but was afterwards told that his name was Foster. He was a ruling elder from the Presbytery of Montrose, in this state. I think he spoke twice as loud as any other person in the house. I took hold of his arm and told him not to halloo so loud next time.

Mr. Randall.—Then you know that the little gentleman with the loud voice was not Dr. Beecher?

Witness.—It was not Dr. Beecher. He did not at any time stand on the top of a pew, but towards the close of the proceedings I think that he sat on the back of one.

Cross-examination.—Interrogated by *Mr. Preston*, the witness said: I did vote on all the questions. I said "aye" every time, or at least I intended to do so. My commission was rejected by the Committee on Commissions, Mr. M'Dowell and Mr. Krebs. I cannot tell whether all those whose commissions were rejected, voted on the questions put by Mr. Cleaveland, Dr. Beman, and Dr. Fisher. I can't say about others. I myself voted in the affirmative on all the questions, and presume that others did. I know that one did. I could not see them all in so large an assembly.

Counsel.—Have you not expressed a doubt whether these questions were reversed?

Witness.—I have not. I have heard stated, a doubt in regard to the reversal of the questions, which I do not feel. I distinctly heard the question reversed, on the motion in regard to Dr. Beman; distinctly, on the choice of clerks; and I believe that it was reversed on the appointment of Dr. Fisher, in a plain, distinct voice, the two former louder than usual. I have never doubted, and do not now feel any doubt as to this matter. I cannot say that every question was reversed, but I have no doubt in regard to the questions on Dr. Beman, Dr. Fisher, and the clerks. I was one range of pews east, and two or three pews north of Mr. Cleaveland. He was at the east end of his pew, and I in the middle, or the west end of mine. We were probably ten, or it might be a dozen feet apart.

Mr. Hubbell.—Has there not been a suit brought in your name against Dr. Elliott, Dr. M'Dowell, and Mr. Krebs, for an infringement of your rights?

Witness.—There is one suit in my name, among those read from the docket.

Mr. Hubbell.—Are you not aware that there have been *five* suits commenced?

Witness.—Perhaps there are five, I was not very particular about

that matter. I left it to my counsel, with entire confidence that it would be managed correctly.

Mr. Thomas Elmes called by the plaintiffs.

Interrogated by *Mr. Randall*, the witness said: I belong to the First Congregational Church of this city. The church of which Mr. Todd is pastor. I have no connexion with the Presbyterian Church whatever. I have not heard the testimony of the witnesses which have been examined, with the exception of one or two to-day. I attended at the organization of the General Assembly in Ranstead court, on the 17th of May, 1838. I went in at the west door of the house, from the burying-ground, and stood leaning on the rail of the pew near the door. I heard Mr. Cleaveland's motion very distinctly put, the motion for Dr. Beman to take the chair. I heard the affirmative very distinctly, and several negatives, say two or three, after a short interval. I stood near the moderator. Dr. Miller was between Dr. Elliott and me. Dr. Elliott hammered and called to order, and Dr. Miller tried to hush the noise. He put his hand up as though to stop the tumult, and used some expression like, "Let them go through." Dr. Miller, I think, stood up at this moment. He had before been sitting. This was about the time Mr. Cleaveland was endeavouring to read his paper. The tumult was the calling to order, very loudly, in the neighbourhood of the moderator. All the noise, pretty much, that I heard was in that part of the house. I know the Rev. George Duffield. He is now in Detroit, as I understand. I have never known him to use a cane. I have known him for several years, but more particularly for about three. When in Philadelphia, he staid at my house for some time. I never saw him use a cane. His deportment was always very gentlemanly. I never heard him use coarse language. He is far from doing so.

Cross-examined by Mr. Preston.—I did not see Mr. Duffield present at the organization of the Assembly of 1838. He did not walk there, or come away, with me. The reason why I could not hear all distinctly, was, that there were calls to order. The moderator called to order very loudly, and thumped with his hammer; and others around him called order loudly. There was a good deal of stir and bustle. This was what I meant, when I spoke of tumult. I perceived no other noise, or movement, until Mr. Cleaveland had made his motion. When that motion had been put, Dr. Beman stepped into the aisle, and others at the same time. The affirmative vote was very numerous. There were a few noes. I did not hear the negative distinctly, but some said "No." I did not hear any noes mixed with the ayes. There was a pretty loud burst of ayes, then a few scattering ones; then, after a short pause, a few noes. I heard Dr. Mason nominated as clerk, but I do not know by whom. I do not distinctly recollect hearing the motion put, but I think Mr. Cleaveland put it. I did not hear any noes on that question. Dr. Miller was between me and the moderator, somewhere near the moderator. Mr. Cleaveland was fifteen or twenty feet from me. I would not like to say, that I distinctly saw Mr. Cleaveland when he made his motion. I can't say that Mr. Cleave-

land put the question for the choice of clerks: it might have been Dr. Beman. I belonged to the Congregational Church at that time. I was once an elder in the Presbyterian Church, and was a delegate to the Assembly that met at Pittsburg. I can tell how I voted there. I sympathize with those who do right. I don't know what is understood by Old School or New School. I don't belong to either. Other people must judge which I belonged to. I profess to be a Calvinist; was an elder in the Fifth Presbyterian Church. Mr. Duffield was pastor of it a short time. I was a Presbyterian while I was in that church: I have since become a Congregationalist, to get out of the quarrels of the other church. I don't recollect ever saying that this was a contest between Presbyterians and Congregationalists, or that the Presbyterians were struggling for existence.

Mr. Preston.—Is it your opinion that it is such a struggle?

Mr. Elmes.—I never did conceive it to be so. I have never thought or stated that that was the real struggle. I joined a Congregational Church in Maine in 1812. I was ordained an elder in 1828. I became a member of the Presbyterian Church in 1815. Several years I belonged to the Sixth Presbyterian Church. Two years ago, I again entered into connexion with the Congregational Church. I had been a Congregationalist first in Augusta, Maine. I joined Mr. Todd's church in the beginning of the spring of 1837, after the church was completed, because it was convenient for me, though I probably should not have left the Presbyterian Church, if it had not been for their quarrels. The church is in Tenth street below Spruce.

Rev. James M. Davis, called by the plaintiffs, interrogated by *Mr. Randall*, said: I am a minister, am preaching to the Presbyterian Church at Fairmount. I attended at the organization of the Assembly of 1838. I remember Mr. Cleaveland's motion. I was standing half way down the middle aisle when he rose, and heard his prefatory remarks. I heard Mr. Cleaveland's motion distinctly, and the reversal with equal distinctness. I heard from eight to ten negative voices. My impression was, that they came from the quarter where the Old School brethren sat. I was expecting them from that quarter, and think I do not mistake. There was considerable confusion when Mr. Cleaveland commenced. There were calls to order by the moderator, and by persons at his left; but they soon desisted, and, at the close of his remarks, the house was still. His last sentence has been repeated by every witness. When he made his motion, the house was very still; all the noise had subsided by that time. I formerly preached at the First Presbyterian Church at Manayunk, belonging to the Third presbytery. I sympathize entirely with the New School.

Cross-examined by Mr. Preston.—I heard the reversal of the question. It was put distinctly as the affirmative, but more rapid. I think it was distinct enough for every one in the house to hear it, if disposed to hear, as I was. An individual might have made so much noise, that he could not hear. When it was put, the house was quiet. I was about the middle of the aisle. Dr. Beman came out of the pew by my side, and put the question on the appointment

of clerks. I was not a member of the Assembly, and did not vote. I am connected with Mr. M'Clelland, one of the relators in this case. He is my father-in-law. I was licensed by a Congregational Association, but ordained by the presbytery. I was born in New England, and received my theological education at New Haven. I continued near to Dr. Beman till the close of the proceedings, and left the church when those did who acted with him. I recollect some noes on one or two of the motions. There was considerable clapping and some hissing, when Dr. Fisher announced the adjournment. I mentioned my relationship to Mr. M'Clelland, to Mr. Gilbert, and he said that he would tell Mr. Randall.

The plaintiffs called *Rev. Daniel W. Lathrop.* Interrogated by *Mr. Randall*, the witness said: I attended the Assembly of 1838, as a commissioner from the Presbytery of Lorain, in the Synod of the Western Reserve. That synod is one of the excinded. I came as a minister. I heard Mr. Cleaveland's remarks, and his motion, with perfect distinctness. At the conclusion of his introductory remarks, he moved that Dr. Beman should be moderator, my impression is, or that he should take the chair. I should not hesitate to say unqualifiedly that "moderator" was the term used, had not the other form of expression been so often repeated in my hearing, here in Court. Referring only to my own recollection, I say that Mr. Cleaveland used the word "moderator." He stated the question distinctly, in his usual loud and clear voice. The question was put in a voice louder than is usual in the Assembly. He put both the affirmative and the negative. There were some negative votes.

Counsel.—From what part of the house did the negatives come?

Witness.—One of them was my own. I do not recollect any others immediately in my neighbourhood. I was on the east aisle. Some two or three of the noes I should think nearly in front of me, and a little more toward the south-east quarter of the church. The others appeared to come from the south-west part of the house. My recollection of the noise that I heard, is, that it consisted principally of cries of order, from the south and south-west parts of the house, with some from the south-east, chiefly from near the moderator, and from west of him. I heard no noise, or confusion, in the vicinity of Mr. Cleaveland. With the exception of himself, and the others who proposed questions, all were silent, until the ayes were called for. Then there was a distinct and loud response. I do not recollect any noise in that vicinity, other than the one alluded to. There was one aye louder than the rest. I saw the gentleman from whom I supposed the loud aye came: he was an elder from the Presbytery of Montrose. His name was Foster.

Counsel.—Then you are quite certain that it was not Dr. Beecher who responded aye so very loudly?

Witness.—I am certain.

Cross-examination by Mr. Preston.—Did I understand you to say that you voted in the negative on the nomination of Dr. Beman?

Witness.—I did. I recollect my reason for so voting.

Mr. Preston.—Did you also vote in the affirmative on that question?

Witness.—I don't recollect voting so, and think that I could not have so done, with the reason that I had for voting the other way.

Mr. Preston.—You have spoken of your reasons for voting in the negative: what were those reasons?

[The plaintiffs' counsel objected to the question, and the Court ruled that the reasons of the witness for his vote in the Assembly, could not be demanded.]

Mr. Preston.—I will then ask whether these reasons were apart from what caused the witness to recollect that he voted in the negative.

A colloquy of some length ensued between the counsel.

Mr. Ingersoll urged that the recollection of the witness, of his reason for voting in the negative, had been mentioned by himself, and would be considered as strengthening the evidence that the question was reversed, and that now the counsel had a right to know what that reason was.

Mr. Preston said: Suppose the reason of the witness was a collusion among the New School men, an agreement in their previous consultations, to throw a few votes in the negative, so as to cover the pretence, that we of the Old School understood what was doing, and such of us as chose, participated in the vote? I have been extremely desirous to reach some evidence of such a fact, and expect that we can find it in the reasons of this witness.

The witness said: If the Court pleased, he had no manner of objection to stating the reason, the allusion to which had been elicited only by the interrogatories of the counsel, and he was not aware that it would be of particular importance to either party in this case.

[The objection was withdrawn, and the Court said the witness could proceed.]

Witness.—I had attended no meetings for consultation. Having arrived in the city only at ten o'clock on the evening previous to the opening of the Assembly, after a fatiguing journey, I did not leave my hotel till after ten o'clock in the morning. I saw no member of the Assembly, or other person of my acquaintance, of either party, or of any school, until I fell in with two or three commissioners on my way to the committee-room of the clerks. I had no intimation of any peculiarity in the organization of the Assembly, from any gentleman in the city, or on my way. I went to the house at the usual time, and found a seat as I could. My attention was very much absorbed, during the religious exercises, by what seemed to me the very peculiar character of those services. I was pondering on those strange peculiarities, and was very much grieved and deeply affected by them, until my attention was arrested by the subsequent proceedings. When Mr. Cleaveland rose, and moved the appointment of another moderator, it did not strike me favourably, nor seem to be the course which I should choose to pursue. This was the simple and only reason for my voting in the negative.

By Mr. Preston.—I believe that I voted in the affirmative on all the subsequent questions, excepting the first nomination for clerks; as to this, I am not certain. My commission had

been rejected by Dr. M'Dowell. I think that on my way, or as I was coming out of the committee-room, I gave it into the hands of a gentleman, who had been similarly treated: I think it was Mr. Squier. I am not certain that I had not the commission at the time. I have no stronger assurance, in regard to this point, than in relation to the other. I think I had given it to Mr. Squier. I subsequently sat with the body that adjourned to the church on Washington Square. I acted, in that Assembly, in the Committee of Overtures, but I think not on any other standing committee. I do not recollect whether I was on any other committee. I think I was not on the committee appointed to revise the minutes. I think I was a member of the committee to form a Pastoral Letter. I was. My name was added to that committee subsequent to its first appointment; and I now recollect meeting repeatedly with the committee. I have no recollection of being on a committee to prepare a minute of the organization of the Assembly. My impression is, that there was such a committee. My recollection is not distinct in regard to this point, but such is my impression. I cannot tell how often I have been a member of the Assembly; I think, about eight times.

Counsel.—Did you not once attend as a committee-man?

Witness.—I did; the session of 1820. I came to that Assembly, of which Dr. John M'Dowell was chosen moderator, from the Presbytery of Hartford, in the Synod of Pittsburg, then, now, and ever, a good, thorough-going Old School synod. My commission was questioned, and discussed a long while, and the previous moderator, seeing that the discussion was likely to occupy considerable time, asked me if I would not waive my right to have the question decided before a new moderator should be chosen. I did so. Afterwards, my seat was given to me. I was, first, a member of a Congregational church, in Norwich, Connecticut, where I was born, the only church in the parish. I was licensed, and ordained, by the Rev. John M'Dowell, and his co-presbyters of the Presbytery of New Jersey. Afterwards, I belonged to the Synod of Pittsburg, a thorough-going Old School synod, where my connexion continued, until, in connexion with others, my presbytery was regularly detached from it, by the General Assembly, in erecting the Synod of the Western Reserve.

Counsel.—Are you not now acting as reporter for the Journal of Commerce?

Witness.—I could not with propriety say that; but I have written a few letters to the editors of that journal, during the progress of this trial, one of those gentlemen being a personal friend of mine.

Counsel.—Are the reports in that journal from your pen?

Witness.—I have recently seen two or three letters published in that journal, which were from my pen.

Counsel.—Have you them here in court?

Witness.—I have not. I saw them in the reading-room at the Exchange.

Mr. Randall.—In the case of Duncan against the Ninth Presbyterian Church, Dr. Green, one of the respondents in this case, was

examined, and I propose, now, to read his testimony. It has been intimated that an objection will be made. I offer it as the confessions of a party.

Objection was made by the counsel for the respondents.

Mr. Randall.—I withdraw the offer.

The plaintiffs here offered in evidence, as rebutting the testimony of the defendants, the minute of the organization in Ranstead court, as contained in the Old School Minutes of 1838, as follows:

The General Assembly of the Presbyterian Church in the United States of America, met agreeably to appointment, in the Seventh Presbyterian Church, in the city of Philadelphia, on Thursday, the 17th day of May, A. D. 1838, at 11 o'clock, A. M.; and was opened with a sermon by the Rev. David Elliott, D. D., the moderator of the last Assembly, from Isaiah 60, 1: "Arise, shine, for thy light is come, and the glory of the Lord is risen upon thee."

After the sermon, the moderator gave notice that as soon as the benediction was pronounced, he would take the chair, and proceed to the organization of the Assembly. The benediction being pronounced, the moderator took the chair, and having opened the meeting with prayer, called upon the permanent clerk to report the roll.

The Rev. William Patton, a member of the Third Presbytery of New York, rose, and asked leave to offer certain resolutions which he held in his hand.

The moderator declared the request at that time to be out of order, as the first business was the report of the clerks.

Dr. Patton appealed from the decision. The moderator declared the appeal, for the reason already stated, to be at that time out of order. Dr. Patton stated that the resolutions related to the formation of the roll, and began to read the same: but being called to order, took his seat.

The permanent clerk, from the Standing Committee of Commissions, reported that the following persons, present, have been duly appointed, and are enrolled as commissioners to this General Assembly, and laid their commissions on the table, viz:

[The roll follows.]

The Committee of Commissions further reported that the Rev. Robert G. Thompson, of the Presbytery of Bedford; Rev. Adam Millar, of the Presbytery of Montrose, and Mr. James Elliott, a ruling elder of the Presbytery of Richland, have stated to the committee that they were appointed by their respective presbyteries, but have not their commissions; that the commission of Mr. John W. Cunningham, a ruling elder from the Presbytery of New Castle, wants the signature of the moderator; and that the commission of Rev. Ephraim P. Bradford, of the Presbytery of Londonderry, wants the signature of the clerk.

They further reported that the Rev. David R. Preston, and Mr. Thomas Beard, a ruling elder, appeared before the committee with regular commissions from the Presbytery of Greenbrier, which commissions were accompanied with an attested extract from the minutes of the Synod of Virginia, certifying that said presbytery was regularly constituted by the Synod of Virginia, October 10th, 1837.

The documents referred to in the foregoing report of the informal cases, were laid on the table by the permanent clerk.

After the report of the Committee of Commissions had been read, the moderator stated that the commissioners whose commissions had been examined, and whose names had been enrolled, were to be considered as members of this Assembly; and added that if there were any commissioners present from the presbyteries belonging to the Presbyterian Church in the United States of America, whose names had not been enrolled, then was the time for presenting their commissions.

Dr. Mason rose, as he said, to offer a resolution to "complete the roll," by adding the names of certain commissioners who, he said, had offered their commissions to the clerks, and had been by them refused. The moderator inquired if they were from presbyteries belonging to the Assembly at the close of the sessions of last year? Dr. Mason replied that they were from presbyteries belonging to the Synods of Utica, Geneva, Genessee, and the Western Reserve. The moderator

then stated that the motion was out of order at this time. Dr. Mason appealed from the decision of the moderator; which appeal, also, the moderator declared to be out of order, and repeated the call for commissions from presbyteries in connexion with the Assembly.

The Rev. Miles P. Squier, a member of the Presbytery of Geneva, then rose and stated that he had a commission from the Presbytery of Geneva, which he had presented to the clerks, who refused to receive it, and that he now offered it to the Assembly, and claimed his right to his seat. The moderator inquired if the Presbytery of Geneva was within the bounds of the Synod of Geneva. Mr. Squier replied that it was. The moderator said: "Then we do not know you, sir," and declared the application out of order. Mr. Cleaveland then rose and began to read a paper, the purport of which was not heard, when the moderator called him to order. Mr. Cleaveland, however, notwithstanding the call to order was repeated by the moderator, persisted in the reading. During which, the Rev. Joshua Moore, from the Presbytery of Huntingdon, presented a commission, which being examined by the Committee of Commissions, Mr. Moore was enrolled, and took his seat.

It was then moved to appoint a Committee of Elections, to which the informal commissions might be referred. But the reading by Mr. Cleaveland still continuing, and the moderator having in vain again called to order, took his seat, and the residue of the Assembly remaining silent, the business was suspended during the short but painful scene of confusion and disorder which ensued. After which, and the actors therein having left the house, the Assembly resumed its business.

On motion,

The cases of Messrs. Thompson, Millar, Elliott, Cunningham, Bradford, Preston, and Beard, and the documents concerning them, were referred to Messrs. Culbertson, J. L. R. Davies, and Hugh Campbell, as a Committee of Elections.

The Rev. William S. Plumer was unanimously elected moderator; and the Rev. Elias W. Crane was unanimously elected temporary clerk.

The Committee of Elections reported that the following persons, whose cases had been submitted to them, were regularly appointed commissioners to this Assembly, and recommended that they be severally admitted to seats, viz. Rev. Robert G. Thompson, of the Presbytery of Bedford; Mr. James Elliott, ruling elder of the Presbytery of Richland; Mr. John W. Cunningham, ruling elder of the Presbytery of New Castle; the Rev. Ephraim P. Bradford, and Rev. David R. Preston, and Mr. Thomas Beard, ruling elder, from the Presbytery of Greenbrier; they further reported that the Rev. Adam Millar, of the Presbytery of Montrose, did not appear before the committee.

The case of the commissioners from the Presbytery of Greenbrier was referred back to the Committee of Elections, and that part of their report relative to Messrs. Thompson, Elliott, Cunningham, and Bradford, was adopted, and it was ordered that their names be inserted in the roll. These commissioners took their seats.

And then the Assembly adjourned till this afternoon at 5 o'clock.

Concluded with prayer.

Plaintiffs' counsel also offered the whole of the statistical table appended to the same minutes, occupying forty or fifty pages, but without reading; and then read extracts from the unpublished manuscript minutes of the earlier Assemblies, to prove the point on which evidence had before been offered from the printed minutes, viz. that it has been customary, in the Assembly, to determine disputed rights of membership before the choice of a moderator.

The testimony for the relators here closed.

The counsel for the respondents then offered in evidence the New School minutes of 1838, pp. 635–646, as contradictory of the testimony adduced by the relators.

Mr. Meredith demanded that the portions of those minutes which were to be relied on, should be specified.

Mr. Hubbell.—The whole is offered as contradictory of the evidence for the relators.

Mr. Meredith.—We indicated distinctly the portions of the minutes of the other party on which we should rely, and deem the same course requisite on the part of the opposite counsel; unless the court decide that the whole minutes of both parties shall be considered in evidence, at least, so far as the counsel shall choose to use them.

The Court decided that the minutes of both parties, so far as they were relevant to the case, were to be considered as now in evidence, large portions of both have been read by the respective parties. If hereafter any portions should be adverted to by the counsel which seem to be inadmissible, the Court will decide what portions are to be admitted, and what rejected.

Mr. Meredith.—We are content.

The following are the minutes particularly adverted to by the respondents' counsel.

The General Assembly of the Presbyterian Church in the United States of America met, agreeably to appointment, in the 7th Presbyterian Church in the city of Philadelphia, on the third Thursday of May, 1838, at 11 o'clock A. M. and was opened with a sermon by the Rev. David Elliott, D. D. Moderator of the last Assembly, from Isa. lx. 1: "Arise, shine, for thy light is come, and the glory of the Lord is risen upon thee."

After public worship, the Moderator of the last Assembly announced from the desk, that immediately after the benediction, the Moderator would take the chair on the floor of the church, and the Assembly would then be constituted.

After the benediction, the Moderator of the last Assembly took the chair and opened the meeting with prayer.

The Rev. William Patton, D. D. from the 3d Presbytery of New York, then rose, and asked leave to offer the following preamble and resolutions:

"Whereas the General Assembly of 1837 adopted certain resolutions intended to deprive certain presbyteries of the right to be represented in the General Assembly;—and whereas, the more fully to accomplish their purpose, the said Assembly of 1837 did require and receive from their clerks a pledge or promise, that they would, in making out the roll of commissioners to constitute the General Assembly of 1838, omit to insert therein the names of commissioners from said presbyteries;—and whereas the said clerks, having been requested by commissioners from the said presbyteries to receive their commissions and enter their names on the roll of the General Assembly of 1838, now about to be organized, have refused to receive and enter the same;—Therefore

[For these resolutions see page 85 of this report.]

The Moderator declared him to be out of order, and refused to allow them to be read. Dr. Patton then stated that he was very desirous to have them put and passed upon without remark or debate. The moderator again declared them out of order, as the next business was the report of the clerks upon the roll. Dr. Patton then appealed from the decision of the chair. The appeal was seconded, and the moderator declared the appeal to be out of order, and refused to put it, and directed the clerk to make his report upon the roll. Dr. Patton then declared to the moderator that the paper he wished read had relation to forming the roll. The moderator then stated that he was out of order as the clerk was on the floor; whereupon the moderator was reminded by Dr. Patton that he had the floor before the clerk. The moderator directed the clerk to proceed with the report on the roll, and Dr. Patton thereupon took his seat.

The report of the clerks of the last Assembly upon the roll was then read by the Rev. John M. Krebs, one of the Clerks of the last Assembly, and was as follows:

[The roll follows.]

The reading of the report being finished, the moderator announced that if there were commissioners from any presbyteries of the Presbyterian Church who

had not been enrolled, then was the proper time to make application to have their names put upon the roll.

Thereupon the Rev. Erskine Mason, D. D. from the Third Presbytery of New York, rose and offered the following resolution.

"Resolved, That the roll be now completed by adding the names of all commissioners now present from the several presbyteries within the bounds of the synods of Utica, Geneva, Genessee and the Western Reserve."

And stated that the commissioners from the presbyteries therein named had offered their commissions to the clerks, who had refused to receive them. The moderator asked Dr. Mason if they were from presbyteries connected with the Assembly of 1837 at the close of its session. Dr. Mason replied that they were from presbyteries within the bounds of the synods of Utica, Geneva, Genessee and the Western Reserve. The moderator then stated that they could not be received. Dr. Mason then formally tendered the commissions of commissioners from

THE PRESBYTERIES OF	MINISTERS.	ELDERS.
Lorain,	Daniel W. Lathrop,	Henry Brown,
Geneva,	Wm. L. Strong,	Zenas Wheeler,
	Miles P. Squier,	Wm. B. Cook,
Genessee,	Erastus J. Gillett,	Augustus P. Hascall,
	Wm. Bridgman,	
Oneida,	Horace P. Boque,	
	Joseph Myers,	
Angelica,	Asa J. Allen,	Thompson Bell,
Maumee,	J. H. Francis,	Levi Beebe,
Watertown,	Isaac Brayton,	Jason Clark,
Portage,	George E. Pierce,	
	Sherman B. Canfield,	
Cayuga,		Salem Town,
		Joseph Esty,
Ontario,	Silas C. Brown,	Hiram Ashley,
Rochester,	Tryon Edwards,	George A. Avery,
	A. G. Hall,	
Delaware,	Daniel Waterbury,	D. Penfield,
Olsego,	Joseph W. Paddock,	David H. Little,
Trumbull,	Selden Haynes,	M. Messer,
Onondago,	Hutchins Taylor,	
Chemung,	John Frost,	
Huron,	E. P. Salmon,	
Buffalo,	Asa T. Hopkins,	Jabez Goodell,
	George R. Rudd,	Horace Allen,
Grand River,	Ferris Fitch,	
Niagara,	Herman Halsey,	
Cortland,	Joseph R. Johnson,	
Chenango,	John B. Hoyt,	Frederic Hotchkiss,
Cleveland,	Samuel C. Aikin,	Stephen Whitaker,
Bath,	E. Everett,	Daniel S. Benton,
Tioga,	J. A. Nash,	Elias Hawley,

And demanded that they be put upon the roll. The resolution was seconded. The moderator declared it out of order. Dr. Mason then said that with the greatest respect for the chair, he must appeal from that decision. The appeal was seconded. The moderator declared the appeal out of order, and refused to put it.

The Rev. Miles P. Squier, from the Presbytery of Geneva, then rose and addressed the chair, stating that he had a commission from the Presbytery of Geneva, which he had presented to the clerks, who refused to receive it, and he demanded his right to his seat and required his name to be enrolled. The moderator asked him if the Presbytery of Geneva was within the Synod of Geneva. Mr. Squier replied that it was within the bounds of the Synod of Geneva. The moderator then said "We do not know you," and refused the demand, declaring it out of order.

These repeated refusals of the moderator and clerks of the General Assembly of 1837 to perform the duties of their respective offices in the organization of the General Assembly of 1838, till its own officers should be appointed, thus impeding the constitutional progress of business, the Rev. John P. Cleaveland, of the Pres-

bytery of Detroit, rose and stated in substance as follows:—that as the commissioners to the General Assembly for 1838, from a large number of presbyteries, had been refused their seats; and as we had been advised by counsel learned in the law, that a constitutional organization of the Assembly must be secured at this time and in this place, he trusted it would not be considered as an act of discourtesy, but merely as a matter of necessity, if we now proceed to organize the General Assembly for 1838, in the fewest words, the shortest time, and with the least interruption practicable. He therefore moved that Dr. Beman, from the Presbytery of Troy, be moderator to preside till a new moderator be chosen. The motion was seconded by the Rev. Baxter Dickinson from the Presbytery of Cincinnati, and no other person being nominated, the Rev. Dr. Beman was unanimously appointed such moderator.

It was then moved and seconded that the Rev. Erskine Mason, D. D. from the 3d Presbytery of New York, and the Rev. E. W. Gilbert from the Presbytery of Wilmington, be clerks pro tempore; and no other persons being put in nomination, they were unanimously appointed.

The following is the roll of the General Assembly as completed by the clerks:

[The roll here follows.]

The Rev. Samuel Fisher, D. D. of the Presbytery of Newark, was nominated as moderator of the General Assembly, and no other person being put in nomination, he was chosen by a very large majority. The Rev. Dr. Beman thereupon announced to Dr. Fisher that he was duly elected the moderator of the General Assembly; and on leaving the chair, informed him that he was to be governed in his office by the rules of the General Assembly hereafter to be adopted.

The Rev. Erskine Mason, D. D. was then chosen stated clerk, and the Rev. E. W. Gilbert permanent clerk of the General Assembly.

The following notice had been previously delivered to the Rev. Dr. Beman:

"Resolution of the Trustees of the 7th Presbyterian Church, adopted May 7th, 1838.

Resolved, That the General Assembly of the Presbyterian Church, which is to convene in Philadelphia on the 17th inst. and which shall be organized under the direction of the moderator, and clerks, officiating during the meeting of the last Assembly, shall have the use of the Seventh Presbyterian Church during their sessions, to the exclusion of every other Assembly or Convention which may be organized during the same period of time. (Signed) JAMES SCHOTT,
President of the Board of Trustees."

It was moved and seconded that the General Assembly now adjourn to meet forthwith in the lecture room of the First Presbyterian Church in this city. The motion to adjourn was carried unanimously.

The moderator then audibly announced that the General Assembly was so adjourned, and gave notice that any commissioners who had not presented their Commissions should do so at the First Presbyterian Church.

The Assembly being again met at the lecture room of the First Presbyterian Church, Dr. Patton again offered his preamble and resolutions, as follows, which were unanimously adopted:

[See page 258 as before.]

Commissions were called for, and committed to the hands of the stated and permanent clerks.

Adjourned to meet in this place at 4 o'clock, P. M.

Concluded with prayer.

Respondents' counsel here alluded to a reference made in opening their case, to certain principles established by the Form of Government, and to some facts exhibited by the minutes of the Assembly in different years, the documents exhibiting which were not fully read at the time; and the reading was now waived, with the understanding that they would be adverted to in the argument as the counsel should think proper.

Judge Rogers remarked, that he considered the whole of the book containing the Form of Government, the minutes of the Assembly for the several years which had been adverted to by counsel on both

sides, and the book called the Digest, as in evidence, and subject to the use of the counsel in their argument.

Such parts of the documents at this time alluded to by the counsel for the respondents, as were subsequently adverted to in their arguments, and which do not appear on previous pages of this report, are here subjoined.

Form of Government, pp. 354–5.

CHAPTER IX.—Of the Church Session.

I. The church session consists of the pastor or pastors, and ruling elders of a particular congregation.

II. Of this judicatory, two elders, if there be as many in the congregation, with the pastor, shall be necessary to constitute a quorum.

III. The pastor of the congregation shall always be the moderator of the session; except when, for prudential reasons, it may appear advisable that some other minister should be invited to preside; in which case the pastor may, with the concurrence of the session, invite such other minister as they may see meet, belonging to the same presbytery, to preside in that case. The same expedient may be adopted in case of the sickness or absence of the pastor. * * *

Pp. 364–5.

CHAPTER XII.—Of the General Assembly.

[For sections I. II. III. of this chapter, see back, page 30; and for section VIII. see page 44.]

IV. The General Assembly shall receive and issue all appeals and references, which may be regularly brought before them from the inferior judicatories. They shall review the records of every synod, and approve or censure them: they shall give their advice and instruction in all cases submitted to them in conformity with the constitution of the church; and they shall constitute the bond of union, peace, correspondence, and mutual confidence, among all our churches.

V. To the General Assembly also belongs the power of deciding all controversies respecting doctrine and discipline; of reproving, warning, or bearing testimony against error in doctrine, or immorality in practice, in any church, presbytery, or synod; of erecting new synods when it may be judged necessary; of superintending the concerns of the whole church; of corresponding with foreign churches, on such terms as may be agreed upon by the Assembly and the corresponding body; of suppressing schismatical contentions and disputations; and, in general, of recommending and attempting reformation of manners, and the promotion of charity, truth, and holiness, through all the churches under their care.

VI. Before any overtures or regulations proposed by the Assembly to be established as constitutional rules, shall be obligatory on the churches, it shall be necessary to transmit them to all the presbyteries, and to receive the returns of at least a majority of them, in writing, approving thereof.

VII. The General Assembly shall meet at least once in every year. On the day appointed for that purpose, the moderator of the last Assembly, if present, or in case of his absence, some other minister, shall open the meeting with a sermon, and preside until a new moderator be chosen. No commissioner shall have a right to deliberate or vote in the Assembly, until his name shall have been enrolled by the clerk, and his commission examined and filed among the papers of the Assembly.

Pp. 366–8.

CHAPTER XIII.—Of Electing and Ordaining Ruling Elders and Deacons.

II. Every congregation shall elect persons to the office of ruling elder, and to the office of deacon, or either of them, in the mode most approved and in use in that congregation. But in all cases the persons elected must be male members in full communion in the church in which they are to exercise their office.

III. When any person shall have been elected to either of these offices, and shall have declared his willingness to accept thereof, he shall be set apart in the following manner:

IV. After sermon, the minister shall state, in a concise manner, the warrant and

nature of the office of ruling elder or deacon, together with the character proper to be sustained, and the duties to be fulfilled by the officer elect: having done this, he shall propose to the candidate, in the presence of the congregation, the following questions, viz:

1. Do you believe the Scriptures of the Old and New Testaments to be the word of God, the only infallible rule of faith and practice?

2. Do you sincerely receive and adopt the confession of faith of this church, as containing the system of doctrine taught in the Holy Scriptures?

3. Do you approve of the government and discipline of the Presbyterian Church in these United States?

4. Do you accept the office of ruling elder (or deacon, as the case may be,) in this congregation, and promise faithfully to perform all the duties thereof?

5. Do you promise to study the peace, unity and purity of the Church? * * *

VI. The offices of ruling elder and deacon are both perpetual, and cannot be laid aside at pleasure. No person can be divested of either office but by deposition. Yet an elder or deacon may become, by age or infirmity, incapable of performing the duties of his office; or he may, though chargeable with neither heresy nor immorality, become unacceptable, in his official character, to a majority of the congregation to which he belongs. In either of these cases, he may, as often happens with respect to a minister, cease to be an acting elder or deacon.

Pp. 386–7.

CHAPTER XIX.—Of Moderators.

I. It is equally necessary in the judicatories of the church, as in other assemblies, that there should be a moderator or president; that the business may be conducted with order and despatch.

II. The moderator is to be considered as possessing, by delegation from the whole body, all authority necessary for the preservation of order; for convening and adjourning the judicatory; and directing its operations according to the rules of the church. He is to propose to the judicatory every subject of deliberation that comes before them. He may propose what appears to him the most regular and speedy way of bringing any business to issue. He shall prevent the members from interrupting each other; and require them, in speaking, always to address the chair. He shall prevent a speaker from deviating from the subject, and from using personal reflections. He shall silence those who refuse to obey order. He shall prevent members who attempt to leave the judicatory without leave obtained from him. He shall, at a proper season, when the deliberations are ended, put the question and call the votes. If the judicatory be equally divided, he shall possess the casting vote. If he be not willing to decide, he shall put the question a second time; and if the judicatory be again equally divided, and he decline to give his vote, the question shall be lost. In all questions he shall give a concise and clear state of the object of the vote; and the vote being taken, shall then declare how the question is decided. And he shall likewise be empowered, on any extraordinary emergency, to convene the judicatory, by his circular letter, before the ordinary time of meeting.

III. The moderator of the presbytery shall be chosen from year to year, or at every meeting of the presbytery, as the presbytery may think best. The moderator of the synod, and of the General Assembly, shall be chosen at each meeting of those judicatories: and the moderator, or, in case of his absence, another member appointed for the purpose, shall open the next meeting with a sermon, and shall hold the chair till a new moderator be chosen.

Minutes of 1826, *pages* 37-40.

The committee to whom was recommitted the report on the propriety of making certain alterations in the existing rules which govern the proceedings of the General Assembly, and, if necessary, alterations in the constitution of our Church, recommended: * * * *

7. That in the Form of Government, chap. xii. sect. 7, the words "publicly read" should be exchanged for the word "examined." In favour of this amendment, the committee stated, that probably much time, which is now occupied by the whole Assembly in having the commissions publicly read, might be saved, and stricter order be observed, by the adoption of rules of the following import: That immediately after the opening of the General Assembly and the constituting of the house, a committee of commissions be appointed, with instructions; and that the house ad-

journ till the usual hour in the afternoon. That the committee of commissions be instructed to examine the commissions, and to report to the Assembly immediately after its opening in the afternoon, on those commissions which are unobjectionable, and on those, if such there be, which are materially incorrect, or that are otherwise objectionable: That those whose commissions are unobjectionable, immediately take their seats as members, and proceed to business; and that the first act be the appointment of a committee of elections, to which shall be referred all the informal, or otherwise objectionable commissions, with instructions to report thereon as soon as practicable. * * * *

It was also resolved, that so soon as the alteration proposed in the 7th item above enumerated, shall appear to have been constitutionally adopted by the presbyteries, the following rules of the Assembly shall be in force.

[For these rules, see pp. 174–5 of this report.]

The respondents' counsel offered the deposition of Rev. Eliphalet Nott, D. D., dated February 26, 1839. The counsel for the relators objected to portions of the deposition, as relating to matters respecting which testimony on their behalf had been peremptorily excluded by the Court, at the instance of the opposite counsel, which decision of the Court had been acquiesced in by the counsel for the relators.

The Court read the deposition, and decided that the parts relating to occurrences at the organization were admissible, but that other portions were inadmissible.

Mr. Hubbell.—Will your honour please to note an exception to this decision. We withdraw the offer of the part admitted, being unwilling to present that without the other.

Minutes of 1827, *p.* 152.

The committee to whom was referred the report of the committee on the returns of the presbyteries in relation to the proposed alterations and amendments of the constitution, that they might report what ought to be done in consequence of the state of these returns, made the following report, viz. That there are connected with the Assembly, eighty-eight presbyteries: forty-five, therefore, are necessary to make any alteration in the constitution of the Church. * * *

In relation to No. 7, of the proposed amendments to the Form of Government, it appears that fifty-three presbyteries have voted in favour of the alteration, and thirteen against it. Wherefore, resolved, that the proposed amendment, viz. That in the Form of Government, chap. xii. sect. 7, the words "publicly read," should be exchanged for the word "examined," be, and the same is hereby adopted as a part of the constitution of this church.

Minutes of 1829, *p.* 384.

Resolved, That the permanent and stated clerks be, and they hereby are appointed a standing committee of commissions: and that the commissioners to future Assemblies hand their commissions to said committee, in the room in which the Assembly shall hold its sessions, on the morning of the day on which the Assembly opens, previous to 11 o'clock; and further, that all commissions which may be presented during the sessions of the Assembly, instead of being read in the house, shall be examined by said committee, and reported to the Assembly.

Same Minutes, p. 518.

The regulations of the Assembly, on the subject of statistical reports, are subjoined. It is required—

1. That the forms of sessional and presbyterial reports, sent down in the minutes, be strictly observed. Deviation from these frequently requires the stated clerk of the General Assembly to copy the whole report, before it can be sent to the press.

2. That in the sessional report, the pastor or session be required to insert in the column headed "Missionary Funds," all sums of money collected, or procured to be collected by said pastor or session from the congregation under his and their care for any evangelical mission, whether foreign or domestic; and particularly all sums collected for the Board of Missions under the care of the General Assembly,

for the American Home Missionary Society, and for the American Board of Commissioners for Foreign Missions; that under the caption of "Commissioners' Fund," be returned all moneys collected for defraying the expenses of commissioners to the General Assembly, whether transmitted to the treasurer of the trustees of the General Assembly, or paid by the presbytery itself to its own commissioners; that under the head of "Theological Seminary Funds," be stated all funds collected for any theological seminary under the care of the General Assembly, or under the care of any synod belonging to said Assembly; and that under the caption of "Education Funds," be returned all funds collected for promoting the charitable and religious education of persons in Sabbath schools; and especially all money collected for the education of poor and pious youth, in academies, colleges, or theological seminaries, with a view to their becoming ministers of the gospel.

Rev. Henry A. Boardman, re-called by defendants, said: I have heard the testimony of the witnesses this morning, in regard to the noise made by the Old School party. Their statements are altogether counter to my own recollection, and, as to myself, are entirely unfounded. To the best of my recollection, there was no stamping or scraping with the feet in my neighbourhood, or any other indecorous conduct. There may have been one or two calls to order, but the calls came chiefly from the moderator, and those in his vicinity. I heard nothing of the remarks of Mr. Gemmill, that this was pretty conduct for ministers of the gospel.

Rev. Wm. W. Phillips, re-called by defendants, said: Mr. Boardman sat in the same pew with me, or one adjoining. I am certain that he made no noise, and there was certainly nothing unbecoming in his manner. I recollect no scraping or stamping in our vicinity. There were calls to order, in which I joined. I recollect at some time during the proceedings of the New School party, I think it was when they were leaving the church, Mr. Boardman remarked to me, "How true it is, that whom God has determined to destroy, he first makes mad." I think he did not use the Latin words.

Hon. Walter Lowrie, re-called by the respondents, said: I did not observe the position of Mr. Boardman, at all. From his account of it I think I must have been in the pew adjoining his. I sat next the door of the pew. I heard no coughing in my neighbourhood, no legislative coughing. There was no indecorum in my neighbourhood that I perceived, and no calls, excepting calls to order.

Hugh Auchincloss, Esq., re-called by defendants. I neither saw nor heard any stamping, scraping or rubbing in that vicinity. All in that part of the house behaved with perfect propriety.

Rev. John M. Krebs, re-called by defendants, at his own request, said: I omitted one point in giving my testimony. Dr. Mason has stated, that he heard the name of John Boynton from my lips, and was surprised at it, as he was not present. No commission with his name upon it was handed to me. It was not on my roll, and I never uttered it.

In regard to Mr. Joshua Moore, I wish also to explain in my testimony. I said, that the minute was inaccurate in regard to the period when he presented his commission, and was enrolled. The fact in this case is, that an interval of some time occurred between the time of his first appearing in the Assembly and his actual presentation of his commission.

The testimony here closed, and the court adjourned.

Saturday, March 16th.

The testimony on both sides having closed on the previous day, the Court announced at the opening this morning, that the case was ready for the arguments of counsel, if they wished to address the jury. According to previous arrangement among the counsel, Mr. Meredith was to open, and Mr. Wood to close for the relators; and Mr. Preston to open, and Mr. Ingersoll to close for the respondents. The respective arguments are here subjoined.

ARGUMENT OF WILLIAM M. MEREDITH, ESQ.

Commenced Saturday Morning, March 16th, and closed Monday, March 18th.

May it please your Honour,—Gentlemen of the Jury: This is an action brought in the name of the Commonwealth of Pennsylvania, at the relation of James Todd and others, against the respondents Ashbel Green and others, to try the titles of the respective parties. It is on many accounts important that you should obtain a correct understanding of the case in order that you may render a righteous decision. This decision you are bound to render, and I have no doubt will be disposed to do so. In arriving at your conclusions in this case, you are to be guided by the principles of common law and common sense. So clearly have the great principles of the common law been defined by the ablest jurists, that there will be little difficulty in exhibiting them to the satisfaction of the jury.

I shall, I can assure you, make no points of law in relation to this case, but such as are absolutely necessary to a correct understanding of the principles involved in it. The law, gentlemen, is perfectly clear in regard to the questions which you are to determine. But on this subject it is the prerogative of the court to inform you. The controversy in relation to which you are to decide, is one which excites unusual interest in the community. The high character and standing of the parties to this suit invest it with an interest of no ordinary character. The fact that it involves questions connected with the religious rights, interests and feelings of a large denomination of Christians, naturally and necessarily increases the interest felt among the people on the subject. The intensity of the interest in this case, has been manifested by the large number of respectable and intelligent men, who have filled the room from day to day, for nearly two weeks, during the development of the evidence.

I could wish that such cases as this, involving controversy among religionists were less frequent than they are. Many such have occurred and doubtless others will occur, which will have to be decided by our courts of justice. This must be expected while the professors and ministers of religion are so imperfectly imbued with the spirit of the Saviour, and among them are found men obstinately bent on carrying out their own determinations, sacrificing in their accomplishment that charity, which is the glory of their religion.

I wish you, however, while engaged in the consideration of this case, to recollect that this suit has been occasioned by the violence

of a party, which has unjustly accused the relators of having, by usurpation, attempted the exercise of a control in the church to which they are not entitled. The acts of excision, of which you have heard, during the development of the testimony, were the primary cause which led to the institution of this suit. Those acts of the party in the church, I need hardly tell you are unjust, oppressive and tyrannical. That you may understand the position of the relators in this case, I must remind you, and this I wish you not to forget, that we are not the party which undertakes to sit in judgment on our brethren and condemn without a trial. We are not the party claiming to be Presbyterians to the exclusion of others asserting the same claim. Those whom I here represent are Presbyterians, and claim to be such, but they do not deny that others are also Presbyterians. We set up no claim to possess *exclusively* the keys of the church. We are not the party, which attempts the confiscation of the property of another portion of the church, and claims for itself the exclusive enjoyment of the whole. But we desire to enjoy our rights, to stand as we have heretofore stood, on equality with those who have attempted to exercise an usurped arbitrary power over us. To the disgrace of Christians, a party has arisen in the Presbyterian Church, which has undertaken to exclude their brethren, without citation, without trial, and consequently, without conviction of heresy or any crime whatever.

The question in regard to property, large as is the amount involved, is one to us of comparatively little consequence. I would not have made the allusion which I have to that subject, but to disabuse your minds of the prejudice which it has been unjustly attempted to excite against us. In the progress of the spirit of persecution and misrule, which in 1837 was consummated by the sundering of the Presbyterian Church, there has been much crimination and recrimination, with the rehearsal of which, however, I will not detain you. Of these odious measures, the acts of excision, as they have been called, I have no doubt that our friends on the other side are, by this time, heartily ashamed.

Gentlemen, I do not ask of you a verdict in our favour unless you are fully satisfied that our rights have been trampled on, and that the property of the church has been unjustly siezed by the ruthless violence of a party.. The attempt has been made to persuade you, in the opening of the opposite counsel and by testimony which he attempted to introduce, that on the subject of property, the excinding party were willing to do justly and even liberally by us; that they were willing to divide equally with us. That you may understand their position in this respect, it is proper that your attention should be turned to the propositions made on that subject at the meeting of the General Assembly of 1837. The minutes of that Assembly contain a correspondence, which has been given in evidence, between the two portions of the celebrated committee of ten, a committee appointed on the motion of the leader of the Old School party, the Rev. Robert J. Breckinridge, of Baltimore, for the purpose of effecting an amicable division of the Presbyterian Church. The correspondence alluded to, exhibits the propositions of the de-

fendants in this case for a division of the church. It shows that they proposed, that the theological seminaries and other public property of the church, should be retained by the Old School party. True, they were willing that if any portion of the property could consistently with the will of the donors be given to any who were not Presbyterians, which name they denied to us, such portion they would equally divide with the New School. In other words, they would consent to our having a small fragment of that which was already in our possession, and to which our right was equally incontestible with theirs. Coupled with this, was their proposition, claiming to retain to themselves exclusively and denying entirely to us, the succession of the Presbyterian Church. On such terms, and such *only*, would they consent to the amicable division, which themselves proposed. This circumstance alone, is sufficient to stamp with opprobrium their whole proceedings in this business. Their propositions in relation to the church property, and to the succession, were couched in language calculated to deceive the unwary; but the necessary consequence of acceding to these propositions, as you, gentlemen, will readily perceive, would have been at once to make us seceders from the church of our fathers, and voluntarily to exclude ourselves from all claim to the property of that church. About the property itself we care little. We would cheerfully relinquish all participation in its benefits, were that the only subject involved in the controversy. But we will not consent without a struggle to be unjustly branded as heretics, or seceders from the church to whose constitution and principles we claim to adhere, at least as closely as those who seek to exclude us. Extraordinary as it may seem, after what has been attempted to be shown on the other side, the proposition for a division of the church came from the Old School party. The proposition for a committee for this purpose came from them. They proposed the terms, as I have shown you, on which such a division might be made. But this is not all. They determined on effecting the division at all hazards. If they could not peaceably compass their object, they would do it by violence. Accordingly, as soon as it was ascertained that we would not truckle to their proposals for a separation, they introduced and urged to their accomplishment, the unlawful measures for an expulsion. On an allegation, claiming to be founded only on mere rumour, they declared out of the pale of the church the Synods of the Western Reserve, Utica, Geneva, and Genessee. Thus without a trial, or a *shadow* of trial, was cut off from the Presbyterian Church, so large a portion of the members obnoxious to this party, as to secure, in their judgment, the perpetual preponderance of their power. We come into this court then, gentlemen, for a trial, because it has been denied us elsewhere. We have been driven here by the injustice, not of the Presbyterian Church, but of a party who have claimed to rule that church with a rod of iron; and who have endeavoured, without the appearance of law or right, to lay on us "heavy burdens which neither we nor our fathers were able to bear." I am thankful, and I congratulate the Court and jury, that we have not to wade through the mazes of theologi-

cal dispute; we have happily no points of doctrine or of faith to settle in this controversy. The matters in dispute, and on which you are to decide, are simply matters of law and of fact. The question at issue is, Are the respondents in this case entitled to hold the office of Trustees of the General Assembly of the Presbyterian Church in the United States of America? The general issue in this case is what you are to try. This issue is, Who are the Trustees of the General Assembly, according to the tenor of the act of incorporation, passed by the Legislature, March 28, 1799? The relators in this case claim to be legal trustees. There is no dispute that they were elected to this office by the body claiming to be the General Assembly of the Presbyterian Church, which held its sessions in May, 1838, in the First Presbyterian Church in this city.

The secondary issue, therefore, comes directly under your consideration. This is, whether that body which elected these relators, was truly the General Assembly of the Presbyterian Church. If you are satisfied of this fact, it will of course be your duty to render a verdict for the relators. The kind of incorporation granted by the legislature to the General Assembly, is one of frequent occurrence here and elsewhere. Some explanation of its character, however, may be necessary. The trustees of the General Assembly are the legal corporation; but by the act of incorporation itself, they are under the control of a body not incorporated, and subject to be removed by that body, which is also authorized to appoint others in their stead. The body to whose control they are thus subjected becomes therefore what is termed the body at large of the corporation, or body of electors; and in this capacity, the General Assembly of the Presbyterian Church is recognized in the charter of incorporation, giving to it the power to control the real corporation. In this investigation, while you are happily relieved from the consideration of those spiritual matters, those doctrinal points and theological niceties, which belong to the courts of the church, it will nevertheless be necessary to examine the constitution, or form of government of the Presbyterian Church, which is in some respects different from most others. This form of government embraces a succession of judicatories, as they are technically called, and bears a striking resemblance to the republican form of our civil government. By the constitution of this church, no member can be expelled without citation and trial, first before the inferior court which has cognizance of the case, and from this he has the privilege of appeal to the higher judicatories, from the church session to the presbytery, from the presbytery to the synod, and from the synod to the General Assembly. These judicatories, or courts of justice, as they may be called, have each their appropriate functions. The church session, composed of the pastor and ruling elders of a particular congregation, is the lowest court, and has charge of the discipline, according to the form of government, of the private members of that congregation or church. The next higher court, or judicatory of the church, is the presbytery, which is composed of all the ministers, (being at least three,) and as many ruling elders, as there are congregations, within a certain district.

The ministers sit in presbytery, not by delegation, but of their own right, by virtue of their ordination. The ruling elders have their seats in presbytery as representatives of the congregations, each of which is entitled to be represented by one elder. The jury will bear particularly in mind this fact in relation to the ministers. The next higher court is the synod, which is composed in all respects like the presbytery, only extending over a larger district, and embracing, in fact, several presbyteries, at least three. In the language of the constitution, the synod is appropriately declared to be only a larger presbytery. The next and highest judicatory of this church is the General Assembly. This body is constituted by representation from the presbyteries, without any reference to the synods. Each presbytery, by the terms of the constitution, has a right to be represented in the General Assembly by a certain number of members, according to a settled ratio, as the counties of this state are represented in the legislature, or the congressional districts in the Congress of the United States. This point you will see clearly established by those portions of the constitution which have been submitted to you in evidence. This point will claim the especial attention of the jury, that the General Assembly is composed exclusively of commissioners, who are the representatives of the presbyteries; and that each presbytery is entitled to its full proportionate representation in that body. The only question, in regard to the right of an individual to a seat in the General Assembly, is, whether he is a representative duly commissioned by a presbytery in connexion with the General Assembly. If then certain officers entrusted with the business of examining the credentials of members, or appointed to other duties connected with the organization of the Assembly, should assume the power of excluding representatives from the presbyteries duly commissioned, they would commit a high outrage upon the rights of those presbyteries; and the ultimate exclusion of such commissioners, regularly appointed and presenting credentials, would necessarily vitiate such organization of the Assembly.

But this suggestion is only by the way, and will hereafter claim a more careful consideration. It seemed necessary, thus briefly to review the structure of the judicatories of this church, that you might be in possession of the whole case; although, properly, the highest court, the General Assembly, is the only one with which we have to do. This body, as you see by the constitution, represents the whole church. It is the highest court of appeals, and within the limits prescribed by the constitution, has a general supervisory power over the concerns of the whole church. But within those limits it must keep itself, or, if in exceeding them, it violates the rights of any portion of the church, it of course subjects itself to the moral reprobation of the community; and, if such violation of rights involve the corporate privileges of any portion of its legitimate members or constituency, it necessarily subjects itself to the supervision of the courts erected by the state to adjudicate on violations of the laws of the land, and on questions involving the corporate rights of individuals and communities or associations of

individuals. A few words now may be necessary in regard to the manner in which the General Assembly is constituted, and the specific powers and duties of its officers and of the body itself. As to the first, it has been already sufficiently shown from the constitution that the Assembly is constituted by delegation from the presbyteries, each of which is entitled to its appropriate representation. This you will bear in mind throughout the whole of your investigations, or you must necessarily fail of appreciating the real merits of the case committed to you. Its powers also are clearly defined in the portions of the constitution which have been read in evidence. You can hardly fail to observe that among them is not to be found the power of instituting original process against any portion of the church, and consummating that process in the exclusion of such portion from membership, or from being a constituent part of the church. As a supreme court of judicature it may consummate, according to the principles laid down in the constitution, all proceedings of adjudication "which are regularly brought before it," by appeal, complaint or reference from the inferior courts; and, in certain cases, on a review of proceedings in those courts it may censure them for what it deems irregular or wrong in their proceedings. It may also, when the good of the church, in their judgment requires it, divide certain of those inferior judicatories, distributing their component parts among other judicatories. But nowhere can you find a shadow of foundation for the exercise of an original authority and jurisdiction by the General Assembly, consummated by itself, in the exclusion from the body of the church of either an individual member, or an inferior judicatory belonging to that church. This, I apprehend, you must see to be as plainly the fact as it is that the church has a constitution. But if the power of expulsion, in any form, were even conceded to be in the General Assembly, which we by no means admit, and which, probably, no Presbyterian, till 1837, ever dreamed of claiming, yet if it were even possessed by the Assembly, it must surely be exercised in accordance with the same principles which govern the proceedings in the courts below, the only principles on which the constitution of that church allows any man or body of men to be expelled from its connexion.

It may therefore be desirable on this as well as on other accounts, that your attention should be directed to those principles, as they have been read to you and will be placed in your hands as evidence in this case. They are developed in the "Book of Discipline," as it is called, and are an admirable system, in perfect accordance not only with the principles of holy charity inculcated in the scriptures, but with the system of civil jurisprudence established under our republican government, and with those immutable principles of justice, which, while they demand the punishment of the guilty, throw around the accused the guards of innocence until he is *proved to be guilty.* They establish *forms of process*, clear and intelligible in their character, by which his trial shall proceed, and the proof of his guilt be elicited and established before he is condemned. They also prescribe the form and measure of punishment

for the several grades of offence, and the manner in which it shall be inflicted, when, after a fair and impartial trial, the guilt of the accused is established by incontrovertible proof.

You will also observe, gentlemen, that by the provisions of this book, process against either ruling elders or private members, (60,000 of whom were extirpated from the church by the acts of 1837, if those acts are of any valid force at all,) the discipline, I say, of these classes of members, is entrusted with the church session, and not one of them can be constitutionally reached by the General Assembly, by any penal or disciplinary act, unless he comes before that body through a regular series of removals by appeal or otherwise, from the session to the presbytery, and so on up to the General Assembly. So also "process against ministers must commence in the presbytery to which they belong," to whom the discipline of this class of members is entrusted, and their case can only come before the Assembly by a prescribed process of removals from the lower courts. Thus far in relation to process.

Now, in relation to the offences imputed to the district of the church cut off by the acts of 1837, and on the ground of which that excision is attempted to be justified. I say the *district* of the church, for to no one of the sixty thousand and more individuals, ministers, elders, or communicants, thus unceremoniously ejected, is any offence imputed. But what are the offences in question. If they have a name in the book, they are "heresy and schism." "Gross disorders in doctrine and practice," say the excinding acts. Well, the church has provided in its constitution for the punishment of "heresy and schism." If a member, or a minister is a heretic, because, for instance, he does not believe in the divine appointment of ruling elders, for that seems to be the greatest possible heresy, in the estimation of the Old School party, he may be tried by his session or his presbytery, and if it should so happen that their courts should be so heretical as not to consider the offence a damnable heresy, and therefore not cut him off, the prosecutor can carry the case up in regular form to the General Assembly. But when an accidental majority in the General Assembly, or any other majority, large or small, take it into their head that "individual process is difficult and tedious," and avowedly on this ground conclude to leap the barriers of the constitution, and at a stroke cut off churches, presbyteries and synods, it is no answer to those thus excinded, to say smooth things to them, to say as one of my learned friends did, in his opening for the other side, and as another has done (Mr. Preston,) on an incidental question, "Why really we don't accuse you of any offence, we only say that you are *heretical*, and we use that word only in a technical sense; you may be very good men, we have no evidence against you. When we thus declare that you are not Presbyterians and cut you off entirely from the communion of the church, we do not impeach your moral character. We do not accuse you of any *crime*. We only put you on a level with the Episcopalians, the Roman Catholics, the Baptists, the Methodists, the Quakers, the Unitarians, the Jews, the Mohammedans and the Congregationalists, who may be good men. But

they are not Presbyterians and neither are you. It would be indecorous in us to say any thing derogatory to your character as men and citizens. Christian charity will not permit us to assail your characters. All we say, is, that you are apostates and heretics. We have supported and sustained you when you were weak, and now you are guilty of parricide and sacrilegiously endeavouring to destroy your parent."

Why these are very pliant gentlemen—eminently endowed with christian charity to be sure. Who can possibly doubt it, and that they have exercised it towards their brethren in the most extraordinary manner. In their most wonderful exercise of charity, they in effect say, "We do not accuse you of being drunkards, nor of having kept a disorderly house, the resort of drunkards. We do not accuse you of any immorality or profanity. We only say you are not Presbyterians. We mean nothing personal. We only mean it in the parliamentary sense. We do not say that you are bad men, that you are drunkards, liars, or guilty of certain other nameless crimes. But if you had been guilty of these offences, in the exercise of our sovereign volition and christian charity, we could have dispensed with all measures of excision." It was not necessary for them to say that any one of those who was thus cut off from church fellowship was a bad man. They merely say to them, "You are guilty of heresy." It is vain to say that that is no offence, no crime, when you visit it with the highest punishment of crime, known to this or any other church in our land.

Heresy *does* constitute an offence against the church, a violation of her constitution and discipline. And every member who promulgates heretical opinions is subject to trial and expulsion from the church. But this trial and expulsion must be in accordance with her constitution and established rules of discipline, as has been clearly shown to you. It was necessary so far to examine this subject, in order to understand the new mode of punishing offences invented by the General Assembly of 1837. It is too serious a subject for amusement, or it would be ludicrous in the extreme, to observe the preposterous results to which this new mode of punishing heresy in the infected district, has led the party which perpetrated the excinding acts of 1837; to see, for example, hundreds of individuals, ministers and laymen belonging to the Presbyterian church, who had been in fellowship and in good standing for a period of *forty* years, and who had contributed liberally to the funds of the church during that time, cut off from the church of their fathers, not only without citation and without trial, but also without the commission of any offence or even the allegation of any offence *on their* part, but on the ground of a mere rumour, that *some body*, in the same district of the church, was guilty of offences.

I am sorry, gentlemen, that it is necessary to the issue in this case to exhibit these strange proceedings of the Assembly of 1837, and to spread before you their arbitrary character and the injustice of their operation. But the necessity is imposed on me, because, as has been fully proved to you, they were made the basis of an attempt in 1838 to organize an illegal and unconstitutional

Assembly, by the party which perpetrated these acts. To secure this organization in 1838, excluding the representatives of the presbyteries within the obnoxious synods, the party in 1837 exacted of their officers a pledge, that in performing their functions connected with that organization, they would regard, not the constitution of the church, but the will of the majority in 1837.

We may, perhaps, as well at this time as any other, advert to the powers and duties of those officers. The officers of the General Assembly are a moderator to preside over its deliberations, and clerks to perform certain duties appropriate to their office, such as the preparation and preservation of the records of the Assembly, the reading of documents under consideration in the body, and the preparation of such as are to be sent abroad after they have been adopted by the Assembly. In addition to these natural and appropriate duties of their office, the moderator of the Assembly for one year, is authorized by the constitution to preside in the incipient measures for organizing the Assembly of the succeeding year. The terms of the constitution on this subject are, that the moderator of the previous year, "or some other minister, shall preside until a new moderator be chosen." By certain rules which have been generally observed in the Assembly for a number of years, in case of the absence of the last moderator, his place is supplied by "the last moderator present;" though this rule, as it is not of imperative obligation, has not always been observed. By a regulation of the Assembly, there has also been devolved on the clerks a specific duty connected with the organization of the Assembly. This duty is to examine the commissions of the delegates from the several presbyteries, to report to the house such as they find to be regular, that the delegates whose credentials they are may take their seats as members of the Assembly; also to report to the house such commissions as they find irregular or informal, that they may be submitted to a committee of elections, for their decision respecting the right to a seat in the Assembly, of the members who bring those commissions. For this specific duty the clerks are styled a Committee of Commissions. They are, however, the officers of the house, and by the terms of the constitution itself, they need not be members of the Assembly, and are liable to be removed at the pleasure of the house, either with or without a cause assigned. Such being the prescribed duties of the moderator and the clerks, and their respective relations to the body, it will be obvious to you, gentlemen, that they must have one rule, and only one, to regulate their actions in organizing the Assembly. That rule is the constitution of the church. Their first and only duty in this whole transaction, is to see that all applicants for a seat, constitutionally entitled thereto, and none others, be admitted to the Assembly.

I now come to a fact, gentlemen, to be found by you, namely, that for a series of years, certain presbyteries and synods have been in connexion with the General Assembly of the Presbyterian Church. By the testimony it has been shown to you that these bodies were constitutionally organized and connected with the Assembly in the same manner with other judicatories of the church.

Twenty-three of these presbyteries were thus organized and connected with the General Assembly previous to the year 1821, and therefore, as has also been shown to you, participated in the adoption, in that year, of the present constitution of the church. From 1802 to 1837, according to their age respectively, these several presbyteries were in every appropriate form recognized by the General Assembly, and shown, by their records, to be constituent portions of the Presbyterian Church.

Now, what is to establish the right of any presbytery to be represented in the General Assembly? Take, for example, the Presbytery of Brunswick, in the Synod of New Jersey. When its commissioners present themselves to the clerks of the Assembly, and demand to be enrolled as members, how are these clerks to decide whether they shall be admitted? The first question is, Are their commissions regular? Do they show in an authentic form that these individuals, ministers and elders, were appointed by the Presbytery of Brunswick to represent them in the Assembly? Does it appear by the records, or is it in any form within the knowledge of the clerks, that that presbytery was organized by the constitutional authority, or has been for a series of years recognized by the Assembly as a constituent portion of the Presbyterian Church? These questions being answered in the affirmative, dare these clerks refuse to enrol their names? Or if any defect appears in their credentials, can they, without a violation of their trust, do otherwise than report them to the house? Again, when opportunity is afforded for the house satisfactorily to ascertain that these men were duly appointed by the Presbytery of New Brunswick to represent that body in the Assembly, dare the Assembly do otherwise than admit them as members? Could the Assembly do otherwise without sacrificing its own integrity? Would not such refusal be, not only an outrage on the rights of these commissioners and the rights of their presbytery, but would it not also, according to the constitution of the church, authorize any fourteen or more of the members present to organize the General Assembly, admitting the commissioners from the Presbytery of Brunswick and from all other presbyteries of the church?

What would you think, gentlemen of the jury, if the Congress of the United States should declare the State of Pennsylvania no longer a part of the confederacy, thrust our representatives from their halls, and, at the succeeding session, refuse to admit the delegation of this commonwealth, on the ground, forsooth, that the previous Congress had declared Pennsylvania out of the Union? Will any man of common sense pretend that Congress has such power as this? Or, suppose that the legislature of this commonwealth should declare one of the counties no longer a part of the state, and on this ground refuse its representatives a seat, or that our city council should treat in a similar manner one of the wards of the city, would such arbitrary assumptions be tolerated by the people? Would they any where find an advocate in our land? Would any court, possessing competent jurisdiction, justify the measure? In these supposed cases, gentlemen, which, indeed, are hardly supposa-

ble, you have, with one exception, a fair illustration of the cause which has driven my clients into this court. The exception is, that the General Assembly had, if possible, less a shadow of claim to the exercise of the prerogatives which it asserted in relation to the synods and presbyteries in question, than have the national and state legislatures and our city council to the exercise of such a power.

What would be the *consequence* if the Senate and House of Representatives in Congress, should undertake to disfranchise one or more of the states of this Union, by resolving that they are no longer a portion of the confederacy? Would such an act be regarded otherwise than an arbitrary assumption of power, and utterly null and void? Would not such assumption of unauthorized power, if carried out, overturn all our civil and religious institutions, and wholly subvert the constitutions of our governments? And might not the dominant party in Congress undertake to exclude the state of Pennsylvania, or any other state in this Union, from a representation in the counsels of the nation, with as much propriety and justice as characterized the dominant party in the General Assembly of the Presbyterian Church, when it resolved that the Synods of Utica, Geneva, Genessee, and the Western Reserve, and their presbyteries, were no longer in connexion with that body, or when, in 1838, they undertook to exclude the representation from those presbyteries? Such an assumption on the part of the majority in Congress, would be analogous to that of the accidental majority in the General Assembly. To what would such high-handed assumptions lead, but to the utter subversion of all law, all order, and all right? If suffered to be carried into effect by a church judicatory, they must lead to the entire destruction of the constitution, and the establishment of an odious ecclesiastical tyranny. The General Assembly of the Presbyterian Church is a limited organized body, and is constituted of representatives elected by the several presbyteries. It therefore has no power to exclude any of these representatives from a seat in the body; and the attempt to do so was an utter violation of law, order, and the constitution. As a lawyer, I deny that the General Assembly could be legally constituted, unless every legally elected commissioner from the several presbyteries were permitted to take his seat. All the representatives legally chosen, have a right to take their seats in the first instance, and participate in the organization of the house, by the election of a speaker or moderator, and the other officers.

A party in the General Assembly of the Presbyterian Church, be that party the majority or minority, has no right whatever to reject or exclude any delegate duly elected by the presbytery to which he belongs. In either case then, (whether in the Congress of the United States, or in the General Assembly of the Presbyterian Church) an arbitrary attempt to exclude or reject a representative, would be grossly illegal. A party which may by accident happen to be the majority, nay even the whole body collectively, has no legal right to deprive any representative duly elected by those who possess the constitutional right to elect him, from taking his seat, and participating in the organization of that body. Such a pro-

ceeding is a gross infraction of right, an unwarrantable and dangerous assumption of power, and in the case of the Presbyterian Church it is a direct violation of the constitution, which expressly declares, that "the General Assembly shall consist of a delegation from each presbytery." A presbytery may fail of a delegation by its own neglect to appoint, or by the failure of its delegates to attend, but if the appointment is made, and the delegate in attendance, he clearly cannot be excluded without a violation of the constitution and of corporate rights.

The jury will then remember, that for seventeen years, before 1821, when the present constitution of the church was adopted by those very presbyteries, as well as others, and from that time to 1837, you will remember that the presbyteries, whose commissioners were excluded from the Assembly of that year, and were refused seats in the Assembly of 1838, were admitted to have the same right as any other presbyteries, to a representation in the General Assembly. They could then show as clear a title to be thus represented, as the state of Rhode Island or that of South Carolina could show to a representation in the Congress of the United States. They were, and were admitted to be, as much a part of the Presbyterian Church, as those states are part of the American Union.

Gentlemen, you cannot fail to see—what indeed our opponents well know, and for that reason have sedulously endeavoured to avoid an examination of that subject—you cannot fail to see that the General Assembly of 1837 had no shadow of right to object to an equal participation with themselves, by the commissioners from these presbyteries, in the business of that body, much less to declare their connexion with the General Assembly of the Presbyterian Church totally and for ever dissolved. You will bear in mind, as has been proved to you, that the alterations in the constitution and form of church government in 1821, were approved by the votes of these presbyteries. Not only were they received and acknowledged as brethren, as fellow-labourers in the church, but, as appears by examining the votes, the record of which has been read to you, the amended constitution would have been defeated, had it not been for the votes of those very presbyteries. On *those very votes* turned the adoption of that constitution. No man in his senses can doubt that these twenty-eight presbyteries were as fully entitled to a representation in the "General Assembly," as the "old presbyteries" were; and as well might the representation from the old *thirteen* states of this Union undertake to exclude the representatives from Kentucky, Ohio, Illinois, or Michigan, from a seat in Congress, as for the representation from the older presbyteries to attempt the exclusion of the members from the new presbyteries. The two cases are parallel. In both, the old and the new have an equal right, and stand on equal ground. In both cases, the rights of the new constituencies have been fully recognized, and the old have acted with them as equal parts of the whole body. The human imagination cannot conceive any right whatever that these *twenty-eight* presbyteries did not possess in common with the other presbyteries, any right that

their representatives did not possess in common with the representatives from the other presbyteries.

How, then, it may be asked, could the party which had the predominance in the Assembly of 1837, perpetrate the acts of excision, cutting off at a single stroke these large portions of the church, and refusing, at the organization of the Assembly of 1838, to admit their constitutional representation in that body? Why, it appears that there were some things, in the portions of the church thus excinded, which the party in question disliked, as there are some things in the politics of Rhode Island and of South Carolina which are offensive to certain parties in the national Congress. This is substantially the amount of the explanation which can be given of these singular transactions. It was alleged that certain irregularities in doctrine and discipline existed in these portions of the church. The party, finding the power in their hands, by the majority which they possessed in 1837, determined in some way to get rid of what was so offensive to them. Accordingly, they came to us with the very modest proposition, not, in the first place, that South Carolina and Rhode Island should be declared out of the confederacy, but that we should concur with them in peaceably dissolving the Union, or dividing the church: that, in substance, what they termed the New School party, which was understood to sympathize with the members in the obnoxious district, and many of them to reside there, should peaceably withdraw from the church, and organize a new body, leaving to the Old School the possession of the seminaries and funds of the church, except that they would equally divide with us such portion of the property, which had been given to the *Presbyterian Church* for its exclusive use, as the will of the donors would permit to be given to some other church or body of men. When they found us not prepared to accede to these terms, to desert the church of our fathers, and leave in their hands exclusively the inheritance both of its funds and its name, they resolved, not that South Carolina and Rhode Island, but that western New York and the northern part of Ohio, were no longer any part of the Union: in other words, that the Synods of Utica, Geneva, Genessee, and the Western Reserve, with all their constituent parts, presbyteries, churches, and communicants, were no longer any part of the Presbyterian Church.

Indeed, it is obvious that the party which assumed to exercise this power in 1837, and that in the most summary manner, without process, without trial, and without evidence, and to the broad extent of cutting off, at one fell swoop, four synods, twenty-eight presbyteries, five hundred ministers, five hundred and ninety-nine churches, and sixty thousand communicants, that this party, I say, did not suppose themselves to be warranted by the constitution in any such exercise of power, such a stretch of arbitrary sway as this. We were not permitted to go into that matter in the evidence, and therefore the positive testimony is not before you. You will, however, see by the constitution itself, with which you are bound to suppose them to be acquainted, you will see by necessary implication from their knowledge of the provisions of that instrument, what we

wished to show you by positive testimony, that, regarding the exigences of their cause to require it, that party deemed it meet to ride over and trample in the dust the provisions of that instrument. They, no doubt, in the zeal which inspired them, deemed it right to do, what you, gentlemen, and the good sense of all the dispassionate and disinterested community, will tell them was wrong, a grievous wrong; to trample on the principles of what they had ever before professed to regard as the *sacred* provisions of a glorious constitution, by exercising a power which did not belong to them as the General Assembly, and to exercise it in a manner which no body had a right to do. No judicatory of their church could do it according to their constitution, and no other body of men in ecclesiastical or civil organizations could do it, in accordance with any principles of law or right known among men. You will see additional evidence of this in what, had it proceeded from any other than a body of religious men, you would not hesitate to pronounce the lame sophistry and flimsy evasions of the answers which they adopted, to the manly protests which were promptly presented against the acts of their high-handed usurpation. From the same documents you will also be likely to gather the conviction of what, also, we are precluded by a rule of the court (to which, however, we cordially submit,) from showing you by positive testimony, namely, that the party in question felt compelled to perpetrate these acts, which, however honestly intended by them "for the good of the church," we cannot but regard as acts of most outrageous injustice, to perpetrate them at that time, to carry them through to their consummation by a very short and unceremonious process indeed, because, in their own estimation, their "time was short," if not then improved; because the majority by which they were able to accomplish this object, was merely an accidental majority at that meeting, and if they did not improve the opportunity, it might never return to them again. Such, gentlemen, I am persuaded that you will be obliged to conclude, were the impulses under which they were hurried on to the exercise of an unlawful power, in an unlawful and desperate manner.

Now, whether errors in doctrine or discipline did or did not exist in these portions of the church, we have no occasion to admit or deny. We claim, indeed, that neither in orthodoxy or Presbyterian order are we a whit behind them; but this is a question not to be settled in the civil courts. If the errors imputed did exist, those who were guilty of them were subject to the regular and constitutional discipline of the church. Had this discipline been exercised, (for we have never, for a moment, refused submission to the regular discipline of the church; we have always held ourselves subject to its exercise;) had this discipline been exercised, and, in its regular execution, had those who constitute these portions of the church been excluded from its pale, neither they, nor those who in 1838 espoused their cause, would have found or sought a place here, at the bar of their country's justice. They would never have come to ask at your hands, gentlemen of the jury, a verdict to restore to them their rights. But, as is clearly in evidence to you,

gentlemen, no such opportunity, no such trial was afforded them; but without trial, process, or citation, or, in relation to the great mass of them, even the *pretence* of an accusation or imputation of wrong, they were unceremoniously cut off, in the unlawful manner which has been described.

But it is claimed that the foundation and justification of these acts is laid in the repeal of a certain Plan of Union, by the abrogation of which it is said that these portions of the church necessarily became disconnected with the other portion. In order to understand correctly the true relation of this subject, it will be necessary to consider two distinct series of facts which have existed in the history of the Presbyterian Church, and which have been distinctly presented to you in evidence.

From the very infancy of this church there has existed a practice of associating with themselves brethren of other denominations, such as they have termed cognate churches; that is, those who are nearly assimilated in their views of doctrine and important principles of church government. I shall endeavour to lead you to discriminate between one class of associations of this character, and another, which it will be, I apprehend, the great object of the other party to confound. The distinction between them, if rightly appreciated by the jury, will put an end to the defendants' case.

As early as 1792, the records of the Assembly show the patriarchs of the church zealously engaged in forming associations with other denominations. By patriarchs, I mean the *real* patriarchs, under whose guidance the church was carried safely forward, whose wisdom and sound discretion, as well as piety, were manifested in the measures which they proposed and executed. They were for union, and for extending the communion and fellowship of the church; unlike the *juvenile patriarchs* who seem to have obtained the control in these latter days, and whose works are acts of disunion and excision.

As early as the year 1792, a plan of union and correspondence was formed with the General Association of Connecticut; in 1794 with the Association of Massachusetts; in 1802, with that of Vermont; in 1808, with that of New Hampshire; and subsequently with the Dutch Reformed and Associate Reformed churches, and some others. These plans of union became so numerous as to require a set of rules to regulate the correspondence which they involved. With at least the four Congregational Associations first named, the union formed was so intimate, as to admit the members interchanging the fraternal expressions of fellowship and confidence, not only to sit and deliberate, but also to vote in the bodies to which they were sent. Thus the real patriarchs of the church, extended wide the arms of their benevolent regard, and took other denominations into their embrace, for the purpose of extending the Redeemer's kingdom. From year to year, we find them pursuing this course, as late, at least, as 1821. Again, the General Assembly of the Presbyterian Church, proposed to the General Synod of the Associate Reformed church, a union, of a still more intimate character. The Plan of Union which was

unanimously adopted in the committee of conference between the two denominations, of which committee, we find that the venerable Dr. Green, the early projector of these plans of union, presided as chairman, was subsequently ratified by the Assembly and the Synod. In pursuance of this arrangement, the General Assembly received this Associate Church, with all its differences of sentiment and practice, into its own body. There were differences in the Confession of Faith, as you have learned from the evidence submitted to you, particularly on the subject of the powers of the civil magistrate, and in the article respecting baptism, differences in the form of government, in the basis of representation, the constitution of the General Assembly requiring at least three ministers to constitute a presbytery, entitled to representation in the General Assembly, and that of the Associate Church requiring only two, and to crown the whole, the ministers and elders of the Associate Church, received their confession of faith, only as being "*for substance the system of doctrine*," taught in the scriptures. It is a singular fact, that this is the very highest offence, in the declared estimation of the excinding party of 1837 and 1838, which they ever dreamed of imputing to any, and this but to a portion, of those whom they have thus cut off, for this grievous heresy, and yet some seventeen years ago, they could amalgamate the whole Associate Church with their own body, with this, in their present estimation, most odious and abominable feature of deformity crowning all their other divergencies from the true standard of Presbyterian orthodoxy. Yes, this church was thus received, and with the express stipulation too, that they might retain all these distinctive peculiarities, and in addition to them all, retain also, on the principle, so odious at least to the juvenile patriarchate of the church at the present day, on the principle of "elective affinity," I believe is the phrase, retain their separate presbyterial organizations. Now, as if the climax of absurdities and preposterous inconsistencies of these *Old School Presbyterians*, as they boast themselves to be, were to be placed above the reach of mortal apprehension, the very men who came into the church under these circumstances, under *this* plan of union, are in the front rank among those who are engaged in the very charitable office of excinding their brethren, who from some supposed and undefined connexion with another plan of union, commit the grievous sin of preaching, (some of them,) to Congregational churches.

These several plans of union have been read in full to the jury, [See pp. 77 to 84, and 156 to 158, of this report,] but in order to a full understanding of the point now submitted to your examination, it may be well for me again to advert to them. Now by the operation of the plans of union of the class which I have been considering, individuals were brought from other denominations, from associations of Congregationalists, into the judicatories of the Presbyterian Church, particularly into the General Assembly, and there invested for the time, with all the privileges of members, while they retained in full their relation to their own denomination; and if members of these Congregational bodies removed into the bounds of the Presbyterian

Church, and chose to transfer their relation, these plans of union provided for their being received to an equal standing with those who were ordained in the Presbyterian Church. The union with the Associate Reformed Church went even beyond this, and brought another denomination, not occasionally and individually, but permanently and in mass, into the bosom of the church, as constituent members. The very thing, you will remark, was done by these unions, and signally so by that with the Associate or Scotch Church, which *was not done*, but which the whole strength of the counsel on the other side is to be employed in endeavouring to make you *believe was* done, by another plan of union, which it will now shortly be our business to consider, the plan of 1801, which was abrogated by the Assembly of 1837, *because*, forsooth, it was *unconstitutional*—and unconstitutional *because* it brought aliens into the church! Wonderful precocity of vision which discovered this!

The Plan of Union of 1801 is of an entirely different character from those which we have been considering. It is different in its nature, and was adopted for different purposes. For the same general object indeed, it was professedly, and doubtless was really designed, namely, the object of advancing the interests of religion. Like the others also, it was proposed originally by the General Assembly itself. By certain regulations embraced in the other plans, you will recollect, that the ministers of one of the associated bodies, going into the bounds of another, and bearing credentials of his good standing in the body from which he came, was to be received, on the strength of those credentials, under the patronage and into the fellowship of the body into whose bounds he came. Under the operation of one of these plans, you will recollect that a whole denomination, the Associate Church, was received, with all its peculiarities, by the General Assembly, into the bosom of the Presbyterian Church. Not so the Plan of Union of 1801. Your attention is requested to the features of this plan, as I shall now read its provisions. (See pp. 77 and 78 of this report.) Now, gentlemen, what is this act of Union, or more properly, are these "regulations," for that is the proper title, that of Plan of Union being merely affixed to it by the compiler of the Digest, what are these "regulations, adopted by the General Assembly of the Presbyterian Church and the General Association of Connecticut, with a view to prevent alienation and promote union and harmony in those new settlements which are composed of inhabitants from these bodies?" The very title which I have now repeated, tells you what they are, a plan to promote union and harmony in the new settlements. Not to introduce members of a foreign body into the bosom of the Presbyterian Church. The provisions of the plan which have been repeatedly read in your hearing, are in perfect accordance with this title. They provide, that a Presbyterian minister may, in the new and scattered settlements of the country, without loosing his caste as a Presbyterian, or subjecting himself to discipline, preach to a Congregational church; nay, they direct him so to do, particularly if he is sent out as a missionary, and finds such a church destitute of the ministrations of the gospel. They provide also, that a Presby-

terian congregation may, under similar circumstances, receive the labours of a Congregational minister, and that Presbyterians and Congregationalists, meeting in a community too few and too feeble to form separate congregations, may unite in one church, and that, in the isolated case of a mixed church of this character, a standing committee, appointed by that church, and exercising its discipline, though not ordained as elders, may, under certain circumstances, be represented in the presbytery. It admitted nobody to the Presbyterian Church nor into the General Assembly, neither minister, church, nor private member. It merely prescribed terms on which the General Assembly would recommend to those who were already in the church, to associate, under peculiar circumstances, with their Congregational brethren in the new settlements. The utmost effect, therefore, of the repeal of this Plan of Union, or of these regulations to promote harmony, would be, that Presbyterian ministers must no longer thus associate with Congregational churches; that Presbyterian churches must no longer receive the labours of Congregational ministers, and that Presbyterian members must no longer associate with Congregationalists, in forming a mixed church. This was perfectly understood by the General Assembly, when in 1835, they expressed the opinion, that these regulations should no longer be in operation. They then kindly and christianly declared that the privilege should be reserved to those already thus associated of continuing together in harmony. It seems that the violent spirit of the juvenile patriarchs impelling to the rupture of all the bonds of peace and unity, had not then obtained the entire ascendancy in the councils of the General Assembly.

We will now return to the General Assembly of 1837. By the opening of the other side, it is admitted, nay affirmed, that there came to the Assembly of that year, one body of men, peacefully adhering to the principles of their form of government and book of discipline, and another body determined that, at all events, the differences which had existed in the church, *should be settled*, not by the whole body, constituting the General Assembly, but with a fixed determination to exclude, in some form, such as did not agree with them. If they should find themselves in a minority, as they had every reason to expect, it was their determination to rupture the church and retire from it. But if, as unhappily proved to be the case, they should find themselves a majority of the house, they were determined to expel at least so many of their brethren as should secure to themselves a majority thereafter. This, gentlemen, you cannot fail to regard as an unlawful combination. If I have in any degree overrated the admissions of my learned friend, who opened on the other side, (which I have not intended to do,) I have certainly not so misstated them, as materially to vary the result. At any rate, the fact is clearly spread out on the history of the transactions of that year, in their Convention and in the Assembly, that there was, of the Old School party, such an unlawful combination. I use the term in a worldly sense. In a *legal* sense, it was an uncandid, an unlawful combination. Whether it was unchristian, I do not assume to decide.

From that time to this, the same characteristics have marked the proceedings of the two parties. On one side, open and unsuspecting, with no secrecy in their councils, their meetings for deliberation open to all of all parties, and actually attended throughout by some of the Old School. On the other side, secrecy and seclusion; closeted behind *bolts* and *bars*, to concoct their measures, effectually to rid themselves in some way of so many of their New School brethren, as to secure to themselves the preponderance of power.

The first act in the execution of this purpose, was the abrogation of the Plan of Union, or the regulations which I have last described to you, for promoting union and harmony. That this was a part of the plan for carrying out this fixed determination of theirs, I infer, not from any natural or necessary connexion between the abrogation of this plan and the accomplishment of their determination, but because of the reasons assigned for the abrogation. One of these reasons was, that the Plan of Union was unconstitutional, which I defy any man to show. This was a regulation, not an article of constitutional force. But if it were of that force, forty years acquiescence is enough, in all reason, to establish it; and the formation and adoption of a new constitution in the mean time, by the very persons who are alleged to have come into the church through its operation, must leave but a faint reason indeed for its abrogation, on the ground of unconstitutionality.

The next act, in the series carrying out their determination, immediately followed the report of final disagreement in the committee, to the voluntary separation of the church, on the terms most graciously proposed by this party. This act was a resolution, that "by the operation of the abrogation of the Plan of Union of 1801, the Synod of the Western Reserve is, and is hereby declared to be no longer a part of the Presbyterian church in the United States of America." The syllogism, however perfect and wise in the apprehension of those who adopted it, had not yet got into the heads of the victims. They therefore protested against the act.

The next step was a resolution, that "in consequence of the abrogation of the Plan of Union of 1801, as utterly unconstitutional, and therefore null and void from the beginning, the Synods of Utica, Geneva and Genessee, be and are hereby declared to be out of the ecclesiastical connexion of the Presbyterian Church, and that they are not in form nor in fact an integral portion of this church. And yet, after all this, they come into this court and avow that it is all a mistake, this talk about excision; that we have not been put out of the church at all; and that if we had waited a few minutes in 1838, we might have been admitted to our seats in the Assembly. Examine, gentlemen, the excinding acts, and see if it is not with singular effrontery, that we are now told that we have never been put out of the church.

Not put out of the church, indeed! and why? Because, say they, we adopted a resolution re-admitting you, on your furnishing evidence that you "are purely Presbyterian in doctrine and order." Monstrous insult to the human understanding! Not *put out*, because you *can come in again!* not put out of the Presbyterian

church, because you can *come back* into that church—and that too on the same terms that Jews, Mohammedans, or Pagans can come in! No, gentlemen, we are *not* put out of the church, as I doubt not you will find in your verdict, but for a very different reason than that assigned. You will not say, that we are *not out, because we are out and can come in*, but that we are not out, because the excinding acts which did *all they could* to put us out, and which, if sanctioned, do effectually put us out, were impotent to accomplish their object; that is, that those abominable acts were, by their unconstitutionality, as well as palpable injustice, null and void; and consequently that the proceedings of the same party for organizing an Assembly in 1838, based avowedly upon these unlawful acts of 1837, were on this account, as well as on account of their inherent injustice and unconstitutionality, unlawful proceedings, vitiating the organization which they proposed to form, and making both right and necessary *our organization*, which recognized the members thus unlawfully excluded, and all other commissioners constitutionally appointed to the Assembly.

But the strangest argument of all adduced here, against the claims of the relators in this case, is that there never has been a Presbyterian General Assembly since 1801. I would not stop to notice this argument, although the gentlemen have *proposed* to lay such stress upon it, except to say, that the exception which they have made in favour of Dr. Green will not hold. According to the argument of the gentlemen, you will recollect, that the Rev. Doctor is left alone in his glory, as the only legitimate trustee of the General Assembly, because, forsooth, the adoption of the Plan of Union of 1801 destroyed the distinctive character of the Presbyterian Church, by the introduction of Congregationalism, and the Doctor is the only survivor of the trustees appointed previous to that time. But, gentlemen, I shall show that Dr. Green must go too; for though this party treat with such disrespect the acts of that venerable man in proposing plans of union, (it appears that he is the father of that of 1801, as well as of the rest,) we are not willing to leave him "solitary and alone" in his old age. Such a course might indeed promote *union and harmony;* at least, it would undoubtedly conduce to a unity of councils, greater than has recently obtained in the Presbyterian Church.

But give the gentlemen their argument. The consequence is, that there has never been any General Assembly at all since 1801, and the donors may all take their donations back again. How far the Associate Reformed Church may take advantage of this argument, is not for me to say. They may wish their library back again, that now lies at Princeton.

But the argument of the gentlemen is quite too much for their own purpose, in another and more important particular; for by the records of the Assembly which have been read in evidence, it appears that the voting of Congregationalists in the General Assembly, was introduced, not by the Plan of Union of 1801, but by that of 1794, five years previous to the appointment of Dr. Green. The argu-

ment, gentlemen, is not ours, but theirs. They are welcome to its effects, for if valid at all, it *effectually cuts off all the defendants.*

But we must not complain of the excinding acts, we are told, because we have recognized, have admitted their validity. How have we done this? Why, forsooth, in 1838, we said that there were no vacancies in the Board of Trustees, whereas there was a vacancy in 1837 ascertained and supplied by an election, after the passage of the excinding acts, as is shown by the minutes of the Assembly of that year. Our answer to this may be, if indeed it require an answer, that we knew nothing of that transaction. That is, we were not bound to know it, and there is no evidence that we did. Because they appointed a trustee or trustees after the excision, it by no means follows that we knew the fact. We did not see their minutes, and certainly they held themselves under no obligation to read them to us after they had shown us the door. Besides, we cannot look with very great respect to those minutes as authority, since we have ascertained the fact that they contain some things and omit others, as in the case of the transactions respecting the pledge demanded of the clerks, not a trace of which is discernible on the minutes, and it was exceedingly fortunate that we discovered it at all.

There is another argument advanced on the other side to which we must give a moment's attention. It is said, that if the excinding acts were unlawful and void, then the Assembly was destroyed, and could have no legitimate successor; so that the case of the relators must fail, as they could not have been appointed trustees by the General Assembly, that body having become extinct. But this, gentlemen, is a misunderstanding or perversion of the law of corporations, which you will not allow to deceive you. The court will doubtless instruct you, if it shall be deemed necessary, that an illegal act of a corporation does not of itself destroy that corporation.

Before closing my notice of the proceedings of the Assembly of 1837, it is proper that I should here call your attention to another transaction connected with those proceedings. It has been clearly proved to you, gentlemen, though we should never have known the fact, if we had been dependent on the minutes of that body alone for our information. No, there were some at least, who had good sense enough to discern that there were some things which it would do no credit to their party to have spread out on the records of the Assembly. I allude to the pledge required of the clerks, that they would carry out the unlawful acts of 1837 in organizing the Assembly of 1838.

I am sorry to detain you, but it is necessary for me to read here, the evidence by which this fact has been distinctly proved, as we are approaching the consideration of the acts in which this pledge was fulfilled. [For the evidence referred to, see pp. 99 to 104 of this report.]

When a majority of them had come to the General Assembly with a determination to cast their brethren out of the church, they were in doubt as to the validity of what they purposed to attempt.

They therefore first proposed the appointment of a committee to

divide the church. In that committee they made certain propositions to the other party, the character of which has been exhibited to you; but the minority refused to consent to their taking advantage of them, and proposed to treat with them on equal terms. This was in turn refused by the majority, who would not be satisfied with any thing less than a relinquishment, on the part of the minority, of the name and character of Presbyterians, and an acknowledgment on their part that they were apostates and heretics. Finding that the minority would not consent to this, they at once proceeded to exclude them from the church. The act itself evinces that they then abjured all dependence on legal or constitutional means, or they had not the benefit of "counsel learned in the law."

They had failed in one attempt, and were determined to effect their designs by some process or other, some trick of legerdemain. I mean no personal disrespect to any, but they turned these gentlemen out of doors without any process of law or order, and without trial. Well, what next? They required a pledge from the clerks that they would keep them out of doors, the next year. They felt it so necessary to strengthen their usurped power by every devisable means. Conscious, it would seem, of the illegality of the excinding acts, they dared not to trust the clerks with the constitution in their hand, their only proper guide, to organize the next General Assembly. They therefore require of those officers a pledge, that in that organization they will contribute their mite to enforce the exclusion of their brethren.

Now, as the determination to exclude these portions of the church was not previously announced, but concocted in secret conclave, so the account of this transaction was not printed with the other minutes. And why? They *now* assign as a reason for this singular omission that the clerks signified their intention to exclude these gentlemen from their seats in 1838; and therefore the resolution requiring a pledge that they would do so was withdrawn. But was there not another reason, that by concealing the fact of the pledge, the other party might be ignorant of their intentions? The effect of not printing that famous party pledge, not only was to have been that their design should be concealed, but also to enable them to complete the work of destruction before the other party were aware of the deep-laid plot.

These acts, base as they are, were all predicated on the assumption that those on whom they were to operate, are not Presbyterians, but Congregationalists, who came into the Presbyterian Church, forsooth, under the Plan of Union of 1801. Now without dwelling here on the fact, fully established, that the plan referred to neither did nor could admit Congregationalists to the Presbyterian Church; nor on the fact, also fully proved to you by the documents of the General Assembly, that those synods were constitutionally organized by the Assembly, without any reference to that plan, their constituent parts being Presbyterian, and some of them having been in the church before the plan was formed; and without detaining you by a reference to the testimony of Mr. Squier, who was fully examined by the other side respecting the synods in New York,

and other evidence adduced, that all the ministers composing the presbyteries of those synods, at the time of the excision, were Presbyterian ministers: without dwelling on these things, I beg leave to refer to the character of the synods which were put out of the church in this ruthless manner, as that character is exhibited by the records of the Assembly. But first I will refer to the character of the Synod of Albany, from which the Synod of Geneva was separated by the General Assembly in 1812, and the Synod of Utica in 1829, which was similarly situated. The statistical tables published under the direction of the General Assembly, by its stated clerk, show from year to year, the number and names of the ministers and churches connected with each presbytery. Those tables are in evidence. The Synod of Albany, you will recollect, is not touched by the excinding acts, though the Presbytery of Londonderry in that synod, with twenty-five ministers, has eight who are pastors of Congregational churches within its limits, the same number who are pastors of Presbyterian churches, and nine who are not pastors of any church. The Presbytery of Newburyport, in the same synod, has sixteen ministers, and the statistical table of the Assembly of 1837, at the very time when the others were cut off, designated only two in that presbytery as pastors of Presbyterian churches. Yet these are sound in doctrine and order! I suppose these ministers voted on the right side. If not, the right time had not come to excind them. However, be that as it may, they are good Presbyterians. None of them are excinded. The acts of excision did not touch the Synod of Albany, notwithstanding some of the presbyteries belonging to that synod are more closely connected with the Congregationalists than any of the excinded presbyteries, the Presbytery of Otsego, or any other.

It appears by the same statistical table, that the Presbytery of Oneida consists of forty-seven ministers, not a single one of whom is pastor of a Congregational church. The same remark applies to the Presbytery of Geneva, and so with the other presbyteries included in the synods which were formed out of the Synod of Albany, and yet that synod is untouched, and they are cut off. Oh, but say they, there were such, but those presbyteries did not mention it. To this I reply, that the record is the evidence, and that evidence, the statistical report of the General Assembly, fully sustains the position I have taken in relation to this matter. It would be strange indeed, if such connexions had been formed in accordance with the Plan of Union of 1801, and the presbyteries never name the fact in their report; especially while the provisions of that Plan of Union were entirely unquestioned, and while the forming of such connexions was, moreover, recommended and encouraged by the General Assembly, as being meritorious and praiseworthy. No. Congregationalism was not the real cause of the excision. There was another, and of a different character, the lust of domination. As I before stated, these gentlemen came to the General Assembly of 1837, determined that they would get a vote to secure to themselves, the Old School party, such a majority in future General Assemblies, as would enable them to rule the whole Presby-

terian Church; and those synods were cut off for that purpose. The jury will say, whether it was not formally declared by the learned gentleman who opened the defendants' case, that their party never intended that the other party should be consulted in regard to the manner in which the differences in the church should be settled.

[*Mr. Hubbell* said that he did not make any such admission, and explained what he said on that subject.]

Mr. Meredith proceeded: I cheerfully accept the explanation, though I certainly so understood the gentleman, I am glad that it was not so stated by the counsel. But, how much better is it? They were determined that none should *vote* in the settlement of those differences, except such as they called Presbyterians; that is, they choose to stigmatize the New School, as they called them, but whom we believe to be in fact the Old School, if that term is to denote an adherence to the real principles of Presbyterianism, to the constitution and discipline of the church; but they choose to stigmatize the New School as not being Presbyterians, and then cut off enough of them to answer their purpose, to make it no longer "tedious and troublesome" to govern the rest as they choose. This fact then is conclusively established, that they came with a fixed design to exclude from the General Assembly and from the Presbyterian church, those who had participated in forming the constitution of that church, and had assiduously laboured therein for a period of *forty years*. This suicidal act they performed; and then, afraid that the constitution would regain its supremacy in the organization of the Assembly of 1838, they required of the clerks a pledge, as you have seen, that they would disregard its sacred provisions, and conform to the excinding will and pleasure of the majority in 1837.

Gentlemen of the jury: I have endeavoured to present to you without any exaggeration, the character of the excinding acts of the General Assembly of 1837, together with the preparation, by the pledge of the officers of the Assembly, for the subsequent consummation of those acts, and concisely to exhibit the constitutional provisions of the Presbyterian Church which should have been scrupulously regarded by that grave Assembly in all its proceedings, but which, by those acts, were violated in a manner the most astonishing and unprecedented.

That those acts were utterly unconstitutional and void, and that they were the result of an unlawful combination of one portion of the General Assembly, against the rights and privileges of another portion, must be perfectly apparent to you, gentlemen, as to every unprejudiced person conversant with the facts. It will doubtless be equally obvious to you, that this unconstitutional violation of rights, occurring in the body at large, or body of electors of the corporation—the trustees of the General Assembly, and involving the disfranchisement of a large body of those electors of the corporation, the redress of the wrong is properly to be sought before the civil tribunals of the country.

We now come to the consideration of those proceedings in 1838 which have been detailed in the testimony and which may be justly

regarded as the counterpart of the excinding acts of 1837, even the attempt of the moderator and clerks to exclude from their seats in the General Assembly of 1838, all the commissioners from the twenty-eight presbyteries within the bounds of the four excinded synods. It has already fully appeared that that Assembly had no power to put out any of the commissioners from these presbyteries, and consequently that officers of the body could not possibly possess any such power, for

"No stream can higher than its fountain flow."

No such power was conferred on them by the excinding acts of 1837, for those acts, as I have already shown you, were unlawful. They were unlawful and absolutely void. I have also showed you that they had no confidence in their case, that they did not rely on the validity of the acts of excision, but like the woman, the harlot who was willing that king Solomon should divide the living child, rather than the true mother should have it, the Old School party was willing to sacrifice the living child; rather than admit them to their just rights in the General Assembly, they were determined to blot the General Assembly itself out of existence.

But as I said, the excinding acts were utterly null and void. The acts of the General Assembly of 1837 could not bind the General Assembly of 1838. Much less could a concealed pledge of the clerks and moderator of that Assembly clothe them with the authority which they usurped. The General Assembly of 1837 could not give its officers any authority over the General Assembly of 1838. Their only legitimate authority was derived from the constitution. The mere fact of their *appointment* was all that devolved on the Assembly of the previous year, and by the constitution only could they, with a shadow of right or reason, be guided in executing the duties of their appointment. The General Assembly of 1837 was dissolved at the close of its session in that year, and the General Assembly of 1838 was a new body, composed of delegates elected by the several presbyteries, and responsible to no former Assembly. To that body came two parties: one of them composed of those who represented the twenty-eight presbyteries within the bounds of the four excinded synods, and those who sympathized with them under the unrighteous wrong which they had suffered. The other party was composed of those who had a small majority of numerical strength in the General Assembly of 1837, and who were predetermined to exclude the other party, in opposition to the authority of the constitution of the church and of the laws of the land; in other words, to carry out the rebellion of 1837; a party resembling Samson only in his blindness.

As the same spirit, so we find the same course of conduct characterizing the respective parties as on approaching the meeting of the previous year. The one party, determined to place themselves above every principle of the constitution, and every legitimate power of both the church and the state, came to the General Assembly of 1838, actuated by the same fixed determination to exclude all who stood in their way, as in 1837.

Accordingly, you find them meeting in secret conclave, with closed doors, in order the more effectually to conceal their plans from the other party. On the other side, we find the New School party, with its characteristic frankness, open, disdaining concealment, making their intentions known to the Old School party, and to the whole church, by public notice, inserted in several religious newspapers of extensive circulation. Through this medium they gave a general invitation to *all* the delegates to the General Assembly, to attend a meeting for consultation, in relation to the affairs of the church, and the discharge of their duty in their peculiar circumstances. At their meetings for consultation, some of the Old School men attended; enough at any rate, to keep an eye on them. And it would be unreasonable to suppose, that all that passed was not immediately communicated to their adversaries, who were then assembled together in secret conclave for the purpose of devising measures to ensure their exclusion from the church.

But these matters belong to the preliminaries of what the respective parties were to perform.

I come now to other points on which you must find the facts of the case, the particulars of which have been detailed by the witnesses. Here permit me to remark that the witnesses on both sides are of great respectability.

We are happily relieved from the painful necessity which sometimes occurs of scrutinizing testimony with a view to its actual credibility. In the whole mass of testimony which has been elicited during the last two weeks, there is an entire agreement of all the witnesses, on both sides, as to most of the principal facts in the case; and such apparent discrepances in the testimony as exist, are of such a character as may be wholly attributable to the different positions occupied by the witnesses, or the circumstances with which they were surrounded at the time. Thus the witnesses on the one side testify that certain facts transpired, while many on the other side testify that they did not hear them. This only proves that the latter were located in a position less favourable for hearing than the former, or that other circumstances affected unfavourably their hearing, as was indicated by some of these witnesses. It is no proof that such event did not take place. Thus, whatever seeming contradiction exists in the testimony in this case, may be easily reconciled. Gentlemen, there are three points which we regard as conclusively established by this testimony.

1st. That there was such misconduct in the officers of the Assembly, in their proceedings for organizing that body, as, if allowed by the Assembly, would have fatally vitiated that organization, for which misconduct they were justly liable to removal.

2d. That they were properly and legitimately removed.

3d. That the General Assembly was then constitutionally organized in connexion with the movements of Mr. Cleaveland, Dr. Beman, and others, and the election of Dr. Fisher as moderator, and Dr. Mason and Mr. Gilbert as clerks.

These points being established to your satisfaction, the subsequent adjournment of the body thus organized to the First Church, was unquestionably an act to which they were perfectly competent, and

their election of the relators in this case as trustees is admitted. The necessary corollary, therefore, is, that the relators were appointed by the lawful Assembly, and the case is ours.

On the other hand what do the counsel oppose to these positions? Points of law, of order. You were out of time, they say; your proceedings were imperfect, were out of order. They rest their whole case upon a mere point of order.

But I proceed to the consideration of our position in regard to the conduct of the officers, and first of the clerks, as a committee of commissions. Their acting in this capacity, it will be remarked, was not sanctioned by the constitution, but they acted in that capacity in accordance with a usage which had for some time obtained in the Assembly, and on that account they had been constituted a committee on commissions for convenience merely, in order that time might be saved to the General Assembly by the previous enrolment of the commissioners. We have acquiesced, so far as their action was right, and in accordance with previous usage. So far, the common law will sustain them, and no farther. They had no power and no right to say, whether regular commissions should be entered on the roll. Usage required them to enrol all such without exception, and to report all commissions which were irregular to the house. They had no further discretion whatever. They had no right to reject any commission which was offered to them for enrolment. They admit that the commissions from the presbyteries belonging to the four excinded synods were presented to them, and that they promptly refused to receive them. Did they refuse to receive them on the ground of irregularity? No: but merely because of the excinding resolutions of 1837, and the pledge they had then given to their party. The only question which they asked was, whether those commissions came from within the excinded synods, and on being answered in the affirmative, they peremptorily refused to receive them.

And on what ground did they so refuse? Was it on the question of constitutional right in these members to a seat? Impossible! nor was there any such pretence. Up to 1837, when the excinding resolutions were passed, the presbyteries from which these ministers came formed a part of the Presbyterian Church. That they were acknowledged by the General Assembly as being in full communion therewith, appears by divers acts of said Assembly, to which we have already adverted, and it is not denied. The evidence is abundant and conclusive, and it would be burning daylight to detain the jury on that point. From 1802 up to 1837, we find the ministers belonging to the presbyteries within the infected district sitting and acting in the General Assembly, no objection being made by any one. During this period of thirty-six years, we find that the records of these synods and presbyteries were regularly sent up to the General Assembly for examination, as provided for by the discipline of the Presbyterian Church. And we find further, that these records were approved by the General Assembly, except in one case, and that on a point relating to ruling elders, a point which an Episcopalian would not consider essential to salvation or to church order. But it appears that it is one of the requisitions of the Presbyterian

Church, and an essential requisite in its order and government, that there shall be ruling elders ordained for life. Whether this is essential or not, is not what we are now to consider. What we are now considering, and what the records of the General Assembly show, is, that they were in every form recognised by the Assembly. Their contributions to the funds of the General Assembly were raised during that time, and received and applied in the same manner as contributions from other portions of the church. And yet it was proposed by this Old School party to their New School brethren in 1837, that they should retain exclusive possession of the *name* of the church, of the Theological Seminary at Princeton, and the Western Theological Seminary at Alleghany town, and the Missionary and Education funds. And they then very modestly propose that the other property belonging to the church shall be divided, *so far as the will of the donors will admit;* when they well knew that this equivocal proposition, if assented to by the other party, would put it into their power to appropriate to themselves the whole funds of the church: and this, notwithstanding the churches within the "infected district," had contributed to the funds of this very Theological Seminary at Princeton, &c. It is the practice of the General Assembly to direct the statistical reports from the several presbyteries to be printed annually: and to these statistical reports I refer, as the excinded synods and presbyteries are there fully recognised as having contributed to these funds.

But to return to the clerks' duty. Now I ask you, what is to establish the rightful claim of an individual presbytery, that these presbyteries have not complied with? Their ministers have been ordained in regular order, and they have been uniformly recognised by the General Assembly, and have acted on perfect equality with others in that Assembly for many years. They have themselves adopted—yes, *formed* the very constitution of the church, in connexion with their brethren. What then is wanting to establish their right to a seat in the Assembly, which is furnished in the case of any other presbytery? Plainly nothing! absolutely nothing within the range of thought or reason.

The clerks were then clearly guilty of misconduct in refusing to receive any commission which was tendered to them. Such a procedure was without a precedent in the usages of the Presbyterian Church, and consequently the common law will not sustain them. Common law is common sense, and will sanction no such outrage. Whether the counsel will resort to some quibble of parliamentary law for their support, I cannot tell. If they do, they will be very likely to have no better success than at common law. The clerks had pledged themselves to exclude the delegates from the excinded synods, and they were determined to fulfil that pledge, regardless alike of parliamentary law and common law, as of the constitution of their own church. If they had supposed themselves, or had even been on any ground, warranted in refusing to enrol them as members of the Assembly, even in that case, the most they could do was to receive the commissions and report the facts to the house. They

were shut up to the one or the other course by the very express terms of their appointment as a committee of commissions.

Of this, you will recollect, that by the testimony of Mr. Krebs, himself one of those clerks, he was perfectly aware, and argued the point with his colleague, Dr. M'Dowell, regarding that course, it seems, as the full extent to which even his pledge bound him. Mr. Krebs was desirous to receive these commissions, and leave it to the General Assembly to decide what was to be done with them: but the other having the seniority, persisted in the refusal; and Mr. Krebs, though he wished to receive them, and leave the responsibility of doing a wrong act with the Assembly itself, yet ultimately sanctioned and participated in the misconduct, though contrary to his own judgment.

The clerks must have been very intent on their business indeed, as appears by their locking the door, that their attention to the business of making up the roll might be undivided. That those commissions were not authentic, or in regular form, was not alleged by the clerks, because they were acting in accordance with the pledge which they had given to the party in 1837; a pledge which I had not named, if they had not, in their determination that it should be kept, violated their duty as officers of the General Assembly, and their trust as a committee on commissions. They were, then, guilty of gross misconduct. You will remember that the clerks were not themselves members of the General Assembly. They acted as a committee of commissions in accordance with a recent usage, and as a mere matter of convenience, having been the clerks in 1837. They held their office during the pleasure of the body, and were liable at any time to be removed.

I come now to the consideration of the conduct of another officer, whose official duty and whose relations to these transactions have been already explained. The moderator exercised his authority as presiding officer in the General Assembly of 1838, (at its commencement,) not by the appointment of that body, but by virtue of his election to the office of moderator in the General Assembly of 1837, and in accordance with former usage.

Where, then, do you find Dr. Elliott? Does he come at the hour of eleven, gravely, and in accordance with former usage, to perform the simple and appropriate religious duties connected with opening the Assembly of 1838, and then meekly to "hold the chair" of the forming body, till the pleasure of his brethren is expressed in regard to the individual whom they will have for his successor? Instead of this, you find him, at the hour of nine in the morning, busily engaged in marshaling a phalanx of troops in the different quarters of the house in which the Assembly is to convene; stationing a picket here and another there, flanking the position which he is to occupy, with picked and sturdy warriors, arranging a solid body of the main army on his right, his left, and in his front; with Dr. Harris, as surgeon-general, stationed in the midst of the south-western division, which seems to have been the most numerous, and where his services might be most needed, with his lint and bandages to staunch any wounds that might be

received, or to minister cordials to those in that quarter, who, it seems were likely to be attacked with a violent *cough*, (not a legislative cough; oh no! Mr. Lowrie was there, an experienced hand, to see to that; besides, by the constitution, the Assembly has no legislative power, but,) a martial cough, I suppose, as they were in very warlike mood. Well, here you find Dr. Elliott, in the midst of this hostile array. The *moderator*, at the head of an insurrectionary force, and the only question agitated, seems to have been, whether the rebels would prove strong enough to overpower the authorities, that is, the constitution, and those who adhered to it.

In this strange condition, we find the moderator and his party throughout. The ostensible warlike preparations were, perhaps, in a measure intermitted, during the brief period of the public religious services. But unless we suppose in them a greater power of sudden abstraction than is common, we must suppose, that even while engaged in addressing the throne of grace in the solemn attitude of prayer, he and his party were devising plans for the exclusion of a portion of the commissioners from their seats in the General Assembly. I can not say that they slept on their arms as soldiers in the tented field, but I will say, that at that very time they had girded themselves with their mystical armour, and were prepared for battle.

What is the evidence before you? Why that Dr. Elliott was a pledged man. He, as well as the clerks, was pledged to use all the force of his official station in carrying out the design of a party. True, the pledge was not recorded and printed in the minutes of 1837, but the moderator and clerks had verbally pledged themselves, and were acting under a pledge, to a party, and not in the discharge of their duty. Those in the south-west part of the church were the remnant of the majority of 1837, and the other seats in the vicinity of the moderator were occupied by their allies.

How was it with the other party? Some of them occupied, as has been proved to you in evidence, in an open meeting for consultation on the state of the church; others reaching the city, as Mr. Lathrop stated in his testimony, just in season to meet their duties in the Assembly, and all resorting to the house appointed for the convocation at about the usual hour. There they find ingress denied them through the usual doors of entrance for members of the Assembly, and are obliged to wander round to the other doors of the building. When at last they obtained admittance to the body of the church, they were obliged to take the lowest seats, the others, those nearest to the moderator, being previously occupied by the Old School party. The gross injustice and oppressive character of these proceedings on the part of the Old School, and the design which they indicated, are too apparent to need comment. They show that excessive caution and preparation, which indicate a feverish jealousy of the success of their illegal conspiracy against the rights of the others, which explains the conduct of the moderator and shows why he was so easily brought under the influence of violent excitement and loss of temper in the subsequent proceed-

ings. I do not wish to say any thing harsh or disrespectful of either of the gentlemen concerned in these transactions, but I think it proper to offer a remark or two in relation to the temper manifested by Dr. Elliott and others of his party on that memorable occasion. I assert (and the assertion accords with the testimony in the case) that Dr. Elliott did fall into a state of violent and unpardonable excitement, and that in this way alone can it be accounted for, that a person usually governed, as I doubt not that he is, by the mild and courteous spirit of the gospel, should treat so harshly as he did, gentlemen and brethren pursuing a mild, peaceful and orderly course for the maintenance of rights. His hurried and petulant refusal to receive the motions of Dr. Patton and Dr. Mason, when their language and manner is described by all the witnesses, on both sides, as altogether respectful and courteous; his refusals to put to the house their repeated, but respectful appeals from his decisions, and his impatient calls on the clerk to read the roll "if he had one ready," all indicate that Dr. Elliott had suffered for a time the violent agitation of passion to overcome the sway of the benign principles of the gospel. He was pursuing a wrong course. He was met in that course by mild and gentlemanly opponents, adhering firmly indeed to constitutional principles, and pursuing steadily and calmly the constitutional means for their maintenance.

Nothing is more calculated to overcome the balance of temper, than for one conscious of pursuing a wrong course, to be put in the wrong by those whom his course is intended to injure, especially if the injured party maintains an equable temper and courteous conduct. Such was Dr. Elliott's position, and so manifestly had Drs. Patton and Mason the advantage of him, so obviously was their cause, the cause of right, triumphing, even in their quiet submission to his unreasonable and unlawful decisions, that he seems, by the time that Mr. Squier rose, to have lost all command over himself, and to have met his mild demand of the rights of his presbytery, by the most appalling denunciation, one which, in a circle less refined and grave, is sometimes heard in the height of passion, from lips, and in terms accounted vulgar and profane. I shall not repeat the three short words, which, in such circles, express the sentiment referred to, but it is more to my purpose to notice the fact, that Dr. Elliott, sitting then as the head of the highest tribunal of the Presbyterian Church, replied to the application of Mr. Squier by a quotation of awful import, from the sentence of final reprobation, pronounced upon hypocrites and apostates, by the Great Judge of quick and dead. Taking into view all the circumstances of the case, it certainly was one of the most astonishing exhibitions of presumption and passion, and would seem to present a more fit occasion for the application of Mr. Boardman's heathen maxim, than that on which it was quoted by him. This strange language from both these gentlemen, however, is probably only a development of the violent passion which was manifested by others of the same party, in the scene of tumult which they created, in aid of Dr. Elliott's unlawful exercise of official authority, to prevent the con-

stitutional organization of the Assembly. They are such exemplifications of the infirmity of human nature, as are likely to be made, when good men suffer their zeal for a particular object to betray them into wrong measures for its attainment.

These ebullitions of passion appear to have characterized the measures of the party during these transactions.

I must now call your attention to the several steps taken by the moderator, Dr. Elliott, under these circumstances, in connexion with the propositions brought forward by those who sought to restore the action of the church to its constitutional order.

To establish the facts themselves I need not detain you; for, as already remarked, they are in general not only unequivocally established by ample testimony, but by the accordant testimony of the witnesses on both sides. In considering the relation of these facts to the case of the parties, I desire the jury to bear in mind certain positions which have been already established by the highest authority, in regard to the duties of the moderator and clerks in organizing the General Assembly, and particularly the imperative obligation resting on them to make the constitution of the church their guide, and the necessity, in order to a constitutional organization, that all the presbyteries of the church should be allowed their proper representation. You will then recollect that at the close of the religious services, after the prayer at the opening of the Assembly, Dr. Patton addressed the moderator, proposing to submit to the house certain resolutions, [see page 85 of this report] the purport of which was to admit to their seats the commissioners from the presbyteries within the excinded synods. The moderator hastily refused to receive his motion and called on the clerks for the roll, denied Dr. Patton's earnest but respectful plea that as his motion related to the roll it might then be received; alleged that the floor belonged to the clerk, though reminded by Dr. Patton that he first possessed it, and refused to put to the house the appeal of Dr. Patton from his decision as moderator.

The clerks then read their roll of members, prepared according to their pledge, excluding the members from the excinded presbyteries. The moderator then declared that this selected portion of the commissioners would be considered members of the house, and said that if there were other members present, whose names had not been entered on the roll, then was the time to present them, in order that the roll might be completed. On this call it was, that Dr. Mason, another acknowledged member of the house, rose, tendered the commissions from the excinded districts and moved that they be added to the roll. His motion also the moderator declared to be out of order, and his appeal from the moderator's decision that officer also refused to entertain or to put to the house.

But here the ingenuity of the counsel on the other side have raised a question whether the commissions tendered by Dr. Mason were of the description called for by the moderator. According to the testimony of our witnesses and the acknowledged practice in such cases, he called for such commissions as were not yet enrolled. This had been usual, and he was understood to call for

such commissions as were usually called for by the moderator on similar occasions. But they say that he called for other commissions, and such as had not been presented to the clerks and rejected by them. It is well for you to understand why this distinction is made by them, *now*.

It is a curious fact, that during the investigation of the facts of this case, all our witnesses testify that the call was made by the moderator, for commissions which had not been enrolled, and that fact is not contradicted by the witnesses on the other side, though some of them add one thing and some another to these words. A minute of these proceedings was afterwards prepared by the Old School party, which is in evidence before the jury. Of the committee which prepared that minute Dr. Elliott was a member, and the language of that minute fully sustains our witnesses.

The language of Dr. Elliott, according to that minute on this subject, was, "that if there were any commissioners present from the presbyteries belonging to the Presbyterian Church in the United States of America, whose names had not been enrolled, then was the time for presenting their commissions." There is no difficulty at all in this matter. The moderator called for commissions which had not been enrolled, at the same time announcing that if there were any such that was the time to present them. There was no irregularity in the call or in the annunciation, according to the testimony of our witnesses, or to the record of the Old School.

It is a curious fact, also, that throwing out of view altogether the testimony of our witnesses, they, on the other side, give us three distinct versions of this matter.

One is that of their record, which I have read to you, and which is explicit, that Dr. Elliott called for those "whose names had not been enrolled."

Another is that of witnesses whom they introduced to show that Dr. Elliott said, those "whose commissions had not been presented to the clerks."

The third is that of Dr. Elliott himself, who says that his call was for those "commissions which had not been presented and enrolled."

Dr. Mason then was in order, as meeting the call of the moderator, whether you take the language of that call from our witnesses, from Dr. Elliott himself, or from the deliberate and matured record, which Dr. Elliott himself, with Dr. Nott and others, prepared, and which the house adopted after careful and critical examination. So he was in order indeed, whether such call had been made by the moderator or not. The constitution of the church itself made it in order, by prescribing, in accordance indeed with all law and all usage in every deliberative body, and with the obvious dictates of common sense, that the receiving of commissions, or settling the right of members to their seats, should be the first thing attended to.

But Dr. Elliott declared him out of order, and refused both to admit his motion and to put his appeal. In regard to the language employed by Dr. Elliott on this occasion also, a slight difference exists in the testimony, which would hardly seem worthy of notice,

but that an attempt is made on the other side to give it importance. Our witnesses understand Dr. Elliott simply as saying "You are out of order;" and their witnesses understand him to say "You are out of order *at this time*," or, "You are out of order, *Sir*." Some of their witnesses giving one form of expression, and some of them the other. But Dr. Elliott himself, who of all men ought to know best what were the words he used, tells you distinctly, "I then stated to him that he was out of order at this time, or now, using one or the other of these forms of expression." These are Dr. Elliott's own words, and though he differs from most of their witnesses, yet he is not certain what was the exact form of expression which he used. It is but reasonable to conclude, however, that his recollection of the particular phraseology which he himself used, is quite as perfect as the recollection of the others, and yet when he says that he used "one or the other of these forms of expressions," he admits that he is not positively certain that he used either of them. Dr. Elliott's testimony goes very far towards explaining the whole mystery. It sufficiently proves that the Old School party were so excited and confused at the time, that they have no distinct recollection of what transpired,—and it is thus confirmatory of the testimony of our witnesses. If, however, there is any discrepancy, it is among their witnesses, and not ours, for they all agree.

The commissions tendered to the moderator by Dr. Mason had not been presented to the clerks and enrolled, for the clerks refused to either receive or enrol them when they were presented, and therefore they were precisely such as the moderator called for, and neither he nor they had any right to refuse them. Besides, how is it possible to suppose that Dr. Elliott discriminated in his call for commissions between those which had, and those which had not, been presented to the clerks, and refused? They had not reported that any had been so presented. They had no authority to refuse any, or dispose of any presented to them, in any other way than to report them to the house, either as regular, and therefore enrolled, or irregular, and therefore to go to the Committee of Elections, or be otherwise disposed of by the house. Nor had such an occurrence ever before existed. How then could Dr. Elliott frame his call with reference to the exclusion from its import of such commissions? Dr. Patton's resolutions, you will recollect, had not been read, or the subject of them announced to the house, only that "they related to the formation of the roll," not a word about commissions presented to the clerks, or commissions from the excinded synods. If, then, the other side *will have it*, that Dr. Elliott framed his call designedly, as some of their witnesses allege, to exclude these commissioners, they have no alternative but to admit that it proves, what they have so stoutly denied, that this was the carrying out, by the moderator and clerks, of the excinding acts of 1837, agreeably to their pledge, a fact, however, which is amply proved without this admission, and proved at every step of the whole proceedings.

But again. Dr. Elliott does not at any time assign as a reason for rejecting those commissions that they were such as had been

presented to the clerks and refused, and therefore were not in order, but, they were from the excinded synods—*he did not know them.* The moderator then, instead of receiving these commissions, as it was his duty to do, inquired of Dr. Mason "where those commissions were from:" and Dr. Mason replying that they were from presbyteries within the bounds of the Synods of Utica, Geneva, Genessee, and the Western Reserve, the moderator declared him out of order, and when he, in a very respectful manner, appealed from the decision, the moderator declared the appeal to be out of order, and refused to put it to the house. Did the moderator assign any reason why he declared Dr. Mason to be out of order? He did not. He is silent as to that. He did not say that he had called for commissions of a different kind. He did not assign even that as a reason for his conduct. But whether they were called for or not, is not material to the issue of this case. They were in regular form, and were not reported by the clerks as being either irregular or disputed commissions, and Dr. Mason, or any other member of the General Assembly, had a right to present them to the house without any call having been made by the moderator. The call of the moderator for other commissions, though usual in such cases in the Assembly, was not essential, and might have been dispensed with. It is a question of privilege which, in all deliberative bodies, takes precedence of all others, and is always in order. Whenever such a question is introduced, (and a question of privilege may be raised by any member of the body and at any time) it puts a stop to all other proceedings until it is settled. The question of privilege must be determined before the house can proceed with its ordinary business, so that Dr. Mason, or any other member, had a right to be heard in presenting those commissions, even if it conflicted (which it did not in this case) with an ordinary rule of order, such as the standing and particular rules adopted by the Assembly for the transaction of business. Those rules not being constitutional provisions, are subject to the will of the house; and no rule of order can be interposed to prevent the settlement of a question of privilege.

I must illustrate this point. I am sorry, but so the other side have chosen, to decide this whole case on a *mere point of order.* They hang the whole cause on the construction of a rule of mere parliamentary order. Since so they will have it, we must meet the point which they make on that ground.

I have already remarked, gentlemen, that the constitution requires, as does every principle of right, and of common sense, that the first business in organizing the Assembly should be the reception of commissions or settling the right of commissioners to a seat in the body. Any rule contradicting this would of course not be binding. On this ground then, the motion of Dr. Mason was in order. It was also in order as a question of privilege. The rights of persons claiming as members of the house were alleged to be invaded. Whether they were really so or not was immaterial to the order of the question of privilege. It was indeed the very thing to be settled by that question. That question Dr. Mason, an acknowledged member, raised in behalf of these commissioners, and,

according to all parliamentary law, there was no other question which could supersede this, nor any ground on which it could be set aside till it was settled. You will observe the distinction between this and what are termed "privileged questions." These are questions, which according to the rules of the house may come in at a certain time, or in a certain order, or at the will of a member, as the case may be, superseding ordinary business which may be on hand at the time, or setting aside certain other questions which may be before the body at the time. They are the subject of rules adopted for convenience, facility or order in the transaction of business. But a "question of privilege" is a question of right, a question touching the personal rights, privileges or relations of the house or any member of the house, or the rights of constituents through their representatives.

It is a just and equal law which makes it necessary to decide a question of privilege as soon as it is presented to the house, and before any other business shall be proceeded in, and which thus puts it out of the power of a majority to subserve, by stratagem, the designs of a party, by keeping out of the house a part of the members duly elected by their constituents.

Finding that the common law will not sustain them, the other party resolved to resort to a point of parliamentary law in their defence. But this case is lost to them if it is to be decided as they have put it, on a point of order. It must go against them on any principle of order, or of parliamentary law.

They were acting in open violation of parliamentary law, as well as the constitution of their church and the law of the land.

According both to the constitution of the Presbyterian Church, and to all parliamentary law, this was a question vital to the integrity of the body, to its very existence as a lawful Assembly. Privileged questions and rules of order adopted for regulating the transaction of business, may be waived by the house without violating its own integrity. The standing rules, as they are termed, of the Assembly, not being of constitutional force, and being in fact adopted by each Assembly for itself, though in general they ought to be observed, may yet be violated forty times in a day without invalidating the acts of the Assembly. But a question of privilege cannot be put aside for any consideration; and the highest of all questions of this character, is that which involves the right of a member to his seat, and the right of his constituents to be represented.

The election of the commissioners was an act of the presbyteries, and they had a just right to complain of the clerks for refusing to receive their representatives. The clerks neither reported them as being enrolled, nor yet as informal commissions. The presbyteries had also good right to complain of the moderator for endeavouring to exclude their representatives. Never before was such a double violation of law and order, such a gross infraction of the most sacred rights of members and constituents, perpetrated by the officers of any deliberative body, ecclesiastical or civil, amongst any people. History does not furnish a parallel case.

But here comes in that other small matter. It is said that the moderator qualified the declaration by saying "now," or "at this time." Whether he did so, is, you have seen, from the various accounts of their own witnesses, a matter of doubt. But what if he did? There is nothing very unusual in this mode of declaring a question out of order. There is nothing in it affecting the nature of the decision. The other side, however, tell you, that it was an intimation that if he would only wait some five minutes, his motion would be in order. Did Dr. Elliott mean to intimate any such thing? If he did, then he admitted that the motion was a legitimate motion, one which might properly be brought by a member before that body.

Now, what was the motion? It was not a motion asking admission into the church, under the acts of 1837, but against those acts. It was not an acknowledgment of the justice or validity of those acts of excision, by which they were declared to be no longer a portion of the Presbyterian Church. It was not a confession that they were guilty of heresy and apostacy, and a profession of sorrow and repentance, and asking forgiveness of these Old School men, with an humble petition that they would "take proper order thereon." But it was, according to Dr. Elliott's own testimony, a motion to complete the roll by adding thereto the names of the commissioners from those excinded presbyteries, whose commissions had been refused by the clerks. Now, if Dr. Elliott said the motion is out of order *now*, but there is a time approaching when it will be in order, he admitted that it was a legitimate motion. And that it was a legitimate motion there can be no doubt, for the excinding acts of 1837 were utterly null and void, as much so as an act of Congress declaring the states of Pennsylvania, Ohio, and Kentucky, out of the Union, would be null and void.

Well then if the motion was in order at any time, it was in order at this time, when Dr. Mason moved it. Then was the very time, and the only proper time for "receiving commissions to complete the roll."

One of the standing regulations of the Assembly as published in the "Digest," which is in evidence in this case, is that "the list of commissioners present being completed, a new moderator is chosen." I read from the Digest, page 17. Another of those regulations, on page 19 of the same book is, that "commissioners who do not produce their commissions at the opening of the Assembly, can be received only at the commencement of a session." So that if Dr. Mason had not made his motion precisely when he did, the opportunity would have been lost. Having admitted such, and such only, as the officers, under a party pledge, saw fit to admit, Dr. Elliott would have declared the roll to be completed, and they would have proceeded to the choice of a new moderator, and might have transacted other business, the most important of the Assembly, before the commencement of another session, when only, if ever, an opportunity would again occur for offering these commissions.

Thus might the constituent presbyteries be deprived of their most inestimable rights, and their commissioners be precluded

from the discharge of their most important duties. And you will remark, gentlemen, that if this course could with impunity be pursued in relation to these commissioners, it might equally in relation to any others. Thus the doctrine set up in defence of this procedure, is shown to assert a more arbitrary power over a deliberative and representative body, than ever was claimed, or than would even be tolerated in the most absolute despotism on earth. Does any one believe that this is Presbyterianism—that such domination of official tyranny is sanctioned by the constitution of that church, a church, which, in this land of equal laws, makes so loud claims, as you have heard from the learned counsel on the other side, to be the patron of liberty! No, gentlemen. That was *the* time to make the motion which Dr. Mason made, and the moderator had no right to declare it out of order. Dr. Mason knew this, and he appealed from the decision of the chair. His appeal also was refused, and declared to be out of order. And under what pretence? What reason did the moderator assign, for declaring the motion and the appeal to be out of order? They cannot attempt to excuse Dr. Elliott's conduct in this case, as in that of Dr. Patton's motion and appeal, by saying that their was no house. The roll had now been read, and their picked company had been declared to be the house, at least far enough to proceed in completing the roll. Dr. Elliott says he had entertained a motion for the appointment of a committee of elections. It was not, then, because there was "no house." The truth is, that neither Dr. Elliott nor the clerks, assigned any reason whatever for their conduct. If that conduct had a single reason in its favour, which would bear the light, I doubt not, it would have been assigned.

The refusal of the moderator was in violation of all law, parliamentary law as well as every other. His refusal to put to the house the appeal from his decision, was probably the first example of that kind of assumption of arbitrary power in a moderator of a deliberative body, which has occurred in the history of the whole civilized world. I defy any one to show, any where, a power in the moderator or presiding officer to refuse to put the house in possession of an appeal from his decision. There was no right or power in the majority to exclude those persons who were lawfully entitled to seats; and if, on any ground, there was a question whether they were so entitled, the only possible way in which that question could be tried, was by bringing such a motion as that of Dr. Mason before the house, which we have seen was, for any such purpose as this, fully organized. This step of the moderator in refusing the appeal, may find one, and only one rule that I know of, for its justification, and that, much more fitting the circumstances of the Roman Emperor, whose rule it was, than the position of a moderator of a Presbyterian judicatory in the United States of America.

"Sic volo, sic jubeo," is the rule by which a tyrant tramples on the rights of his people when they become his slaves. Denying the appeal in this case, was the tyranny of arbitrary despotism. It showed a consciousness, that carrying out the principles to which they were pledged, required the sacrifice of constitutional principles,

and on this ground, it accounts for the violent passion into which Dr. Elliott and his party were thrown.

Our party were all mild and courteous in their proceedings. Dr. Elliott's own testimony shows this: so does that of other witnesses on that side, as well as our own. The testimony of their witnesses even exonerates our party from the charge of all indecorum and tumult, throughout the whole proceedings up to the time of our adjournment, except the single sin that some of us voted "aye" louder than we need to have done in order to be heard, and one person so loud that "he might even have been heard *the whole distance* from one side of Washington Square to the other!" that is, some 50 or 60 rods, or across a 12 acre lot. But the mind of the moderator, in sympathy with his belligerent partisans, was undergoing a change. It was losing its equable temperament. It was the change which the consciousness of an attempted perpetration of wrong produces in the perpetrator of that wrong, when he sees, that those against whom it is attempted maintain a mild but firm deportment, and in a steady adherence to the right, are, by peaceful means, averting the injury intended for them. Such circumstances are greatly calculated to excite, and hence is it accounted for that Dr. Elliott was so wrought up, that he could meet the courteous advances of Mr. Squier with that tremendous denunciation, which, had he completed the quotation, would have only more perfectly expressed the feelings which seemed to predominate on that occasion. Dr. Elliott was called a moderator. I leave it to you, gentlemen, to say, if he did not furnish a wonderful example of im-moderation.

Will any one deny that he was in a passion? Look at the facts in the case of Mr. Squier. In a respectful manner he presents his commission, when the house was properly organized so far as related to the reception of commissions, though it could not properly transact other business. The moderator had called for commissions from commissioners whose names had not been enrolled. But instead of receiving his commission, the moderator asked him from what presbytery he came. Mr. Squier replied, "From the Presbytery of Geneva." The moderator, not yet satisfied, queried if that presbytery belonged to the Synod of Geneva. And on Mr. Squier's informing him that the Presbytery of Geneva was within the bounds of the Synod of Geneva, he insultingly replied, "*We do not know you!*"

A partial countenance had been given to Mr. Squier's demand by the moderator asking him from what presbytery he came, thereby signifying that if he came from the right place his request or demand should be complied with. But ascertaining that he was from the proscribed or infected district, he passionately exclaimed, "*We do not know you.*" He did not mean that he did not know the man, for he tells you that he had formerly been acquainted with Mr. Squier. When Dr. Elliott said "We do not know you," he did not allude to Mr. Squier personally, but he undoubtedly had a more extensive allusion. He meant to include all the proscribed, the whole five hundred and nine ministers and the sixty thousand members within the infected district, composing the four excinded synods. What then did the moderator mean by exclaiming "We

do not know you." What could he mean, unless he meant to apply to those whom they had declared to be excinded, cut off from the communion of the church, that awful denunciation to which I have before alluded?

Now why should the Rev. Dr. Elliott, presiding over the admission of members to the General Assembly of the Presbyterian Church address such language to Mr. Squier and his friends?

There can be no other reason assigned than that he and his party had forsaken the light, or that they had so far given way to feelings of excitement and passion, that the light in them had become darkness.

Was ever such a course pursued by the presiding officer of any deliberative body, ecclesiastical or civil, against a person on the floor, for claiming his seat as a member of the house? Show me, if you can, any precedent in book, bound or half bound, large or small, printed or in manuscript, in parliamentary law or usage, where the president or speaker has dared to address any one in such a harsh and unfeeling manner. The historical records of the world from its creation to the memorable year 1837 do not furnish such a precedent. I do however recollect one case in point—and the only one, I believe, that the history of the world has yet furnished—of the presiding officer of a deliberative body attacking a member on the floor of the house, merely because he might take exception to the proposition submitted to him by the member. The only case in point of which I ever heard, transpired in the legislature of one of the south-western states of this confederacy, the new state of Arkansas. I am not certain but it occurred since, and that this case of Dr. Elliott's was its precedent. The speaker, in that case, however, taking offence at something which was said by one of the members, which he deemed personally disrespectful to himself, got into a passion, whipped out his *bowie knife*, rushed from the chair, attacked the offending member on the floor of the house, and murdered him on the spot. And then, I suppose, turned round and said, "I do hope we shall have order!"

The moderator then had been guilty of misconduct which merited removal. He had assumed an attitude, which, if he were allowed to hold it, would not only prostrate the dignity and self-respect of the body over which he presided, but would defeat the constitutional organization of that body; and if he had so chosen, by carrying out the same principle, he might have entirely defeated the appointment, at any time, of a moderator in his place. He had only to refuse to put such motions as were offensive to him, to declare them out of order, and refuse to put to the house appeals from his decision, (and he might do it in any other case as well as in these) and thus make himself not only dictator, but *perpetual dictator* to the General Assembly. Was there no remedy for such a state of things? There was a remedy and it is rather wonderful that it was forborne so long. He was liable at any time to be removed, or to have another appointed in his place. Those whose rights were thus outraged deferred action of this kind long enough. The moderator had refused to receive motion after motion, and

denied that most sacred right, so strongly and explicitly guarantied by the constitution to every member, the right of appeal to the house, from the decisions of its presiding officer, and finally told Mr. Squier that he did not know him, and he might go—I will not say where; but the language of the moderator was equally as violent and offensive as if he had completed the quotation of the denunciatory sentence. He had only to go one step further to come fully up to the only similar exhibition which the world has witnessed in a presiding officer of a deliberative body; and that was to have attacked Mr. Squier, personally, with any weapon that he could lay his hand on.

Immediately after this last outrage of the moderator, finding that all appeals to justice or magnanimity were entirely disregarded by their adversaries, and that they had nothing to expect from them but repeated acts of injustice, the friends of constitutional order deemed it necessary to exert a prerogative higher than submission to unlawful acts of usurpation. Accordingly, Mr. Cleaveland rose and commenced making a few preliminary remarks, explanatory of a motion which he was about to make and put to the house. But no sooner was it perceived that he alleged the misconduct of the moderator, as sufficient cause for his removal by the appointment of another, than a scene of confusion occurred, which baffles description—which reminds one of the scene described by Burke as having taken place in the Irish house of commons, when Jack Fuller, the little man with the big wig, having insulted the speaker, was ordered to be arrested by the sergeant-at-arms, he started for the door, and a race commenced, *helter skelter* over the forms and benches, and overturning the desks which stood in their way, until he finally escaped from the hall, *minus* his cloak.

Now came the occasion, which, it seems, had been anticipated as likely to result from the usurpations of the moderator, and to meet which the morning had been spent in marshaling the troops. Now was put in requisition the hammer of the moderator, the stentorian lungs of those who were to cry, in trumpet tones, "order! order!" the stamping of others with their feet, the scraping and shuffling of others, the rapping with canes, the cries of "shame! shame!" and the peculiar *cough* which put in requisition the talents of the surgeon-general, Dr. Harris.

All this ado was made to drown the voice of Mr. Cleaveland, or prevent themselves from hearing; and though not entirely successful, yet it was so far, that they are able to come here and testify, very truly, no doubt, that there was a great uproar and confusion. Unfortunately for them, the evidence is full and conclusive that they made the tumult themselves. Mr. Cleaveland, favoured with a full and clear voice, continued, till at length, finding their uproar vain to stay the course of right and equitable action, and being hushed by some of the more quiet spirits of their own party, the Old School members ceased their noise, and allowed Mr. Cleaveland to put his motion. This and the several successive motions were regularly put, seconded and carried, as was detailed to you in the testimony,

completing the organization of the Assembly of 1838, on the principles of the constitution of the church.

You will remark here, that by the constitution, the offices of Dr. Elliott were not necessary to the organization of the Assembly. The constitution prescribes simply that "the moderator, or in case of his absence *another member* appointed for the purpose, shall open the next meeting with a sermon, and shall hold the chair till a new moderator be chosen." Form of Government, chapter 19, section 3d. This article relates to the moderators of presbyteries, synods and General Assemblies. In the article respecting the General Assembly, is a similar provision in these words, chapter 12, section 7. "The moderator of the last Assembly, if present, or in case of his absence, *some other minister*, shall open the meeting with a sermon, and preside till a new moderator be chosen." Now, according to the terms of the constitution, all that was necessary in regard to an officer to preside in organizing the Assembly, was, that a minister, being a member of the Assembly, appointed for the purpose, should so preside, or if the moderator of the last Assembly should be present, he might preside, though not a member of the Assembly for the current year. The object of so presiding, is obviously, and simply, to act as the organ for ascertaining the will of the forming body, till it has expressed that will, in the appointment of a member as its moderator. What, then, according to the constitution, would have occured if at the opening of the Assembly of 1838, Dr. Elliott had not been present? Why, the members then assembled would have, at the motion of some member, to designate, that is to appoint one of their own number, as is usual in other bodies, so assembling, to preside till the permanent moderator for that Assembly was elected. This is according to the constitution. True, according to a rule recommended by a previous Assembly, to their judicatories, the last moderator *present* would so preside. But that rule is not obligatory upon the Assembly, or any other judicatory, unless they choose to adopt it. But if the rule were obligatory; suppose no individual present had previously been moderator of the Assembly, a case always liable to occur, then clearly the body of the commissioners are thrown back upon the constitution, and must designate the individual to preside till the new moderator be chosen. It is obvious, then, that the services of the previous moderator are not essential to the constitutional organization of the Assembly. The members had an undoubted right to call another member to the chair; the right to change their presiding officer being indisputably inherent in every representative, deliberative body, who choose their own president or moderator. If they had said, in the first place, that Dr. Beman or any one else, should be moderator to the exclusion of Dr. Elliott, they had a perfect right to do so, as he was to preside only until another moderator should be chosen. Whenever that choice was expressed, his official duty ceased. But our opponents now pretend to say that he could not be put out until he consented to it! Absurd!

Why, even if no misconduct had been alleged, or could be alleged against the moderator, he was subject to be removed at any

time. But, he had been guilty of misconduct, gross misconduct, and was therefore liable to be removed on that ground.

The right to remove a presiding officer will not be doubted by any one conversant with parliamentary law. There is an instance in English history of a motion being made in the house of commons to remove the speaker. (I am not able to cite an instance in our own country. There may have been, but I do not recollect any at present.) In the year 1773, a motion was made in the house of commons, that the speaker be removed, which motion was received and put to the house, but it was not carried. The majority voted against it, but the *right* was acknowledged to exist, as fully as if the question had been decided in the affirmative, and if there had been a majority in favour of the motion he would undoubtedly have been removed. It must be evident to all, that if a speaker, president, or other presiding officer of a legislative or deliberative body were guilty of misconduct in office; if he had exerted the whole of his influence in favour of a party; if he showed his determination to carry out the designs of that party by assuming authority, which was unlawful and unconstitutional; if he did this in obedience to a pledge which he had previously given to that party, and if he were to refuse to receive a motion or put an appeal, and refuse to admit a member duly elected by his constituents to his seat in the house, there would be sufficient cause for his removal, and that house which would not promptly remove him from office, would be unworthy of respect. The moderator did assume such despotic authority. He *was* thus guilty of gross misconduct. His removal was necessary. The house had a right to remove him, and he was removed. That he was lawfully removed I will now proceed to show.

The sense of the house can only be ascertained by its vote. In no other way can its intentions become known even to the house itself. If you can show a lawful vote, it is the vote of the house, and the question is determined by a majority of those who actually vote. In order for the vote to be lawful, none of the members must be excluded from the house or denied the privilege of voting; though, when a question is put, the members are not at liberty to sit still or make a noise in order to defeat a vote, under pretence that they did not vote, or did not hear. Such a course would lead to endless confusion in a deliberative body, and would prevent the transaction of business altogether, whenever a faction should choose.

The New School party, both before and after their adjourning to the First Presbyterian Church, excluded nobody. Every commissioner to the General Assembly of 1838 was at liberty to participate in their proceedings. Their hearts and arms were open to receive them all, irrespective of party. The names of all the members were placed on their roll. A lawful question was lawfully put by a recognized member of the house. In a case of this kind, the question must of necessity be put by a member, and any member has a right to put the question in such a case. It was distinctly

and lawfully put, and determined in the affirmative, as were the succeeding questions, as you will recollect from the testimony, by members of the house, whose names had been enrolled and reported by the clerks, and who had been declared by Dr. Elliott to be members of the house. The same objections or excuses could not be made as in the case of the motion of Dr. Patton. According to Dr. Elliott's own showing, there was now a house. Mr. Cleaveland stated his reasons for his motion, the necessity of changing the moderator at that time, and then moved that Dr. Beman take the chair. Now that was coming to the pinch of the matter. A motion was now made, and the question was about to be put to the General Assembly of 1838, which would elicit a vote of that body, whether they would sanction the excinding acts of 1837. The choice of another moderator is not the only thing which it involved. It involved also the acts of excision of 1837, for on them were based the unlawful acts of Dr. Elliott and the clerks. The General Assembly of 1838 being a new body, composed of delegates elected by the several presbyteries, and reflecting their will, had power to repeal the excinding resolutions of 1837, even if those resolutions had been valid. Any act of a former General Assembly might have been rescinded by the General Assembly of 1838, if found to be injurious in its operation and tendency. But the motion was to remove the moderator by appointing another presiding officer, and on the question being put to the house, it was determined in the affirmative by a majority of votes. The members had all an opportunity to vote on the question, but there was a corner in the house where they were unwilling that the question should be put, and they not only refused to vote, but tried to interrupt the proceedings by making a noise of various kinds. I am sorry to say it, but I must. They acted in a riotous and disorderly manner. That the question on the motion of Mr. Cleaveland was put to the house, is admitted, and the only point of fact in relation to it which is disputed, is, whether there was a reversal of the question. On this point, however, there can be no difficulty. The fact is clearly proved by so large a number of witnesses, that there is no room for even the shadow of a doubt. True, they bring witnesses to testify that they did not hear the reversal. And what of that? Why did they not hear it? They contrived to make so much noise as to prevent themselves from hearing. There was, in that corner of the house occupied by the Old School party, a universal uproar and confusion—shuffling, stamping, scraping with the feet, coughing and hissing, the moderator rapping with his hammer, cries of order, and what other kinds of noise I do not know, but they prevented themselves from hearing the reversal of the question, by these unseemly noises. Ah, but the coughing was "not a legislative cough!" Those reverend divines were not experienced in the art. Mr. Lowrie, who has had some experience in such matters, tells you that it was not a parliamentary cough. That is, I suppose, it was not so loud and boisterous as is sometimes heard in the British parliament, when it is determined to *cough down* a member. The reason was, they were inexperienced in the art of coughing. They had prac-

tised only since 9 o'clock that morning, and had not got their throats opened sufficiently. But still they managed to cough as loud as they could, and if they did not come fully up to the standard of parliamentary coughing, still their coughing was loud enough to prevent themselves from voting, and that is the clinching in this case. Whilst they were coughing, the vote was going on under their eyes. They might have heard it, but they were determined not to hear. That they prevented themselves from hearing by the noise which they made, is amply confirmed by the testimony, as is the fact of the question being put to the house both in the affirmative and in the negative form. Numerous witnesses testify that they distinctly heard the reversal of the question. They distinctly heard the negative vote. They heard both the ayes and noes. Witnesses from every corner of the house, on the floor and in the gallery, distinctly heard the question put and reversed, and tell you that there was a negative vote as well as an affirmative one. Indeed, this south-western asthma seems to have been rather unfortunate in its time of attacking the Old School members, for their own witnesses show that the essential motions were heard by all who were willing to hear. One of their witnesses, who stated that he heard the motion of Mr. Cleaveland distinctly, was but partly in the house, beyond the south-western members, and more remote from Mr. Cleaveland than almost any one of them; so that it appears that it was heard at the remotest distance. We should not have known this fact, if it had not been for that straggling Episcopalian, [the only one there, it appears, and as an Episcopalian, I certainly should hope so,] Mr. Norris, who thrust his head in at the south-western door of the house. I don't know how they came to get that witness—for it appears that he only ventured to poke his head inside the door, whilst his body remained outside, thus securing to himself the means of a safe escape. I don't know what business he had there; but whatever took him there, he is their witness, and it is from him that we learn the fact, that the motion was distinctly heard even beyond the part of the house occupied by the Old School party.

We learn from all the witnesses that Mr. Cleaveland's voice is very distinct and clear, and that he usually speaks very loudly. The moderator himself states that he heard the motion. The negative vote also was heard in every part of the house. There was a general aye, and a few noes. Some of the witnesses heard no noes, but many of them tell you that they heard a few scattering noes. These are facts proved all round. It is in vain to dispute them. Those witnesses who did not hear any noes, nor hear the question reversed, do not contradict or disprove the testimony of those who did. They only testify that they did not hear them. For it is a well established principle of law, that a dozen witnesses declaring negatively that they did not see or hear a certain fact, will not invalidate the testimony of one who testifies affirmatively and positively that he did see or hear it.

Now what is it which is to save Dr. Elliott? Why they say the right question was not put; it should have been a motion addressed

to Dr. Elliott himself for his removal. But who would have addressed such a question as that to Dr. Elliott, after the manner in which he had treated Mr. Squier, for simply claiming his own seat? Beside, this motion was equivalent to that; it was a motion to remove Dr. Elliott by putting another in his place, and it was addressed to the house, the proper body to act under these circumstances. This proceeding, you will observe, is exactly parallel to that in 1835. Dr. Ely, as a member of the Assembly (for as stated clerk he was not an officer of the house, but his duties occurred during the interim) put the question to the house to place Dr. M'Dowell in the chair instead of Dr. Beman. It was a good rule, it seems, in 1835, for putting Dr. Beman out of the chair, but a very bad one for putting him into it in 1838. It is needless to waste words on this subject, for plainly, by all rule, from the nature of the case, and according to former precedent, Mr. Cleaveland had a perfect right to put the question which he did. Dr. Beman, being thus chosen, took the chair; in other words, he assumed the office of moderator. But why, they ask, did he take a station in the aisle? Why did he not occupy the little chair usually occupied by the moderator. I reply, Dr. Elliott still sat there, though he was divested of his office. It is entirely unimportant where the moderator took his position. If Dr. Beman had waited until Dr. Elliott left the chair, Dr. Elliott might have been there yet; and it is impossible to tell what might have been the consequence, if he had been required to give up his seat. It is fabled of Aristophanes, that he sat so long in one place as to become united to the seat. Whether Dr. Elliott would have done so, is more than we can tell. Dr. Beman then, could not have occupied any other portion than he did. These trivial circumstances are of no moment whatever. But why did they not call a former moderator to the chair? That question is already answered. I may here add, that it was entirely unnecessary to do so: the constitution does not require it. The rule which suggests such a course was not binding, and if it had been, it did not apply to this case, that rule having reference, not to a moderator to be called to the chair after the process of organization had commenced, but to one originally to take the chair at the opening of the meeting.

The motion to choose another moderator was equivalent to a motion putting Dr. Elliott out from being moderator. When that motion was made, and the question put to the house by Mr. Cleaveland, it was carried by a large majority of votes. For, according to all law and usage, we can only know what the decision was by the vote, without respect to the reasons of individuals for voting or not voting, and those who remained silent and refused to vote, must be considered as having acquiesced in the decision. This is always so, and it would otherwise be impossible to transact business. If they did not know this, it was unfortunate for them. But it is not to be believed that they did not know it. That, however, does not change the nature of the case. It was not our fault that they did not vote. It was not the fault of the law. It was their own fault. Again it is objected—the question was not put to the house by Dr.

Elliott. To this we reply that it is the practice of the country. When a motion is made which is personal to the speaker, it is not put to the house by the speaker, but by the member making the motion, though a motion may be put by the clerk if the house order it.

They have said that Mr. Cleaveland did not reverse the question. But we have shown, we have proved beyond a doubt, that he did reverse it; although by parliamentary law there is not a necessity for reversing the question in such a case. But it was reversed. It is a well known principle of law and of common sense, that positive testimony must altogether outweigh that which is negative, for no man can positively know that a fact did not transpire.

We have the testimony of no less than sixteen witnesses of different parties in the church, who are positive that the question was reversed. One of them tells you that he was disappointed in the small number of noes, when the question was reversed. He was surprised that the Old School men did not vote down the proposition. If this testimony be false, it is in the very worst sense *false*. True, one of the witnesses on the other side stated, that he would have heard the motion, if it had been reversed. How could he know that he would have heard it? He could not possibly know it. Another goes on to describe the confusion which prevented him from hearing. The most that they could say in truth was that they did not hear it. Not that it was not reversed. Of their witnesses, twenty-seven in number, who did not hear it, there were three classes. One class, like Dr. Elliott, and others, were occupied about other things, or themselves making so much noise that it was not strange that they should not hear. Another class heard things, some one thing and some another, which did not transpire, as the "motion to move down the aisle," and things which were impossible under the circumstances. Still another class were determined not to hear, as you have gathered from their testimony.

It would not be worth while to dwell on this point, if the other side had not indicated a disposition to hang their whole case upon the single point whether Mr. Cleaveland said, "those who are opposed will say no." But I am sure, gentlemen, that you can have no doubt on this point, when you consider the comparative weight of positive and negative testimony, and the circumstances, according to the avowals of the Old School themselves, which were likely to prevent their hearing, and especially, when in connexion with this consideration, you reflect that the reversal of a question is a matter of such usual occurrence, as not likely to make an impression to be particularly remembered. But for particular circumstances, directing the attention of our witnesses to the fact, we should probably not have been able, at all, to show that the question was reversed, and so it would not be strange that others should not have remembered it. This position is perfectly philosophical, and an apt illustration of it is at hand. The clock on this very building is heard for miles, and yet probably not a man in that jury box would venture to say that he has this morning heard it strike the hours of 11 and 12. But it has so struck, at least the time is passed when

it should have done so, and it is not wont to fail. Perhaps not three individuals, in this crowd of hundreds, could say that he heard it. But let it, though in lower tones, strike in its less common form and sound the alarm of fire, every individual would at once catch the sound, and it would not be forgotten.

I am not at all surprised that they did not hear Mr. Cleaveland, though his voice is unusually clear and strong, and he was distinctly heard over every part of the house. The only wonder is that they heard any part of what he said, they were in such a state of disorder at the time. How could they hear in the midst of the noise and confusion which they made among themselves? And if they did hear him, could it be expected that men under the influence of excitement so great as that which then obtained among them, could remember so as to give a correct account of what transpired.

The excitement must have run very high, or Dr. Miller, who was not a member of the Assembly, distinguished as that gentleman is for a scrupulous regard to decorum, would not have found himself waving his hand and crying order. It appears by his own account, that he was for some time unconscious of what he did, and was surprised to find himself in such a predicament.*

For them now to set up the defence that they did not hear the question put, or that it was not reversed, appears, in view of the testimony which has been submitted, very much like a forlorn hope. Some of the gentlemen called as witnesses by the respondents tell you that they would not have voted if they had heard the question. Enough was elicited from their own witnesses to show that they might all have heard and voted if they would. And are these gentlemen to get their case by their own refusal to vote, and the disorder which they themselves produced? Obviously, if they get it at all, it must be by these means. I have shown you, gentlemen, that the whole conduct of the Old School party was arbitrary, disorderly and illegal from beginning to end. The moderator's refusing to receive a motion from a recognized member of the General Assembly, and above all refusing to put an appeal from his decision, the refusal of the clerks to receive and enrol the commissions from a certain district which the party had determined to put out of the church, were not merely disorderly, but in direct violation of the law of the land and the constitution of the church. There was an unlawful combination, a conspiracy of these officers against the rights and privileges of their brethren.

Now as to the vote, if there is any such thing as faith in human testimony, it is fully proved that the question was put to the house, both affirmatively and negatively, and that the affirmative

* While the form containing the testimony of Dr. Miller was in press, the stenographer sent a note saying that he had discovered a slip containing notes of a portion of the Doctor's testimony, which he had omitted to send with the other, in consequence of its being mislaid. It was then too late to insert it in its proper place, and it is here subjoined.

Dr. Miller said—It was indeed a scene of great excitement, and I was surprised to find myself, though not a commissioner, unconsciously waving my hand, and expressing a wish for the restoration of order.

vote was much larger than the negative. In other words, that it was carried by a decided and lawful majority. True, many did not vote, but that circumstance did not and cannot change the result. They practically consented to the decision by their silence, at the time, and must abide the consequences.

The question was put in a voice sufficiently audible to be heard all over the house, and was heard in every corner of the house. No man called for a division of the house, as every member had a a right to do. The question then was legally carried. If they did not hear it reversed, we have shown the reason; but the fact is it *was* reversed. The negative voices were distinctly heard, though a few scattering noes only were raised. They knew that they were the defeated party, and sat in mute amazement, finding that their plans, though woven with the ingenuity of the spider's web, had proved abortive; that they were completely caught in their own trap, and were grovelling at the bottom of the pit, which they, with so much pains, had digged for others. They need not lay the blame on the ladies in the gallery, for they made the noise themselves. Their acts show that they saw themselves defeated, and a perfect phrensy appears to have been produced among them by seeing that the straight forward course of truth was triumphant over their tortuous inventions. Under these circumstances the spectre of Mr. Duffield rose before their over-excited imaginations, and "the hair of their heads stood up." They could not discern or describe what manner of form it was, but it "shouted aye, so as to be heard across Washington Square!" The mere operation of taking a vote on the appointment of a new moderator, threw them into amazement, and their excited imaginations conjured up phantoms in every bush, and spectres in every pew. They saw, or thought they saw, this spectre, which was every way different in manners and appearance from Mr. Duffield, flourishing his cane and striking with it on the seat. Who or what this spectre was, I leave for you to judge. But it could not have been Mr. Duffield. By some similar disorder of the mind, doubtless, it must be accounted for, that a worthy minister should use toward his brethren such language, as one of their own witnesses, Dr. Phillips, testifies that the Rev. Mr. Boardman used on that occasion, "Whom the gods have determined to destroy, they first make mad." Mr. Boardman's imagination must have been touched by some magic wand, or he would hardly have adopted and applied in that strange manner this pagan maxim.

On the other hand, Mr. Cleaveland and his friends, having no devious course to sustain, no unlawful and unconstitutional plans to effect, came straight forward to the work. They distinctly announce that a constitutional organization of the General Assembly cannot be effected without admitting to their seats all duly appointed commissioners; that they were determined under legal advice to effect that organization; that all the commissioners had a right to vote, both the Old School party and the New School party; that their rights were equal. The commissioners from the twenty-eight presbyteries within the bounds of the four excinded synods, were

entitled to equal rights and privileges with those from other presbyteries, whether they were located in Virginia, Pennsylvania, or any other state. The excinding resolutions of 1837 were unconstitutional, null and void, to all intents and purposes. They could have no effect whatever.

Thus, stating explicitly what they mean to do, they are not dismayed by the cries of order, raised merely to drown their voices and prevent their being heard. They state their motions distinctly and audibly to the house, giving all an opportunity to understand them, and to act on them if they please. In this calm procedure, a new moderator and new clerks are elected, and then, being warned that none but those who adhere to the rebellious party may occupy that house, the body adjourned from the scene of confusion in Ranstead Court, to the place where the Assembly was accustomed to meet in earlier days, when all parties held sacred the principles of their constitution; taking care, however, in this adjournment, to inform all present, that there was nothing exclusive in their movements. This they did in the terms of the adjournment itself, and by proclamation at the church doors, as has been already detailed to you. Thus we did what we could to maintain inviolate the unity of the body which our brethren had attempted to sever. We employed the only means in our power, by which could be maintained, in a peaceable manner, the rights of all portions of the church, and the inviolability of the constitution. We had made them liberal offers for the amicable adjustment of all difficulties, but they would not hear. They were determined to exclude us from the church of our fathers. They would not be satisfied with any thing short of a confession on our part, that we were not Presbyterians, that we were heretics and apostates. If we would not acknowledge this, (and they knew that we never could, because the charge was utterly groundless,) they were determined to exclude us from the church. They were determined to put the knife to our throats: nothing short of our blood would satisfy them. We defended ourselves and the rights of our brethren, only with the force of truth and the simplicity of righteous and constitutional action. Of these we are not ashamed. We excluded no one; excinded no one. We have ever acknowledged and do still acknowledge our erring brethren, as equally entitled with us to the rights and privileges of the church, and to an equal place in its councils. And the effect of your verdict, gentlemen, if given to us, as I doubt not it must be, will not be to exclude the party of the Old School from the church, but only to say, according to the facts in the case, that we are still one church, who may either remain together in unity, or peaceably separate into two bodies on such equitable terms as all may agree to adopt.

But they still ask, why was not Dr. Beman or Dr. Fisher put into the chair usually occupied by the moderator? You have seen, gentlemen, that there was no necessity for this, no rule of order or discipline requiring it. Beside, with the temper which prevailed at the time among the Old School members, it is easy to see that such a course of proceeding would have been unwise and highly inex-

pedient. Would it not have led to a riot? Would not Dr. Hill's apprehensions of violence have been verified? Undoubtedly such would have been the consequence of an attempt to put another moderator in the wooden chair which Dr. Elliott then occupied. In relation to that matter, I will only say in addition, that I know not why such a trivial objection as this, and Dr. Beman's not having the little wooden hammer in his hand should be raised, except they suppose that there was something mystical in the chair, like the nether garment of Mohammed, and that those mystical virtues were communicated to him that sat thereon. They do not ascribe any such mystical virtues to the chair which was occupied by Dr. M'Dowell, nor to the stool on which Mr. Krebs sat, though I know not but they may, after having adopted the pagan maxim, "whom the gods are determined to destroy they first make mad."

There were no such mystical virtues in chair, stool or mallet, and we are legally and constitutionally the "General Assembly of the Presbyterian church in the United States of America," whether we have such tools or not. Being then constitutionally organized, we made a legal adjournment, and in the regular progress of business, elected the individuals, who are now the relators in this case, as trustees of the General Assembly, according to the provisions of the act of incorporation received from the legislature of this commonwealth. This election was regularly conducted according to the standing regulations on that subject. All these things are fully shown to you, gentlemen, in the testimony. It is also in evidence, that a majority of the Board of Trustees refused to admit these relators to their seats in that board, and that the persons in whose place the relators were elected, continued to exercise the office of trustees. On this account this suit is brought. Now if the Assembly which elected the relators is the legal General Assembly, it is beyond dispute that they were legally elected; the case is then ours, and so will be your verdict.

I have now examined the facts of the case in detail. Respecting the law in relation to it, it is the province of his honour the judge to instruct you. I regard the law in its application to this case as so plain, that I need say little respecting it. If, as I apprehend that he will, his honour shall instruct you that those who did not vote are to be accounted as acquiescing in the decision of the majority of those who did vote, then, if you believe that Dr. Beman was elected moderator by a majority of those who actually voted on the question, and that point is fully proved, your verdict must be for the relators. No fact could be more fully established by human testimony, than the fact that a majority of the votes given on the occasion referred to were for Dr. Beman as moderator. And that fact being established, there is an end of the controversy.

Those for whom I act desire to have their rights and to preserve the unity of the church, and nothing more. They do not wish to exclude others from the enjoyment of their rights and privileges, nor do they wish to be excluded themselves. And if your verdict shall be in their favour (and it cannot be otherwise) it will go far

towards restoring peace and harmony to the Presbyterian Church. Such a verdict will deprive no person of any right or privilege, but will secure the rights of all concerned. While it will declare the excinding resolutions of 1837 to be null and void, and put the seal of reprobation on such usurpations as those of the clerks and the moderator at the meeting of the General Assembly of 1838, it will exclude none of the members of the church, nor will it deprive any presbyterial delegate of either party from taking his seat in a future General Assembly. Such a verdict I confidently anticipate, and such a *verdict* will have a salutary tendency to heal the breach between these two parties.

I leave the case with you, gentlemen, with the fullest confidence that you will render a righteous verdict.

Allow me to say, that if, in the course of my remarks, I have used any expression which might seem to be personally disrespectful or offensive, I can only say that I did not intend it. I sincerely hope that the end of this controversy may be peace.

Mr. Meredith having closed, at 1 o'clock, on Monday, March 18th, at a quarter past one William C. Preston, Esq., of South Carolina addressed the jury as follows. His argument occupied the remainder of Monday and the two succeeding days:

With the permission of the Court,—Gentlemen of the Jury: It is a peculiar misfortune to myself to come to the argument of this important case, labouring under severe indisposition. This indisposition must be evident to you all. A few more hours of rest to recover from the debility under which I have been labouring for several days would have been very desirable. But as the patience of both the judge and the jury must be by this time in a great measure exhausted, I am admonished of the necessity of proceeding immediately to the argument of the case, though, as must be obvious to you all, with very inadequate physical strength. I consider my indisposition at the present juncture as being a peculiar misfortune, personally, to myself, but not at all to the cause of those whom I represent. For I am thankful that their cause does not require any great exertion on my part, in its defence. For, permit me to say, gentlemen, and I can assure you that I say it with all candour, that this cause requires very little exertion for its triumphant vindication, incredible as the assertion may appear to some of those who have listened to the able and eloquent argument of the counsel on the other side, during a period of nearly two days. Permit me, gentlemen, further to observe (and I make the observation candidly) that I do not feel the slightest apprehension, or doubt that in the result of this case your decision will establish these defendants in the full and free exercise of their just rights and privileges, and thus go far towards the restoration of peace and harmony to the Presbyterian Church.

Entertaining no doubt that this will be the effect of the verdict which you will render after you shall have heard what the counsel for the defence shall lay before you in relation to this case, I will proceed immediately to its examination. It is to me a fortunate

circumstance, gentlemen, that the case is a plain one, as you will readily perceive when all the circumstances in relation to it shall have been fairly laid before you.

I cannot otherwise than admire the zeal and ability which have been displayed by the counsel for the relators, which you, as well as myself, have witnessed during the progress of this cause—a zeal, which, circumstanced as I now am, I cannot attempt to emulate. The gentlemen have certainly manifested great ability and zeal in the course which they have adopted, not only in the opening speech of the learned counsel who first addressed you, but in the examination of the witnesses, and in the argument of the eloquent gentleman who immediately preceded me. But you will observe, gentlemen, that your attention for much the greater part of the time, has been occupied with subjects relating to the proceedings of the General Assembly of 1837. In the opening speech of Mr. Randall, that subject occupied full two-thirds of the time. A large portion of the testimony, and much the greater portion of the argument which you have heard from the learned and able gentleman who has just closed, had relation to these same proceedings. You will recollect, gentlemen, that nearly the whole of his exordium was taken up with the consideration of these proceedings of 1837. And I must do him the justice to say, that it was much the longest exordium, in proportion to the length of his argument, which I ever heard. I, however, will not follow him in the ingenious course which he has adopted. I shall proceed immediately to the discharge of my duty to my clients, adopting the plan which, in my opinion, is best adapted to the clear elucidation of the case. I think it better to build the house first, and add the portico afterwards, provided it shall then be found to be a necessary appendage to the building. For an exordium is not more necessary to the entrance of an argument, than a portico to the entrance of a house.

Leaving therefore the exordium out of the question, it is possible that some portion of his two hours' argument of to-day, may demand from me a few words in reply, as he then referred for the first time to the merits of the case. As he devoted five hours to what he himself admitted were only preliminaries, it appears that, in his estimation, the preliminaries are to the merits of the case as five to two. I should consider myself entirely exonerated from uttering one word in reply to what has been said concerning the proceedings of the General Assembly of 1837, feeling, as I do, perfectly satisfied that those proceedings have no relevancy to this case: but as they have thrown down the gauntlet, I will, after having disposed of the merits of the case, vindicate my clients from the imputations cast upon them, relative to their conduct in the Assembly of that year. Persuaded that you will have to adjudicate this case on the evidence before you, relative to the proceedings of the General Assembly of 1838, without any reference to what took place in that of 1837, I will reverse the order which my friend has pursued, in laying this case before the court and jury. I will commence with the argument, and not with the exordium. A skilful general will put his artillery before the light

troops, and not behind them. But the efforts of the gentleman which have been displayed with such admirable ingenuity, remind me of the manoeuvre of some general of which I have read, who shielded himself from the attack of his opponents by operating on the dust, which being blown in the faces of the enemy, prevented them from seeing him. I will not, however, waste my strength in operating on the cloud of dust which has been raised with so much ingenuity, and thrown directly in your faces with so much dexterity by the opposing counsel. I will leave it until the wind shall come from another quarter, when, I entertain no doubt, it will be blown entirely away.

To come at once to the case; the counsel, as you must have observed, gentlemen, for the relators, have failed to lay down any distinct proposition, on which they hope to succeed, in establishing their claim.

My responsibility as a member of the bar, requires that I should distinctly state the point at issue in this case, the only point on which the opposite counsel can possibly rely; or his ingenuity would certainly have produced some other before you. The point on which your verdict is to be rendered is, that by law and parliamentary usage, the rules that had been previously adopted by the General Assembly, in accordance with its "constitution and form of government," being obligatory on the General Assembly of 1838, and binding on all the members of that Assembly, when voting on the subjects presented to their consideration, we, the Old School members, are to be considered as voting with them, the New School party. That is, we are to be considered as having so voted with them by *intendment of the law!* On this point, the whole case turns. They contend that we acquiesced in their proceedings by our silence, by our refusal to vote against them.

Gentlemen, it is the solemn conviction of my own mind, that this is the most important point in the whole case before you, and therefore I state it to you methodically, though I consider it more as a question of law, than as a question of fact. I state it distinctly, as the hinge on which the whole controversy turns. The main point for your decision then is, whether, in the General Assembly of 1838, in putting the question as to the appointment of a new moderator, the silence of a portion of that Assembly is to be construed into an acquiescence, on their part, with those who voted in the affirmative, on the question then raised by Mr. Cleaveland. Did *we*, by our silence and refusal to vote at all on that question, which we considered to be entirely out of order, acquiesce in *their* disorderly proceedings? I will show you plainly that we did not so acquiesce, and then they surely will not claim a verdict at your hands.

But, before a minute examination of the evidence in relation to this point, let us look at some circumstances which must necessarily claim your attention, respecting the attitude of the parties to the transactions which gave rise to this suit. One of these circumstances, to which I will now call your attention, is this. They have not asserted that we are not the General Assembly of the Presby-

terian church; they have not come here to *impugn* much less to vituperate us. To their credit be it said they have done neither. They have not said that we are not the General Assembly; and is not that an admission that we are that General Assembly? We are not standing here as a nonentity. We are not standing here for the General Assembly of 1837, which was dissolved when it closed its session, and became a nonentity. Nor are we standing here for any General Assembly of 1838, which was also resolved into its original elements. I stand here as the attorney of Princeton Seminary, and of every body else opposed to these relators. We act on the defensive. We come into this court as the *trustees* of the General Assembly of the Presbyterian church, having been elected in accordance with the provisions of the charter granted to that Assembly by the Legislature of Pennsylvania in the year 1799. The relators in this case are not properly in court. They have no rights to establish here. They have come here merely by an *intendment of law*, by a mere antiphrasis. They thus come into this court, claiming by a mere antiphrasis or intendment of law, to exercise control over the funds and property of the Presbyterian Church, which church is opposed to them. I must say, with no asperity of feeling towards these relators, that these principal charities, devised to the General Assembly of the Presbyterian church, are not to be seized on merely by an intendment of law, by which the defendants are to be considered as participating in what they did not intend to participate in. Justice will not sanction it. And yet the counsel for the relators put himself on it. He put himself on this ground, that by intendment of law, the defendants are to be considered as having sanctioned the whole proceedings of the New School party in Ranstead court, though it is a well known and admitted fact, that they opposed them by every legitimate means in their power. It is an atrocious and unreasonable assumption, that a mere technicality of law shall supersede the whole Presbyterian Church, by depriving the true trustees of the control over those noble beneficences, which have been devised to that church "for the advancement of religion, and the glory of God." And in such a case as this, I here give the gentlemen notice, that we shall avail ourselves of every means which the law allows us, to prevent such a supersedure. I ask you, gentlemen, for you have doubtless some acquaintance with legal proceedings, whether you have ever seen such a spectacle in the courts of justice of Pennsylvania, as that now exhibited? I doubt very much, whether you or the learned judge who presides with so much dignity on that bench, ever heard of a case brought into court in this manner.

The other side claim, not upon any principle of justice or right, but upon a mere technical construction of an intendment of law, in opposition to the known and admitted facts in the case. And I will say to the court and jury, that if the case of the relators be established by a mere technicality of law, it will be the first time that I have ever known such a triumph to be achieved. I know that there is a vulgar notion extant, that the law is mere trick, that it consists entirely of technicalities and unmeaning phrases, and that

it has but little, if any connexion with justice. But God forbid that I, an humble officer in the temple of justice, should give the least sanction to such an erroneous opinion, or that I should ever witness the triumph of a mere trick, a quibble, over the fundamental principles of law and justice.

No, it cannot be. The common law, that glorious fabric, which has been founded on experience and built up with so much labour and care by the skill and wisdom of centuries, which has drawn forth such high-wrought encomiums from the most eloquent statesmen and orators, shall continue to impart to all, the benefits of the sacred principles of justice. Like the alluvial soil, deposited by some mighty river, to enrich the valley through which it passes, so may the common law continue, for ages and generations, the rich alluvion thrown up by the stream of time.

An intendment of law, indeed! What is it, but to infer that that has been done which we all know has not been done? Suppose one of you, gentlemen, infers that a paper was signed by another, because you have signed it in his presence and he did not object, as he had nothing to do with it, and knew nothing at all about it: and suppose that paper to be an obligation for the payment of money: will you go to a lawyer and say, I know that he did not intend to sign that paper, that he did not know that such a paper was signed in his presence: but can not I go into the courts of law, and compel him to pay, by inferring that he did so intend? I know that you would not sanction such monstrous injustice.

Well, suppose that either of these gentlemen had advertised these defendants of what they did intend. Suppose they had told them "you will be considered as having voted with us." Do you suppose, does any man suppose, that they would have given their assent? Would they have refused to vote on the questions if they had been apprised that advantage could be taken of their refusal by *an intendment of law?* They oppose them by all the means in their power, and shall they now be considered as voting with them, as having acquiesced in their proceedings, merely because they did not vote? Shall we without a struggle yield to such a desperate attempt to lay hold of the whole property of the Presbyterian Church, and of the church itself, by an ejectment of the trustees now in power? The gist of the whole case is, they assume that the Old School party voted with the New School party, in the General Assembly of 1838. The whole case turns on that point. Did we vote with them? We did not. This is admitted. But then they assume that we assented to their proceeding by refusing to vote. Did we so assent? Answer this question affirmatively if you can. If you cannot, in good conscience, give an affirmative answer to this question, then dismiss us, and the relators must be turned out of court.

It is a maxim with myself, and however others may regard it, it is one to which, at the bar, I adhere, that "Show me the fact of a sound right in equity and justice, and I will find law to support that right:" and I have not been disappointed in a single instance, by an adherence to this maxim, unless the present case shall prove an

exception. Now these relators know—they admit the facts to be against them; and yet they think to stand on a mere technicality. But, as I will show you, they can't stand even on that. I trust that when the sharp edge of the law shall be applied, the same spirit which guards that law from infraction, will prevent its being perverted to be a shield for injustice, and divest it of all other effect than the promotion of the general good. And if I did not rely on this spirit of the common law, I would go to a higher principle, even the eternal providence of God, and on that would I rely to prevent the perversion of these noble charities from their legitimate object.

This, then, is one attitude in which these parties stand. Another, in which the relators stand before you, is that of a minority assuming the position and powers of the majority, a majority in every aspect, except the mere trick of technicality, in keeping our names on their roll; and then stigmatizing us, not as heterodox in faith or doctrine, but as having acted with them, the really heterodox. It is with pain that I allude to this proceeding. Among the many things which are trying to the feelings in connexion with these transactions, this circumstance is the most so. To avoid the conclusion that they are a minority, they contend that the Old School members are a part of them; that when they went from Ranstead court, they went as the whole General Assembly, and took us with them; and that when they afterwards met in the First Presbyterian Church on Washington Square, the whole of the General Assembly was congregated there, that is, they had our names on their roll.

If this claim had been openly stated, its notorious contrariety to the truth would have shocked every body. But when this claim is brought forward insidiously, it becomes necessary to expose its absurdity by depicting it in its true colours. The counsel erred egregiously when he gravely put the query, "Why did we not vote down the proceedings, if we were the majority as we claim to be?" He erred egregiously, when he inferred that our refusal to vote is evidence that we were not the majority. Suppose we had voted with them, what would have been the consequence? If Dr. Elliott, Dr. M'Dowell, Mr. Krebs, Dr. Plumer, Mr. Breckinridge, and their associates, had participated in the proceedings of Dr. Patton, Dr. Mason, Mr. Squier, Mr. Cleaveland, Dr Beman, Dr. Fisher, and their associates, the measures of the New School party would have been defeated altogether. If, instead of a simultaneous burst of disapprobation from the Old School party, with cries of *order, order!* together with Dr. Elliott rapping with his hammer, we had let them proceed quietly, and then voted with them, we would have voted them out of the house; and that "in the shortest time, in the fewest words, and with the least interruption" to the regular proceedings. Nay, further, if we had participated with them, we could have followed them into the street, or gone with them to Washington Square, and have voted them out of the house there also. Did they expect us to do so? With what joyous exultation their kind hearts would have welcomed the defeated and suppliant majority. We could thus have followed them from one house

to another, and voted them out, until we had voted them out of the city of Philadelphia. We might have pursued the same course until we had voted them clear into the excinded synods. Such would have been the effect, if we had acted with them. It is therefore manifest that we did not vote with them. For if we had so voted, they could not have found a resting place short of the excinded synods, if they could even there.

But why pursue this course of beating round the compass. Let us come to the point at once. Did they intend that we were of them? Does the law so intend? Or did they intend to supplant us, and wrest from us the control of the whole of the charitable beneficences of the church, together with the Theological Seminary at Princeton? What else can we suppose, when we are told that we are not the Presbyterian Church by a mere intendment of law? That we are thus to be considered as having been personally present in their Assembly, when, if we had been there and voted with them, we could have voted them out of the house?

But I will proceed to a third point in the argument of my learned friend. He inquires "who are they?" but, like some of his clients, he forgot to reverse the question, and ask "who are we?" I will endeavour to examine both inquiries. It was a position of my learned friend, though one in which he was entirely mistaken, that we are identified with them in their proceedings, because the question was put to the house by a member of that house in our presence. He omitted to state that the question was not reversed. Mr. Cleaveland, in his haste and perturbation, forgot to reverse the question, and Dr. Beman also forgot to instruct Dr. Fisher that he must be governed in his conduct as moderator by the same rules that his predecessors had been. I know the learned counsel on the other side treated this as a very small matter; but I will presently show you that it is important. Why did Dr. Beman forget this important duty, which is expressly required of him by the discipline of the church? I have put this query, and I will answer it. He did not know what the discipline of the church required, and Dr. Fisher did not know how many members constituted a quorum. They were ignorant of what the rules of order required, and yet you have been told that we, the Old School men, are "the juvenile patriarchs of the church." They, forsooth, are the older and more experienced, and we are the younger members. They are the seniors, and we the juniors. Who are these juvenile patriarchs, with an account of whom the counsel amused you? Is that (pointing to Dr. Green) one of these young men? Is that the youth to whom he alluded? You may search the world over for such another youth, whose seared brow has borne the frost of more than *seventy* winters, as his "locks of silver grey disclose." Is that venerable man, who was engaged in political controversy before his religious influence was so extensively felt as it has since been, who shed his blood in the cause of American Liberty in the war of the revolution, before he became the head of the Presbyterian Church—is he to be sneered at, and termed a youthful patriarch by those who have grown up under his auspices, and owe what little influence they

now possess to his fostering care? Or did the counsel allude to the venerable Dr. Alexander? Who is he, and where is he, that has dared to raise a parricidal hand against the venerable institutions which he and such as he have reared?

I should like that you should look at either of these venerable men, whose gray hairs and bent bodies "proclaim their lengthened years," and ask yourselves if they are the juvenile patriarchs who would destroy the church of their fathers! And now, to reverse the question, who are they of the other side? Ah, who are they? Gentlemen, we have come to the conclusion that the New School church is the true one, because they have differed from Dr. Green and Dr. Alexander, these inexperienced juvenile patriarchs; and by these statistics of age, I judge that they must be the oldest. But has any one, Old School or New School, man, woman or child, said that we are not Presbyterians? Do they not concede that we are; that Drs. Green, Miller, Plumer, M'Dowell, and others, are up-to-the-hub, true-blue Presbyterians?

But is *their* party Presbyterian? Can both be Presbyterians? Can they be Presbyterians whilst they acknowledge Congregational churches? If you call in an unlettered Presbyterian, he may tell you that this is not an important matter, that it is a mere dispute about words. He may tell you, as one of the witnesses told you, that he was once a Congregationalist, then a Presbyterian, and then a Congregationalist. Why, it seemed that some of them have travelled about the country with an assortment of creeds in their pockets, to suit purchasers, and that they have found a ready market amongst those who could change their religion with as much facility as they could change their coats. A Presbyterian or Congregationalist coming from a section of country where Congregationalists and Presbyterians were intermingled, attached himself to one or the other of these churches, as might suit his convenience. My learned friend depicted to you a lisping infant bowed in prayer at its mother's knee. I wish I could command the beautiful language in which he described the thrilling scene with that kneeling infant. But it happens that they among whom that scene occurred are Congregationalists, and the infant by its mother's side became contaminated by this Congregational heresy, which has been preying on the very vitals of that body to which it has attached itself as an exotic. Congregationalists have thus been coming in amongst us insidiously for years, and when an attempt was made to purify the church by excluding the Congregationalists, this New School party was so deeply imbued with the Congregational heresy, that they made common cause with them. They then are not Presbyterians, but Congregationalists. Who then are the Presbyterians? Did we exhibit any thing of this kind? We certainly did not. We desired to check the growth of heresy, by admitting none to the communion of the church who were not strictly Presbyterian in faith and practice. And if you decide against us, and by your verdict say that we are not the Presbyterian Church, and that they are, you will give the whole property of the Presbyterian Church to Congregationalists and the associates and advocates of Congregationalists.

The next position in the case is this. They brought us here. The third Thursday in May, 1838, was a memorable day, a day never to be forgotten in the annals of the Presbyterian Church. And here we come to the git of the whole case. You are aware of what took place in Ranstead court on that day, when through the aisles, and from the portals of that church, swept a loose disorderly and disjointed mass of men. It was then that the black cloud, which had been for several years increasing, burst in all its fury. Then from that portentous cloud, falls a bolt of lightning, aimed at the head of *that venerable man*, (Dr. Green,) and we ask you, shall it be suffered to strike his silvered locks to the ground. The one act by which they bring us before this court is, that desperate blow by which they have sought to strike Presbyterianism to the ground. An act which too plainly says, "we want the money, and we can't trust you with it." All this they propose to accomplish by a mere *intendment of law*. This is the issue, and the only issue before you.

Gentlemen of the Jury, I have endeavoured, in the first place, to state to you the nature of the question at issue. I then reviewed some of the circumstances attending, and the relative position of the respective parties before you. I then called your attention to that portion of the argument of the gentleman who preceded me, on which the whole case rests. I showed you that the relators did not expect to succeed in establishing their claim, unless they can succeed by an intendment of law; unless the General Assembly of 1838 be presumed to have acquiesced in the proceedings, by which the relators in this case have been enabled to come into this court. The question of legal intendment is a matter for the judge to decide. For if his honour instructs you that there are certain circumstances in which a question must be settled by such intendment, then, if the circumstances of this case are of that character, the whole case turns on a point of order, and it is not for me to disparage the rules of parliamentary order. They are unquestionably of great importance, are necessary to the transaction of business, and cannot be departed from without danger. The ends of justice are best subserved by adhering to them. These rules are not, as the learned gentleman has said, of little importance. Indeed, it seems a little strange that he should speak lightly of them, when his whole case may turn on a point of order, and the very lightest of them.

The plaintiffs in this case exhibited themselves in this light. They have placed their sole reliance on the construction of a rule of order; and this is it: (Rule 30,) "silent members, unless excused from voting, must be considered as acquiescing with the majority." Of so slight authority was this rule considered, that Dr. Beman, when he inducted Dr. Fisher into the office of moderator, gave him instructions to govern himself, not by this and the other rules which had been previously adopted by the General Assembly, but by the rules which should be subsequently adopted, that is, by an *ex post facto* law. This is on the principle, which our opponents sometimes find convenient, that these rules are not binding on any Assembly, until re-enacted by themselves. And yet it is only by one of these rules that they can come at all into this court. But I

am willing in this case to concede that this rule was in existence, and that if they have brought themselves within its application, you must give them a verdict.

It then becomes necessary to consider under what circumstances silent members are to be held as acquiescing with the majority. I admit that if the question is fairly put in a deliberative body, and one portion of that body refuses to vote, they are to be considered as acquiescing in the will of the majority of those who did vote. I admit that this is an established rule of parliamentary law. But in this case, *was the question put?* That is, was it legally put? Was it put in accordance with the usages and requisitions appropriate to the case? Was it put in an audible voice and in proper terms, and was it reversed? For unless all these circumstances were attended to in putting the question, it was not legally put. All the members must have an opportunity of hearing the question put, or they cannot be considered as having acquiesced in the decision because they did not vote. The learned gentleman stated in summing up his argument, that it had been proved that the question was put and reversed in a proper shape, and loud enough to be heard. But he omitted to state a most important principle of parliamentary law, that the question must be put by a *competent person.* He avoided the mention of this most important principle. He evaded it, and that during the consideration of a case, the decision of which depends on a question of order! I state it as one of the most important questions submitted to you in this case; was he who put the question, the *proper* person? For every question must be put by a competent person, and that person is the presiding officer, the president or speaker, and in this case it was the moderator. And not only this, but the question must be put at a proper time also. Recollect that we are now discussing a question of order. Questions must be parliamentary in their character in all points, and pertinent to the business of the house, if they are to claim the attention of a deliberative body. If one party proposes questions which are in their very nature disorderly, the other party is not bound to notice them, or to give their sanction to disorder by voting on them either affirmatively or negatively. It does not fit the case, to say that we might have voted on the question if we were disposed, because they must show that they acted orderly in all points, to sustain their assumption that we acquiesced in their decision. I then repeat the inquiry, was Mr. Cleaveland's motion put? To put a question requires a proper person. This rule implies an agreement, in the nature of a contract. The members place themselves on the ground of contracting parties, by agreeing to and adopting certain rules of order for their government. The presiding officer contracts to do certain acts, and to preserve order according to certain rules; and the members, on their part, contract to abide by his decisions made in accordance with those rules, and that all decisions shall be in accordance with the will of the majority. One provision of this contract is, that all questions shall be properly put to the house, and by a proper person, and that when so put, those who abstain from voting shall be accounted to acquiesce in the decision of the ma-

jority. Could Cleaveland, then, have been the proper person to put any question in that Assembly, not that particular question merely, but any question whatever? Was he authorized to get up in that Assembly, setting aside all rules of order, and put a question to the house for its consideration. Such a procedure had not, I believe, occurred in the history of the Presbyterian Church from her first organization, down to the meeting of the General Assembly in 1838. Such a thing as for a member on the floor to rise, make a motion, and then put that motion to the house, has not occurred from the date of the Wittenagemote down to the present time. Did any of you ever hear of any such thing having occurred in the proceedings of Congress, or of the legislature of your own state, as for a private member to rise and put a question without even submitting it to the speaker? No such thing has ever occurred, and they have not produced a single sentence either of the rules of order of the Presbyterian Church or general parliamentary law, that will justify such a course. I make the broad assertion, and without fear of contradiction, that they cannot produce a single instance of that kind. There is not an instance to be found in the records of any deliberative body, even in a political caucus, a debating club, or a ward meeting. Even there, the question is always put by their own officers. Amidst the convulsing and turbulent scenes of the British parliament, and even of the French revolutionary tribunal, a measure so revolutionary in its character is not to be found. Reflect, gentlemen, what may be the consequences if such a course of proceeding is sanctioned. A dozen of conspirators may thus defeat all business in bodies of this kind, or in an Assembly which is composed of half a dozen parties, any one may rise and get a half a dozen of his partisans around him and thus half a dozen *cliques* be formed, each desirous to carry its particular or favourite measure, and each proclaim itself the constitutional body. Must we acquiesce in such scenes of confusion as would entirely destroy deliberative and legislative bodies? Every deliberative body must have some mode to ascertain the judgment of its members, as it is impossible to transact business without order; and the mode universally adopted by such bodies, is, that no question can be put to the body but by or through its presiding officer. And if you find an Assembly without any rules of order and without any head, what do you observe but a confused, disorderly, violent and lawless mob, where every man acts according to the dictates of his own folly or caprice? If a private member of his own mere motion rise up and seize the reins of government, he is an usurper. If he should succeed in such a disorderly course it would be a revolution, and if he did not succeed it would be rebellion. The difference is simply in the result, and in either case, though it may be righteous, and done for good reason, and the participators in it be virtuous and good men, yet it is usurpation, and usurpation is not to be tried by rules of law in this court. It is a great mistake and a narrow view of the case for a party or faction to assume that a mere motion of a member in a deliberative body necessarily puts it in possession of

the question. I might as well put a question to the spectators in this crowded room, and if they remain silent say to them, very well, gentlemen, "silence gives consent," and then go away and proclaim that the whole house is with me on that question. Or suppose I now claim of you a verdict for these defendants. Suppose I put the question to you, "gentlemen, have you decided in our favour?" and you remain silent, as no doubt you would, may I not say that you have acquiesced in what I demand, that you have already decided in favour of our claim? If I should do so, and go away and report that we have gained the great cause of the Presbyterian Church, and in a day or two afterwards, when you should be called on in a very different manner, by his honour, from that bench, you should give the verdict the other way, would not my position be rather awkward? The reason is, that I am not the proper person to put the question to you, neither is this the proper time to put it, nor are you in duty bound to respond to a question, if put by any other than the honourable judge of this court. Gentlemen, what is putting a question? Is it the proposing of a question by an unauthorized, or by an authorized individual? In a deliberative body when a member rises and says "I move that such a course of proceeding be adopted," he acts in accordance with an acknowledged right. But having made his motion, other rights intervene, to take up that motion and put it to the house. For this there is an express requisition of parliamentary law, noted in 2d Hatsell. I will read to your honour an authority which has been considered, ever since its publication, the very best on the subject, since all subsequent treatises have reference to it. He says, on page 105, "It was the ancient practice for the speaker to collect the sense of the house from the debate, and from thence to form a question on which to take the opinion of the house; but this has been long discontinued: and at present the usual and almost universal method is, for the member who moves a question to put it in writing, and deliver it to the speaker; who, when it has been seconded, proposes it to the house, and then the house are said to be in possession of the question."

I have preferred to quote Hatsell, in his exposition of this fundamental law, in his own words. He was followed by Jefferson, who, in his Manual, lays down the same principles.

The counsel complained that we had presented these rules before in little books, but I trust that I have now produced one big enough to satisfy him. Every deliberative body places itself under the control of a responsible head, from whom alone it can receive questions proposed for its deliberation, and that head or presiding officer occupies a conspicuous position, like that occupied by his honour, the presiding judge of this court, so that he can see and hear all that passes in the house. His being thus placed is not a mere accidental circumstance, but a form of substantial convenience in the transaction of business. Otherwise, interminable embarrassment, riot and confusion would inevitably follow, and the transaction of business would be rendered impracticable. But we are not left to Hatsell or Jefferson alone to supply us with a rule on

this occasion. I will appeal directly to the rules of order of the General Assembly itself, which destroys at once the cause of our opponents. That very Assembly of 1838 adopted this rule, which I read from the Assembly's Digest, page 25, rule 6. "A motion made must be seconded, and afterwards repeated by the moderator, or read aloud, before it is debated; and every motion shall be reduced to writing, if the moderator or any member require it."

That it was necessary to conform to this rule they admit, for the gentlemen have asked every witness the question, "Was the motion seconded?" though they seem to have forgotten one part of this rule. which is separated from the other only by a comma.

Now I put it to you to say if the General Assembly of 1838 was put in possession of the question. The rule which I have just read requires that a motion when made must be put by the moderator. Was the question so put by the moderator? At what time, by *an intendment of law*, was he supposed to have put the question? The rule requires that the question must be put by the moderator, after it has been repeated or read aloud by him, and not before. The moderator, and the moderator only, has a right to put the question to the house, and he who usurps that authority is acting in a rebellious manner, and it was the right of the other members, nay it was their duty, to call him to order.

Mr. Cleaveland, in usurping the place of the moderator, trampled on the rules of order and put himself without the pale of the law. What he did, therefore, was not obligatory on any member of the Assembly, nor could any one be bound to vote on a question put by him. Well, let me not be answered that a case of extreme necessity may occur, where the moderator will not put the question. I know of no right existing under any circumstances for a private member to rise and put a question. If he was competent thus to bind the members in this case, he might have usurped the power of the moderator altogether, and had in his hands nine-tenths of the whole power of the General Assembly.

"Necessity is the tyrant's plea."

It knows no law, and is bound by no principle. Shall he not on this plea of necessity usurp the office of the clerks, by accusing them of having refused to do their duty? Why did he not constitute himself clerk? Was not the case of the clerks a case of necessity, which would have authorized him to seize the pens, himself complete the roll, and usurp every function of the Assembly as well as that of the moderator?

If then the question was not legally put, were we bound to vote? No. They had a right to frown down every attempt to take away their rights. They knew full well that if the moderator put a question, it was their duty to vote on that question, but if another person put a question to their injury, they were not bound to acknowledge his right so to do. If Mr. Cleaveland had put his question to the moderator, and the moderator had put it to the house, and the members had then been silent, they might, by an intendment of law,

have been accounted to have acquiesced, because they would have understood the question, and have known that it was put by the proper officer.

Here is a regular system of government. But a private member gets up and proposes to take the government into his own hands, and every one who does not utter his dissent is considered as acquiescing in his usurpation. By such an assumption it is an easy matter to create a constructive majority in submission to the will of the usurper. By such an usurpation Cæsar triumphed over the Roman senate, and substituted his own will for the laws of his country. Every tyrant that has trampled on the liberties of his country has succeeded by similar means. By such an usurpation of power did Oliver Cromwell enter the English parliament, pluck the speaker from his chair, and take the government into his own hands. And by a similar process did that arch-usurper, Napoleon Bonaparte, ascend the imperial throne of France. He entered the council of five hundred, ascended the tribune, put questions by the list, and carried them, regardless of the will of the representatives elected by the people, by his train bands crying *aye*, AYE, AYE!

It would be a waste of time to argue this position, that an official organ must put the question, or the house is not in possession of it; and that when the house is not in possession of the question, the members cannot vote. But then, the plea of necessity—and what are the pleas of necessity, that Cleaveland should state the question? I beg you, now, to remark that from his own statement, it does not appear that there was any necessity that he should occupy the position in which he placed himself. What does he do? He rises with a paper in his hand, commencing with a formal "whereas." He reads and comments, but he submits no motion whatever to the moderator. He refuses to put the moderator in possession of his motion. He did not address the moderator by his title, "Mr. Moderator," but turns away from him, and when he thus refuses to put the moderator in possession of his motion, he has no right to say that the moderator refused to put the question to the house. Had he then any personal grievance to complain of? Now if he had put his motion to the moderator, and the moderator had refused to put it to the house, then, however disorderly, I admit that he might have had some pretence for appealing to the Assembly. Had Mr. Cleaveland's seat been denied him, as was the case with Mr. Squier, there might have been some pretext or apology for such a strange proceeding; but as there had been no such denial on the part of the moderator, he had no excuse, not even the shadow of a pretext, for proceeding in a manner which said, in the eloquent language of the action, I choose to depose you, and appoint myself moderator *pro hac vice*. But Mr. Cleaveland could not justly complain of the moderator's conduct towards himself. He had suffered nothing. He had not given Dr. Elliott a chance to receive the motion. He did not present his motion to him. Dr. Elliott did not refuse to put the question, and no man has a right, either in law or equity, to say that he would have refused to put it to the house, if he had been requested so to do. I believe he would have received the motion, and

put the question himself, on a motion for his own removal, and he would have submitted to the decision of the General Assembly. Such a motion would not have been considered personal to Dr. Elliott. By his putting the question himself, his feelings would have been spared. But if he refused to put the question, an appeal might have been made to the General Assembly. And it is to be presumed that no presiding officer whatever would act in opposition to the will of the majority of the house. If he did, the power to remove him from office is vested in the house. Now, if it were necessary to remove the presiding officer, a motion to that effect must be put to the house through the presiding officer, and if he refuse to put the question, then through the next official dignitary of the house. If the motion had been submitted to the moderator, and he had put the question to the house, he might have been removed, as in the case of Dr. Beman in 1835. Then Dr. Elliott would have said, "If it is the wish of the house to turn me out, I submit to it." But Mr. Cleaveland chose, *ex mero motu*, to assume the functions and clothe himself with all the paraphernalia of the highest officer in the General Assembly,—and claims to exercise those powers in the face of the whole Assembly, notwithstanding a regularly elected and properly constituted officer then occupied the chair. And there were some half a dozen other persons on the floor of the house, who had been elected to the office in previous years, and therefore were the proper persons, instead of Mr. Cleaveland, if there was occasion for any other than Dr. Elliott to fill the place of moderator. Well, under these circumstances Mr. Cleaveland executed his purpose, organized an Assembly, and upon this organization the relators in this case rest their claim. If there had been a necessity for the removal of the moderator, what was the proper course for them to take? Why to say, Mr. Moderator, I move that the next preceding moderator present take your place. That was the motion in 1835. If they failed in this, or the next preceding moderator was not present, they must resort to the one still preceding him, and so on, ad infinitum; every individual who had filled that office being entitled to the precedence, over any one who had not filled it.

When Mr. Cleaveland and those who acted with him undertook in this manner, in the face of the General Assembly, by indirection, to remove the moderator from his office, by declaring that they had elected another, for the double purpose of filling the office and of turning out the present incumbent, they aimed a deadly blow at his devoted head. They make a personal attack, and wound his feelings to the very utmost. They in effect declare to him and to the world, that they place no confidence in him, and consequently they will not entrust him with the motion. They declare that he has forfeited his office by misconduct, and that half a dozen members on the floor of the house have a right to depose him at their sovereign will and pleasure. They in effect declare that they have a right to take from him the insignia of office, to degrade him in the view of his fellow-men and in the face of the General Assembly, by thus declaring him to be unworthy of confidence. At every

step of these proceedings the rights of the General Assembly were invaded in the person of the moderator, as were also the rights of half a dozen others who had previously been moderators. Recollect, I now speak of Mr. Cleaveland. I say nothing now of Dr. Beman: I will refer to him at a proper time. A high-minded and honourable man will always prefer encountering the undisguised attacks of an open enemy, to the insidious designs of the dastardly and cowardly assassin, who stabs with the stiletto in the dark, or accomplishes his hateful purpose by indirection.

It would be a latitudinarian doctrine, indeed, that would sanction such a course of proceeding, and nothing can be more dangerous to both civil and religious liberty, than latitudinarian and agrarian doctrines of construction. Such doctrines lead to disorder, to confusion, and to anarchy, which is the commencement of tyranny and despotism. If Mr. Cleaveland's object was to remove the moderator without "*discourtesy*" towards him, or aiming a stab at his feelings and reputation, his object would have been attained by simply rising in his place, and saying, "Mr. Moderator, I move that the next preceding moderator take your place." That was the motion in 1835, when Dr. Beman was removed from the chair by a vote of the General Assembly, and Dr. William M'Dowell was put in his place; and no doubt if a similar course had been taken by Mr. Cleaveland and his associates in 1838, Dr. Elliott would have acted on the occasion precisely as Dr. Beman did in 1835. He would have retired from the chair without a murmur. But they were not satisfied to proceed in this open and undisguised manner. They undertook the accomplishment of their purpose by indirection, and they thus violated the rule of order which was the law in relation to the case. The only power which they had, or possibly could have, was to put the next preceding moderator who was then present, in the chair: and we have proved that there were several persons present who had previously held that office in the General Assembly. But Mr. Cleaveland saw fit to rise and say, 'Whereas Dr. Elliott is not fit any longer to be moderator, he must be put out; but I am fit for moderator, and therefore I will assume the functions and office of moderator, and proceed to organize the General Assembly, by making motions and putting questions to the house in relation to those motions.' I say, gentlemen, Mr. Cleaveland had no right to do this. The utmost extent of lawful power which he could possibly possess, was to move that the next preceding moderator present should take the moderator's chair and assume the functions of moderator. But instead of this, when he proceeded to charge the moderator with misdemeanor in office, and, in language carrying all the imaginable presumption of a demagogue and dictator, to constitute himself the moderator, he was clearly rebelling against law and order. When he thus said, I will organize this General Assembly, he could not reasonably expect that courtesy which he had denied to others. He did constitute himself the moderator. He did undertake to preside at the organization of the General Assembly. And it is on that fact that I rely in this defence, since on that our opponents rest their claim. I rely on the

presumption that Mr. Cleaveland *was* a moderator, and they must admit that he was *de facto* a moderator, or their argument, based on the presumption of the legality of his acts, totally fails. For if they sink Cleaveland to a mere imaginary connecting link, in the chain of their proceedings, their case cannot be sustained. The moderator was the connecting link, the conduit through which was to flow the power from the General Assembly of 1837 to the General Assembly of 1838; and if this link should fail, that power could not issue, as a clear and limpid stream, from one Assembly to the other. Mr. Cleaveland, then, *was* a moderator, acting by a self-assumed power. They must admit that he was the connecting link through which the power flowed from one Assembly to another, or abandon their cause, which turns on the legality or illegality of his acts. It is necessary scrupulously to examine this point of order, to discover by what authority (if by any kind of authority) Mr. Cleaveland performed the functions of a moderator, because their case rests on it. Unless they had a coward for a moderator, he would not refuse to put a question relating to himself, and Dr. Elliott would not have refused to put the question to the house, if Mr. Cleaveland had entrusted him with it, in accordance with the rules of order and of parliamentary law. They admit that he might have put that very question, and I will go further, and say, he *must* have put it. But they say that Dr. Elliott was disqualified. And what is it to the purpose, even if he were disqualified? Would that be a justification of Mr. Cleaveland's conduct? Certainly not. It would be a poor apology, indeed, as by no construction of parliamentary law could Mr. Cleaveland be the proper person to put the motion to the house.

You, gentlemen, might now, I should think, venture to decide this point without further illustration. I suppose you fully competent to decide this plain common sense question, whether any person can, in his own time and merely of his own will, constitute himself presiding officer, and exercise all the functions and duties pertaining to the chair, beyond the control even of the house itself? But as I intended to enter into a full investigation of this subject, I will now proceed to an examination in another point of view; for you, gentlemen, will find it necessary to enter with me into a full examination of the *minutiæ* of parliamentary law, in order to arrive at an understanding of this part of our defence. It is the main point, the hinge on which the whole controversy between these two parties turns. Suppose then that the moderator were disqualified, that his power was annulled, or had been rendered nugatory, the question arises, who was the proper person to put the question to the house? It might perhaps have appeared awkward in Dr. Elliott to put the question in relation to his own removal, but the obligation of duty resting on him was rendered the more imperative by that circumstance. Instances of the kind have occurred, and may occur again.

But, suppose Dr. Elliott had abdicated. Suppose the moderator was self-annihilated, *functus officio*, whose duty would it have been to put the question to the house? The clerk's, undoubtedly.

The clerk was the proper person to put the question in that case, and it could not legally be put by any other person or functionary. This is a point of order, which is clearly established by parliamentary law. The British parliamentary law is very clear on this point. For a period of two hundred years, at least, it has been the uniform practice for the clerk to put a question to the house, when, from any cause whatever, the speaker was disqualified, or when the question had a personal relation to the speaker himself. Some may apprehend that there is little reason why such a rule should be universally adopted, yet the experience of ages has proved its utility, and so absolutely necessary has it been found in a legislative or deliberative body, to have some official organ by and through whom the questions presented to the house may be propounded, that the rule has been rendered imperative. In cases of this kind, if the presiding officer refused, it would therefore become the duty of the clerk, as the next official dignitary in the house, to put the question. It is so laid down in Hatsell's Precedents of Parliamentary Law. But it is not only John Hatsell; Mr. Jefferson and Mr. Sutherland in their *manuals* lay down the same rule. 2 Hatsell 158, 6 Gray 406–408, Jefferson's Manual 118, Sutherland's Manual 104.

I read from this big book (Hatsell, vol. 2,) as the learned counsel appeared to manifest, as I thought, some antipathy to little books, such as Jefferson's and Sutherland's Manuals. The rule is substantially the same in all the authorities to which I have referred, there being only a slight variation in the phraseology.

"When it becomes necessary to elect a speaker, and but one person is proposed for that office, it has not been usual in parliament to put any question to the house; but, no objection being made, without the question being formally put, the members proposing him conduct him to the chair. But if there be objection or another person is proposed, the question on the nomination is put by the clerk; and so also are questions of adjournment."

That is the rule, and it is a rule of law which was established in the English parliament more than two hundred years ago, and we received it from England, before we acted for ourselves independently of the British crown. This rule was introduced into the colonial legislatures whilst we were mere appendages to the British empire, and this rule materially influences this important case which mainly turns on a point of order.

The rule was adopted on the occasion of the speaker becoming contumacious and refusing to obey the direction of the house; when the house took up the subject and decided two things at the same time. The one was "that a member has not the right to put the question, even in his own case;" the other, "that the clerk of the house should put the question whenever the speaker should be incapacitated, whether his incapacity should arise from physical disability or otherwise," thus making the decision a precedent to all future time. Both in Europe and in this country has it been acted on, so scrupulously, that a single instance of a departure from this rule cannot be cited. All our American legislative bodies have, *ex necessitate rei*, uniformly adopted this rule. In all of them the

clerk puts the question to the house when the speaker is not present. This rule of parliamentary law is familiar to my friend, Mr. Lowrie, who was examined before you. He has been in legislative bodies, and is familiar with their practices. He has been for several years secretary of the senate of the United States, and in his capacity of secretary, has frequently put questions to that body in the absence of the vice-president. A similar practice prevails in your own state, with the proceedings of whose legislature some of you, perhaps, may be more familiar than with the proceedings of parliament or even of congress.

But says the learned and very ingenious counsel, who in his argument has fully sustained the high reputation which he has acquired as a member of the bar, by what right shall the clerk propound the question to the house? Shall a mere inferior officer, the mere servant of the Assembly, who is not even a member of the body, and consequently is less than a member, exercise that power? Shall the clerk who is the mere hand, (I mean the writing hand,) which wields the pen of the body, exercise higher functions than a member of the Assembly can of right do? I would ask him, and I ask you, why may not the clerk exercise that right? Is not the clerk as dignified a functionary as any *pressed* member on the floor of the house. Here the argument of my learned and very worthy friend fails entirely. His argument cannot be maintained. Does he intend to say that whilst the officer elected by the house is not a sufficiently dignified person to put the question to the house, yet, any member who may rise on the floor may possess all the dignity of office, and may propound what questions he pleases, whether they be in order or not? The argument of the counsel is, (if I understood him,) that though the clerk cannot put a question to the house, yet any one else may. Will he pretend to say that the clerk is not a personage sufficiently dignified to be allowed to put a question, when it is expressly provided by the rules of the church, that in case of a certain emergency, the clerk shall exercise the functions of the moderator? In every stage of the proceedings in this case, they have ruthlessly put their feet on the principles of their constitution. I have already shown you, that long established precedents are directly against them. But I have something more forcible than precedent to oppose to their proceedings. I have the written law; for the rules laid down in the form of government of the Presbyterian Church, are law in this case; and in case of difficulty it is provided by this law, that the clerk shall supersede the members, and perform the functions of the head of the judicatory. Under the head "of the presbytery," there is a special provision, that the stated clerk shall in some cases exercise the power of calling together the presbytery, and requiring the members thereof to convene in special meeting. Thus, this extraordinary power, the very highest power of the moderator, is conferred on the clerk in such cases. The rule to which I have referred is as follows:

Form of Government, page 360, chapter 10, section 10. "The presbytery shall meet on its own adjournment; and when any emergency shall require a meeting sooner than the time to

which it stands adjourned, the moderator, or in case of his absence, death, or inability to act, the stated clerk, shall, with the concurrence, or at the request of two ministers and two elders, the elders being of different congregations, call a special meeting. For this purpose he shall send a circular letter, specifying the particular business of the intended meeting, to every minister belonging to the presbytery, and to the session of every vacant congregation, in due time previous to the meeting; which shall not be less than ten days. And nothing shall be transacted at such special meeting besides the particular business for which the judicatory has been thus convened."

Now, mark, the reference to the two ministers and two elders does not relate to the clerk merely, but to both the moderator and the clerk alike. Both are referred to the same privy council. The power of the clerk becomes in this case exactly the same as that of the moderator. When the moderator is out of the way, the clerk supplies his place. He fills the vacuum, stepping fairly into the shoes of the moderator himself, and exercising his functions. According to the parliamentary law of England, from which country we derived most of the fundamental principles of our institutions and laws, and also in our own country, the clerk is the person to put the question in case of the absence, inability, or disqualification of the presiding officer. And I have shown you that the rules governing one of the judicatures of this very church, confer the dignity and powers of the moderator on the clerk, in a case of paramount importance. I do not suppose that we can be driven from this ground. I certainly cannot think so from any thing which the learned counsel has said. We shall not, by his denunciation of the powers of the clerk; for the General Assembly itself, no longer ago than 1835, when the moderator was excused from putting the question from motives of delicacy, decided, as the parliament of England had done long before, that the clerk should put the question, though the moderator was present, and actually presiding in the General Assembly at the time.

Here, then, from every source, we have the most conclusive and satisfactory proof, that in every deliberative and parliamentary assembly in the world, the practice in others being confirmed by strong analogy and direct rule in this church, together with the precedent of our highest church judicatory, that when a presiding officer, be he president, speaker, or moderator, is disqualified or shall refuse to put the question, or when he is absent, the clerk shall propound the question to the house.

But I have not even yet completed the list of errors into which Mr. Cleaveland fell, while engaged in this single transaction. His errors, intentional or unintentional, are very numerous. In our view, every thing that he said, or did, went but to constitute an assemblage of errors. When he constituted himself moderator, he placed himself in a most unfortunate predicament. Immediately on his rising with the formal "whereas," he had to encounter points of order, which strike him in every direction, like the picture of the man in the beginning of the almanac, wounded in every vul-

nerable part of his body, and pierced in all his vitals! The motion that he made was out of order, and would of itself be sufficient for our purpose. What was that motion? He rose and moved that Dr. Beman should be moderator, or take the chair. The exact words which he used cannot be ascertained with precision, as the witnesses do not precisely agree as to the words, though they are agreed as to the substance of the motion, and *non mihi tantas componere lites.* At least four fifths of the witnesses swear, that the words which Mr. Cleaveland used were, "I move that Dr. Beman take the chair," or "be called to the chair," and with that form of the testimony the whole of the *res gestae* certainly agree. The witnesses agree that Mr. Cleaveland said that it had become necessary to organize the General Assembly of 1838: (consequently to re-organize it, as that Assembly had already been partially organized:) he therefore proceeded to another, a new and separate organization, by appointing a *new* moderator and clerks. The substance, then, if not the form of his motion was, that Dr. Beman should take the chair until a new moderator should be chosen. Accordingly Dr. Beman had no sooner assumed the imaginary chair in the aisle, (for there was no real chair in that place,) than they proceeded to elect another *new* moderator? Dr. Beman then, was not a moderator, but a mere *locum tenens.* He was but the chairman of a preparatory meeting, a meeting preparatory to their new and separate organization. For, if, according to their logic, Dr. Beman was in reality a moderator, there must have been three different moderators for the General Assembly, and all within the short space of seven, or seven and a half minutes. Dr. Beman evidently was called up merely as sort of intermediary or internuncio, to effect a new organization, and he merely sat during an interregnum. If then the proposition or motion of Mr. Cleaveland was that Dr. Beman should take the chair, (and such is the testimony of a majority of the witnesses,) it was in itself disorderly, because, under any circumstances, such an officer as an intermediary chairman, is entirely unknown to the General Assembly of the Presbyterian Church. No such officer for any of their judicatories is recognized by the constitution of the church. And for what purpose do they thus appoint an officer unknown to the General Assembly? Why, forsooth, for the purpose of presiding in the election of a moderator for their deliberations. The question then was a disorderly question, and it was propounded in a disorderly manner.

I come now to the consideration of another little circumstance in connexion with these singular and most extraordinary proceedings, the question in relation to the appointment of Dr. Fisher as moderator. This is a little thing I admit, but when a case depends on little things, it is necessary to mention them. Now, it is not material whether Mr. Cleaveland or Dr. Beman first put the question in relation to the appointment of a moderator. We have fairly placed the saddle on one of them, and they were both out of order in this particular. I wish you to pay careful attention to this point, for though it is a little circumstance, yet it has a material bearing on the cause. I have said that the question

was out of order; and *now* I ask, what question would have been *in* order? But one question could have been in order at that time, even if their other proceedings had been orderly, and that was "Will the General Assembly now proceed to the election of a moderator?" Now mark; this question was never proposed. And why? Because it would have been voted down instanter, if it had been put to the moderator, and by the moderator to the house. This question was never put, and consequently there could not possibly be any tremendous and overwhelming majority in favour of electing a new moderator. They knew that if they had put a motion of that kind, we would have voted it down *instanter*. It was therefore that our opponents shrunk from making such a motion. When they come here, endeavouring to seize our patrimonial inheritance by an intendment of law in this court, we think proper to show that if they had then made the only motion that could be legally made, we would have voted it down. But, whatever may have been Mr. Cleaveland's motion, whichever form of the disorder be fastened upon him, of this we are certain, that the question put by Dr. Beman was, that Dr. Fisher be moderator. That motion was made whilst there was a moderator in the chair. They thus dispense with the orderly question, and supersede the presiding officer by indirection; thus relieving themselves from all the awkwardness which would have attended their position, had they proceeded regularly. It is very important that you should examine this point. They neglected the preliminary question, and Dr. Beman not occupying a proper position for a moderator, but in the imaginary chair, they proceed at once to the election of a new moderator! It is not known that there has ever before been an instance of the election of a presiding officer of this body being passed by yeas and nays as a simple motion. A moderator is not chosen by a mere resolution, but on a nomination. But I will show you that two persons were in nomination, and that no question at all was ever taken on the nomination of one of them. A moderator had been previously nominated, and it was therefore a contest between these two, for the chair. As to Dr. Beman, I do not know but he had a question to read from printed minutes, as Mr. Cleaveland read from written notes; but no matter, our opponents gravely tell us that every other question was passed unanimously, while on this there were nays. They found it necessary to reverse this question, and yet the learned and very ingenious counsel himself told you that if but one person is put in nomination, it is not necessary to reverse it. He further informed you that when there is but one person nominated no vote at all is necessary, as if there is no objection, all are to be considered as acquiescing in the choice. But if two persons are nominated, the sense of the house must be taken on each nomination separately by yeas and nays. Thus then, the real question is this: there were three persons, Dr. Elliott, Dr. Beman, and Dr. Fisher, and one of these was to be chosen *extraordinary* moderator, who was to act in a new and unknown capacity. The learned counsel says that where there is but one person nominated, he may be chosen without calling for the yeas and nays.

Granted: but where two persons are nominated, it is the practice for the clerk to call the roll, when each member votes for A or for B, as he may prefer. But here are three persons to be voted for. What now is to be done, the learned counsel has not informed us. Whether they are to be amalgamated by animal magnetism, or by some process of electricity, as bits of paper when electrified are brought into juxta-position, or amalgamated into one mass. By a common rule of parliamentary law, the motion to appoint a moderator was a disorderly motion, and by their own admission, the vote on the question was disorderly. The roll of members should have been called, and the number of yeas and nays recorded as they might be given for A, B, or C. But the minutes which are the record in the case, do not show that any such vote was taken. They do not even allege that a vote was taken on either of the nominations by calling the roll, and the question relative to Dr. Elliott was not put at all. But they contend that the vote on the question of appointing Dr. Beman, was taken by yeas and nays, and that some nays were heard on that question. They have not been able to produce any evidence that nays were heard on the other questions. Consequently there is no proof that either of those questions were by yeas and nays. Dr. Beman and Dr. Fisher were chosen moderators by resolution, if they were chosen at all. And it is incompetent to elect a moderator by resolution as I have already shown to you: such an occurrence as the election of a moderator of the General Assembly of the Presbyterian church by acclamation, was never heard of before this. The record says, a motion was made, the question was put, and Dr. Fisher was chosen by a large majority. Thus was he inducted into office. But the question was not put on both sides, and it is proved by their own witnesses, that no question was put on the appointment of Mr. Cleaveland, and if Mr. Cleaveland were a moderator, the motion should have been put on himself. But these motions and questions were all out of order, as I have endeavoured to show to you. Such motions were entirely unknown in the history of presbyterial proceedings.

But there is another rule of order which must be taken into consideration here, and that is, that an individual rising in his place must address the moderator. He must submit his motion through the proper organ of communication between the individual members and the body. The presiding officer is that organ or conduit. But Mr. Cleaveland did not address the moderator. On the contrary, he turned his face from him in an entirely different direction, and towards those persons near to him and to whom he made his motion. He did not address the moderator at all, but he addressed the New School people, and to them he put the question. He did not even face the Assembly and address them, but he voluntarily got behind their backs in the rear of the whole body, and while in that position he constituted himself a moderator, and put the question on his own motion. Well, how was it with his successor? Did Dr. Beman address the moderator when he put the question on the appointment or election of Dr. Fisher? He did not. Did he assume a position where he could address the Assembly? He did

not. He too was located in the rear of the Assembly. The locality of these men during these proceedings is somewhat important. Suppose, for instance, that two or three disorderly persons in the gallery, or in the lobby, or in some nook or corner of the house, should assume the province of making motions and putting questions to the house, would such proceedings be in order?

The proceedings of these gentlemen remind me of the story of a braggadocia sort of a fellow, who, having been called to account by the court for his impudence, boasted that he had shaken his fist at the judge and called him a despot and a tyrant. "Well, how did he take it?" inquired some one that heard him. "Oh, he said nothing, he bore it all," was his reply. But being forced at length to give an explanation, he confessed that he had his cloak on, and shook his fist under his cloak, and said the judge was a tyrant below his breath. All the proceedings of these New School gentlemen were had in the rear of the body of the Assembly. Instead of addressing the moderator as was their duty by the rules of order, they turned away from him and addressed themselves to their associates. And they took a position where they could conveniently communicate with their own party, in the rear of the house. They exhibited a singular spectacle indeed.

I will now go to another point of order still more important than any that I have yet mentioned. It is indeed a paramount point that I now make. The multiplicity of these points of order, and their rapid accumulation, shows clearly that when persons undertake an act of this kind, they necessarily fall into gross irregularities, as was the case in regard to Cleaveland's proceeding. It is thus that some men hastily press on amidst tumult and disorder to the consummation of the most atrocious acts of violence. They cannot attempt to stand on these proceedings. I am now about to mention a point of order, which, if it be raised in a deliberative Assembly, prevails over every thing else, and completely rides over every other rule of order. Even if a member is on the floor in the midst of his speech, only let this point of order be raised, only let the speaker or a member even in the warmth of debate amidst the torrent and tempest of party conflict, pronounce that single word "order," it instantaneously arrests all proceedings. That talismanic word stills the tempest of strife, and all business is thereby *de facto* laid on the table for the time being. And no other business can be proceeded with, until the question of order is determined.

Now, when Mr. Cleaveland rose with all that gallimatia of a "whereas," and so forth, and so forth, one half of which he read, whilst the other half was spoken, cries of "order," "order," instantly broke forth from every point of the compass, at least from every part of the house where they might have been expected to come from, and were reiterated by many members on the floor. But Mr. Cleaveland proceeded with his harangue in spite of this point of order, and regardless of the reiterated cries of "order" from the members; thus introducing the precedent for an anomaly in legislative practice, even that of the consideration of two questions simultaneously. What in this case was the duty of the moderator?

It was his imperative duty to call Mr. Cleaveland to order. It was his duty to preserve order in the Assembly, and to do this he must enforce the rules of order. But what was then the duty of those who are endeavouring to enforce their claims in this court, on a point of order. It was their duty, at the echo of that all controlling and emphatic word, to stop all proceedings; to take their seats and await in silence the decision of the house on the point of order which they thus raised. The cry of "order," no matter from what quarter it came, was equally efficacious. It should have brought them to a solemn pause, in order that the question of order might be fairly tried. It instantly became the imperative duty of the moderator to insist on this point of order, at all hazards, and to invoke the assistance of every member in enforcing it. In accordance with parliamentary law, there is also a provision on this subject in the general rules for the judicatories of the church: (it is rule 28, in the Appendix to the Form of Government,) as follows:—

"If any member shall act, in any respect, in a disorderly manner, it shall be the privilege of any member, and the duty of the moderator to call him to order."

In defiance of the authority of the moderator, and in open violation of the dignity of the house and of the rights of every member present, Mr. Cleaveland persisted. It is no matter whether the moderator was right or not. The Assembly itself was the only tribunal which could decide that question. Mr. Cleaveland had no right to decide it himself. It was no matter whether Mr. Cleaveland was originally in order or not. The moment the moderator said "order," even if he were wrong, until the question was decided by the house, he must be sustained, and Mr. Cleaveland was therefore out of order, from that time forward.

What! are we to be told that the General Assembly has not power to protect itself from insult, that it is utterly powerless, that when we were crying "order, order," and the moderator, shocked and agitated with their lawless proceedings, was vainly endeavouring to arrest the torrent of disorder, which bore down all before it, are we to be told that we acquiesced in those disorderly proceedings, which were persevered in, in spite of our utmost efforts to arrest them? Are we to be insultingly told that by *an intendment of law* the universal cry of "order, order," which burst forth from us is to be received as the evidence of our acquiescence therein. No man who regarded the authority of the moderator, or the rights of the General Assembly, would vote on that question. If he had done so, he would have been a partaker in the disorderly and riotous proceedings of Mr. Cleaveland and his party. They did not vote, they could not. Now those very individuals who caused all the disorder on that occasion, are now endeavouring to force us by intendment of law to consider a question as having been legally and properly put which was never submitted to the moderator, but was put to a party in open defiance and contempt of his authority. It is not only enjoined on the moderator to enforce order under such circumstances, but on the members of the Assembly also.

Now, the propriety of the call to order does not depend on the

fact that one is out of order, but that the moderator, or a member, believes him to be out of order. If either the moderator or another member consider him to be out of order, the question whether he is really out of order or not must be settled by the house. Thus if Mr. Cleaveland had risen in order, and the moderator, armed with the insignia of his office, called him to order, he was bound to submit to the call until the point of order was settled. If he attempted to proceed he immediately became disorderly. All the confusion that followed resulted from this disorder of Mr. Cleaveland. The moderator did all in his power to restore order, by calling him to order and rapping with the small hammer which had been put in his hand as the *insignia* of his office. But the calls to order were not confined to the moderator. Cries of "order, order," met his ear from every point of the compass. He was altogether out of order from beginning to end, and shall they now be permitted to say that we yielded our consent by intendment of law, when we were crying "order" all the time? We intended to vote that it was out of order, and *our intendment* is as good as theirs.

But there is yet another point of order which was violated by these New School gentlemen. It is in evidence that Dr. Beman, Dr. Patton, Dr. Fisher, Dr. Mason, Mr. Gilbert, together with a great many others were standing in the aisle, and on the seats and pews at the time. Even the newly elected moderator of their party, who they say was undoubtedly in the chair, was at that time standing on his feet in the aisle, in a position more than forty feet from any chair whatever. At the same time it was that they pressed forward towards the scene of that most orderly, quiet and peaceable, and what if I say Christian-like organization. They burst forth from every direction, they rushed from the pews, and over the tops of the pews, pressing and crowding towards the scene of action, in the midst of the crowd which had congregated near the centre of the house. Now we have a rule that whenever three or more than three members are standing at the same time, the moderator shall require them to sit down, consequently, in such a case, they were *ipso facto* out of order, and must take their seats, excepting the person who might be speaking at the time, and those who refused to take their seats in obedience to the call of the moderator were guilty of a gross infraction of the rules of order, which of itself fully justified the Old School party in bursting forth in one universal shout of "order." I will now read the rule to which I have referred; it is the twenty-seventh rule, Appendix to the Form of Government, page 454.

"When more than three members of the judicatory shall be standing at the same time, the moderator shall require all to take their seats, the person only excepted who may be speaking."

This being the rule of the General Assembly is the law in this case, and every member of that Assembly had a right to demand that it should be enforced. It may be objected that the moderator and the Old School party did not require them to take their seats. Ah! but they did the same thing, though in another form of words. They uttered and reiterated the call to order. "Order," "order,"

was heard from every part of the house. When that cry was first heard, it might have been asked with propriety, "who is out of order?" And the answer might have been, "there are more than three members standing." In this case there were not only three members, for the whole association of these New School men rushed together with one accord. At least a majority of them were standing at that moment, and the whole of them were out of order, and the moderator was bound to restore order or the business of the Assembly could not be legally proceeded with.

My remarks in relation to order, have, so far, an application alike to all assemblies legally organized, of whatever profession, or in whatever capacity met, whether for religious or civil purposes, legislative or deliberative. But there is another and more important consideration involved in the present case, one of vast importance and deeply affecting the peace and welfare of society. In a civil or political assembly composed of mere men of the world, the obligation rests on all the members to observe the rules of order, an obligation arising no less from courtesy and politeness than from the necessity of having proper order in the transaction of business. On an assembly of grave divines, rest special and additional obligations. The clergy are considered as being by their ordination separated from the world, and commissioned to teach the doctrines of a holy religion, which peculiarly inculcate the principles of peace and order. They are, therefore, bound to set the example themselves. Their business and habits of mind should lead them carefully to scrutinize the maxims of propriety, to cultivate a spirit of meekness, forbearance, and proper regard to authority. It would be derogatory to the institutions of the church to suppose that they had not added something of a graver nature than the obligations which rest on other assemblies, or than are exacted from us, mere children of the world. Accordingly, we find that the twenty-fourth of the standing rules for the government of the judicatories of the Presbyterian Church, declared in these solemn and hortatory words:

"It is indispensable that members of ecclesiastical judicatories maintain great gravity and dignity while judicially convened; that they attend closely in their speeches, to the subject under consideration, and avoid prolix and desultory harangues: and when they deviate from the subject, it is the privilege of any member, and the duty of the moderator, to call them to order."

This rule is to be found in the appendix to the Form of Government, page 453.

In addition, therefore, to every thing known in other assemblies, in an ecclesiastical assembly great gravity and dignity are required whilst the members are convened, whether judicially or otherwise. Did they at that time conform to this rule? Did they give heed to its exhortation? Were their proceedings in the midst of such a scene of confusion characterized by that gravity which would add dignity to their acts and manifest the Christian forbearance becoming the professed ministers of God? If you had listened to the gentlemen who first testified in this court you might have sup-

posed so. But on the cross-examination, what appeared? Did it appear that they had quietly kept their seats, and yielded a ready obedience to the lawfully constituted authorities of the General Assembly? Did they give to the chair even the attention and courtesy which would have been anticipated in political or polemical assemblies, influenced only by the exalted obligations of courtesy and politeness which belong to the character and standing of gentlemen, irrespective of the higher claims of Christian deportment? On the contrary, what do we see? A gentleman rose and stated that something had taken place which required that a new General Assembly must be organized "at this time, and in this place," that they had been so advised by counsel learned in the law. In a hurried and broken voice, manifesting great agitation, he reads and recites, and not knowing exactly what he does, he interlards both his reading and his recitation with extemporaneous remarks, and as the confusion increases, with a trembling hand and a tremulous voice, in a tone scarcely audible, he adds, "not to appear discourteous," "in the shortest time, and with the fewest words possible." But few even of his few words, only one now and then, are heard; but he moved that Dr. Nathan S. S. Beman take the chair. Now I wish you to pay particular attention to the manner in which this motion was received by those New School men, who ought to have been bowed down under an awful sense of the responsibility resting on them, as men accustomed to exercise the functions of the sacerdotal office. How was the question on Mr. Cleaveland's motion received by them? How was it responded to? Why, by a yell of "aye," so loud as to astound the whole Assembly, and drown the calls to order. Well then, in what manner did Dr. Beman go to the chair? Did he proceed to take his station in *a grave and solemn manner?* He rushes from the pew in which he had been sitting, retreats precipitately some distance down the aisle, takes his station in the midst of his party, turns his back to the Assembly, and acting as a chairman without a chair, a moderator without the insignia of office, he proceeded to business without calling the Assembly to order, or constituting with prayer, as their rules require that every General Assembly shall be constituted. Resolute as they were, they were not sufficiently hardened to assume the humble attitude of prayer, to crave the blessing of the God of peace and order, on their confused, hurried and riotous proceedings. Dr. Beman did not address the Divine Majesty, but he immediately proceeds to put question after question in rapid succession, which being seconded by some of the party, were responded to by thundering shouts of *aye*, AYE, AYE, from those who were rushing from every part of the house, or huddled together in the aisle. Can any one suppose that that tremendous and thundering aye in the midst of such confusion was becoming the dignity of a grave and solemn assembly of divines? Only view them, pushing on to their strange destiny, dashing and foaming in their ungovernable fury from aisle to aisle, the confused noise reverberating with deafening sounds like distant thunder, until they at last rush through the open portals. Then, fearing that those who remained in mute astonish

ment at these unheard of proceedings, not knowing what was done, would be uncertain where they had gone, they send back a messenger to announce their departure. Thus from three corners of the house, successively, was the vociferous proclamation heard, that they had adjourned to Washington Square. Now I would ask you, gentlemen, if those New School members did maintain great gravity and dignity whilst they were thus judicially engaged in the preliminaries of their new and separate organization?

There is another circumstance connected with this matter which elicits a very curious inquiry in relation to this part of the case, and the consideration of which may assist you in determining whether those questions were put in such an orderly manner as to give an opportunity to all the members to vote. For even admitting that the questions were, inherently, proper questions, yet if we had not an opportunity to vote they cannot bind us by intendment of law. It will become particularly necessary to examine this circumstance, if the jury shall consider those questions lawful and orderly within themselves; for order means, in parliamentary phrase, a regular question, properly proposed in the regular succession of business, and it does not mean anything else. If the time occupied by the proceedings was not sufficient for their completion, they could not have been had in an orderly manner. In order, then, to ascertain what was the space of time between the period when Mr. Cleaveland first gave utterance to his "whereas," and the period when the New School men in a body left the church in Ranstead court, it will be necessary for you, in the first place, to fix in your minds from recollection what was the evidence on this point, of course remembering that it was intended to be done in the shortest time possible; and next inquire whether this time was sufficient for those multifarious transactions to have transpired decently and in order. The witnesses, I think, have generally put the time from *four* to *seven* minutes, and they all agree that the time was very short indeed.

[*Mr. Meredith.*—The Episcopalian, the only one examined, said *twenty* to *twenty-five* minutes.]

Mr. Preston.—As to his testimony it is very uncertain. And I beg of you gentlemen to make up your own minds as to the time, and having done so, see what was done during that time. You will recollect that, in the first place, Mr. Cleaveland made a kind of speech or recitation which occupies ten or fifteen closely printed lines; he then made a motion that Dr. Beman take the chair, and put and reversed the question on that motion audibly and distinctly. Some of the witnesses, if I recollect aright, said deliberately. So much for Cleaveland. Then in regard to Dr. Beman's agency. Dr. Beman having marched backwards down the aisle and taken the imaginary chair, a motion was made for the appointment of temporary clerks, on which also, the question was deliberately put in the affirmative and in the negative. Then followed the nomination of Dr. Fisher for the office of moderator, with the question thereon both put and reversed, and next the appointment of a stated

and permanent clerk, in a similar manner. Finally, came a motion for adjournment, also put and reversed.

Thus then there were no less than fourteen questions (and I do not know but there might have been eighteen or twenty) put and reversed, and the vote taken audibly and distinctly on each in a period which is admitted to have been very short. Now I venture the assertion, that if so many propositions were acted on in the longest time suggested by any one of the witnesses, the historical records of the world do not furnish a case of similar despatch in business in any body governed by parliamentary rules.

Why, gentlemen, it was the creation of a world, as regards the Presbyterian Church. The creation of the world which we inhabit occupied the wisdom and power of the Omnipotent Creator for six days, but here was one world destroyed, and another world created, and all occupied but from four to seven minutes.

I well know, how wearisome these minute investigations must be to your honour, as well as exhausting to the patience of the jury, and nothing less than an imperative sense of duty could impel me to resort to the alternative of dissecting this case in this manner. It is necessary that I should claim your indulgence, for I apprehend that I am not going beyond what the exigencies of this cause demand. I will, therefore, endeavour still further to strengthen myself as to the position that Mr. Cleaveland was out of order, from beginning to end, by showing that they could not have been otherwise than out of order, that they did not intend to be in order, it being their purpose to organize a new and separate body, entirely distinct from the General Assembly of the Presbyterian Church, and they cannot now avail themselves of the advantage of an intendment of law, for maintaining the contrary. I will show that the gentlemen, in point of truth, have never considered themselves as acting in conjunction with the General Assembly, either then or since. I undertake to sustain the bold proposition that in their own secret hearts they never considered us as participating with them, nor regarded themselves in reality *with us*, but that they entirely segregated themselves from all connexion with us. I have entered into the minutia of this investigation for the purpose of showing that it was utterly impossible that these gentlemen should consider themselves as the rightful inheritors of the name and property of the Presbyterian Church. This, to some gentlemen, may seem bold language, but I expect to search the course of these men through and through, and to see their nerves tremble under the investigation. I now propose to aim a blow at the head of their case, which must put an end to its existence. I will show you that they did not consider themselves as any part or parcel of us or of the same Assembly with us; and the first witness that I shall call in support of my position is Mr. Cleaveland himself. What does he say? The paper which has been offered in evidence, being a part of the minutes of their New School Assembly, is not the same that he read in Ranstead court. The original paper, which it is very desirable should meet the public eye, has been carefully concealed from public view, but this has been adopted as containing the substance of

the original, and I wish you to mark its language. [See page 260 of this report, at top.]

Thus, these New School men have thought proper to give the substance only of that extraordinary paper. We can neither obtain the original nor an exact copy of it. Why was not a true copy of the original paper that was submitted to the General Assembly recorded on their minutes? Why the original cannot be found is a query that I should like to hear satisfactorily answered. But according to their statement, the language of their organ, Mr. Cleaveland, was, "As *we* had been advised by counsel learned in the law." Who were the "*we*" that had been thus *advised?* Had *we*, the Old School men? Did *we* institute those extraordinary proceedings? Did Mr. Cleaveland mean to intimate that we, the Old School members, had been so advised? He could not mean the *Old School* party, because he did not address himself to them. He did not mean the General Assembly itself, for he did not address the moderator, who was the presiding officer of the Assembly. It is therefore evident that he used the word "we" as a designation of himself and his party; thus separating himself at once from those denominated *Old School* men, and whom they now wish to make a part of the "we" by intendment of law!

But to enter a little further into an examination of that remarkable paper. I find in it this language: "He trusted it would not be considered an act of discourtesy." *Discourtesy*—to whom? Surely not to those who had appointed him to be their spokesman on that occasion; but to us of the *Old School* party. He meant to say, and in effect did say, "I trust, gentlemen of the Old School, that it will not be considered discourteous to *you* if we proceed to organize ourselves as the General Assembly of 1838." Is it not clear that *that* was what they intended, even an organization of themselves separate from us? As to Mr. Cleaveland, he was the selected organ of a body of men to which we did not and do not belong; and they appealed to the courtesy of the Old School party not to interrupt them.

I will not so far implicate these *New School* gentlemen as to suppose that they were then deliberately setting a trap or pitfall in which to catch their brethren unawares, by a mere *intendment of law*. No, they did not at the time intend such treachery. But, supposing that we had so far acceded to their request as to agree to stand aside, as mere lookers on, in silence, while certain acts were performed, are they to be permitted to come into this court and say, "Gentlemen, you acceded to our proposition out of courtesy, and remained silent whilst we performed certain acts which we could not have performed elsewhere; and we have since found out that we can take advantage of you, and by a legal intendment we can construe your silence into an acquiescence with our acts?" Would you, gentlemen, by your verdict, sanction such a gross fraud? You cannot do it. Their questions were clearly put to themselves exclusively, and not to us. The preceding motions of Dr. Mason and others were propounded to us through the moderator, but Mr. Cleaveland's motion was not proposed to us at all. He did not ad-

dress the moderator. His motion was addressed to the New School party only, and not to the *Old School* men. He did not intend to address himself to us, nor was he so understood at the time.

But let me again suppose a case. Suppose that paper of Mr. Cleaveland had not revealed their intentions. Suppose that there had been a previous understanding that the Old School men should remain silent spectators of the scene. Suppose that understanding to have been in consequence of a messenger sent by these New School gentlemen, for the purpose of entrapping us, with a request that we would be silent whilst they effected a separate organization of their party. And suppose that under such circumstances they should subsequently tell us that we had depended on a delusion, on a false security. What, gentleman, would that be, but the setting of a legal steel-trap? Such conduct is not practised by high-minded and honest men, or by honourable Christian gentlemen; and I insist that no court of justice would sustain the fraud. Yet I really cannot perceive that this supposable case is stronger than the real one; that is, if our adversaries have really done what they now pretend. What are the facts in this case? Mr. Cleaveland rises in the rear of the Assembly, and says, "We desire to proceed to a matter of business, and as it is of very great importance to me and my friends that we should improve this present time, and act in this place, I hope that we shall be permitted to proceed without interruption—particularly as we mean nothing discourteous." He was aware that he was placing himself in a most extraordinary attitude, and he therefore urges the plea of necessity, at the same time begging that his conduct might not be considered discourteous. So forcibly was Mr. Cleaveland struck with the impropriety of his conduct, that he thought it right to apologize to the General Assembly for the interruption that he gave; and the words which he used, most certainly implied that he was asking permission to proceed with the contemplated matter of business.

But that important word *we* shows conclusively that our opponents did actually intend a separate and ex-parte organization. By that one word, in the manner and connexion in which it was used, the conclusion that they did not mean to include the Old School party, and did not address themselves to them, is completely clinched and riveted on these New School gentlemen.

But I intend to leave no room for any dispute respecting the part they considered themselves as acting at that time. Out of their own mouths they shall be judged. By their own testimony you shall convict them. In a paper which was issued by the Assembly of this New School party, after their separate organization, there is a passage in which they give a solemn exposition of what they had done. It is in what is called the Pastoral Letter, which they addressed to the whole of the Presbyterian churches in the United States of America, and which was no doubt intended as a full exposition of their proceedings to all the Presbyterian churches throughout Christendom. And I venture to say, that if you shall be satisfied that they have really done what they say here, it is utterly impossible that your verdict should be in their favour. In this

Pastoral Letter they recognize the existence of two distinct parties in the Presbyterian church, and mention the differences which had arisen between them, which differences they lament. They next give a statement of the plans and propositions that had been made with a view to effect the restoration of peace. But, to the Pastoral Letter itself. [For this Letter, from which Mr. P. made several quotations, see page 219 to 222 of this Report.] "We did"—"we" again: and who are the "we" that had taken "advice of counsel learned in the law?" Had *we* of the Old School been so advised, before the session of the General Assembly of 1838? Had we the General Assembly, or we the Old School been apprised by learned counsel as to the effect of an intendment of law? Had we, in a meeting for consultation and prayer, on the 15th day of May, 1838, sent a proposal to commissioners to the General Assembly which were met in another place. Was that meeting for consultation identical with the General Assembly of the Presbyterian church, or can we by any trick or intendment of law be identified with it, either as the whole or a part thereof? Strange, indeed! Well, "we did" all this, and then "it was resolved by the meeting," that is, we resolved, "that should a portion of the commissioners to the next General Assembly attempt to organize the Assembly, without admitting to their seats, &c., it will then be the duty of the commissioners present to organize the General Assembly of 1838, in all respects according to the constitution," and so on. Take notice, gentlemen, "the commissioners present" were "to organize the General Assembly of 1838," if a certain emergency should occur. Where were they present? In the General Assembly? No: that body had not yet convened; but present in the "meeting for consultation." They were the "we" of the consultative meeting, the "we" who "acted under the advisement of counsel learned in the law." The New School party resolved, "that should a portion of the commissioners," that portion which were then in session "in another place," the Old School portion, attempt to do a certain thing, in any other way than that which met their approbation, then it would be the duty of "the commissioners present," that is, the New School, "to organize the General Assembly of 1838." Thus this New School Assembly identify themselves with a previously consulting body, who resolved that they would organize separately from the Old School commissioners, and then claim to be the General Assembly of the Presbyterian Church by an intendment of law. Such was the character of their resolution, as will clearly appear when it is dissected and exposed in its true colours. They go on to say, "By this answer all prospect of conciliation, or an amicable division of the church, being foreclosed, we," the same, the identical "we," "did, after mature consideration and fervent prayer, proceed, at a proper time and place, to organize, in a constitutional manner, the General Assembly of 1838." After this, will any man, learned or unlearned, pretend that we of the Old School acted with them, either by intendment of law or by any other intendment whatever; that we had previously consulted with ourselves, sent a messenger with a communication to ourselves,

returned an answer to ourselves; that we were both present and absent, there and "in another place" at the same time; and that we "proceeded to organize" their Assembly, or assented to their organization? We did not regard the question on their separate organization as being put to us of the Old School party. They did not so regard or intend it, and we did not intend it so. We had not the opportunity to act with them. It was wholly an act of their own; an act relating to themselves only, and of course utterly null and void as regards us.

Gentlemen of the Jury: I am aware of the tediousness of the minute investigations into which I am entering. I am aware, gentlemen, that your patience must be severely tried, but I feel that I am performing a most solemn duty. The case, as you are well aware, is one of very great importance, and, in consequence, I feel an additional obligation resting on me to endeavour to clear up every thing in relation to it. A faithful discharge of the obligations imposed on me, requires that I should omit nothing material to the issue; because I do not stand here as counsel for the defendants merely, but engaged in defence of the rights and privileges of the thousands and tens of thousands of Presbyterians densely scattered over the length and breadth of these United States. The aspirations now ascending from a thousand pulpits on our behalf, awake me to a full sense of the momentousness of this most important cause. I crave of you, therefore, not to suffer your patience to become entirely exhausted; and I trust, however feebly I may be able to go on to the termination of my argument, I shall not abuse your confidence, if you grant me the indulgence which I now ask.

And may it please your Honour: I have nearly brought to a conclusion the examination of the several points of order which are involved in this case; and it appears to me that I have completely undermined the foundation of our opponents, and effectually demolished their superstructure. But, though I consider the monster as now completely prostrated, beaten to the ground, yet I will give this hydra one or two blows more, lest, perchance, there should be life left in it.

Mr. Cleaveland was out of order. That fact is established, beyond all controversy. For before he rose, a motion, as appears by the testimony, had been made to the Assembly through the moderator, for the appointment of a Committee of Elections. Now, any question raised whilst this was pending, unless it had relation to the subject matter of that motion, was disorderly. The fact that that motion had been made before Mr. Cleaveland rose, shows that it was then the pending question; and a subsequent question which is irrelevant to the purposes of another question which had been antecedently raised, is *ipso facto* out of order. I leave out of view at present the motions of the other gentlemen, together with the demand of Mr. Squier, and confine myself to the consideration of Mr. Cleaveland's proceedings. His motion was not connected with the pending question, nor was it germain to the determination of that question, either as an amendment or as an independent question. It was not a privileged question, for the appointment of a

moderator is not such. Besides, it was the standing order of the Assembly that the appointment of a Committee of Elections should be the first business, and there is a parliamentary rule that a subsisting order of the house must invariably, in all cases, take the precedence of all other business. So completely does the standing order of the day override and take precedence of every thing else in parliamentary bodies, that the moment the call is made for "the order of the day," all other business is suspended, and that question is immediately taken up. It is a privileged question which overrides all other privileged questions, and any member may, against the consent of the house, force this question to be taken up. That such was the case with this question is rendered clear by a reference to the minutes of the Assembly for 1826, page 40, where this rule is found:

"The first act of the General Assembly, when thus ready for business, (that is immediately after the clerk has read the roll or report of the Committee of Commissions) shall be the appointment of a Committee of Elections, whose duty it shall be to examine all informal and unconstitutional commissions, and report on the same as soon as practicable."

By this standing rule the first act of the Assembly, after the reading of the report of the Committee of Commissions, is the appointment of a Committee of Elections. Now the execution of this rule was a matter of course. It was the duty of the moderator to enforce it, even if no motion to that effect had been made, and any member was privileged to call on the moderator for its enforcement, and the rule was fundamental. A compliance with it was the first act which the General Assembly could orderly perform. Any person introducing any other business, therefore, was *ipso facto* out of order. In this case, the execution of this fundamental rule had been called for; a motion had been made to that effect, when Mr. Cleaveland rose and made a motion in defiance of the established order of the General Assembly and of the motion for its execution; and not only this, but after he was informed by the moderator of the existence of this rule, he obstinately persisted in his course, though he knew that he was out of order.

It is true, that the moderator did not enforce this rule of order, and why did he not enforce it? Dr. Elliott has told you, on his solemn oath, that he could not, because of the disorderly conduct of Mr. Cleaveland, and his pertinacious persistence in that disorderly conduct. He has distinctly informed you that he was called on to enforce it; but he found it impossible during those disorderly proceedings. And he has told you further, that it was enforced soon, or immediately after Mr. Cleaveland and his disorderly associates had left the house.

The rule to which I have adverted is of the most general and common application of any rule of parliamentary law in existence. It applies equally to every deliberative body in the world. *John Hatsell* lays it down in these words, (I read from vol. ii., page 113.) "Indeed the doctrine of any one member having a right to insist upon any thing appears to be absurd; for another member may insist

upon the contrary: and, therefore, in all cases whatever, the only method of deciding whether any thing shall, or shall not be done, or how it shall be done, must be by moving a question to the house; that question to be seconded, and proposed from the chair, and the sense of the house taken upon it."

This is the general doctrine of parliamentary law as laid down by Hatsell. The exception, which is to my present purpose, he gives in a note to the precept just read, as follows:—

"The only exception to this is, when a member calls for the execution of a *subsisting order of the house*. Here the matter having been already resolved upon, and ordered by the house, any member has a right to insist that the speaker, or any other person, whose duty it is, shall carry that order into execution, and no debate or delay can be had upon it; and this frequently happens in the case of admitting strangers into the gallery, the clearing the lobby of footmen, telling the house when notice is taken that forty members are not present, &c.; every member being entitled to have the orders and resolutions of the house carried into immediate execution; and in this case, the member does not properly *make any motion*, but only *takes notice*, that the orders of the house are disobeyed."

It is useless to exhaust your patience by discussing this principle of parliamentary law. You see that Hatsell introduces it as an incontrovertible and established doctrine. However unreasonable the member may be in insisting on his right, "the matter having been already resolved upon, and ordered by the house," must be taken up when any member insists on it, and that without "debate or delay."

If the house does not choose to conform to this rule, it can get clear of the difficulty in but one possible way; and that is, by repealing or suspending the order. And that can only be done by a deliberate and solemn vote of the house, two-thirds, or whatever established proportion, of the members voting in favour of such a repeal or suspension. Until it is repealed the rule is the law of the house, and any member may compel its execution. Thus, in illustration of this point; if the Senate of the United States, or any other parliamentary body, (the General Assembly of the Presbyterian Church, for instance) has decided that a particular question (the appointment of a Committee of Elections, or any other) shall be the order of the day at 12 o'clock on a particular day, when the hammer of the clock strikes the bell, announcing the hour of noon, the order of the day must be taken up, and all other business must be instantly suspended. A member in the midst of his speech, yea, even in the midst of a half uttered sentence, or word, is instantly arrested. The voice of that inanimate instrument is sufficient to arrest the tongue of the eloquent orator, and if he should fail to pause at the first reverberation of its sound, at that juncture, he would be called to order, and that instantly. However the house might prefer to listen to an interesting speech, unless the order is solemnly repealed, any one member may compel all the rest to a compliance with his wishes to proceed to the order of the day. This is the only alter-

native to avoid leaving important business to be attended to or not, according to whim or caprice. By this fundamental rule of order then, no other business could be brought before the Assembly until the appointment of the Committee of Elections was disposed of. Even if other business could have been previously brought before the house, in an orderly manner, its suspension must instantly take place when that order was called for. It is, therefore, perfectly a matter of indifference, whether the call for the appointment of a Committee of Elections was made before or after the paper of these gentlemen was read, or the motion of Mr. Cleaveland made, as that call was in order at any time; and not merely that, for it completely rode over all other questions, and put them out of order the moment it was made. It completely crushed every thing else, and more especially Mr. Cleaveland's proposition. Pending the decision of this question, no man had a right to propose another question. Nay, even the moderator himself could not put another question to the house: even if another were proposed, the members of the house were not compelled to pay attention to it, or bound to vote for or against it.

Yet during the pendency of the question on the appointment of a *Committee of Elections*, Mr. Cleaveland and his associates proposed at least half a dozen other questions, and, if we credit their assertions, they took the sense of the house on each one of them. The moderator swears that a motion for the appointment of a Committee of Elections had been made, and he had a right to know that fact. There could not be an intendment of law in this case. I will maintain it, there can be no legal intendment without the question being in possession of the whole house, which Mr. Cleaveland's question, and those which followed, obviously *could not be*, in this case. Even if the whole house had entertained those questions and voted on them, it would have been of no avail. The moderator was opposed to them and their proceedings, and in the rightful discharge of his legitimate functions, was endeavouring to maintain the existing rules of the Assembly, and striving with all his might for the restoration of order. The moderator then would have been right, and the whole house wrong. I raise this point of order, and I put it on these three grounds, that it is sustained by a standing rule of the General Assembly, by the universal practice of parliamentary bodies, and by the high authority of old John Hatsell, whom I have before quoted.

I now dismiss Mr. Cleaveland, and proceed to show that all these gentlemen were out of order. This I propose to establish in such a manner as I think will effectually turn these gentlemen, all of them, out of court.

The unauthorized, individual interference of Mr. Cleaveland, was in several particulars altogether disorderly. Unless greatly deceived, I have shown this to your full satisfaction. Now, he made his motion on the alleged ground that the constitutional officers of the General Assembly had refused to do their duty. The three gentlemen, Dr. Patton, Dr. Mason, and Mr. Squier, had each of them offered a resolution, prior to the complete organization of

the General Assembly, and because the moderator declared those resolutions to be out of order at that time, it is now alleged that the officers were removed for refusing to entertain those resolutions. Thus, according to their statement, they proceeded to organize the General Assembly because Dr. Elliott, the moderator, had declared that certain motions were out of order until the complete organization of the General Assembly should be effected. Now, gentlemen, what do you think of their process of completing the organization of the Assembly, prior to the reception of those motions, and the passage of the questions consequent thereon? They say that they dissolved our Assembly because we refused to perform a certain thing which they deemed essential to the existence of the General Assembly; and yet they themselves afterwards neglected to do that very act, the non-performance of which they so pointedly condemn in us. After they had chosen Dr. Beman as chairman in the room of Dr. Elliott, they proceeded to elect a moderator and clerks, and then adjourned to another place, and there those resolutions were again presented, put and carried. They however fully completed the organization of their Assembly before the said resolutions were offered to it, much less passed. *We* could not organize the Assembly before receiving certain resolutions, and yet they could organize an Assembly before the reception of the very same. Ah! but we could not do it constitutionally because we had excluded or refused to admit certain persons; yet they could, and did organize themselves without admitting those very persons. They admitted them afterwards; and so might we have done, and there is no evidence that we would not.

But if the refusal to admit those persons was the ground of their proceedings, why was Mr. Cleaveland selected to make the motion? Why did not Dr. Mason make the motion? If any one of them had any right to complain of the moderator or to make a motion for his removal, it was Dr. Mason, and not Mr. Cleaveland. If Dr. Mason were dissatisfied, he should have said, the moderator has refused to entertain my motion and appeal, and I move that he be deposed, or removed from office. Well, whatever was their real ground, they proceeded to the organization, and having declared their Assembly completely organized, they then adjourned to the Presbyterian church on Washington Square, and *there* the resolution of Dr. Patton was again offered, and was adopted. I will now read their own version of their proceedings from the New School minutes. "The moderator then audibly announced that the General Assembly was so adjourned, and gave notice, that any commissioners who had not presented their commissions should do so at the First Presbyterian church."

They give us further information of what were their proceedings after they had re-assembled in the First church. They say: "The Assembly being again met at the lecture room of the First Presbyterian church, Dr. Patton again offered his preamble and resolutions as follows, which were unanimously adopted."

And yet our moderator and clerks were turned out of office, and the General Assembly resolved into its original elements, and then

by them re-organized from those elements, because they had not received the said motions previous to the election of a moderator, the very same thing that was done by these New School men immediately afterwards. They passed those resolutions for the first time after their "being again met at the lecture room of the First Presbyterian church." And there, for the first time, are the commissioners from the four excinded synods admitted to their seats. Though these gentlemen have so loudly complained of our moderator and clerks, for not admitting those delegates previously to the house being organized; yet so fully do they recognize the propriety of our course in that respect, that they act precisely in the same manner. For though those delegates from presbyteries within the bounds of the excinded synods, voted on the questions which were severally put by Mr. Cleaveland, Dr. Beman, and Dr. Fisher, yet after every one of those questions had been finally determined, the resolution was first adopted, that those delegates should be allowed to vote.

This proceeding of these New School men reminds me of the story of the Satyr in some of the Arabian Tales, which blew hot and cold with the same breath. Every one must be struck with horror at the monstrosity. By adopting these resolutions of Dr. Patton's, they in effect admit the validity of the proceedings of 1837, in so far at least that they precluded the admission of these members in 1838, till the Assembly should be fully organized. Thus these gentlemen sanctioned, by a "unanimous" vote of their house, all that we had proposed from the beginning.

Yes, may it please your Honour, they censure our moderator depose him, and divest him of his official dignity; and they turn out our clerks neck and heels, for the very act which, immediately after, they fully sanction by their own unanimous vote.

The last of Dr. Patton's series of resolutions requires the clerks, of course the new clerks of their newly organized Assembly, "to form the roll, by including therein the names of all commissioners from presbyteries belonging to the Presbyterian Church, not omitting the commissioners from the several presbyteries within the bounds of the Synods of Utica, Geneva, Genessee, and the Western Reserve." In virtue of this adoption of the resolution just read, those delegates came in, for the first time, after the extraordinary anomaly had been exhibited of their voting on the question of their own admittance. By their own admission they were out, and voted on that and other questions before they came in. Such were the shifts to which our opponents were driven, and such are the difficulties in which they have involved themselves. There is a tissue of blunders interwoven throughout the whole of their proceedings. Men always entangle themselves in difficulties when they attempt measures of this kind, as the spider is sometimes entangled in his own web, which he has interwoven with so much ingenuity and care for the purpose of entrapping the unwary fly.

> "A tangled web like that which spiders weave,
> Men form, when thus they practise to deceive."

Thus, then, these gentlemen have been caught in their own trap. They have violated their own rule. They have undermined their own foundation. They have subverted their own principles. They turn out our officers for not doing what they would not give them an opportunity of doing in the only way in which, according to their own acts, it could be done.

I will now leave the consideration of those proceedings which were consequent on Mr. Cleaveland's motion with you, gentlemen of the jury, and proceed to another point in the cause. I will now take a more general and comprehensive view of the proceedings in organizing the General Assembly of 1838. I have not yet occupied as much of your time and attention as was consumed by my learned friend with his exordium, and I will not take up much time in the consideration of the proceedings of 1837. I suppose, however, that in my effort to lay before you the facts only of this important case, I shall probably consume as much time with the substance as he did with the shadow. The first remark which I will make in relation to the organization of 1838, is this: If the acts of 1837 were valid and legal, then, in any point of view, the organization in 1838 by the Old School party was in all respects a correct and constitutional organization of the General Assembly of the Presbyterian Church. And further, you may make those proceedings of 1837 as incorrect, unconstitutional and illegal as you please, and it will not affect the validity and constitutionality of our proceedings in the organization of the General Assembly of 1838. Those proceedings in 1838 were on their own ground correct and constitutional, and can be vindicated in a court of law, either with or without reference to the acts of the Assembly of 1837. The General Assembly of 1838 was *de facto* a new Assembly, wholly independent not only of the General Assembly of 1837, but of all former General Assemblies. And the proceedings in 1838 were wholly independent of those in 1837. There is no necessary connexion whatever between the two, except as the Assembly in 1837 provides the elements to effect the organization of that in 1838; and the acts of the General Assembly of 1838 were substantially correct within themselves. Now it is not denied that by certain resolutions of the General Assembly of 1837, the names of the commissioners from four synods were stricken from the roll of members. They were stricken from the roll because it had been satisfactorily ascertained that they had not been elected by a proper constituency; and that Assembly at the same time, by a solemn act, decided that they should not be considered a part of the General Assembly of the Presbyterian Church in the United States of America. Here two questions naturally arise, and it is necessary that we should carefully distinguish between them. The first question is, Were the acts of exclusion legal and valid? The second is, If those acts were invalid, what then was the duty of the clerks, and of the moderator who presided over the General Assembly at its organization in 1838? I propose now to examine both of these questions thus presented to you, commencing with the latter.

Supposing, then, that those acts of exclusion were invalid, unconstitutional, null and void, as our opponents assert; that the Assembly of 1837 had no right to exclude the commissioners from those synods, nor to declare those bodies out of the connexion of the Presbyterian Church; what then was the duty of the moderator and the clerks, who were the elements of the General Assembly, the only elements which had survived the dissolution of the Assembly of 1837? Now an inquiry arises, Who and what is the moderator? He is the executive organ of the General Assembly. It is necessary to an understanding of this case that you should fully comprehend the exact nature of the moderator's office. In the book which contains "The Constitution and Form of Government of the Presbyterian Church," cap. 19th, his duties are prescribed and his authority defined as follows: I will read the rule. [See this Report, page 262.] You will perceive, gentlemen, that by this constitutional law of the General Assembly, the moderator is made the general depositary of the power inherent in the whole Assembly, for the purpose of executing the rules of order in effecting the organization of the body. He must therefore preside and preserve order, till the next moderator is chosen, being, as he is for this purpose, the organ of the house, and the only medium of communication between the individual members and the house itself. There is no discretion vested in him to judge of the propriety or impropriety of any law which may have been enacted, or of the constitutionality or unconstitutionality of any thing which may have been determined by the Assembly. And so it is with all executive officers. Their business is simply to execute the laws. An executive officer cannot say, "The law is unconstitutional: ergo, I will not carry it into execution." Though it be in his private judgment unconstitutional, the law enacted by the competent authority is in full force, and cannot be repealed or nullified by a mere executive officer. That must be left to the law-making power.

Now, let us apply these well established principles to those who were the executive and presiding officers of the General Assembly at the organization of that body in 1838. Clearly they must do this in obedience to the requisitions of the existing laws of the General Assembly. On proceeding to the fulfilment of their trust, they find recorded in the minutes of a former year, an act of that body, unrepealed and in full force, requiring them to exclude persons of a certain description from the roll. What are they to do? The answer is plain. They are to execute the law. The only body that can repeal an existing law is that in which the legislative power is vested. And the judiciary is the only tribunal which is competent to declare a law unconstitutional. Admit then that the acts of the General Assembly of 1837 were unconstitutional and unjust, I would ask you, were the moderator and the clerks so to pronounce them? What would we think of mere executive officers who should say, "We will do our duty in accordance with our own opinions of right and wrong; we will take the responsibility, and administer the laws as we understand the constitution?" I hold that they were bound to execute the order of the Assembly, even

though persuaded that it was unconstitutional. If that were the case, they took the only legitimate course. They expressly said, "We are bound by the law so long as it remains unrepealed." And when it was urged on them that they should enrol the excluded commissioners, they inform those commissioners that their rights must be adjudged by the General Assembly, and that they had no discretion in the case. Had they acted otherwise, they must have perpetrated a most preposterous act, transcending their powers, and assuming that they could repeal a solemn act of the General Assembly. That would have been "taking the responsibility" with a vengeance. The General Assembly only could repeal that act, and did repeal it, if the relators in this case are the General Assembly. If they are to be believed, they finally determined the question, with the full knowledge that the clerks could not so determine it. By a solemn and formal vote of the house, they repealed those very enactments which they now say were so utterly unconstitutional, null and void, from the time of their enactment in 1837, that Mr. Krebs and Dr. M'Dowell should have disregarded them entirely, or that they should have repealed them on their own responsibility and by their own authority, independently of the General Assembly. But these executive officers acted at the commencement of the new Assembly merely by virtue of their appointment in the last Assembly. The General Assembly of 1838 was in some sort propagated from them, as the germ which had been provided for its organization by the General Assembly of 1837. They were the connecting link between the old Assembly and the new. It has been stated to you that they were acting in obedience to pledges which had been exacted of them. Now, whether this allegation be true or false is not very material, as it is irrelevant to the case at issue. But it is not true in point of fact, nor is it true by legal intendment, because the clerks obviously did not intend to pledge themselves. The whole difficulty here is in the manner of using many ambiguous words and phrases in the English language, by which men are oftimes enabled to "keep the word of promise to the ear," whilst they "break it to the hope." I deny that there was any pledge given. The clerks refused to give any pledge when it was exacted. Those officers, when the resolution was offered requiring a pledge of them, replied, "I will give no pledge, but I think it right to tell you what I consider to be my duty." If these were not the exact words, the declaration was the same in substance. Of their own accord, they declared what they would do; a very different thing from what the other side charge them with. Besides, no pledge ever was required of the clerks. The Assembly did not agree to Mr. Ewing's resolution. He offered that resolution of his own accord, and when he found that the clerks refused to give a pledge, (though they declared their intentions,) he withdrew it of his own accord. So, their rejection of those commissioners was not a consequence of Mr. Ewing's resolution, nor of a pledge from the clerks, but it was the result of their own conviction of duty. They acted voluntarily, and therefore independently of the General As-

sembly of 1837, except that they relied on the acts of that former Assembly as authority.

Now, gentlemen, even admitting those acts of 1837 to be unconstitutional, they are the law, and an unconstitutional law must be executed or enforced whilst it is law. That unconstitutional law can be got clear of only by legislative or judicial authority. The clerks were bound by the law, and it was their indispensable duty to aid in carrying it into effect. It was competent for the General Assembly of 1838, to repeal the law which had been enacted by the General Assembly of 1837. The clerks, therefore, were right in referring the whole matter to the house for its decision. They could not have been right, had they acted otherwise than they did. They only fulfilled their duty in accordance with the law, as I have adduced sufficient authority to show. It was the duty of the clerks first to decide whether a commissioner is entitled to his seat in the Assembly, and in this case they decided by saying, "We will not admit the party to the roll." Who then shall admit them? Why, the house; because the house, and the house only, has power to admit them, by a repeal of the law. And what is the house? Is it every body who may chance to be within the walls of the building? The house undoubtedly is composed of those persons whose right to seats was not contested. The inquiry then arises, when can the house admit one who is disputed? Can it do so before or after its organization? It is self-evident that the organization must be completed before the delegates can compose a house capable of transacting business. In the present case, the clerks having rejected certain persons who claimed to be commissioners duly elected, it became necessary to inquire how those commissioners came there. To make this inquiry, the rules of order provide for a Committee of Elections to be appointed by those commissioners whom the clerks had admitted. This proceeding is made absolute by a standing rule of the body. The reasons which influenced the judgment of the clerks in their decision are not open to inquiry. With those reasons we cannot meddle unless you make a civil court to entertain an appeal from the decision of an ecclesiastical tribunal in relation to a matter which is unquestionably within the jurisdiction of such ecclesiastical body. May God in his wisdom forbid that this, or any other civil court, should ever maintain so monstrous a doctrine. No matter whether the decision was right or wrong, it is not a question for this court to determine. A civil court cannot have jurisdiction in the case. Otherwise you produce the anomalous and monstrous result of amalgamating the church and state, and put it in the power of the civil magistrate to decide questions of conscience; a monstrous result indeed, and one to which none of us would be willing to submit. Until, then, the question of the disputed commissions was referred to the Committee of Elections, and they had reported, the direct question on the admission of those members could not be brought before the house. That was the way to bring the question before the house. That course was open to these gentlemen. Or they could then have moved the repeal of the acts of 1837. This course was open to them, and they knew

it. They knew too, that if the General Assembly of 1838 should decide against them, if that body should by a solemn vote determine to abide by the decision of the General Assembly of 1837, then the very questions which they are now so very desirous to present might have been raised. Why then did they not pursue this course? The reason is evident. If they had done this, they would have manifested their submission to the law, and afforded an opportunity for the question to be fairly met and decided by those commissioners who had been admitted because their seats were undisputed. But this was the last thing which they intended to do. How absurd is any other course, is obvious from the fact that it would involve the anomaly of individuals voting on the question of their own admission to a seat. But as to the time when this proceeding might have occurred, though it is not material, yet I will put myself on this ground also.

Before the report of the Committee of Elections the Assembly was but in an inchoate state of organization, and existed in this state by virtue of the acts of a previous Assembly; and during the process of its organization, the officers of that previous Assembly perform their respective duties as officers in the present Assembly, for the purposes of organization merely.

In the first place the General Assembly is constituted with prayer by the moderator of the preceding Assembly, and being thus constituted proceeds to the business of forming the roll of its members, by which the Assembly is organized, and until the organization is completed, there is no house for the transaction of ordinary business. There was no house by which any name could be added to the roll reported by the clerks. I put the question to you, could they be added whilst the house was not yet organized? I know that you will agree with me that they could not. But these gentlemen were too impatient. They made their motions whilst the Assembly was in its inchoate or incipient state, whilst there was in fact no house. Who were to vote on the question? Who were the Assembly? Do they mean to assert that the Assembly was that mixed crowd which thronged every avenue of the church in Ranstead court, from the floor to the galleries, the men, women and children who listened to the sermon and constituting prayer of the moderator, or even all who might pretend to be members? Such an assumption is an absurdity. That body was, at that time, composed of those members only who had produced undisputed credentials, and all of this description must have been admitted to their seats before the organization could be completed, or the Assembly could perform one valid act, except such as had immediate connexion with the organization itself. The number of such undisputed commissioners is not material, provided they amount to fourteen, nor is it a material point whether they composed the majority or the minority of those claiming seats, they, and they only, were the persons to whom a question could be legally put. As to the ascertainment of who are entitled to their seats, the rule decides how it shall be done. In the first place, all the commissioners were required to present their commissions to the clerks, who, as a

Committee on Commissions, were to examine them, to decide as to their validity, and report the roll to the Assembly. In the second place, disputed and informal commissions were to be referred to the Committee of Elections. The moderator then proceeds to the organization, by throwing off the exuviæ, or those whose credentials were irregular or disputed, and declaring those reported by the clerks to be members of the house.

Now, in connexion with this organization of the Assembly, there is another circumstance which deserves a passing notice. It is this. Dr. Elliott was not our moderator. Suppose, then, that he did wrong; his wrong is not to be imputed to us. We did not even appoint him. He was not our moderator. Our opponents say that the conduct of the moderator vitiated the organization of the General Assembly of 1838, and therefore authorized them to do what they did. They cannot substantiate this allegation unless they can make it appear that the moderator had control of the Assembly, or was the Assembly itself. Dr. Elliott was in fact the moderator not of 1838 but of 1837, and was to continue in office only to preside at the organization of the General Assembly of 1838. They were continued in office by the rule merely during the process of organization in 1838. The Assembly then were not responsible for the acts of the moderator, unless they had sustained those acts by a solemn vote of the body, which they did not, as it has been clearly proved that no question was put to the house. An appeal was indeed taken from the decision of the moderator, that a motion was out of order at that time, and the appeal was declared to be also out of order, but no question had been put to the house. Now how does it appear that the house sustained that decision of the moderator? In no way whatever. They assumed that position for the purpose of turning him out. But at the same time they are driven to the necessity for another purpose, of maintaining the contrary. Both propositions, though they are contradictory to each other, they must maintain, or they cannot sustain their cause. Their course in regard to this matter is any thing but a straight-forward course. In such an endless labyrinth of difficulties, do those who depend on cunning usually involve themselves.

But we did not sustain the moderator or his acts, for no opportunity was afforded us of acting on the matter in anywise. We could not pass those resolutions which were offered by them until the General Assembly was organized. And they are not to infer that we would not have passed them after the organization. If they had waited and given us an opportunity, we might then have passed them; and if we had refused, they might then have had some shadow of ground for this allegation against us. But we did not sustain the moderator, and we are not bound by his proceedings. We think that he did right. But thinking so will not implicate us without an overt act. "Ah! but," say the learned gentlemen on the other side, "you acquiesced in the moderator's refusal to put the questions on the appeals to the house." They thus attempt to implicate us by that eternal intendment of law. But when the moderator decided that the appeal was out of order, was any appeal taken from that

decision? Certainly not. There was no appeal from the decision of the moderator on that question. The house did not decide the question, for he did not put the appeal to the house. Mr. Cleaveland did not venture to say to the house, "Gentlemen, the moderator has refused to do his duty: he has refused to put an appeal to the house; therefore, *I* put it to you: Will you sustain him in this decision?" In not daring to do this, the only legitimate thing to be done, if he could interpose at all, he showed that he had assumed the position for another purpose. If Mr. Cleaveland and his associates had appealed from the decision of the moderator, that the appeal of Dr. Mason was out of order, and the house had sustained the moderator, there might have been some show of a wild sort of justice in their proceedings. But Mr. Cleaveland did not put such a question to the house. Admitting then that the moderator was guilty of misconduct. How did we acquiesce? Besides this, as I have already said, Dr. Elliott was not our moderator. Why then should we be held responsible for his acts? In a dispute between him and a member, the member was check-mated. The house did not interfere, and cannot be implicated, even by an intendment of law. When the moderator refused to put the appeal, if there was necessity for any other person to put a question to the house, that person could only put the question that I have mentioned. This position is so clear as to strike you at first view.

But there is another consideration connected with this matter. Who, if any one, was authorized to interpose? This was not a case in which who ever might please was justified in rising up in the Assembly to take the law into his own hands. For centuries this case has been provided for by parliamentary rules. The refusal of the presiding officer to put the question on an appeal is, if wrong, a breach of privilege, and a question of privileges may be instantly raised, a question which overrides every thing else. The member whose rights are thus infringed has a right to appeal to the house; he may say, "I stand on a question of privilege," and move that the speaker be impeached, that the house proceed to try him for misconduct in office; thus by the regular process may the speaker be deposed and punished, according to the powers of the body, and the demerit which they shall find in him, and during the process the clerk may take his place. But where was it ever heard, that in any deliberative assembly the aggrieved member was endowed with all the powers of the executive officer? If the sheriff of the city and county of Philadelphia should refuse to execute a writ, to him directed by this court, would *your honour*, therefore, be at liberty to descend from the bench and execute it yourself? If the President of the United States refuse to execute the laws as he is required to do by the constitution, am I at liberty to assume the office and exercise all its functions? An executive or presiding officer may be impeached and removed for the non-fulfilment of the duties of his office. But when you do this, you must make the question a question of privilege. The law is laid down very distinctly; Grey v., 133, and Hatsell ii., 175, 176.

The same principle is laid down by Jefferson in his Manual, p. 115, and, to quote an authority of your own state, by Sutherland in his Manual, p. 95. Thus, without a resort to force, violence, or revolution, all the decisions of the speaker are subject to the supervision of the house itself. But they cannot be brought before the house unless by raising a question of privilege, or impeaching the speaker.

But in this case the moderator could not be impeached exactly, although he might have been in error, because he existed only as the moderator of the General Assembly of 1837, and during the process of *organization* of the General Assembly of 1838. The question might at least be raised whether a moderator of a former Assembly, acting as presiding officer of this, were subject to impeachment for his conduct during the process of organization of the *new* Assembly. He exercised his duty of constituting and organizing the General Assembly of 1838 in obedience to an established law.

I now propose to show that those proceedings of Mr. Cleaveland and the rest of these New School gentlemen were in every part essentially disorderly. They were altogether disorderly from beginning to end. I appeal to their own minutes as testimony in the case. In the first place, Dr. Patton made a motion; and I will here remind you, gentlemen, that every one of these things was done by advisement of "counsel learned in the law," both as to time and place. The drama was written out, and the characters in that drama were cast; each one of the actors had his appropriate place assigned him; each his own part to act, and each was anxiously waiting the arrival of the period when he should appear on the stage.

What say they? Scarcely had the benediction left the lips of the moderator, when the farce commenced by Dr. Patton's presenting his preamble and resolutions, when as yet there was no house in existence, no Assembly, except that mixed multitude of men, women and children, convened in the church. To this mixed multitude, "the Rev. William Patton, D. D." offered his resolutions. He introduced them as the very first business, and thus superseded the clerks with their report on the roll, and on this account the moderator declared this rigmarole of Dr. Patton to be out of order. He informed him that the first business was the report of the clerks on the roll. Dr. Patton appealed from this decision of the moderator. I am inclined to think the decision of the moderator was unexpected, that it deranged the plan of proceeding that had been determined on by Dr. Patton and his friends. They were well aware that if the question had been put on the resolutions offered, the decision would have been against them and they had shaped their course to meet that exigency. But the moderator stated that he was out of order, as the clerk was on the floor; whereupon the moderator was reminded by Dr. Patton that "he had the floor before the clerk." But the clerk was the person who was first entitled to the floor. The reading of his report was the very first business, and the next business was the appointment of a Committee of Elections. *That is the law, and if there is law for the act, that law shall vindicate that act.* The moderator informed him that the clerk had the

floor, and Dr. Patton said that he had the floor before the clerk had. That is the point. If Dr. Patton had not been trampling on all law and order, if he had not been endeavouring to embarrass the process of organization, he would not have insisted that he had the floor *before the clerk*, when, by the rules, the clerk must proceed to read the report on the roll, as the *first* business. Dr. Patton knew this, and when the moderator reminded him of it, he was instantly struck dumb, it was so obvious that the moderator must first hear the clerk's report on the roll in order to the very existence of the General Assembly. And there was an end to Dr. Patton.

The part of Dr. Mason came next, which was to offer the resolution: "That the roll be now completed by adding the names of all commissioners now present from the several presbyteries within the bounds of the Synods of Utica, Geneva, Genessee and the Western Reserve."

Was this a response to the previous call of the moderator, in any sense in which he could understand that call? Take any of the forms given in the testimony, and it evidently was a call for commissions to be presented to the clerks, as executive officers, to be by them enrolled, provided they were regular. But Dr. Mason offered a formal resolution, that certain commissions which had been previously rejected by the clerks should be annexed to the roll. The resolution was altogether unusual, and unprecedented. It was an appeal to the legislative power, and in no sense a response to the call. The rule required that these executive officers, the clerks, should receive all commissions which should be presented to them in accordance with the rule, and enrol or reject them. And if the clerks should reject them, the rule required that they should be referred to the Committee of Elections. Dr. Mason knew all this, and knowing it, appealed at once from the decision of the clerks, not to the Committee of Elections, but to the Assembly itself; thus superseding the Committee of Elections, and abrogating their authority. He was, then, clearly out of order.

The object of forming the roll is to ascertain who shall vote, and this the moderator was endeavouring to effect. *Their* object was to allow all them to vote who chose to claim a right of membership in the General Assembly. It was, in point of fact, a proposition that all persons who were there should vote, whether they were regularly there or not. In other words, that the gentlemen from presbyteries belonging to the four excluded synods should vote on the question whether they had a right to vote. Dr. Mason's motion embraced the strange and anomalous proposition in relation to the officers and members of the Assembly, to disfranchise them in one case, and invest them with powers in other cases, without regard to the regular forms of proceeding in either. It was not to repeal the law which required a Committee of Elections. That might have required a majority of two-thirds of the regular and undisputed members. He desired to effect his object by a simple vote of the Assembly. His motion was clearly a violation of order.

I now come to the part of Mr. Squier in these transactions. It is thus described in these minutes. [See p. 259 of this report.]

Now, I think that I can despatch this Mr. Squier in very short order. Mr. Squier's commission had been rejected by the clerks, and without any pretence that he was a member of the house (for his name was not entered on the roll, and consequently he acted without having produced any *prima facie* evidence of right to a seat in that body,) yet this Mr. Squier has the presumption to submit a motion for the body to entertain. If he could vote in that Assembly, any body could vote there. I might, with as much propriety, undertake to submit a motion and vote in any assembly under heaven, regardless alike of the rules of order, and of the rights of the body. It was absolutely ridiculous, and shows the disorderly character of the whole of their proceedings. He must have known that until the Committee of Elections should decide that he was a member, he had no right to open his mouth. But he seems to have been very eager to show off his talents as a speaker. Besides all this, every one must perceive that there was then no house to which he could submit his demand. He made it, then, of all present, himself included. Well, let us regard it in this point of view. Mr. Squier says, "I move, Mr. Moderator, that I be entered on the roll of members. I *demand it.*" If the moderator should declare him to be out of order, to whom could he appeal? Would he appeal to himself? It was a strange confusion of ideas which could lead any person to attempt to make a motion, who was not a recognized member in some shape or form. There is in this connexion another matter which now occurs to me. Mr. Squier presented himself as a member avowedly in the face of the decision of the whole Presbyterian Church, which had declared that he was not a member; all which he showed, in the same breath in which he stated that his commission had been presented to the clerks and by them rejected. Thus in the very face of the decision of that whole Assembly, and in defiance of both executive and legislative decisions, he claimed to be a member, made a speech, and demanded that his claim should be acknowledged, and this, too, before the Assembly was more than partially organized.

The presiding officer said to him, "We do not know you, sir." Now, could any thing have been more simple and appropriate than this reply of the moderator. "We do not know you, sir." The learned counsel and some of the witnesses omitted the word "sir," which materially qualifies the expression, and explains what Dr. Elliott's meaning really was: that is, "The General Assembly does not know you. We do not recognize you as a member." No answer could possibly have been more appropriate. Yet of this simple and appropriate intimation from the chair, expressions have been used which require some comment from me at this time. The learned counsel on the other side has deemed it consistent with his impressions of duty, to cast an imputation on Dr. Elliott which the expression never warranted, which strange imputation, you, gentlemen, cannot but know to be wholly gratuitous. He has told you that Dr. Elliott meant to hurl against these men, that most terrible

denunciation; the most terrible of any on record; that Dr. Elliott intended to denounce on Mr. Squier and his associates *eternal damnation!* Is it not going somewhat too far, to impute to him feelings of such direful nature, on account of his having uttered that simple and appropriate expression? Certainly no person can believe it. Such a thing never entered the head of Dr. Elliott. The imputation is unjust and groundless. He had no allusion to the denunciation in that awful text of Scripture alluded to by the learned counsel; and it would be monstrous injustice to cast such an imputation on him. The position occupied by the learned counsel, enabled him to attribute to Dr. Elliott every thing that is diabolical. I do not say that he represented the feelings of others when he indulged in this sally of the imagination; I do say that their imaginations were unduly excited. This imputation betrays the real situation of our opponents at that time. They imagined that they saw every thing diabolical in our conduct. Dr. Elliott repels the imputation with pious horror. But this is only of a piece with the picture which they have drawn of other scenes, representing the Old School party as sitting in solemn conclave, in fearful and tremulous expectation of being attacked by an approaching adversary; taking the advice of lawyers in forming their minutes and concocting their plans; imagining every thing, suspecting every thing, and apprehending all sorts of strange and fearful occurrences.

In the height of the distemper, the phrenzy of this fancy, they saw in every man a lawyer, and in every word a quirk. Designing to entrap others they watched every thing they saw, lest perchance it should be a snare spread for them. And this feeling they have imparted to the learned counsel. I am sure that he could never have conceived such imputations against us, till they suggested it in giving him instructions. Dr. Mason was under the influence of this wild creative imagination. He *fancied* that he heard the name of Mr. Boynton when Mr. Krebs was reading the roll, though Mr. Boynton was not present, and Mr. Krebs expressly tells you that his name never escaped his lips. Mr. Gilbert also is a man of the warmest imagination. He it was that formed the roll for these New School men, and how did he form his roll. His vivid imagination certainly possesses the creative powers of the wand of a conjurer. He tells you that he made up his roll from that of Mr. Krebs, and that he corrected Mr. Krebs's roll from statements published in the the newspapers. "Ah! how did you do that?" "Why I did it!" "Did you see the list of names on Mr. Krebs's roll?" "No." "Did you see the commissions?" "No." Being pressed by the counsel, "I will tell you how I did it. I heard Mr. Krebs read over the roll, and I wrote down some of the names, as he read." "Well, did you make out the whole of your roll whilst he was reading?" "I corrected it." "Where did you get your original list from?" "I got it from the newspapers, and as Mr. Krebs read his roll, I corrected it, by putting in, or striking out names." Here, indeed, was a most potent effort of his imagination. He had a roll of his own, a roll which Mr. Krebs had not, and it was on separate pieces of paper, being derived from different sources, and these pieces of

paper constituted the roll that he held in his hand, when he took his imaginary seat as clerk, standing in the aisle, like Dr. Beman their chairman, who *stood up* whilst he *sat* in his imaginary chair. "Had you any paper, pens, or ink with you?" "No; but nevertheless I was clerk." "Well, how did you make up your roll out of those two lists, which you then held in your hand?" "Why, I considered them as being *one*. I considered them as the roll." And thus, was their roll *formed* by consideration; by an intendment of law.

May it please your honour: His imagination is so vivid that he thinks the two separate pieces of paper are but one. I, however, have no objection to this gentleman's having any thing, or all things in creation in his imagination, as he had his pens and paper, when he imagined himself clerk, *by consideration*.

In this state of excitement all these New School men appear to have acted. Dr. Mason discovered the same potent fancy when he held the imaginary clerkship. But there is another instance in which Mr. Gilbert displayed the energy of his creative fancy. He is an ardent party man and extremely zealous in this controversy. He comes to the church in Ranstead court. His imagination of course was excited to the very highest pitch. Well, he attempts to pass through the passage by the door of the session room, a little apartment about ten feet wide, immediately back of the pulpit. He sees the clerks sitting there. They have some papers spread before them. They also have pens and ink, and they hold frequent consultations with each other. Instantly he imagines that they have some mysterious purpose in view, that they are occupied with some diabolical machinations. Ah, thinks he, what a horrible conspiracy is here. If I could only catch a word, I'd blow it up. As thus he listens attentively he happens to hear the portentous sound of these awful words, Dr. M'Dowell says to Mr. Krebs, (and it seems to be uttered in deep and horrid guttural sounds,) "*Lock that door!*" *What an awful conspiracy!* Locks, bars, bolts and dungeons crowd upon his brain. So intense is the excitement of his imagination, that those awful words "*Lock that door*," have made an indelible impression on his mind, which time cannot efface. The sound of those awful and portentous words is always present with him; that awful sound haunts his imagination both in his waking and sleeping hours. You have seen that as soon as he was brought into this court those awful words burst from his quivering lips—"I heard him say, '*lock that door*.'" What images

> ————"Of things infernal,
> "Of hydras, gorgons, and chimeras dire,"

must be forever running through his brain, who from the simple act of locking a door, could infer a conspiracy the most awful, who could attribute to those words sufficient importance to con them over again and again, to learn them by rote, in order to come here and cast them in our teeth. What would have been the consequence whilst these frightful fancies possessed his mind, if at that critical moment Dr. M'Dowell had had occasion to mend his pen,

and Mr. Gilbert had seen him lean over the table at which the clerks were sitting, and had heard him say to Mr. Krebs, in that awful and sepulchral tone peculiar to the horrid dens of conspirators, "Brother Krebs, lend me your knife!" He would have been frightened to death; at least he would have imagined that he was about to be murdered on the spot. With his mind filled with horror he would have instantly fled the house, and never have been seen there again. I have no doubt that he would have been so fearfully excited, that by this time he would have seen in his imagination a Bowie-knife at least a foot and nine inches long.

Gentlemen, I have now gone through nearly all the points of order in this case. But there are a few other points in regard to which I deem it necessary to speak. I would most cheerfully leave these points to the learned counsel who is to follow me, if I did not feel that duty requires something more at my hands. I must therefore claim some further indulgence from you. If, however, you will agree not to censure me, I will despatch them in the shortest space and time possible.

With your Honour's permission I will now lay before the court and jury what remains of my argument in this important cause.

Gentlemen of the Jury,—I take it for granted that in all organic bodies, in what manner soever constituted, independently of the ele mentary rules which have been framed for the government of the body, and of the requisitions of parliamentary law, there are always certain principles or things existing, which, in the nature of the case, must operate as strongly as any actual regulations can possibly operate. In other words, there are circumstances connected with all parliamentary bodies which, independently of all rules and regulations, must, by their own nature, control their acts, though no reference be had to the existence of those circumstances. In this examination, therefore, of the acts of an organic body, with a view to determine whether those acts have been in accordance with law and former usage, it may be important to inquire, whether at the crisis contemplated there did not exist circumstances which in their nature prevented the organization of the Assembly, circumstances which, according to the nature of things, rendered it impossible that the body could be organized, or that any plan of action could be established. For where there exist circumstances which render it morally or physically impossible to organize the body, that fact alone is sufficient of itself to incapacitate it for arriving at any practical or valid result. To illustrate this position: a man may, under the law of God, do certain things, and in accordance with the law of his country, if his physical, moral and intellectual organization be complete. But if any circumstances, though extraneous in their nature, prevent the exercise of his accustomed powers of either body or mind, the same things cannot be predicated of him. Thus, if a man receives a blow on the head which, by suspending or destroying the nervous energy, renders him senseless, nothing can be predicated of him as a being in the exercise of his organic powers. So, as in the case of an individual, there may be circumstances affecting an assemblage of men, which are sufficient to produce that moral or

physical disability which entirely precludes all organic action; and produces either temporary incapacity or dissolution.

Now, in what position did the General Assembly of 1838 present itself, considered as an organic corporate body, if you will permit me to make use of the expression? Was that body in a capacity to fulfil the designs and execute the functions of a body acting under the law of its incorporation? I tell you, gentlemen, and I tell you under the direction and sanction of the testimony, that at the time when these proceedings took place, the General Assembly was rendered physically, if not morally, incapable of corporate action. That body had received a blow on its sensorium which had paralyzed all its energies. And if you once admit that the members of the Assembly were affected with a physical incapacity for regular action, you divest it of all accountability, as if a deliberative or parliamentary body were dissolved by the violent irruption of a foreign power forcibly separating its members, and taking possession of the usual place of meeting. Such was the scene which occurred on the 18th Brumaire, when Napoleon at the head of his armed legions entered the legislative hall, then occupied by the Council of Five Hundred, silenced the members at the point of the bayonet, drove them from the house, and dissolved the assembly. It would be clearly impossible for a deliberative body to exercise its functions in the midst of a cannonade, or whilst the drums were beating in the hall where the members are convened. The existence of these circumstances, or any portion of them, would render all attempts at the transaction of business nugatory and fruitless, and any thing which might be done under such circumstances would be wholly invalid. The body itself would be dissolved, or if not dissolved, it would be stunned and senseless, and for the time being, lifeless.

Now it is established, as far as a negative can be established, that in the present case the Assembly was physically incapacitated, as to judging of any subject which might be submitted to it, at that period of its existence, and it therefore was released from all obligation in relation to what then transpired. An intendment of law will not bind any under such circumstances. The proceedings which may take place in any assembly are not binding by legal intendment, in the proper sense of the term, when those proceedings took place with the design, or under such circumstances, that all could not participate therein. Such was the fact in this case by reason of the noise which prevented the members from hearing what passed. I am asked, where is the proof of this? The proof is in the circumstances attending those transactions. We have collected a large number of those who were present in the General Assembly of 1838, as members of that body, and all these gentlemen, with one accord, have testified that they did not hear that question on which the whole case turns. They have all told you that it was impossible for them to hear what the New School men did, in consequence of the confusion and noise which they made, but which (if you choose) was aggravated by the noise of the Old School party. The noise (occasioned by the two parties combined,

if you please) prevented the question from being heard. It is of no consequence whether one or both of the parties, or all the persons present, participated in making the noise. During that period of outrageous disorder and confusion, it was utterly impossible to perfect any business whatever, because the proceedings could not be understood. A large portion of the Assembly did not hear what was proposed, and not hearing it, they were released from all liability on its account. If, in consequence of the uproar, riot, and confusion which prevailed, amidst a general outcry, it was impossible to execute the rules of order, and equally impossible to hear, then the proceedings were absolutely void. The question is as to the fact, whether we did hear or not. They must first prove that we heard, or we cannot be bound by an intendment of law. Now, we have anxiously sought and called before us a very large number of witnesses, men of the Old School party who were members of that Assembly, and we have asked them, every one distinctly, "Did you hear those questions put?" and they have all answered "No." "Did you hear them reversed?" "No." "Did you know what was done?" "No." And some of them did not know until the next morning. Not a single one of them could hear those questions. We have examined from twenty-seven to thirty witnesses who were members of the General Assembly, as many of the Old School party as we could get from every section of the country, and proclamation has been made for more of them to come into court and testify. We have anxiously asked, "Do you know of any one who has not been examined?" and have procured all that we could. And are we asked why we did not call up other persons as witnesses? I reply, we are not bound to call up those of the New School party to examine them. The question is, whether we heard? And we have called on every one whom we could find to testify in the case. We are the party implicated, and when every one of our party has been called, and when they with one accord testify that there was so much noise, such uproar and confusion, that it was impossible for the Assembly to transact any business or to hear what was said or done; that in point of fact they did not know what had been done until next day; that they heard nothing distinctly of the proceedings of the New School party, from the time that the uproar commenced, until they heard it proclaimed at the corners of the church that they had adjourned, this question is conclusively settled. There was the intervention of circumstances which rendered it physically impossible for us to participate in any of those proceedings, even if we had been inclined so to do. I venture to say, gentlemen, that such a decision has never yet been made, as that in such circumstances we should be bound by intendment of law. Can it be possible that your Honour will so decide that we were bound to hear though their own acts prevented our hearing? It may be remarked on the other side that there is a notable discrepancy in this part of the testimony between their witnesses and ours. Now all our witnesses do say that they could not hear, whilst their witnesses, with one or two exceptions, state that they could hear, and some of them even that they could hear

distinctly. Now the learned counsel tells you that one positive witness is worth a thousand negative ones. I admit the correctness of the principle, but he has misapplied it. Either the assertion, that "We did hear," or that "We did not hear," is positive. And nobody but myself can tell whether I did or did not. Now we have proved by competent witnesses that we did not hear their proceedings, and all that they have proved is that *they* did hear them. All the persons who were examined were competent witnesses. I think there are about thirty of ours against about twenty of theirs. There is certainly an apparent, and I will not deny that there is a real, contradiction amongst the witnesses. For whilst every one of the witnesses of the one party, swears that all these questions were put and reversed, and that, in their judgment, in an audible voice, and distinctly; all the witnesses of the other party swear that they did not hear them. Now there is something curious in this. There is great discrepancy, and how are we to give an explanation of this contradiction? Perhaps they mean that those motions were made and put audibly to one whose ear was close to the speaker, though not to all who were in the Assembly. But this could not avail them. They must prove that the questions were audible to us. We swear that they were not; no man can prove the contrary. We have proof on all sides that we did not hear, witnesses from different parts of the house, who swear positively that they did not hear any question whatever. This testimony cannot be contradicted. The other party may swear till doomsday, without disproving such testimony. My learned friend became quite metaphysical, and alluded, in the course of his argument on this subject, to certain principles in the theory of sound and in mental philosophy. He told you that the ear does not distinctly note accustomed sounds, that sounds become familiar do not arrest the attention. But were they such familiar sounds, that echoed and re-echoed through the house in Ranstead court? They were of a very different character. The sounds then heard amidst the confusion of that disorderly scene, were no twice told tale, addressing the ear unnoticed. These transactions the mere common routine of business! Why, it was the most extraordinary scene ever witnessed within those walls. The feelings of every person in that house were aroused. How could it be otherwise than that every person present should anxiously listen to every sound that issued from amidst the tumult? In the excitement of the occasion every ear was open to catch, if possible, every word. My learned friend told you that you did not once notice the striking of the clock above us, during the time that he was addressing you, and he drew the inference that in that Assembly the Old School party did not hear because the sounds were familiar to their ears. Now, if it had been the voices of the Old School men there might be some reason for this inference, but it is highly improbable that the voices of the representatives of the New School should be so familiar to the other party. I could give a much better reason for the circumstance of your not hearing the clock, than the one which he assigned. Why a stranger could scarcely have taken any note of

time, even though he were speaking with an iron tongue. We did not hear it because Mr. Meredith himself prevented us hearing just as his clients did in Ranstead court. He made a noise, else we would have heard the clock. There is one way of reconciling the discrepancy of the testimony, (and I am willing to avail myself of every possible way of reconciling it,) consistently with the most perfect respect for the witnesses of both sides. It may be that the gentlemen of the New School party, knowing what was intended to be done, and being all on the alert, caught the feeblest intonations of the voice, and so heard distinctly, or, even with imaginations of much less activity than some of those gentlemen appear to have possessed, expecting that certain events would transpire at a certain time, they may have taken for granted that such motions were made and questions put, and may now fancy that they heard them. It is no unusual thing for the imagination thus to cheat the memory.

Another explanation, however, suggests itself, which is, perhaps, the true one, as it removes the difficulty entirely. That Assembly existed in two parties, and these were in separate portions of the house. These manœuvres were performed in the rear of the Old School party, and in the midst of the New School men. Those who made the several motions and put the questions, being thus in the very midst of the New School party addressed themselves and pitched their voice to meet their auditors. Nothing is more natural than this. For instance, gentlemen of the jury, if I turn from you to address his Honour, the judge, the tone of my voice falls, instinctively obeying the dictate of the eye; and it rises again when I say, "gentlemen of the jury." Thus by the instinct of nature, and not design on my part, the tone of my voice is pitched in adaptation to the distance of those to whom I address myself. On this principle the New School men heard the motions and questions, whilst we did not hear them. They were located in the immediate vicinity of the speakers, and the Old School members were more remote from the scene of action. Whose fault then was it that the Old School members did not hear? As to us, if we had participated in the riot and confusion, then should we be so far guilty. But if there were one indignant and overwhelming shout of "order, order," every one would have been in order, except those who persisted in disobeying the call. They would be completely put out of order by the raising of the point of order, as I have before explained to you. Charity forbids me to impute a want of candour or truth to any of those respectable gentlemen, or even to acknowledge to my own mind a belief of such want, with respect to any of them. I am glad, therefore, that we can get over the difficulty and reconcile the discrepancy in another way. I say then that the Old School members were physically incapacitated for organic action, and therefore you cannot bind us by an intendment of law, any more than if every man of our number had been stunned by a blow on his head from a bludgeon, or suddenly struck with deafness. By no law, human or divine, can any man be con-

strued to have assented, *sub silentio*, to any proposition, because he was physically incapable of opposing it.

We have been taunted by the other side for not putting the question to Dr. M'Dowell, whether he heard the different motions and questions which are said to have been put. For he, says the learned counsel, was likely to know best, whether those questions were put in an audible voice, so as to have been heard by all the members of the Assembly. We did ask Dr. Elliott, whose situation was certainly quite as favourable for hearing what transpired. But Dr. M'Dowell! the counsel queries, "Why did you not ask him?" Why did we not ask him? I reply that it was not necessary. You would infer from the manner in which this taunt was made, that it was pregnant with meaning, and that we did not ask him, because we knew that his answer would have been against us. Now, what is the fact? We called Dr. M'Dowell. We presented him here as our witness, and of course gave him up to them for cross examination. They might have put that question to him if they had desired it. They are not responsible for his credibility or competency. If his testimony is against them, they may deny it, or disprove it if they can. We retort, by returning the question, why did not they examine him on that point? We in effect bantered them to do so and they declined. We, however, were not bound to bring out their case for them. Our business is to develope and establish our own. The gentlemen shrunk from the examination. But I will tell you, gentlemen, what was the true reason, why we did not examine Dr. M'Dowell and every other witness also, on every point in this cause. We had proved the main points in the case over and over again, and we feared that his Honour the judge would become weary with the repetition of the same things, and that your patience, gentlemen, would become exhausted by listening to such a mass of testimony, for days and weeks together, and we refrained lest the case might be overlaid. The whole case turns on the question, whether those whose silence they are endeavouring to construe into an acquiescence, heard the questions put. But depend upon it, gentlemen, when the witness was turned over to them, if they had thought that they could draw any thing from him unfavourable to our side, and beneficial to their own, they would have promptly asked him the question. I would query of my learned friend if Dr. M'Dowell presents the only case of this kind, which, with all his acumen, he has been able to discover. We had here all that we could get here, and we called every man that we could lay our hands on. Every Old School member who was present was examined, and we made proclamation from the witnesses stand, for others to come forward. Unquestionably all those of our party who were principal actors in the scene have been examined, otherwise we should have considered that we were acting unfairly.

But who have been produced as witnesses by the other side? Where are your standard-bearers and trumpeters? Where are your arch-anarchs, your generalissimos, the leaders of your forces? Europe has one of them; Ohio another, or he has gone somewhere

else, to the west or north-west. These were the only persons who are fully competent to explain the whole of the transactions of that eventful day. Why then are they not here to testify? We have presented all, rank and file, and even the surgeon-general has not been omitted. But where are their superior officers? Why are they not here? They have sedulously shown that these men are at a distance. I ask, why, when the welfare of their church so imperiously demands their presence here, and when their own characters are so deeply involved in the controversy? Why are not Dr. Beman and Mr. Cleaveland here, when it is their own conduct that is passing under review, and severely scrutinized? If these men are unavoidably absent, why have not their depositions been produced in this court? Why was not the original paper, which was read by Mr. Cleaveland, and which has elicited so much animadversion, produced here? or why are not their depositions in court? You will be surprised, gentlemen, to learn that they are here. Though these depositions have not been read in evidence before you, they are in the hands of the opposing counsel, and have been all along. Why have they not been read? Perhaps I should not have adverted to these extraordinary and most significant circumstances, if we had not been taunted by my learned friend. We ask them, and we ask emphatically and triumphantly, why do you not read the depositions of these principal actors in all your proceedings, when we know that they were taken, and are here in this court, in the pockets of the counsel. This circumstance got out, notwithstanding their desire to conceal it from us. You were informed of the fact by Dr. Patton, who, in reply to a question put to him during his cross-examination, told you that he had seen those depositions in the hands of the counsel. Mr. Cleaveland was the very Coryphæus of the party, and Dr. Beman occupied the next most elevated position in their ranks, and yet their testimony is not produced here. Though their depositions were taken, in nicely phrased documents, they have been carefully withheld from the court and jury, the opposing counsel having stowed them away in their pockets. Those two gentlemen were the leaders of the revolutionary forces. They had been "instructed by counsel learned in the law." The sound of their voices rallied the troops to the contest, and every thing which they proposed was answered by a tremendous shout, a deafening burst of a-y-e from their zealous followers and partizans. Their testimony would shed a blaze of light, would reveal the mysteries of those transactions, in which they took so conspicuous a part. But they are absent, and the very paper on the purport of which the whole case turns, is not produced to the jury. Had these papers been produced they might perhaps have explained the discrepancies in the testimony of the witnesses. But those intelligent, honest, and candid Christian gentlemen, could not understand alike what transpired. Both parties agree as to there having been a great noise and tumult, while they disagree as to their source. By both parties, however, the fact is fully established, that in the midst of such a state of things, it was utterly impossible for the Assembly to get along with the transaction of any busi-

ness, in a regular and orderly manner; and that is the very point for which we contend, and which must decide the controversy in our favour. But not only this. I am about to state the astounding fact, still more remarkable than the discrepancies and contradictions of the witnesses, that the testimony of all those twenty witnesses who have been called by the New School party, is expressly and pointedly contradicted by the solemn and deliberate record of their own Assembly. That body made a statement respecting the organization which is in evidence before you in their minutes.

Now of the twenty witnesses of the New School party who have testified viva voce, in relation to the organization, many of them say that they heard negative as well as affirmative votes on the questions. They are confident that they heard both. Several of them did not know that the question was reversed, except from the fact that they distinguished a few negative votes. And one of these New School gentlemen, Mr. Lathrop, stated that he voted in the negative himself. Such are the statements. Such is the testimony by which they intended to prove that the negative was put. But these same gentlemen, or many of them, as members of the Assembly which met in the First Presbyterian Church, have given us what was then their original understanding of the matter, each one recorded his solemn vote in favour of a very different account spread upon their record. Within a few hours only after the occurrences had taken place, these very gentlemen sat down together in the First Church, relieved from the anxiety and excitement attendant on the revolution which they had just effected, and coolly and deliberately declared that each of the questions, put previously to that nominating Dr. Fisher for moderator, was carried without one dissenting voice. This declaration is put on their record as testimony to be appealed to in all future time. Now is it not a most singular spectacle to see these gentlemen come into this court and swear that there were negative votes on each of those questions? and that, after the whole Assembly, of which they formed a part, had established the fact that there were no dissentient voices. How great must have been the confusion and excitement of the imagination to produce not only this extraordinary discrepancy between the testimony of respectable, intelligent, and candid gentlemen, but also this remarkable variance between the testimony of these same persons, at different times, and under different circumstances, and especially between the oral testimony of these witnesses and the written record of their own Assembly! This distinctly says, in relation to the several officers elected, with the single exception of Dr. Fisher, "And no other persons being nominated they were unanimously appointed," &c. And again: "The motion to adjourn was carried unanimously." There is the appointment of no less than three officers of the body, and the motion for adjournment, all of which the record says were carried "unanimously," while of Dr. Fisher, as moderator, it is said that he was "chosen by a large majority." I will here stop a moment to meet an objection started by the ingenuity of counsel on the other side. I am aware that the learned counsel stated, or may state, that by the standing rules

of the General Assembly, and the provisions of parliamentary law, where there is but one person nominated, technically speaking, he is unanimously elected. Then they did not mean that the vote was unanimous in point of fact, but unanimous by intendment of law. This record then is not according to the facts which transpired, if literally stated, but according to a legal intendment. They may thus attempt to reconcile this discrepancy. But even that excuse shall not avail them. They shan't have an inch of ground to stand on. I will not take their excuse. They shall not be allowed to give the legal intendment, and not the fact, in the case of Dr. Beman, and then to give the fact and not the legal intendment in the case of Dr. Fisher, as they have done in this minute, which states that Dr. Beman was unanimously chosen, and that Dr. Fisher was chosen by a large majority. I want fact, the direct fact. Why do they thus, in relation to the one, assert the direct fact, and in relation to the other, the negative in the case, unless because in the one case there was a necessity for concealment, and in the other there was none?

In conclusion, gentlemen, I remark, what his honour will bear me out in saying, that up to the time of the session, when these gentlemen left the church in Ranstead court, the General Assembly of 1838 had done nothing of which they have complained, or could complain. Their complaint is, that the officers of the General Assembly of 1837 had done something, the clerks and the moderator had done wrong, they had endeavoured for a short period, (and for a very short period only) to defer the question as to the rights of certain of the commissioners to the Assembly of 1838. Their complaints are not urged, their charges are not brought against that house which was constituted with prayer, and afterwards partially organized, for they seceded before the regular proceedings of the General Assembly of 1838 had commenced. You will bear in mind that that house, as a General Assembly, stands entirely unconnected with the General Assembly of 1837. That Assembly was forever extinct. The General Assembly of 1838 was fully capable of undoing every thing of the doings of the General Assembly of 1837, but there was no application made to the General Assembly of 1838, either to repeal the acts of 1837 or to admit the delegates from the four excluded synods to the seats which they claimed in that Assembly. I should like to know by what species of law the rights and privileges of *one hundred and fifty* commissioners, who constituted the majority of that house were thus ruthlessly invaded, their Assembly thrown into disorder, their proceeding in business obstructed, and their organization broken up and scattered to the winds, for the fault of the clerks and of the moderator. I should like to know by what species of law you invalidate the proceedings of our Assembly in 1838, because the officers of the Assembly of 1837, or even that Assembly itself, had acted improperly? On what principle are we to be bound to answer for the proceedings of the Assembly of 1837? Is this a specimen of the doctrine of imputation and atonement as held by the new Assembly? Can you impute the offence of one quasi corporate body to another?

It would be saying, that by the fall of the General Assembly of 1837 we all sinned, and that the only atonement which can eradicate that original sin and restore us to favour, is the sacrifice of the General Assembly of 1838, which is thus guilty by imputation. This would be the imputation of original sin with a vengeance. But unlike the original sin of the progenitor of the human race, you would here cut off all hopes of a glorious resurrection. Suppose, that as they complain, the acts of the Assembly of 1837 were unconstitutional and unjust, it is not for us to vindicate them. If in the heat of their excitement they have chosen to asperse them, let them do so. Let them vilify and blacken the members of the General Assembly of 1837 with demoniacal virulence, if they are so inclined, still we are not affected. They claim to be the successors of that body, and their whole anxiety has been to attain the reputation of being their legitimate successors. And you will bear in mind that they set up that claim whilst they were still in the church in Ranstead court. They thus affect themselves and not us by vilifying and blackening the General Assembly of 1837. I do not wish to commit myself. But they claim to be the General Assembly whilst they have completely annulled us, as they suppose, at one breath. They have struck at our very existence, have annihilated us, account us nothing, and will not even profane their lips by giving us the poor boon of a name. They, a minority, have done by us, the majority, what they complain of our doing by them, the minority. They excinded us, the majority of the church. Have they not driven us from the General Assembly? and having thus driven us from the church of our fathers, they are now seeking to drive us from the possession of the funds of the church. If, as they say, a cruel, tyrannical and despotic blow has been inflicted on them, have they not dealt another, equally as cruel and despotic? Why have they aimed this tremendous blow at our devoted heads? Admitting that they were for a time deprived of control over any part of the funds, is that sufficient to justify them in now claiming the whole, even the Princeton Theological Seminary, which they never supposed to belong to them? When they accuse us of diabolical conduct in enacting the resolutions of 1837, which have been the subject of so much animadversion, when they cast at us that terrible raw-head and bloody-bones made up of the ghosts of *four* synods, twenty-eight presbyteries, six hundred and nine churches, five hundred ministers, and sixty thousand communicants, shall we not be allowed to retort by showing how they have excinded and stricken out of existence the whole Presbyterian church in the United States of America, including no less than twenty-three synods, one hundred and thirty-five presbyteries, two thousand eight hundred churches, two thousand ministers, and *two hundred and twenty thousand* communicants? Shall not our voices be heard in a court of justice, in our own defence, when they have thus excinded and annulled us all; when they are striking at us these desperate blows, not because we have committed any offence, but because another Assembly had offended these New School gentlemen, and we proposed to defer for a time the decision whether certain gentlemen,

claiming to be the representatives of certain synods, were entitled to their seats in the General Assembly of 1838! True, they now say to us, "By *intendment of law*, you have excluded yourselves." They say that we are a limb which has been severed from the main trunk. Well, if we are a limb, the limb is four or five times as big as the body. According to their new fangled logic this limb, violently torn from the body, now lies bleeding in the dust, weltering in its gore, whilst the body from which it was torn, though only one-fourth to one-sixth as large, still continues to live and flourish. They tell you that we might have come there and taken our seats in their Assembly at any time, that their doors and their hearts were always open to receive us. Now, this is but adding insult to injury, it is solemn mockery, a mere farce. They know that being the majority we would have killed them, entirely annihilated them by going in amongst them. Yet they call themselves the General Assembly by declaring that we were present, by an intendment of law. They have built their hopes on our imaginary presence, when, if we had been really present, we would have annulled them. Away with it. Away with all such artifices. Away with all such vain and shallow pretexts! They had entirely separated themselves from the majority. They have excinded not merely four synods but the whole church, at one fell swoop. These gentlemen, the party of the relators, here, have, a large proportion of them, no grievance to complain of. If there were any who had suffered any grievance of which they could complain, they were the delegates from the four synods. Those fifty-four gentlemen who had been excinded had been aggrieved, if any body had, and they alone had a right to complain. The other of the hundred and forty gentlemen who sympathized with them had suffered nothing at all. We had not excinded their Assembly, nor had we excinded *them* from our Assembly. They took their seats there when the Assembly of 1838 first met, and we might retort upon our opponents that our Assembly was open to all of them at all times. Those who went off of their own accord could have re-taken their seats there, whenever they pleased. And as to the gentlemen belonging to the four synods, they could have returned to us, quite as easily as we could have gone to them. We had provided a mode for their re-union with us, as they say that they had for our becoming re-united to them. They can come yet, if they are Presbyterians. But, say these gentlemen, in a spirit which proves how far their characteristic humility extends, "shall we humble and degrade ourselves by seeking admission into your society after your having told us that we did not belong to it? We meek, humble, self-denying Christian gentlemen are too proud to meet you in the way which you have of your own hearts devised." Is this the language of the promulgators of the religion of the meek and lowly Jesus? too proud to bow their stately necks to the requirements of the church? Is this the consistency of men who profess to be following him who established that church? Shall conscientious men, the followers of him who was altogether meek and lowly, manifest such pride of mind as to say they will not submit, that their *manhood* forbids it! What!

will you call on them to ask admission as humble supplicants? No, those *fifty-four* gentlemen, the *one-sixth* part of the Assembly, are too proud to submit to the other *five-sixths*, thus proving that they are determined to reign supreme. They, the minority, will not submit to us who are the majority. They will not stoop to abase their haughty diadem. But we must degrade ourselves by stooping to them. We, the majority, must follow them, the vagrant minority, and as humble suppliants beg for admission, that we may be considered a part of their Assembly. They will not be reduced to the necessity of complying with our terms, but, on the contrary, we must yield to those prescribed by them. And they are now endeavouring to lay their sacrilegious hands on the whole funds of the church, because we will not submit to their dictation. At the same time that they refuse to submit even for a moment to our officers, they say that we might come into their church if we would submit to their terms.

The gentlemen, on the other side, endeavour to impose on us by talking about union and harmony, and they have poured forth an affected dirge of lamentation because these two portions of the church are thus separated, the one from the other, and affect to believe that a restoration of union and harmony will immediately take place, that the church will again be united if you give them your verdict. Believe them not. Such a thing is impossible. You must perceive that it is absolutely impossible when you see the state of feeling which now exists. You have here but a faint illustration of that feeling, even as you now behold them arrayed against each other in the arena of a temporal court, where they appear like gladiators opposing each other toe to toe, and point to point. They have not here suffered their characters, as gentlemen, to be implicated by the manifestation of a violent ebullition of passion in this court, and consequently have suppressed and concealed from you the intensity of their feelings. These gentlemen propose the establishment of union and harmony in the Presbyterian Church by your giving a verdict in their favour; a thing inconceivable, whilst they are seeking either to compel us to go beseeching to them as a fragmentary portion of the church, or to deprive us of every thing that we hold dear, or regard as sacred. Why do they hold out this delusive idea? Why should they thus attempt to deceive by crying "Peace, peace, when there is no peace?" They know full well that sooner than be amalgamated with them, we should be riven to pieces and scattered in disentegrated fragments. Such an amalgamation is utterly impossible, whilst we maintain our integrity. No: there can be no true reconciliation,

"Where wounds of deadly hate have pierced so deep."

I care not in what terms you express your verdict, whether it be in the spirit-stirring language of the seraphic poet, or in the words of the Odes of Sappho. But we have come to the natural conclusion, that any elucidation of what would be the probable effect of such a verdict as they claim, will shed light on this subject.

What then would probably be the effect of a verdict which should, by an intendment of law, establish the minority, as what they claim to be, the whole General Assembly of the whole Presbyterian Church? What is the purpose of these gentlemen? that you should give all the funds of the church to a meagre minority. I would appeal to them, I appeal to the candour of these gentlemen, What would you do with the money if you had it? What would you do with Princeton Seminary if you should unexpectedly succeed in snatching it from our hands by a mere trick, a quirk, an intendment of law? How would you manage the seminary at Cincinnati, (at Pittsburgh I mean,) and how would you manage the affairs of the whole Presbyterian Church in Pennsylvania, in Virginia, in the whole south and west, in short, in the whole of the United States? How would they manage it? I will tell you how. An instance has been furnished which shows us how. They have commenced with turning out Dr. Green, and very soon every venerable pillar in the church would follow. They would never be satisfied until every office and every post of honour in the church should be filled with these New School gentlemen. What have these New School men to do with the Princeton Seminary? Did they establish it, or have they supported it? Has that seminary been sustained by the Synods of Utica, Genessee, Geneva, and the Western Reserve? Have they contributed to its support? It is, as they themselves acknowledge it to be, an Old School institution. The very ground on which that seminary is built was a donation, not from them, but from the very man whose name they first struck from the list of trustees, (I am corrected; one half the lot was a donation from him,) the venerable Dr. Green. The object of these relators is to take from him that very property, in New Jersey, to take it from him and bestow it upon the delegates from the Western Reserve synod, and the representatives from the three synods in the interior of the state of New York, together with all the Congregationalists in New England. Will gentlemen send their sons there to receive their education, if you should give it to them? They can't manage it, they know they can't. Well, suppose they gain possession. When the excitement of this contest shall be over, they will, they must feel that your verdict has given them the control of charities to which they have no just claim, and which they ought not to have undertaken. The seminary at Auburn is a New School institution. We do not wish to exercise any control over it, even if we had it in our power. We would touch none of their funds. To their own consciences I appeal; and, in the presence of God, let them answer it. Would you be justified before God in thus laying hold of these noble charities, which were designed by the donors for another, and a different purpose? Will you, by a mere intendment of law, dare you, seize on our property, and take fro n us our inheritance?

Gentlemen of the Jury,—I have now exhibited what the other party claim to have done in the General Assembly of 1838, and I have also shown you what they actually did at that time, and also what they have not done. From this view of the case it is clear,

that should you concur with the relators and render a verdict for them, it will go to establish, as far as a single act can establish, their entire control over every part of the church property. It will utterly disfranchise the Old School party, without any prospect of restoring peace to the church. A verdict establishing their claims, unsupported as they are, except by the allegation of imaginary wrongs, will be regarded as gross injustice to us. The case will shortly be with the jury, and you must render a verdict, and though I hope for such a verdict from you as I anticipated in the preliminary stage of my argument, yet should your verdict be against us, should you disfranchise the Old School party, and by reason of intendment of law, give the whole of the funds of the Presbyterian Church to those who have not the shadow of rightful claim to them, who have themselves acknowledged that they had no title by which they could claim those funds, the moral sense of every individual in the community will revolt at the unjust decree. In the preliminary portion of my argument, I alluded to certain papers containing a correspondence between the representatives of these two parties in the church, with a view to an amicable division, which correspondence shows what was the state of their feelings in 1837. I then observed that the Old School party had made to these New School men a most just and liberal offer, which the New School party saw fit to refuse. I will now refer to those papers and that correspondence again. This brings us at once to the consideration of the so much reviled General Assembly of 1837. What were their views concerning the funds of the church at that time? What did each party then propose to the other, relative thereto? In that Assembly, in which the Old School party had a decided majority, on a proposition from that party a joint committee was appointed, or a diplomatic college, consisting of an equal number of the Old School and New School parties, which resolved itself into two separate bodies, from the time of their first meeting; five members on each side, each proposing to engraft certain conditions on an instrument of compromise, for the amicable division of the church, which division both parties regarded as desirable. We have in evidence the result of their diplomatizing. The Old School men commenced the negotiation in this form. (See "No. 1, of the Majority," page 51 of this report.)

This is the first solemn proposition of the representatives of the majority to those of the minority.

Now, the other party are saying in the newspapers and elsewhere, that if your verdict is for them, the church will not be divided, but we shall all go with them. But let us see how they thought in 1837. See their documents in this diplomatic college for agreeing on the manner of a division. The paper containing their first communication in reply to the representatives of the majority, or Old School, runs thus, (see "No. 1, of the Minority," pp. 51 and 52 of this report.) "Difference of views in relation to important points of church policy and action, as well as theological opinion, are found to exist." This was then the language of the New School party. Note another expression, "Now, it is believed

that a division into two separate bodies will be of vital importance to the best interests of the Redeemer's kingdom." Both parties agreed as to the propriety and advantages of a separation of the General Assembly into two bodies. Yet notwithstanding this, the New School party now tell us that such a division would be unnatural, and that the two parties must be kept in union by compulsion. They would now bind the Old School party hand and foot, and thus manacled, have them delivered over the victims of the law, to prevent that very division of the church which they themselves deemed to "be of vital importance to the best interests of the Redeemer's kingdom." In view of the importance of the measure of division to these vital interests, they then made the distinct proposition, which we give in their own language: "The General Assembly shall be divided into two bodies." They proposed, then, a division of the church, on the account of wide differences in opinions relative to policy and action, and even in matters of faith. They also acknowledge the power of the General Assembly to make this division; provided, however, that the final decision be referred by the Assembly to the Presbytery. Next, in stating the terms on which they were willing to agree to a division of the church, they make sundry specifications, in the last of which they distinctly offer to transfer the whole of the seminary fund to the Old School Assembly, to those very gentlemen whom I now represent. The learned counsel severely animadverted on the circumstance of the proposal for a division having originated with the Old School party. I will not stop to argue that, but out of the mouths of his own clients I am able to show, by these ten propositions which they made to the Old School, that they fully acceded to the primary proposition. It is a matter of no consequence then which made the first proposition. But when we accede to the proposition merely repeating their own terms, they accuse us of intending to perpetrate a monstrous fraud, and under the cover of an apparently liberal offer, to secure to ourselves every vestige of the church property. Yet I repeat it, that very proposition was first made to us by themselves. How could they, then, discover fraud in the proposition, unless they intended to perpetrate a fraud on us? We used their own words, and how is it that those words are fraudulent in our mouths and not in theirs? If there be any fraud, it is theirs, not ours. They were the authors of that proposition, except that we added the expression, "Provided the will of the donors will permit." And they, surely, intended to include this idea, unless they proposed, with even more astuteness than the learned counsel has charged upon the Old School party, that one half of the funds should be transferred to them, no matter what the intention of the donors might have been, setting a trap by which they could take the other half afterwards, by an intendment of law. In their second paper, (see previous page 53,) the minority insist on an equal division of the church funds. Then in proposition No. 2, of the majority, (see previous page 53,) you will see that they agree in the main points, but propose a slight modification of the form in which the proposition should stand in regard to a division of the property.

This is the proposition of the Old School party, and they not only agree with the New School in all the material points, but adopt nearly their very words. Their proposition, however, contains one item which is original with the Old School party, that is the proposition for the appointment of committees to adjust these matters, and of arbitrators, with "full power to settle finally the whole case in all its parts;" thus guarding against any appeal "to the legal tribunals of the country." In the language of the New School, a division of the church was "of vital importance to the best interests of the Redeemer's kingdom." And we, acquiescing in this proposition, come forward and propose the appointment of "a Board of Arbitrators" to adjust every thing in relation to it, agreeing to abide by their decision, whatever it might be, in order to save the church from becoming the humiliating spectacle which is now witnessed before a civil tribunal. We desired, by referring the whole controversy, as far as regards property, to an impartial tribunal, to save the church of our fathers from contesting the matter with all the acrimony and violence incident to such proceedings, as well from the humiliation of contesting the claims of the respective parties, in this acrimonious manner as from scandalizing Christianity in view of the whole world. But this proposition, made in the spirit of equity, which the dictates of their religion enjoin, did not suit the views and purposes of our opponents. They would not hear. Such an arbitrament would have placed the two parties precisely on equal ground. But the other side would not assent to it. It would have precluded them from compassing their object in a temporal court, by a suit at Nisi Prius, by an intendment of law! By the answer of the committee of the minority you will readily perceive that they had not yet consulted with the counsel learned in the law, as they seem not then to have understood legal technicalities, (see "No. 3, of the minority," previous page 53.)

"We assent," say they, "to the proposition, with a trifling alteration in the phraseology." That trifling alteration had respect only to the words "remain" and "retain." They propose to strike out these words and insert others. And why should they be so tenacious about these words? They might mean something: and before what tribunal? Why I will tell you. Before a court like this, by intendment of law. Before "a Board of Arbitrators with full power to settle finally the whole case in all its parts," they would have no influence on the decision. These distinctions would not enter there. That is the state of feeling manifested by these two parties in 1837, and such their views in relation to the disposal of these funds. There does not, at first view, appear to be much difference. Both parties agreed that a division of the church was necessary. We proposed to carry it into effect immediately, and they within the next year with the approbation of the presbyteries. Both parties agreed as to the names by which the two bodies should be known in future. They agreed that the one should be styled "the General Assembly of the Presbyterian Church in the United States of America," and the other "the General Assembly of the

American Presbyterian church." The only difference was as to the phraseology of a single word, and their refusal to agree to appoint a Board of Arbitrators. I trust now that you must agree with me, that they would have refused to agree to the proposition in any language, that would not allow them by violence to seize the whole of the funds and property of the church. I say it, and I say it boldly, that a more just and liberal proposal than that which was made by the Old School party, could not have been devised. I say it now on my own responsibility, but with no fear that my clients will retract, that if these New School gentlemen will come forward and agree to choose three impartial men of other religious denominations or of no denomination, to settle all matters in controversy on the principles of equity, we will bind ourselves to abide by their decree. We will pledge ourselves to abide by such a division of the property as they shall direct. If our opponents will accede to these terms we will give up every cent, if the arbitrators shall so determine. If they take every thing, even the Princeton Theological Seminary, together with Dr. Green's donation, if they will only agree to leave us Dr. Green himself, we will surrender all, if such a Board of Arbitrators shall decide against us. We will give up every thing except the doctrines of the church. What the Old School party were willing to do in 1837, they will do now. At this very moment they will bind themselves to the agreement, if the gentlemen on the other side will only say the word. They may draw up with the paper to the table, and we will sign it on the spot. We will abide the issue, and thus relieve both these parties and the whole church from the scandal of these litigious proceedings. We are willing to go farther, that all the funds and Christian charities, so far as the will of the donors will permit, shall be submitted to the impartial arbitrament of such a tribunal as I have named; that all they have against us may be at once settled by a pro rata allowance to each of the respective parties; and we will go even further yet if required, we will give them every thing that they have given to us and themselves whilst we were together.

I propose now, gentlemen, to show you what the Old School party have done, how they have done it, and by what authority they have done it. I am aware that your patience is nearly exhausted by these tedious details, and I am almost ashamed of being obliged further to tax your patience. But as I hope not to detain you long, I must ask you to accept this apology as the only one I have to give. I will, however, as a preliminary, dispose of a small matter, designed to prejudice you against my clients. My learned friend, following his instructions, no doubt, alleged that the Old School men came up to the Assembly of 1837 purposing to expel a large portion of their brethren, in order to secure to themselves a majority on certain questions of doctrine. He assumed that they came to this city to war against their brethren, that they had framed a conspiracy thus to obtain the ascendancy in all future General Assemblies. This is a great mistake indeed, the very reverse of the facts. What are the real facts? We already had the majority in that Assembly. We were the active party, and made the first proposition for

an amicable settlement, by the appointment of a joint committee of five members from each party. We were powerful enough to control all the proceedings of that Assembly. That committee, by our proposition, was composed of both parties, and there we renewed our proposition for an amicable division of the church. But as we consulted our principles, we could not see alike, and the New School party finally refused to accede to any terms of division. We were thus driven to the wall, and forced to adopt the acts of excision as the only alternative to rid the Presbyterian church of a most dangerous heresy. May I not rather say that our opponents were the conspirators, when they were professing to acquiesce in a division of the church, and yet could not be prevailed on to agree to any terms of compromise. But I will not cast any reflection on them. I will rather suppose that the restoration of peace, by the proposed division, failed, because the parties could not see alike, and therefore could not agree. Well, this expedient for the restoration of peace having failed, we tried another proposition, but with no better success than before. And I now refer to these successive though ineffectual attempts on the part of the Old School party for the purpose of showing the absence of any covert design or conspiracy on our part. This proposition, the same which was afterwards made by our opponents themselves, was for a citation and trial of those bodies, or judicatures of the church at the bar of the General Assembly. But strange as it may appear, every New School man voted against it; though they now say that it would have been the only constitutional plan of dealing with the recusant synods and presbyteries, on account of their alleged apostacy from the Confession of Faith and form of government of the Presbyterian Church. Though they acknowledged that a "difference of views in relation to important points of church policy and action, as well as theological opinion," actually did exist to such an extent as to render a division of the church absolutely necessary, and had placed it on the record, yet they voted against the process of citation and trial. I hold in my hand a printed list of the "yeas" and "nays," which proves that every man who is now a New School man, and was there present in that Assembly, decided against it. What, go to try them by citing them to the bar of the General Assembly! They would not submit to it; though it was the only practicable mode of trial that could possibly be devised, the only one by which the laws of the church could be enforced. Suppose these gentlemen were to be tried in the inferior judicatories of the church, what would be the effect? What the result of such a trial? There, these gentlemen who are to try them, the very men who claimed to sit in judgment in the case, had already prejudged it. They say that they are not subject to church censure. They would agree to nothing but what was in accordance with their own views. Who were to try them? Why they themselves, and this would have been a mere farce indeed, as you may well suppose; and the General Assembly must ultimately have proceeded to try them. They would then have stood out and refused to obey its decrees, and being supported in their insubordination, by a power-

ful minority faction, they would have bid defiance to the General Assembly itself, as they have now done. Something like this had previously been experienced in the case of a distinguished gentleman, Rev. Dr. Barnes of this city, who had been accused of heresy and refused to submit to the decision of his case by the synod; and the synod was obliged to resort, in the case of his presbytery, to the alternative of dissolving it. Dr. Albert Barnes continued for years to set at naught the authority of the Synod of Philadelphia, and to uphold and preach his heretical doctrines and opinions in defiance of the synod. The majority thus saw the danger of being entirely frustrated in their purpose. They also saw that even if they should not be ultimately foiled in their purpose, the difficulties would be immense which they would have to overcome, amidst the excitement and confusion of party contention, carried on with all the rancor and violence which emanate from such proceedings. The Old School party adopted the resolutions which they did, to promote peace and prevent the disastrous consequences which I have depicted. The majority having thus been foiled in their attempt at citation of the four synods to the bar of the General Assembly, they were compelled to resort, as the next best mode of proceeding in the case, to the act of excision, so called. That was the only mode left them by which their purpose could be effected. (For the resolution which was here cited by Mr. Preston, see that numbered 1, previous page 56.)

That is the celebrated act, called "the act of excision," by which these four synods were declared to be no part of the Presbyterian church, and were thereby excluded from ecclesiastical connexion with the General Assembly of said church. "The Plan of Union of 1801" had previously been declared unconstitutional and void from the beginning, and now it necessarily followed that all the synods and other bodies which had grown up under it, fell with it to the ground. Having previously passed the act of excision, this resolution merely declared the necessary consequence of the abrogation to be that these synods, together with the presbyteries and other church judicatories in their connexion, were dissolved. They were so declared, (for the resolution was declaratory merely,) but with very important reservations, and it is most important that you, gentlemen, should pay particular attention to the nature and character of those reservations. It is the more imperatively necessary, because our opponents have endeavoured to cause you to believe that this resolution was a bloody Draconic sentence of temporal as well as spiritual excommunication, and utter annihilation. They make a great parade of words, as that these brethren have been turned out of our communion, driven from the church of their fathers, and stigmatized with heresy. Now, there is nothing at all like this, except in the excited and creative imaginations of these gentlemen. It was not so intended. It did not touch one single elder or deacon in all the wide extent of these four synods. And not only so, but we carefully provided for each individual case, in order that their heads might be effectually shielded from harm. By this resolution we did not harm a hair of their heads. The situ-

ation of none of them was made a whit the worse. Not a single man of them was made a tithe of a single hair the worse in consequence of it. As evidence of this you need only read the following resolutions. (See resolutions in continuance numbered 2, 3, 4, previous pp. 56 and 57.) Thus were preserved to every man in the Presbyterian Church his rights in that church, if he were really a Presbyterian, and to every church or presbytery its rights, if "strictly Presbyterian in doctrine and order." Now what was the mode which they pursued? It had been shown that these persons who had entered the church in consequence of the adoption in 1801, of that unconstitutional "Plan of Union" had not come into the church in a proper manner, that their title to church membership was defective, and they then said to them, "There is a defect in your title, and we desire you to remedy that defect." Was there any thing wrong in this? Was it a capricious or captious direction to those gentlemen? To bring it home to you, gentlemen of the jury, it is the same thing as if, in an assembly of private men, or a corporation for banking or other temporal purposes, the title of a portion of the corporators should be found to be defective, and the other corporators should say to them, you cannot be admitted to the privileges of the corporation until the defect in your title shall be remedied. The General Assembly of 1837 simply said to the members of those four synods, (speaking to them as private men,) "Your title is defective, there is a flaw in the instrument by which your ecclesiastical privileges, in connexion with this body, are secured. There is a defective link in the chain of your title, and you must go and have the instrument renewed." The very same as if the members of a private corporation should say to a portion claiming to be members of the corporation, "Fellow-corporators, we perceive that there is an error in the manner in which you were admitted to the privileges of this corporation, and you had better remedy the evil at once." Would, in that case, the members be turned out of the corporation?—would they be deprived of their rights by the board of corporators saying to them, "Your title is defective, go and remedy it?" Or, the majority of the General Assembly in effect said to them, "Your judicatories and ecclesiastical bodies were established by mistake. There is an error in the mode of their admission into the church. Still we do not wish to cut you off entirely at one ruthless blow. All that we desire is that you should return home and perfect your titles, for the advancement of your own happiness and the peace of the church." "We do not accuse you. The defect in your title was no doubt an undesigned defect. It is illegal, however, and as such must be remedied. We do not say that you must be turned out of the church. We do not desire that you should be turned out if you are really Presbyterians. Go home and remedy your title, and then come back, all of you that are purely Presbyterian in doctrine and order, to the next General Assembly, and we will take proper order thereon." Was there any thing unjust in that, to require of them to remedy their title? Even if we were wrong, can you suppose that we had any evil design in thus resolving them back into their original ele-

ments, in order that they might be regularly constituted, in the proper constitutional manner and form; in saying to them, We have discovered that your title is defective; go and remedy that defect, and then come back again, according to the prescribed plan, and prove yourselves to be purely Presbyterian in doctrine and order, and we will receive you? Our arms are open to receive every one who will furnish us with the evidence that he is a Presbyterian.

The gentlemen tell us that all the presbyteries belonging to the four synods were regularly constituted. What then prevents them from complying with the requisition of the General Assembly of 1837, by joining themselves to other synods? Nothing but their own obstinacy, unless it is that they are not Presbyterians. Let them come and show that they are "strictly Presbyterian," and they will be admitted. But they cannot do this. It is impossible for them to do it. They can't say that they are Presbyterians. They say "We won't do it;" but they can't do it. Many of them do differ from us in matters of faith by their own acknowledgment, and those who do not may at any time return to our church. The mode by which they can do this has been clearly pointed out, and I would appeal to you, is it a Christian-like proceeding on their part to raise all this clamour, under the pretext that they had been excluded from the church when the door is open by which all who are really Presbyterians may enter freely and without restraint? But they say to us, "We will stand back, we will not degrade ourselves by returning to the church in the manner you have prescribed. We will not say that we are Presbyterians. We scorn to submit to your requisitions. If Presbyterians were as thick as blackberries amongst us we will not give you one of them by compulsion." They cannot say that they are Presbyterians, much less prove it. Rely upon it, gentlemen, such is the mode which was provided by the Old School party, for the restoration of all those Presbyterians within the bounds of the four synods, who complain of having been cut off, and such, gentlemen, is the temper which has been manifested by these parties in regard to what was proposed to be effected by the measures of 1837. That the situation of those four synods be not misunderstood, I will again state that they came in under the Plan of Union, and they were merely dissolved in order that they might be organized again as speedily as possible on true Presbyterian ground. Their constituencies were merely resolved into their original elements, that those elements might become again united, and form regularly organized presbyteries and synods. Does not this appear to you, gentlemen, as a most outrageous infringement of their rights? Does it not display a most violent, lawless, diabolical and vindictive temper?

Now, may it please your honour, I will enter into the inquiry, what power had the General Assembly to do this? This will include a consideration of the nature and design of the Plan of Union which has been so much talked of. In the year 1837 the New School party appealed to the "Plan of Union of 1801," as a justification of their proceedings. The churches of which those pres-

byteries and synods were composed, had many of them been admitted originally by virtue of that plan, and others continued to be formed in the same way up to the time of the excision, and even since that time. This was declared by both parties; and we say that their excision was the legitimate consequence of the repeal of that plan. When the Plan of Union between Presbyterians and Congregationalists in the new settlements was adopted in 1801, the large tract of country now embraced within the bounds of the four synods was principally a wilderness. Then the settlements on this frontier were few and scattering. That tract of country was not then filled with the busy hum of men, but an untamed forest, except perhaps, a few scattering hamlets and wigwams. Scarcely a single trace of civilization was there to be found. In this situation it continued nearly or quite down to the period of the last war. He who travels over that interesting section of the country, at the present time, can scarcely bring his imagination to conceive the immensity of the changes which, within the few intervening years, have there been wrought by the industry and enterprise of man. Well cultivated farms now cover the face of that whole extent of country. It is intersected with rail-roads and canals, and towns and cities have sprung up as if by magic. Even the cities of Rochester, Buffalo, Cleveland and numerous others now teeming with inhabitants are, as it were, but of yesterday, and date their origin at a less remote period than the Plan of Union. Well, in the new settlements which had begun to form in that tract of wilderness country, Christians of different denominations became desirous that the benign influence of the holy religion of the cross should be shed in all its effulgence and beauty on the wandering and migrating inhabitants of those widely extended forests, a heterogeneous mass suddenly thrown together, in an irregular state of society. With a view of diffusing the means of salvation among this mixed population the Plan of Union was formed. Then the settlements were sparse, the villages were small and far from each other, and the formation of distinct churches by any one denomination was impossible. On the one side of this new territory was the Presbyterian Church with its centre at Philadelphia, and on the other was the General Association of Connecticut, composed of the Congregational Churches in a considerable portion of New England. Lying between the two, this extended wilderness was spread out a spiritual waste, into which missionaries were from time to time sent by both ecclesiastical bodies. The Presbyterians and Congregationalists were so mingled together that it was found to be impossible to form distinct churches of either sect. The General Assembly of the Presbyterian Church, therefore, on the one side, and the General Association of Connecticut, on the other, entered mutually in 1801 into this agreement, called the Plan of Union, to meet the exigencies of the scattered population in this new territory which was situated between them; the plan which has so important a bearing on this case. Though originally suggested from Philadelphia, the General Association of Connecticut made the first distinct proposal of it to the General Assembly. The General Association of Connecticut, being

nearest to the field of missionary labour, and of course more fully apprised of the condition of those new settlements, sent delegates to the General Assembly at Philadelphia and proposed to the Assembly the adoption of a plan, to foster those churches which were located in the new settlements. This proposal for the extension of the holy doctrines of the gospel, for securing the blessings of peace and harmony, and extending the sphere of the benign charities of Christianity, struck the members of the General Assembly of the Presbyterian Church as being both wise and benevolent, and that body, which was then newly organized, entered into the agreement. Thus the Plan of Union was adopted; intended, however, for that desolate region only. They did not propose to form in these new settlements, for which the provisions of the Plan of Union were intended, a complete Presbyterian nor yet a complete Congregational Church organization. It was provided, merely as temporary, that the means of public worship should be afforded without the establishment of any complete ecclesiastical system: and it was expected that the two denominations would separate as soon as they should have increased sufficiently for an independent and regular organization of the members of each sect separately. The plan authorized a Congregational minister to preach to a Presbyterian assembly or congregation, and a Presbyterian minister to preach to a Congregational assembly or congregation. It authorized a church of either denomination to settle a pastor of the other. It was appropriate, and adapted to the tract of country for which it was designed. On its very face it shows that it was intended only for the particular state of society then existing there. It provided for religious worship, in an anomalous form, neither Presbyterian nor Congregational, but a mixture of both. As was well argued on the other side, it obviously did not contemplate the formation of either presbyteries or synods out of these materials.

The General Assembly could not, by virtue of its authority delegated by the presbyteries, thus uproot, undermine and destroy the whole fabric of the Presbyterian system of faith and church government, nor had the fathers of the church any inclination to do so. It was provided by the Plan of Union that Congregationalists should not be governed by Presbyterians nor Presbyterians by Congregationalists. For the very moment that we had decided thus, that Congregationalists should be permitted to organize themselves into presbyteries and synods in connexion with the General Assembly, there would have been a dissolution of the Presbyterian Church and a reorganization of a new mass, something like a mule would have been the offspring of this unnatural process of amalgamation, incapable of continuing the succession of the Presbyterian Church; and so far as such an amalgamation has extended in that section of country, the consequence has been the bringing into existence churches of this anomalous and mulish character. When the Plan of Union was adopted, they did not intend that Presbyterians and Congregationalists should unite together in this unnatural and anomalous manner. But all experience shows that the intention of an instrument furnishes no security for its practical effects. What-

ever its original intention, it may, by intendment of law and the ever-busy working of human ingenuity, be entirely diverted from the purposes intended to be effected by it. Thus the framers of the constitution of the United States could not foresee how that sacred instrument, intended as a safe-guard of liberty, within half a century from its date, would, by their degenerated sons, be perverted to subserve the designs of demagogues and their deluded partisans. Such a thing could not be anticipated, and yet it is emblazoned in broad characters on the pages of American history. The Plan of Union, as I have said, was intended exclusively for the new settlements. Under the anomalous system of worship which it provided, peace, order and harmony reigned for many years. But it was expected that the inhabitants would not, longer than necessity required, continue to worship at the same altar, and adhere to this anomalous form of ecclesiastical rule; that wherever they were sufficiently numerous they would separate, and organize their respective churches on secure ground, that the benign influence of our holy religion would be respectively felt and acknowledged by each, in subordination to its own head.

Gentlemen of the Jury: I have been submitting to you and endeavouring to show that the Plan of Union was limited in its operation as to time by the contingencies of the new settlements. It was also limited as to territory, being confined in its application to those settlements in the state of New York. Both parties to the contract, agreement or treaty, at all times considered it as being thus limited in its operation to the location and circumstances of the new settlements, as I have described. When, therefore, the limited time for which the compact was formed expired, by reason of these regions becoming densely populated, and each denomination had become able to sustain itself, the several portions of those mixed congregations should have segregated themselves from each other, and formed distinct churches, each according to its own peculiar plan of organization and administration. In other words, the Plan of Union was one of those benevolent schemes which have been put in requisition by the Presbyterian Church for extending the principles of their religion. One of those charitable objects, in the furtherance of which missionaries have been sent out to various portions of the world, to Texas, to China, to the dominions of the great Mogul, to the Sandwich Islands, in short to every country where their labours could be available in spreading the means of salvation. But as these missionaries remain connected with their particular presbyteries, so it was intended that the Presbyterian ministers who were permitted to become pastors of Congregational churches, should, notwithstanding, continue to belong to their respective presbyteries.

Thus those mixed churches of an anomalous character, were, by the Plan of Union, permitted to be formed on certain conditions, but with no intention that the fundamental principles of Presbyterianism should be entirely uprooted, by such mixed congregations continuing in existence, after the necessity which first originated them should cease. It was contemplated that a separa-

tion should take place, and that each sect should give in its allegiance to that church to which it most appropriately belongs. But so it happened, as, indeed, it might have been anticipated, if the subject had been severely scrutinized, that the sympathies which arose between them, and the relations in which they became accustomed to associate with each other, in their habitual and continual intercourse, created ties of affection and interest between the portions of the two sects thus circumstanced, which could not easily be severed. It was natural that they should afterwards feel inclined to continue the connexions thus formed. Accordingly, when the time arrived for the union to expire, it was still continued. And not only so, they proceeded to establish regular ecclesiastical organizations. In the first place, they formed churches of this semi-Presbyterian and Congregational character, which churches were recognized by presbyteries and synods, and even by the General Assembly itself. In the next place, they constituted presbyteries, and they then established synods. Such results, certainly, were never contemplated by those who formed the Plan of Union. They did not thereby authorize those proceedings. Those presbyteries and synods were not formed in accordance with the provisions of the Plan of Union, for it did not authorize the erection of any such bodies.

But the practice of associating together in those anomalous and mixed churches, continued and extended, and the mixed and anomalous presbyteries, which were composed in the whole or in part of such anomalous churches, did not conform to the fundamental rules of either the Presbyterians or the Congregationalists. Though they claimed the privilege of belonging to our church, yet their members were partly Congregationalists. For as those mixed presbyteries ordained ministers and elders, and installed pastors for such churches belonging to said presbyteries, and they, as bishops and pastors of these churches, belong to a presbytery, and participate in ordaining others in a similar manner, the effect must be obvious. The Congregationalist heresy encroached, visibly, on the fundamental principles of Presbyterianism in that territory where this state of things existed.

I have said that the Plan of Union did not authorize the erection of presbyteries and synods of this anomalous and mixed character; nevertheless, those ecclesiastical organizations were established under it. Though, in reality, the establishment of presbyteries of this mixed character was not depending on the Plan of Union, yet they claimed the sanction of that Plan for such proceeding, though it did not authorize it. No doubt can be entertained of the existence of numerous churches of this mixed character, in 1837, established in the manner which I have pointed out to you. And not only did those mixed churches exist, but the majority of Congregations belonging to many of the presbyteries, were of this character. But, says the gentleman, how does it then happen that they were admitted as part and parcel of the Presbyterian Church? I reply, that the attention of the General Assembly had not been called to the subject. The Plan of Union, upon its front, allowed

of only a temporary indulgence—a relaxation of the discipline. Yet, as churches had grown up and flourished under this administration of it, the General Assembly acquiesced, from a hope that the doctrines of the Presbyterian Church would be more extensively propagated. They had not examined into the matter. For, though presbyteries and synods were formed in this way, yet the minutes of the General Assembly show, that no examination of the premises was ever made. They supposed a great good would be effected by the propagation of their doctrines amongst the members of other churches. Such considerations as these, appear to have wholly engrossed the thoughts of those fathers of the church. They dreamed not of the attendant dangers. In the prospect of a general and lasting benefit to the Presbyterian Church, and to the Christian churches at large, they winked at what they considered but trifling irregularities, and the discipline was therefore relaxed, in obedience to the ordinary impulses of our nature. They did not intend to establish a precedent, but they could not foresee the consequences. They did not perceive that they were thus opening a most dangerous flood-gate of evil, through which a torrent of disorders have since rushed into the very bosom of the Presbyterian Church. Nevertheless, they had, unawares, planted in their fruitful soil, a strange vine, which they watered with care, intending to permit it to grow outside the wall of their ecclesiastical structure. This parasitical plant of the wild vine, being suffered to grow unmolested on our walls, spread rapidly, and its branches soon twined themselves, and ran over the wall. Before danger was apprehended from it, it had insinuated its roots and tendrils through every nook and crevice, until they had destroyed the cement which bound the stones firmly and compactly together; they reached the inside of the ecclesiastical building, and the fabric itself was threatened with demolition, by the superabundant weight of the luxuriant growth which it sustained. But the General Assembly did not perceive the exact time to prune down this exotic vine, by causing the discipline of the church to be rigidly enforced. I am sorry that they did not perceive the danger earlier than they did. For, when it was first perceived, the whole building had begun to totter to its foundation. The mortar was gone, and the very stones trembled in their places. When the alarm was first given, the danger was so great that it required all their strength, simultaneously exerted, to tear from the wall this vile vine, and to repair the breaches in the wall itself. In order to effect this, they were even under the necessity of tearing down a part of the wall, effectually to detach this foreign growth, and save the remaining portions of their structure from irretrievable ruin. It was necessary, I say, to tear down this exotic, (which grew so luxuriously on our soil, that nothing else could flourish near it,) to tear it down, and let it grow elsewhere, if it would, by itself. It is a singular coincidence, that, at about the same time when this dangerous relaxation of church discipline took place, there was an acquiescence on the part of the General Assembly in other relaxations and abuses. About that time, ministers of other sects, delegates from bodies not Presbyterian, were permitted to sit in the

highest judicatory of the Presbyterian Church, and not only allowed to participate in their deliberations, but even to vote on any and every question, as if they had been members of presbyteries in our connexion.

They were not Presbyterians, and yet the General Assembly admitted them to debate and vote. They, as a representative body, had no constitutional power to do this. But still they did it. As to the acts of the General Assembly permitting these disorders, most of them have been long since repealed. And although such departures from Presbyterian principles were wrong, evidently wrong, and are now fully acknowledged to have been wrong, yet God forbid that I should censure them, that I should call in question the wisdom and piety of those fathers in the church, who, doubtless, acted as they deemed best under the guidance of the clearest light which they then possessed. Doubtless they supposed that by adopting the Plan of Union with the Congregationalists in 1801, they were by that relaxation of the severity of Presbyterian discipline, providing the means for the advancement of religion in a new country, the churches in which would thus be preserved from being disintegrated, until, at length, they should entirely accord with the symmetrical arrangement of doctrines and discipline, which, the Presbyterian Church believes, is in accordance with the example of the primitive Christian Church, and which they trace back to its great and original founders, the Apostles.

It was not until unpleasant differences occurred in the Presbyterian Church, which, during a prolonged period of bitter contention, have continually brought the two parties into collision with each other, and threatened the most disastrous consequences, even the final ruin of both parties; it was not until the experience of these things had proved what evils had grown, and probably would grow out of it, the very fruits which had originated from the Plan of Union, that the attention of the General Assembly was riveted to this subject. Much warm discussion was thereby elicited, and in 1826 that Assembly, which had become divided into two parties on this subject, was deeply agitated in relation to it. In the General Assembly of 1831 there was a desperate and something like a death struggle between these two parties. It was, indeed, a most desperate and violent contest. There the fires of contention were kindled which threatened to consume the peace of the whole religious community. It might, without exaggeration or hyperbole, be termed the seven years war, for, during seven long years thereafter, the same subject was a continual and fruitful source of contention and strife, until it produced the scenes exhibited in the Assembly of 1838 in Ranstead court, and the scenes of which you are witnesses in this court. The evil should have been earlier appreciated, but when, at length, it came to be perceived, the Assembly promptly took measures for its removal.

Now one of two things must be perfectly manifest. Either the General Assembly did know at the time the *four* synods and the presbyteries which they embraced were created, that they were composed either in the whole or in the greater part of mixed or

Congregational Churches; or that body did not know that fact, and, therefore, took it for granted, that all those churches were strictly Presbyterian. If the General Assembly did know it, and if these churches came in and were received under the plan, the plan itself being unconstitutional, that Assembly which admitted any of them had no right to admit them, and therefore, could not bind themselves or their successors by that unconstitutional act. If these churches were not received under the Plan of Union, if they came in on any other ground, it must be admitted by every person, that the Assembly had no power to receive them, and of course the act of their reception was unconstitutional and absolutely void. The General Assembly had no power to receive Congregational or mixed churches into the Presbyterian connexion, as the constitution prohibits the General Assembly from receiving any except Presbyterian churches. If then they admitted them, knowing their character, the General Assembly trampled on its own rules, and on the fundamental principles of Presbyterianism, and thereby dissolved the Presbyterian Church, to which the charter of incorporation was given, and at the same time formed a new ecclesiastical establishment on the ruins of the old. But if the facts in the case were unknown; if these churches, by the outward garb and form of Presbyterians, deceived the General Assembly, which admitted them by mistake, no man will pretend to say that they had not a right to turn them out again when the falsehood and deception were detected. This was then the only legitimate course, to turn them out and reorganize those portions which had inadvertently been organized in an irregular manner. In every view then which can be taken of the subject, the subsequent act, I mean the repealing act of 1837, was necessary, proper, and clearly within the jurisdiction and constitutional powers of the General Assembly. By and by we will show you that the General Assembly possesses a superabundance of power, more than was necessary to effect that purpose. But ample as are the powers of the General Assembly, that body has no power to admit any into its connexion except Presbyterian ministers and Presbyterian elders who have been ordained for life. There is then no body entitled to representation in the General Assembly except that body is composed entirely of Presbyterian ministers and elders.

Who has the right to be represented in the General Assembly? Not an association of Congregational or mixed churches, but an association of Presbyterian churches. And that is not a Presbyterian Church which is composed of Congregationalists or of any other than Presbyterians. And what must be the component parts of a Presbyterian Church? Why the pastor and the ruling elders. If a church be constituted in any other way it is not a Presbyterian Church, no matter by what name you call it. Concerning this there can be no dispute. A General Assembly, therefore, cannot establish a synod or presbytery out of any other materials than Presbyterian materials. It cannot constitutionally admit into the communion of the Presbyterian Church any other than Presbyterian congregations and members of Presbyterian congregations. The

exercise of such a power would strike down the whole Presbyterian Church at one blow. The admission into the Presbyterian Church of others who are not Presbyterians is forbidden by the constitution and laws of the church, by the Confession of Faith, by the Catechisms, and by that eternal record which contains the precepts of the Christian religion, the Bible. Presbyterians appeal to that sacred record as their foundation, because Presbyterianism cannot otherwise exist. The fundamental maxim and principle of Presbyterianism is, that the doctrines and forms of government of the Presbyterian Church are of divine ordination, and that no human power has a right to repeal what God has done. This maxim of belief lies at the very foundation of the whole system of Presbyterianism. The principles of our faith, worship, and church government, came directly from God, and have been handed down to us by the Saviour himself. Such is our confidence and belief, and, consequently, we maintain that they admit of no alteration or repeal by any human authority. They cannot be repealed. They allow of no deviation from them. Speaking as I now do, as the advocate of Presbyterians, and expressing the belief of Presbyterians, I say that Presbyterianism is an institution of divine ordination, established by the Lord Almighty himself, and no human tribunal whatever can set aside or abrogate any portion thereof. They believe, that by divine ordination, presbyteries must be formed of Presbyterian ministers and ruling elders—that a synod must also be constituted of Presbyterian ministers and ruling elders, and that this law of the church cannot be abrogated or repealed.

This is the corner-stone of the Presbyterian system, if not of every other system of faith. I put myself, then, not only on the by-laws of the church, the rules of order, but also upon the great, fundamental law of that church—the eternal law of that Holy Bible. It is a fundamental article of the Presbyterian Church, that Presbyterianism is of divine ordination. The whole Presbyterian Church, which I represent, relies on the Bible, and regards the New Testament as a part of her constitution. Her faith is, that God Almighty has established her, and that her principles were received from his lips, and from the inspired apostles. Ours is, we believe, the primitive church—the true church—the holy apostolic church, —and he who denies it, is not of us. We say to him, "We know you not." We say to such men as those whom we have excluded from our communion, Congregationalists, and representatives of Congregationalists, and mixed churches, not in the spirit of that awful denunciation which has been imputed to us, but in the true spirit of Presbyterianism, "We do not know you; you may be wise men; you may be good men; you may even be good Christians; but you are not Presbyterians. We do not know you, and you do not know us. We do not know of what elements your churches are composed. We should not be Presbyterians, if we acknowledged you or received you." I am not a Presbyterian. I speak as a lawyer, and I have been stating the belief of those whom I represent, and not my own. I am an Episcopalian, and you are a Roman Catholic. Can the Presbyterian Church admit us into her

communion? So soon as she should, she would cease to be a Presbyterian Church. Instead of this, it would become an anomalous amalgamation of different sects and denominations. It would be unlike any of its component parts, unlike any thing else in existence. And what is to prevent any member of a mixed church, composed in this manner, from claiming the rights and privileges of either sect? Nay, further, what is to prevent such a church from usurping the privileges and immunities of all the sects in Christendom? Such a member may be either a Presbyterian or a Congregationalist, or neither, or both, as may happen to suit his fancy.

If you proceed to try him, by citing him to appear before the presbytery, to answer a charge of misdemeanor, or for heresy, he may hold up the Plan of Union, and claim to be a Congregationalist. And if the congregation of which he is a member should commence a process against him, he might then claim to be a Presbyterian. He is, in reality, an anomaly in the creation, a sort of a man-bat, flying to and fro in the twilight; and, though between the two, bearing affinity to neither the beasts nor the birds.

Now, gentlemen, there is another view of the Plan of Union, which I have not disposed of. I do not mean to contend that the plan was not just and proper. It may not have been improper, under the circumstances. If the Presbyterian Church, after carefully viewing certain circumstances, judged it best to grant a dispensation from church censure, in certain cases, which before would have subjected the member or party engaging therein to such censure, it may have been perfectly right, and justifiable by the dictates of wisdom and prudence. It met this exigency, and nothing more, that Presbyterians and Congregationalists might associate together in the new settlements, without becoming liable to church censure, which they would have been if the Plan of Union had not been adopted. But, when Congregationalists came in under that Plan, and claimed to be members of the Presbyterian Church, when they thus claim to be a portion of the church itself, to take part in the proceedings of the tribunals of the church, and when the judicatories of the church shall be composed of such elements, the question then arises, whether the admission of such persons into the very bosom of the church, was in accordance with the fundamental laws and principles of Presbyterianism? Presbyterians believe, that no Presbyterian Church can exist without an order of church officers called ruling elders. But can they proceed to try a Congregational Church, which has no ruling elders, for being without them? Well, suppose they undertake to try one of those anomalous, or mixed churches? How can they proceed, but by bringing the matter before a committee of the said congregation, composed of one-half Presbyterians and the other half Congregationalists? What would this be, but solemn mockery? "Why!" the Congregationalists would reply to the charge—"we do not believe in the divine ordination of ruling elders;" and there would be an end of the chapter, so far as that tribunal was concerned. How could the General Assembly proceed to try these men, and for what! For not having in their churches regularly ordained

elderships, when they do not acknowledge the ordination of elders to be of divine appointment? They would exclaim, that it was a violation of the common law, though they did not come in by common law, and you can't try them by common law. If you try them by any species of law, either common or uncommon, ecclesiastical or civil, for not being Presbyterians—if you convict them of the charge, these New School Congregationalists will say "you shall not turn us away, you did not prove it by an intendment of law." Thus, your whole ecclesiastical jurisdiction rests on an intendment of law. Throughout the whole affair, it is necessary to proceed on the presumption that the facts are otherwise than they really are; and, *pro hac vice*, in order to try them for not being members of the church, you must consider them to be members.

In order to prove that they are not Presbyterians, you must acknowledge that they are Presbyterians. If I have not placed this matter right, it must be because the gentlemen have not been able to give me their assistance. But the General Assembly is a *quasi* corporation, and as such, had not power, by the Plan of Union, or otherwise, to admit Congregationalists into the Presbyterian Church, as that would be a violation of the act of incorporation.

We come, now, to the position suggested in the course of an argument on the admission of certain testimony in this case, that, from the tenor of the act of incorporation, the introduction of any admixture, other than Presbyterianism, is against the integrity of the incorporation. The act of incorporation does not recognize, or admit of mixed synods and presbyteries being in connexion with the General Assembly, but it is confined in its operation to the Presbyterian church, a church which is governed by ministers and ruling elders. The "Act of the Pennsylvania Legislature, incorporating the Trustees of the Ministers and Elders of the Presbyterian Church in the United States of America," we contend, was granted to the Presbyterian Church, to a church composed of Presbyterians only, and without any intermixture of Congregationalists, or any other sect. It was not granted to a General Assembly, composed in the whole, or in part, of committee men, or their representatives. The words, "ministers and elders," are repeated in that act over and over again, and the language of the said act was intended to conform to the fact. Now what comes of your modern Congregational Presbyterians, or Presbyterian Congregationalists? Your committee men, and their representatives? They may hold up the Plan of Union as long as they please, but if the Plan of Union admitted any one else than Presbyterians into the General Assembly, it was unconstitutional, and consequently a violation of the charter of incorporation, and the corporation might have been proceeded against by a writ of *quo warranto*. Suppose, for instance, the General Assembly of the Presbyterian Church should agree to a Plan of Union with all other sects and denominations, bringing, under the broad wing of her charter of incorporation, one and all Christian professions. Could they hold property, or other privileges, under the charter? Did the legislature of Pennsylvania grant, or intend to grant that act of incorporation to all the religious sects and deno-

minations in the whole of Christendom? Or was that charter given to Presbyterians only? It completely separates them from all the other sects. That charter was granted to none but ministers and elders. It was exclusively confined to them, and he who introduces any others to the enjoyment of its privileges, violates both the letter and the spirit of the charter. I do not, however, say that a mistake, merely, involved such serious consequences as the utter forfeiture of the charter. A position on this subject, to which I alluded in an earlier stage of these proceedings, was rather the suggestion of one of my colleagues, than my own, and to whatever consideration it may be entitled, I do not, in the present aspect of the case, deem it necessary to press it here. I do not, therefore, at present wish to be understood as saying, that because the General Assembly passed an unconstitutional act in 1801, that the proceedings of all the General Assemblies which have been held subsequently to that time, have been utterly nugatory and void. They were, perhaps, General Assemblies *de facto*, though not *de jure*. The Congress of the United States, a few years since, refused to renew or continue the charter of the Bank of the United States, and the renewal of its charter, as many of you well know, was defeated principally through the agency of those who opposed it, on account of the real or supposed unconstitutionality of the act of incorporation. Yet no person ever yet pretended, that all the acts of the corporation, all the transactions of that bank were nugatory and void. Or, to bring to your notice a still stronger instance, there was a set of acts passed by the American Congress, about forty years ago, termed the Alien and Sedition Laws, and the community, generally, appears to have settled down in the belief that those laws were unconstitutional. Yet no one ever dreamed of regarding them as null and void, whilst they were in existence. All acts done in execution of them, were considered to be valid. The power to repeal those laws was nowhere to be found but in Congress, and the power to declare them unconstitutional, and consequently void, existed nowhere but in the supreme judiciary of the United States. They had their day—and now, on all sides, the Alien and Sedition Laws are viewed as having been unconstitutional; yet two men, at least, were imprisoned and fined for violations of those very laws. For though there is no man in either house of Congress, who would advocate the re-enactment of those obnoxious laws, yet so long as they existed, they were the law of the land, and acquiesced in, as such, by the people.

Now, gentlemen, I have a few words to say in relation to the acts of the corporation, or *quasi* corporation if you prefer the term. As regards the acts of the corporation, so far as they involved the admission to the rights and privileges of the corporation, of any other than ministers and elders of the Presbyterian Church, those acts were absolutely null and void to all intents and purposes. Because the General Assembly does not possess the power as a *quasi* corporate body to transfer its corporate privileges to another. They cannot divest themselves and impart to others the franchise which the legislature granted to them. At the moment that should be

attempted, the corporate powers of the General Assembly would revert to the legislature by forfeiture. The General Assembly would thus cease to be that General Assembly for which the act of incorporation provides. The legislature granted the franchise of the corporation to us as Presbyterians, and not to Congregationalists and committee-men. It would therefore be a violation of the trust reposed in the General Assembly, to admit Congregationalists or deacons to the enjoyment of the corporate privileges of that body. The legislature contemplated "ministers and elders" only, and not even all ministers and elders, but ministers and elders of the Presbyterian Church and not any others. If, therefore, any church or congregation not belonging to the Presbyterian connexion or communion, should designate its officers as pastors or ministers and elders, those officers could not be admitted to a participation of the benefits and franchises of the corporation, because though they would be known by the general appellation of "ministers and elders," they would not be "ministers and elders of the Presbyterian Church." If the legislature had intended to confer those corporate privileges on deacons, the name of deacons would have been introduced into the charter of incorporation. If, therefore, any of these should be admitted to partake of the benefits of the corporate franchise, the act of admitting them would be not only wrong in itself, but in derogation of the charter of incorporation. It would, by admitting officers or others of a different character from those contemplated in the act of incorporation, have vitiated the corporate power of the General Assembly. The act, then, by which such members were admitted, was wrong in itself, as the admission of Congregationalists under any pretext was a violation of the act of incorporation. I do not say that the Plan of Union was wrong in itself. That may be controverted. But I do say that the General Assembly had a right to repeal it, whether it were right or wrong in itself, because it was only an act of the General Assembly. The repeal of the Plan can be justified by the General Assembly without admitting that it originally did wrong. Whether it was right or wrong, the General Assembly could repeal it at any time. And whenever it was repealed, the whole fabric which had been reared on it, must of necessity fall to the ground, and there must be a re-organization.

[One of the opposite counsel here inquired, "Do you mean to say that such a re-organization took place in 1837?"]

Mr. Preston resumed, "I did not specify any time."

[The court inquired if the General Association of Connecticut had ever consented to the repeal. And was answered that an overture requesting their consent had been sent to that association, by the General Assembly of 1835, but no answer had ever been returned.]

The only point of view in which the constitutionality of the Plan of Union can be at all supposed, is its being established for temporary purposes, and that it was intended to operate only among those in the new settlements, amongst the wild inhabitants of a measurably uncultivated wilderness, and not to admit any except Presbyte-

rians to exercise power and influence in the church. It was an act of the General Assembly; and as such, if it were an act of legislation and intended to be permanent, and to interfere with the established Presbyterian organization in any of the church judicatories, it was evidently unconstitutional, as altogether transcending the powers of the Assembly; and if not, though its unconstitutionality could not be urged, yet if a wrong construction produced such an interference with established principles, it was such an abuse as the General Assembly had a right to rectify. The power was in the church, and consequently in the highest church judicatory, the General Assembly, which possessed within itself the legislative judicial and executive powers. Such a power—the power to repeal a former act, is absolutely necessary to the existence of a deliberative body. Or if it were to be regarded as a treaty, with a foreign power, then the General Assembly is endowed with the treaty-making power, even that high power which is over all law and paramount to all other powers of government, that high power which nothing less than the supreme tribunal can exercise. This supreme power includes the power of excinding every thing at pleasure. The point of view, however, in which I regard the Plan of Union, is, that it was declaratory of what should be admitted in the intercourse between Presbyterians and Congregationalists in the new settlements, and that whilst its operation was confined to the purposes for which it was originally intended, it did not interfere with the established order of the Presbyterian Church. But when, according to their construction of it, it did interfere, the highest ecclesiastical tribunal, the supreme judicatory of the church, had a right to repeal it. My proposition is that the act was not so intended to be construed, because such a construction is contrary to the fundamental principles of the Presbyterian Church, and also to the act of incorporation, and that such construction did admit improper persons into the church there can be no doubt entertained; we had therefore the right to repeal it.

But an idea has been intimated, that these presbyteries and synods, or the congregations entering into their structure, had, under this act, acquired certain rights. That the act is in the nature of a contract or treaty involving the creation of vested rights, and that it could not therefore be repealed by the Assembly. Well, if the Plan of Union were in the nature of a treaty or contract, depending on circumstances existing at the time the contract was made, which circumstances afterwards ceased to exist, or were so far changed as to invalidate the said treaty or contract, we had a right to repeal it: and the consequence of the repeal was, as before stated, that every thing which was depending on it fell to the ground with the repeal of the plan. This is the fact, unless, as intimated, certain inalienable rights had accrued from the instrument, being in the nature of a contract, and a *quid pro quo* having passed between the parties, those rights being in the nature of vested rights, which of course are unalienable. They contend that the Plan of Union of 1801 was a contract of this kind, and that they inherited the vested right to enjoy all the privileges of the corporators. Let

us examine this point for a moment. In the first place, we contend that the act did not authorize that of which we complain; and they must show that there are rights of the respective parties which accrued to them in and by virtue of the compact entered into between Presbyterians and Congregationalists in 1801, and they must further show that by virtue of that act those presbyteries and synods were established, and that the rights of the two parties, whatever they were or are, accrued to them in virtue thereof. But was the Plan of Union a compact or agreement, or any thing like a contract between the two parties, from which vested rights could accrue? There is and was no compact between these presbyteries and synods, and the General Assembly. The Assembly has an appellate jurisdiction from them, but each of these judicatories is dependent on the fundamental laws of the church, and though strong connecting links bind them together, yet there is nothing like an obligatory contract between them. We have courts of law, of appellate jurisdiction. But can you perceive any contract between them, and the lower courts?

Your Honour has not entered into a contract with any of the inferior courts of the state over which this court may have appellate jurisdiction. On the other hand, the court in Bank may review the decision of this court sitting at *Nisi Prius*, but there is no contract between the two. The inferior courts of law are in their organization independent of this court, though they are dependent as regards its appellate jurisdiction. These several courts derive their existence and their prescribed powers from the legislature in accordance with the constitution, but there is no contract between the several courts and the body which formed them. They are entirely independent even of the legislative tribunal, and of each other, except as regards an appellate jurisdiction. So the presbyteries and synods are independent of the General Assembly, excepting so far only as the General Assembly is an appellate ecclesiastical court. As in the one case, the inferior courts, so in the other, the presbyteries and synods have no vested rights, because their being in submission to each other is not by compact. They all proceed on the fundamental principles of the laws and the constitution, and not by contract. But it may be said, that having introduced these men into the Presbyterian Church, the General Assembly has no right to turn them out. But this is not so, they came in by a mistake, and we only say to them, "Gentlemen, you were admitted by mistake; if you please, a mutual mistake between us and you, and that mistake must be rectified as easily as possible. But you shall not be hurt. We will put you to no trouble about it. You shall not lose your standing in the church on that account. But you must, in consequence of this mistake, re-organize your church judicatories. Your title must be renewed and recorded afresh." Having clearly the right to repeal the Plan of Union, we did repeal it, and when it was repealed, the four synods, together with their constituent presbyteries and churches which had been introduced in contravention of the constitution, and which depended on that plan for their support, of necessity fell to the ground, or at least fell

off from us. But it was the part of wisdom in the General Assembly to devise a plan, and accordingly that body did so; a wise and prudent plan, by which the scattered fragmentary portions of those four synods might be collected together again, and by which they may yet become resuscitated and re-organized.

But I contend that, independently of any considerations relative to the Plan of Union, the General Assembly had the inherent power, for its own reasons, to dissolve any synod and any presbytery in its connexion. The General Assembly may strike from existence, destroy, annihilate any synod or presbytery without assigning any reason for the exercise of that power. It would be a work of supererogation to enter into an investigation of the motives which influenced the members of that body in their decision. We contend that the General Assembly possesses this essential power, a power which is wholly discretionary, and for the exercise of which neither the Assembly nor the members are responsible, except to their own discretion. In the course of the argument on the other side it has been contended that the power of the General Assembly over the inferior judicatories of the church, extends only to the trial of cases which are brought before it by appeal; in other words, that its powers are not legislative, but judicial only. So far from that, the powers of the General Assembly are strikingly analogous to the powers of the Senate of the United States, which exercises legislative, executive, and judicial functions, and is also the depository of the treaty-making power. It has been supposed that all these powers of government can never wisely co-exist in the same tribunal. But they are co-existent in the Senate of the Un ed States, and wisely or unwisely, I'll show, and that most conclusively, that they do co-exist here, and that the General Assembly has also constitutional powers superadded. It has not indeed exclusive power to alter or amend the constitution of the church. Neither is that power vested in the synods or in the presbyteries exclusively. The General Assembly suggests or proposes changes in the constitution, and submits them to the presbyteries which decide in relation to the proposed alterations or amendments by the constitutional majority.

In accordance with the principles of constitutional law, neither of these bodies can alter the constitution of the church, but alterations are effected by the joint action of all of them united. The power of proposing alterations in the constitution of the church belongs to the General Assembly, by the constitutional law of the Presbyterian Church, and that power is not a judicial one, surely. The General Assembly is not then merely a simple judicatory, a mere court of justice. A judicatory can expound the law. It cannot alter nor propose alterations to the fundamental law, which is the constitution. But the General Assembly can propose amendments to the fundamental law, passing on them in the first instance, and then transmitting them to the presbyteries for their concurrence; the presbyteries having no power of making alterations unless proposed to them by the Assembly: so that in this instance the two bodies exercise co-ordinate power. The power thus vested

in the General Assembly depends on the fundamental principles and laws of Presbyterianism: I will not, in this instance, say, on the Bible, for the Bible is silent as regards this matter. Now, though Presbyterians believe that all the rules and regulations of their church are in conformity to the Bible, yet we admit, as regards many things, we must be allowed to appeal to the fundamental law of the church, in relation to ecclesiastical affairs where the Bible is silent.

In this respect, as well as in the generality of her constitutional rules and provisions, the constitution of the Presbyterian Church bears so very striking an analogy to the constitution of our General Government, as to lead us to believe that they have been framed on the same model. The authority of the General Assembly of the Presbyterian Church to propose alterations in the constitution, to the constituent presbyteries, is analogous to the power vested in the Congress to propose amendments to the Constitution of the United States, to the several states. The principal difference between them is, the assent of two-thirds of the presbyteries is required in the one instance, and the consent of three-fourths of the states in the other. Thus the presbyteries bear a relation to the General Assembly, similar to that of the several states of this Union to the United States. Indeed there is a striking similarity throughout. Certainly it is a very curious, a most singular and happy coincidence, that the constitution of the Presbyterian Church, purporting as it does to be of divine ordination, should bear such a close and striking resemblance to the political constitution of our common country. This perhaps may be regarded as an earnest of the perpetuity of our beloved national Union. We fondly regard our federal constitution as the purest specimen of republican government that the world ever saw, and on the same pure principles of republicanism as its basis, we find established the constitution of this republican church. The two, without any stretch of the imagination, may be supposed to be framed after the same model. And although a crisis in the affairs of the church has arrived, which has spread disunion and strife to her utmost bounds, and the state appears to be nearly arrived at a similar crisis, yet may we not confidently hope that both these noble and much revered institutions will be able to abide the shock, triumph over their enemies, and go on to the very end of time, spreading their influence and dispensing their blessings simultaneously to all future generations?

This is not the first time that schismatic dissensions have distracted the Presbyterian Church. Before this, the bush has been on fire; but it has never yet been consumed. And I suppose that this New School party will not be able to consummate its entire destruction. It is impossible, if what we believe is true, that the Presbyterian Church is a divine institution, and founded on divine ordination. And if otherwise, yet the analogy between the fundamental principles of the Presbyterian Church and those of our federal and state governments, would, I should suppose, cause republicans to hope that this church may yet become renovated, that arising with renewed strength she may go forth conquering and to conquer to the latest ages. The church has in itself a recuperative

power, and can never become extinct. Not that the Presbyterian church will absorb or swallow up all other sects and denominations. I wish no such thing, but believe and hope that others, as well as Presbyterians, will be preserved and flourish, as I desire the preservation of liberty. Sectarianism, or the division of Christians into different sects and parties, purifies the church, as the agitation of parties has a tendency to purify the political atmosphere. And, no doubt, whilst republican liberty shall be preserved in this country, each denomination and sect will be secure in the enjoyment of its own rights and privileges, and in the free expression of opinions. I claim this for the Presbyterians. I claim it for all churches, and for every individual, whether he is a member of any church or not. Whilst each sect pursues its own proper course, they will go on without harm or interference with the civil power. Though accidental jars may for a time disturb the community or religious societies, yet they all may go on prospering and to prosper.

Now let us inquire respecting the legislative powers of the General Assembly, or the power of passing laws for the government of the Presbyterian Church. That the Assembly has this power, or possesses a legislative character, in distinction from a character purely judicial, is shown with singular clearness by the curious fact, that though all the ecclesiastical courts of the Presbyterian Church are styled *judicatories*, yet the 39th rule for regulating their proceedings, prescribes that in their "*judicial capacity*" they shall be conducted in a particular way. When any one of them "is about to sit in a judicial capacity," a particular form must be observed, as is always the case in the senate of the United States when that body acts in a judicial capacity, laying aside, for the time, its legislative character, to exercise its functions as a court of justice. The 39th rule, referred to, is as follows:—

"Whenever a judicatory is about to sit in a judicial capacity, it shall be the duty of the moderator, solemnly to announce from the chair, that the body is about to pass to the consideration of the business assigned for trial, and to enjoin on the members to recollect and regard their high character, as judges of a court of Jesus Christ, and the solemn duty in which they are about to act."

The mode of proceeding, here prescribed, is different from the ordinary mode of proceeding when engaged in a legislative capacity. What could be stronger than the evidence here furnished, that the General Assembly possesses legislative as well as judicial power. But there is a distinction, which it is necessary to carry along with us, between a limited government with delegated powers, and a delegated government with limited powers.

The federal government of the United States is a government of limited powers specifically delegated by the states which formed the confederacy. The state governments, on the other hand, possessing all the attributes of sovereignty, are limited only by express provisions of their constitutions, except so far only as certain stipulated powers are delegated to the General Government for the common good. Thus, then, if a certain power is claimed to be vested in the Federal Government, you must show the express grant of that power in the constitution. For if you are not able to find

such a grant there, the power claimed is not vested in that government, and Congress cannot exercise such a power without an open violation of the constitution.

On the contrary, when we come to examine into the powers of the state governments, (as those of Pennsylvania and South Carolina, for instance,) the case is exactly reversed. Unless the power claimed to be exercised by a state legislature, is expressly prohibited by her constitution, the right to exercise that power is undoubted, as one of the necessary powers of government. In the one case, the power is a gift or grant affirmatively made. In the other, it is an originally existing power. It is merely a power which has not been prohibited or restricted. The legislatures of the several states possess, and may exercise all the powers of government not expressly denied to them. Congress, on the other hand, cannot exercise any power, except by an express grant. The powers of all the functionaries of the federal government, are defined by affirmative grants. The powers of the state governments are undefined. If, then, the government of the Presbyterian Church is like either of these, it may be very easily determined whether the General Assembly constitutionally possessed the power which it exercised in 1837. If the General Assembly is like Congress, a body of delegated powers, we must show the grant of this particular and specific power. If it is like the state legislatures, a body of restricted powers, they must show the restriction in the case. It so happens, however, that the constitution of the Presbyterian Church is not exactly like either of these, nor can it be judged by either of these rules. It contains a grant of general powers, expressed in very general terms, and, taken as a whole, approximates much more to the constitutions of the state governments, than to the federal constitution. To illustrate this. The federal constitution provides, that the general government shall have certain definite powers, which are each particularly specified in this form—"Congress shall have power," &c., to do such and such things, while the language used in the constitutions of the state governments is, that they shall have "all legislative power," &c., *ex vi termini*. So, to the General Assembly, there is not, in the first place, a delegation of specific powers, but a general declaration that all power belongs to it.

Thus, in the Form of Government, chap. 12, sect. 1st, it is styled "the highest judicatory," that is, governing power "of the Presbyterian Church." "It shall represent all the churches of the denomination;" possessing, therefore, all the power of all the inferior judicatories. Whatever powers any of these judicatories exercises in its particular sphere, and over its own members, the General Assembly shall exercise over the whole Presbyterian Church. I wanted to prove this to you out of their own book, and the clause from which I have quoted, is a sweeping delegation of all the powers of the whole Presbyterian Church, whether legislative, judicial, or executive powers. There are no restrictions here, such as are placed on the other judicatories of the church. In fact, this sweeping grant of power is not restricted, except only by the Holy Scrip-

tures, and by the decisions of a majority of the inferior judicatories. The whole power over all that concerns the whole Presbyterian Church, is carried up and vested in the General Assembly, in the boldest and fullest terms imaginable. It is a delegation of all the power possessed by those who formed the constitution of the Presbyterian Church. It is much broader, and far more extensive than is possessed by any of our legislatures. Should the people of Pennsylvania delegate and transfer all their power, of every description, to the state legislature, then, and then only, would the authority of that body be commensurate with the powers of the General Assembly of the Presbyterian Church. They have given to that body more power than is given to any legislative body in the world. Unquestionably, it was the intention of the constituency of the Presbyterian Church, to give to the General Assembly, (in the same manner as the people have conferred certain powers on the legislatures,) the whole power of the church, throughout its whole extent, which the synods, presbyteries and church sessions exercise within their respective limits.

Now, as there was a broad declaration, vesting all the powers of the church, in the first instance, in the General Assembly, we could not desire any thing more. But, besides this, there is a specific delegation of powers, fully adequate to our purpose. In the fourth section of the same 12th chapter of the Form of Government, relating to appeals, &c., there is an express grant of a specific power, to "review the records of every synod, and approve or censure them." The General Assembly, then, may take those records, and examine them. They may do whatever they please, by approving or censuring them, whether the synods send them up or not. Such a power is necessary to carry into effect that which is expressly granted; because, otherwise, the clause granting a specified power, would be barren and nugatory. "They shall give their advice and instruction in all cases submitted to them, in conformity with the constitution of the church." What if those whom they thus advise or instruct, should refuse to take their advice, and disobey their instructions? Have they not power to carry into effect their injunctions? Are its instructions merely hortatory? If so, it presents the anomaly of a government incapable of carrying into effect its own decrees. Such a construction would make the constitution nothing more than a mass of undigested rules, which none would be bound to obey. "They shall constitute the bond of union, peace, correspondence and mutual confidence among all our churches." Now, suppose that "the bond of union, peace and correspondence should be broken, how are they to restore it in its original strength? Have they not power to heal the wound? The power to preserve the peace of the whole church is given to the General Assembly, and will any one pretend to say that they have not the power to heal the breach of union occasioned by a recusant member, by forcing him to submission? Besides, "to the General Assembly also belongs the power of deciding in all controversies respecting doctrine and discipline." All disputes and controversies are to be determined by this body in the last resort. And here it appears, that

when such disputes and controversies respect doctrine and discipline, the Assembly is to decide in the first resort. Whether they affect presbyteries or synods, the General Assembly is the tribunal of ultimate resort, and has full power to settle all such disputes and controversies, conclusively and finally. This power of the General Assembly is very broad. As regards doctrine, it is perhaps not appropriate to the issue of the present case, though it is not contrary to it; but as it regards the discipline of the church, it is fully to our purpose. What? Shall it be said that this power and authority of the General Assembly extends only to controversies between individuals, and cannot be exercised in the cases of presbyteries and synods? The great, the leading, the primary object of the discipline, is the regulation of the inferior judicatories of the church. And yet our opponents have contended, that the Assembly cannot enforce the discipline against them. Let us read further. "To the General Assembly belongs the power of reproving, warning, or hearing testimony against error in doctrine, or immorality in practice." Is this intended of individuals only, *in personam*, and not *in rem?* Here is the answer—"in any church, presbytery, or synod."

Here, then, we have it at last, express power over the presbyteries, synods, and churches, even the express power to regulate doctrine and discipline. And how is this power to be exercised, but by such censures and remonstrances as they may deem to be suited to the case; and, if these censures and remonstrances be disregarded, by exercising a higher authority in the dissolution of offending presbyteries or synods into their original elements, with a view to re-organize, and form them anew? Accordingly, the Discipline of the Church thus concludes the definition of the powers of the General Assembly, as far as I have occasion to refer to them, "of erecting new synods, when it may be judged necessary; of superintending the concerns of the whole church; of corresponding with foreign churches, on such terms as may be agreed upon by the Assembly and the corresponding body; of suppressing schismatical contentions and disputations; and, in general of recommending and attempting reformation of manners, and the promotion of charity, truth, and holiness, through all the churches under their care."

These, then, are some of their powers. The manner of proceeding in the exercise of those powers is not pointed out by the constitutional provisions. It is their own matter. In carrying these powers into effect, the General Assembly will proceed according to its own judgment. The General Assembly has full power to dissolve, new-arrange, and re-model all of these judicatories within its jurisdiction. And they may exercise it according to their own discretion, or caprice, if you please. They are under no restraint as to the manner of its exercise, and that is all that we wish to establish: for your Honour will not permit any question to be raised here, in this court, in relation to the manner in which an admitted power has been exercised. Having shown these powers to be in the General Assembly, I assert that they have always exercised them at their pleasure. They have continually engaged in acts of

legislation on various subjects, as well as exercised judicial powers, in cases of appeals from the inferior judicatories. That the General Assembly is not merely judicial in its functions, is clearly shown by the fact that a Committee of Overtures is appointed at the commencement of each session. The appointment of this committee, (if we had no other evidence,) conclusively proves the exercise by the Assembly of other functions than those purely executive and judicial.

These gentlemen think hard of their ejectment and excision in 1837; but I think that I have fully shown ample authority in the Assembly to do what it did. These judicatories may be considered as under the supervision of the General Assembly, in a manner somewhat analogous to the territories of the United States which are under the supervision of Congress. Congress is the sole judge when and under what circumstances a territory shall be admitted into the Union, and no state can be admitted without the consent of Congress. If objections are raised, no matter how unreasonable those objections may be, they must be disposed of before the new state can be admitted. This question was settled in a case which is no doubt familiar to you, gentlemen. I allude to the case of Missouri in 1821. The people of the territory of Missouri had held a convention, formed a state constitution, and the legislature of the newly organized state elected two persons as senators, who were not allowed to take their seats in the Senate of the United States during that session, because Congress had not yet received the new state as an integral part of the Union. Missouri claimed admission, and their present senator, who has since rendered himself so conspicuous by predicting that within a limited time "gold would flow up the Mississippi against wind and tide," then signalized himself by protesting against the power of Congress to refuse to admit Missouri when she made application; but that gentleman walked about the lobby of the Senate chamber, and the rotunda of the capitol, during one whole session of Congress. I am not now about to enter into the merits of the Missouri question, as it has been quaintly termed. It is not my purpose to inquire into the relevancy of the abolition and anti-abolition arguments then advanced by distinguished statesmen. My purpose is simply to show that the power of Congress is wholly discretionary, as to the admission of new states into the Union. The senators from Missouri could not take their seats until Congress was satisfied, and the constitution does not limit Congress as to time. The power of Congress in the case is wholly discretionary. So the power of the General Assembly over the presbyteries being discretionary, like that of Congress over the territories, there is no question as to the power of the General Assembly to refuse to admit the delegates from a presbytery until the General Assembly shall be satisfied of their right to admission.

May it please your Honour,—I have contented myself with glancing very cursorily at several of the topics last mentioned, principally because I had previously occupied so large a portion of your attention, and partly because, as I conceive, they have no relevancy to the case before you; though at the request of my clients I have

presented them to your Honour and to the jury, I now leave them. They may receive further examination, perhaps, from the learned and able counsel who will follow me on behalf of the defendants, and who will supply any defects there may be in my argument.

The great question, which you, gentlemen, are shortly to decide, is, whether these relators, or rather the party whom they represent, are what they claim to be, exclusively the General Assembly of the Presbyterian Church. And I hope, that in a review of what I have already said, and of what may hereafter be advanced, you will arrive at the conclusion that these relators have not established their claims. I do not think that the General Assembly of 1837 did wrong. If it did, that wrong was inflicted on the four excinded synods only, and not more than one half of these gentlemen who assert that they formed the constitutional General Assembly, have any cause to complain. The rights of the other half to their seats were acknowledged by us at the commencement of the General Assembly of 1838; and they did sit with us at that time. The rights of the fifty-four commissioners who were excluded, constitute the case before you, if viewed in reference to the acts of 1837. They, only, are the rights which these relators seek to establish by this most extraordinary proceeding. They say that we acted unjustly; but if it were so, is this the only way to obtain redress? Must they annihilate us in order to reinstate themselves? If wrong was committed, the wrong was in exclusion, and the remedy would have been in admission. Why, then, did they not return in the manner prescribed by the General Assembly, and ask leave to take their seats amongst us in the General Assembly of 1838, composed of delegates which had come fresh from the people? Such a proposition was not submitted to us. They would not give us a chance to review the proceedings of the Assembly of 1837. If a wrong had been done them, that wrong could have been remedied by revoking the acts of which they complain. Or if they did not choose to do this, why did they not appeal to the laws of the land to effect the same purpose? Why do they seek to destroy us, and obliterate our very name? Must they destroy us that they may have their rights? Must they disfranchise us and take from us what they admit belongs exclusively to us? Must they usurp our seats, lord it over us, and exercise uncontrolled power over the charitable funds of the church,—dispensing the same in what manner they please? Why did they not submit their claims to that Assembly, which contained none of those who were members of the General Assembly of 1837, except such as had been sent back by the people after the whole subject was submitted to them. Such an appeal was never made to us, and they cannot say that it would have been decided against them if it had been made. Or if they were afraid to trust the General Assembly of 1838, if they apprehended that the members of that Assembly would prove unjust to them, why not apply for a mandamus, when, if they were unjustly deprived of their seats in the General Assembly, that Assembly would have been compelled to open their doors and admit them? No: that was not enough. They did not proceed on these principles to obtain redress. They

would not content themselves merely with recovering what they alleged was unjustly wrested from them. Their motto is *Aut Cæsar, Aut Nullus.* They thus usurp the judgment-seat of the great I AM, and claiming to be All in All, they undertake to blot out our very existence. They do not desire merely to obtain and occupy their old places, but they are determined to seize on the whole of the funds of the church, and to propose terms to us. Thus the minority say to the majority, "We will drag you to our feet. We will subdue you, and humble you to our purpose." We must be humbled, subdued, must come as supplicants for their bounty. They were not willing to abide the trifling delay that would have been required by a formal application to the General Assembly of 1838, after it had become fully organized. This delay, it is true, might have been a misfortune in their case; but, gentlemen, delays in the administration of justice are often the price which we are obliged to pay for the enjoyment of liberty. It may be said that the "unalienable rights of life, liberty, and the pursuit of happiness are inherent in every man," but we often find, that for a time, at least, the law will not permit every one to exercise those rights. But no such excuse is for them. If they were unlawfully cut off in 1837, were unconstitutionally disfranchised, the laws of the land would restore them to their seats. But they were not content to be a part of the General Assembly and of the Presbyterian Church. They were determined to be the whole General Assembly, and place the whole church under their entire control. If it was not the money that they wanted,—if they did not mean to strike down men who were obnoxious to them, and take the money, there was another course by which they might have tried the question of rights. I do not pretend to advise them, but to show that there was no necessity for their pursuing this most extraordinary course of proceeding. Their clerks might have brought an action against ours to recover the books and papers pertaining to the records of the General Assembly of the Presbyterian Church. If an action of trover had been instituted for these papers by their clerks, in that way the whole matter would have been brought up. Thus the question might have been peacefully decided, whether they were a part, or, if they please, the whole of the Presbyterian Church. This question could have been reached by an action of trover, and the institution of such an action would have shown that they were not disposed to strike to the ground that venerable gentleman, (pointing at Dr. A. Green,) and seize upon the purse of the church. But, instead of this, they attack directly our persons, our property, and our characters. This claim to be the whole church is in assumption, made in a spirit of usurpation, which I trust the jury, which is well chosen, being composed of intelligent men of different religious denominations, will signally chastise.

Well, gentlemen, it is for you to say whether they are what they have chosen to claim, the whole Presbyterian Church, and we no part or parcel thereof. On your verdict the claims of each party depends. By your verdict these questions must be answered, and the interesting problem be solved. If you decide that we are

not the Presbyterian Church, and thus give the whole of the funds, together with the name and character of the Presbyterian Church, and the privileges of the corporation also, to a body of men who were not contemplated by the "Act of Incorporation," we will submit, even should this, so unexpected to us, be the result, that we are to part with our patrimonial inheritance. It is for you to decide whether we shall go mourning on our way, or whether we shall again rejoice in hope. If you bring in a verdict for them, we will regard the money as dross; wholly unworthy of our notice. We will respect your verdict, but we shall not be cast down. In the bosoms of the fathers of the church there swells the spirit of philanthropy and Christian fortitude which will still sustain them. In the days of old they have rallied around the standard of their faith, in impenetrable array: so now, with the numerous company of young men who will feel it to be an honour to fall at their sides and perish in support of the principles of their church, they will again rally, though for a transient period they may present the appearance of a broken band. Those who have planted and watered the church, those whose prayers have ascended to the throne of grace, and prevailed with the omnipotent King of heaven, who has dispensed rich blessings on their labours, though that which their hearts have so fondly cherished, that which they hold dearer than life, be taken from them by the finesse, the legal artifices and intendments of their adversaries, will still find comfort in the midst of their sore affliction, in those rich promises to the church, which they believed will assuredly be fulfilled. But I do not expect such a result. I confidently look for your verdict in our favour, and I will tell you the consequences.

If your verdict is with us, the Old School party, being sustained by the bright example and Christian precepts of those who have gone before them, will be strengthened by your verdict, and encouraged to persevere in those noble enterprises which they have undertaken. And, in a short time, those, who, like the wild prodigal, have gone forth to seek their fortunes elsewhere, becoming impoverished by your verdict, will return to their spiritual home, —the church of their fathers, when we will kill for them the fatted calf, and, rejoicing in the restoration of unity in the church, we will spread the banquet of peace and of everlasting love. Should this result, as I confidently hope that it will, be the consequence of your verdict, all the difficulties will be removed, the true flock will be again congregated within its venerable fold, and you will have the happiness to see, in the whole Presbyterian Church, the restoration of peace and harmony, every one enjoying the shade of his vine, none of them being afraid. You will also witness perfect harmony established, as before, between Presbyterians and Congregationalists. Each moving in his appropriate sphere, may shed the blessings of gospel light around them, as the planetary orbs, moving in that majestic and harmonious order which was established by the wisdom and power of the Creator. Such a verdict might cause the people of a small section of this country, to bow their heads in sorrow, yet many ten thousand tongues would send forth

a shout of joy and thanksgiving. From the mountains in the interior, and all the borders of your own state, from your sister, New Jersey; indeed, from this point, throughout the great South and West, to the banks of the Mississippi, would swell one general jubilee of joy and praise, one loud burst of joy and gratitude to the jury, mingled with thanksgiving and prayers of grateful adoration to Almighty God, for this renewed evidence of his superintending care and divine regard for his church and people.

I have now discharged, so far as I have been able, the duties of the very responsible situation which I have occupied in this court. I had not intended to trespass so long on your patience, (and perhaps I have trespassed too long,) but I have been impelled by the conviction that it was my duty to devote to the subject connected with this controversy, the whole of my strength, both of mind and body. I humbly ask your pardon, for having detained you so long. The only apology I can offer is, that I could do no less, according to my impressions of duty. I thank you, gentlemen of the jury, I thank you for your attention.

And may it please your Honour: I may, perhaps, have marred the sympathy of this case, by the unconnected manner in which I have presented the several points for consideration. I thank the Court for the indulgence extended to me, while I have had the privilege of appearing as an advocate for the defendants—a privilege which has been so freely and cordially granted to me, a stranger, and to which I should not otherwise have been entitled, than by the courtesy of the bar.

ARGUMENT OF JOSEPH R. INGERSOLL, ESQ.

Occupying two days—the 21st and 22d of May, 1839.

May it please your Honour—Gentlemen of the Jury: I shall dispense with the usual formality in opening what I have to lay before you in relation to this very important cause. Permit me to remark, that the learned and eloquent gentleman who has preceded me, has laid hold of every thing belonging to the case with such an unsparing grasp—he has reaped the harvest field with such an avaricious hand, that he seems to have left very little for me to do. I shall, however, proceed to discharge the duty which has been imposed on me, applying myself to the patient task of gathering what may be considered as but the gleamings of the vintage, a task increased, in this case, both in difficulty and responsibility, by the fact that he has done the work so well. No one but myself has any occasion for regret, however, on this account. And allow me to say, that I should feel myself deficient in duty to the cause, if I did not here return my cordial thanks to my distinguished colleague, for the example which he has furnished throughout the whole period of his attention to this case, of fair and gentlemanly deportment, marked by that urbanity of manner, that high-minded and honourable bearing, which has drawn a tribute of admiration from all who have been present, even from the first moment that he took his seat within this bar, and which cannot

fail to contribute to the true administration of justice; whilst his learning, his talents, and his eloquence have completely captivated us. The opposite counsel themselves must acknowledge this. They do acknowledge it, though they may be unwilling to admit the force of his argument. They cannot have failed to feel the force of his well-directed blows, any more than to admire the peculiarly impressive manner in which he has shapen his words, with consummate skill and judgment, to meet every point in the whole case. So large a portion of his address has been taken up with explaining the principles of parliamentary law, and applying those principles to the fact elicited by the examination of the witnesses, that there is little left for me to do on that subject. I trust that my brethren of the bar are all prepared to join me in this cordial acknowledgment, and to welcome this distinguished citizen of a sister state to our city. He is indeed one of us, for though he is now a citizen of South Carolina, he is a native of Philadelphia. Though his parents were Virginians, he was born in this city during the sojourn of his parents here, whilst his honoured father was attending to his official duties as a member of Congress from Virginia. We all, he may be assured, hail him a welcome visiter to the city of his nativity, and I trust that an extended intercourse between the citizens of these sister republics, which are bound together by common ties, will be highly salutary to us all.

As I said, my distinguished friend and colleague has reaped the field with such an avaricious hand, that he has left for me but the humble task of collecting in the gleanings of the harvest. My task is the more onerous. The responsibility resting on me is greatly enhanced by the circumstance of its having fallen to my lot to follow in this argument one of so deservedly great celebrity as an orator and a statesman. I trust, however, that I shall not vainly hope to gain your attention to the additional remarks which I apprehend it to be my duty to make in relation to the case before you. The circumstances are such as require your individed attention to the arguments of the counsel, as this is required by your oaths, and is for you the only honourable and fair course to pursue. The task is certainly more humble to those who follow in the argument, under such circumstances as I am now placed in, yet such must often fall to the lot of those who are engaged in securing the ends of justice.

It becomes my duty, gentlemen, in the remarks which I have to submit, to set out with presenting to you a statement of the difference between the parties. I do not mean the personal differences, if there are any such; not whose feelings are right or wrong, or whose motives are purest, but the visible points of difference as they radiate from the law, and are exhibited by the evidence which has been elicited during this suit. These circumstances, to be satisfactorily investigated, must be deliberately compared with each other, and this deliberate investigation and comparison of all the facts and circumstances is due to the parties, and to the importance of the cause itself. The visible points in the case are those facts and circumstances which must influence your decision. It is these

facts to which you are required to pay particular attention on each side of the question. It is admitted by the counsel on both sides, as it evidently may well be, that the facts of the case must rule your decision under the law. I trust, then, that it will not be difficult for you to arrive at a correct conclusion in the premises as you carefully weigh and attentively investigate these facts.

You will not suffer the tedious character of this investigation to distract your attention. The close attention which you, gentlemen of the jury, have paid from the commencement, to the whole case, warrants the conclusion that you will not suffer your patience to become exhausted, while its exercise is necessary to the attainment of a correct result. There are certain facts and circumstances which have transpired at different periods from the very commencement of the difficulties between these two parties, or rather between those who are the active representatives of the two parties in the Presbyterian Church, and those individuals who have been actively engaged in this unpleasant and painful controversy, which show what were the designs of the respective parties, though one half perhaps has not been expressed in words. With regard to these important trusts, the Church funds, which are now involved in this controversy, the difference between the two parties was very little in the Assembly of 1837, as appears by the correspondence of their representatives in the celebrated committee of ten.

The naked question now is, as to who are the legal trustees of the General Assembly of the Presbyterian Church. Although at first view this might appear to be a very simple question, yet, while it is the very question which is to decide the whole case at issue, in order to answer this, you are not required to try the titles of the trustees merely, but you are required to try the titles of two bodies, claiming to be the General Assembly itself, it being a self-evident proposition, that the legal trustees of the church have been chosen by the legal Assembly.

On a close analysis of this question, it may appear that these plaintiffs are such only, because they desire to possess the golden keys. In the course of our investigations the inquiry arises, whether the plaintiffs in this suit had equal power in the church with the other party; and I have made a miscalculation, if the examination of that question does not put our opponents down at once. To this circumstance I desire particularly to direct your attention. It is an essential part of our defence to show that they had not equal power; and that, therefore, their acts cannot bind us. The minority cannot bind the majority. It is impossible, on any principle of justice or of law. Every thing in relation to this case must bend to some points of this kind, which I am now about to exhibit to you, and to which it is necessary for you to give a close attention in order to an understanding of the merits of the case in controversy. In taking up those points which have a bearing on this case, I see no difficulty, except in selecting those which are most material to the issue. It may be necessary, in the first place, to ascertain the true nature of the question, and in order to do this you must refer to the situation and comparative strength of these parties in the

General Assembly of 1837. For the case of the plaintiffs is based on the allegation of injustice having been done them by certain proceedings of the General Assembly of 1837; and every simple proposition that was made in that Assembly has been supposed to be connected with this controversy. By the fact, then, that every one of those propositions was carried against the New School, it is conclusively evident that the Old School were a decided majority in that Assembly. But there was an essential difference (call it by what name you please,) between the decisions of the General Assembly of 1837, and what those proceedings are alleged to have been. But if it were shown that actual injustice were done to those parties, would that help their case in this suit? If, as I think has been fully shown, the Old School, being the majority, had the power to do what they did, we cannot, in this court, inquire into the right of their doing. We are led then directly to the main position of the opposite party. The plaintiffs allege that the proceedings of 1837, excluding the four synods, were null and void. I would ask my learned friend, is not this the very question for investigation, and which it is necessary for us to reach in argument, so far as the Assembly of 1837 is concerned? They assert the affirmative of this proposition, and we assert the negative. You may see, then, that the point of difference between us in relation to this subject is very simple, and one which you will easily bear in mind; and I shall pursue no point farther than is necessary to a fair view of the whole case, and will only here remind you, that they do virtually abandon their ground on this subject, by founding their claims in this suit on the assumption that they are the legitimate successors of that very Assembly of 1837. It was then but a mere abstraction, which, if analysed, dwindles to a mere mathematical point, which they say thus separated the soul from the body of the church. But the plaintiffs must go a step further. It will not do for them to rest their case on the affirmative of this proposition, even if it were established. If the acts of 1837 were null and void, that would not invalidate the title of these defendants; they are still trustees of the church. Can these men, who were declared to be out of ecclesiastical connexion by the General Assembly itself, (for the decision of the majority made it the act of the Assembly,) can they displace the trustees who were previously appointed? They see this difficulty, and this requires of them the producing of other facts. They are bound to go a large step further to show that they have supplanted the trustees. And when they have made out that proposition, I would remind them that they are to make out another. To prove that they have in fact succeeded them and have the better title, they have to show that they have done it in order, that they have done it regularly. They must never shrink from an investigation, whether their provisional Assembly was intrinsically and extrinsically the legal Assembly of the Presbyterian Church. They, therefore, propose to satisfy you that they affected a lawful change in the General Assembly, possessing themselves of its powers, and that carrying them away with them, they exercised them in another place; that on the 17th

day of May, 1838, in Ranstead court, they effected an entire revolution in the Presbyterian Church, by choosing a lawful chairman, and that the General Assembly itself submitted, by an intendment of law, to all which was then done: that the whole body assented to each of their propositions and motions. Now, we deny this proposition, and it is my purpose to show, that no involuntary change of this kind was affected by their voluntary secession; because it would be unreasonable to suppose that such a change could be effected without the knowledge of the parties concerned. Without the consent of the General Assembly itself, by a direct vote, it was impossible to affect the least change. I cannot doubt that this question must be so decided by yourselves; and if the defendants can make out this proposition to your entire satisfaction, you are bound to give them your verdict: their case will then be made out. But the plaintiffs must substantiate both their propositions, in order to have any ground on which to stand in court. If the Assembly of 1837 were ever so much in fault, if it were even annihilated, yet the defendants have not advanced a step. The trustees remain by previous appointment. If they should prove that the decisions of 1837 were wrong, and that the four synods were still a part of the Assembly, and that the commissioners from their presbyteries ought to have been received, still they have a burthen greater than Atlas himself could bear, to show that, in 1838, they effected a lawful organization of the General Assembly of the Presbyterian Church.

If what has been stated relative to the General Assembly of 1837 be stricken from the testimony, the relators could not advance a single step towards gaining what they are now contending for, even by an *intendment of law*. They could have no hopes of obtaining a decree of *ouster*, based on the proceedings in 1838, separate and apart from those of 1837. But it will not do to rest on what is not material to the issue. You will, however, recollect, gentlemen, that the New School party voted in 1837 on the question relative to the passage of the excinding resolutions. The question is not material whether they then voted affirmatively or negatively, as the fact that they did vote was, of itself, a virtual acknowledgment that the General Assembly had the constitutional power to pass those resolutions. It does not appear that they voted afterwards except on the appointment of trustees of the General Assembly; but that is quite sufficient to show that they considered that the General Assembly was still in existence. Their vote on that question was an acknowledgment, on their part, that the Assembly had not dissolved itself by any of its former acts. Though they then voted against any change of the trustees, yet now, forsooth, they must all be struck out of official existence, even that venerable patriarch of the Presbyterian Church who has been so often adverted to during the progress of this trial, Dr. Green. They, therefore, acknowledge that the General Assembly continued a legitimate existence, or, on the other hand, if they make it null and void, after they had declared those *four* synods to be no part of the Presbyterian Church, they then make void their own proceed-

ings had on the 17th of May, 1838, in Ranstead court, in the city of Philadelphia; in which proceedings they exhibited themselves under circumstances so unenviable, that the defendants do not wish to emulate them, in this particular at least. And yet they claim to be that very General Assembly which they then attempted to destroy root and branch. Each of the several circumstances connected with this cause may be small in itself, yet when the whole of these circumstances are connected together, they make in the aggregate a compound of considerable magnitude. It makes but little difference where we strike this chain of circumstances, which is intertwined throughout the whole case. Any one of them will do. To strike at any one of them will answer our purpose, for

> "Whichever link you strike
> "Tenth or ten thousandth breaks the chain alike."

The relators and their counsel have taken the liberty to lay the whole stress of their claim and argument in support of that claim on an intendment of agreeing to their propositions, and the defendants have taken the liberty of placing their defence on an intendment of not agreeing to these propositions. With these *intendments* are connected the only important facts in the case at issue. The question arises, how are we to get at the exact state of facts in this case? I will first confine myself to those connected with the General Assembly of 1837, as being first in order of time, if not first in importance. These are first in order of that assemblage of facts and circumstances, which form the broad base on which we stand in our defence; and these must be considered in order to ascertain the legality of the proceedings of that body. I shall endeavour as I proceed, to distinguish, amidst the multiplicity and variety of the surrounding circumstances, which bear on the case now before you, and which are explanatory of the principles of the Presbyterian Church, and the power of the General Assembly over the inferior judicatories and the individual members of the Church.

We are then to look at the circumstances attending, and persons composing that Assembly. In the first place, that body comprised the wisdom and piety of the Presbyterian Church; and in the next place its members were selected by their constituents with special reference to the difficulties which then existed in the Church.

You will be good enough to recollect that the General Assembly was complained of for exercising the wisdom and power of which that body was, by the constitution, made the depository for the whole Presbyterian Church. The constitution making the General Assembly the depository of the concentrated wisdom and power of the whole church, was framed by their best and wisest men, and all who have adopted it as their constitution, have made the General Assembly the depository of their rights as Presbyterians.

Do you suppose that such men as composed the Assembly of 1837, were willing to prostitute and abuse the powers thus conferred on them? Every church has some sort of a General Assembly in which resides the power of forming disciplinary rules and regu-

lations for the government of the whole of the subordinate churches in connexion therewith. There is, therefore, nothing peculiar in the power claimed for the General Assembly. So it has been ever since the times of the primitive church in the days of the apostles, when, on a memorable occasion, the whole assembly of the apostles and elders were gathered in the city of Jerusalem, to decide the dispute which had arisen in the city of Antioch, between the Jewish and the Gentile proselytes to the Christian faith. Every church has its courts of final appeal, or infallible hierarchy.

The forms of Church government have been varied in almost endless degrees, from the simplicity of the Quaker to the gorgeous and splendid imagery of that church of which the Roman pontiff is the acknowledged sovereign and spiritual head; but in them all they have some tribunal whose decisions are final. And what is the difference as to name or form, if, as they believe, God applies himself to guide them in the right course, so that their ultimate decisions are infallible, as the Roman Catholic is persuaded that the sovereign pontifical head is influenced to the right course by an internal sense. Their councils have so decided, because they deemed it to be absolutely necessary that the appellate tribunal of last resort in the church should possess the attribute of infallibility of judgment concerning matters of conscience. But before this attribute of infallibility was conferred on the pointiff, the councils were considered as spiritual directors, whose decisions was binding on all the members of the church, and which they were bound to obey in all good conscience. The attribute of infallibility was for a time supposed by some to lie in a state council, as the Council of Trent, or the Council of Constantinople, which was summoned and held by the authority of the emperor.

These state councils were considered as the dernier resort, in controversial matters. Martin Luther appealed to them, when involved in serious disputes with the pope, and the whole of the matters in controversy were referred to the arbitrament of the council convened at Worms, by the Emperor of Germany. And John Calvin, who is considered as the founder of Presbyterianism, also appealed to such councils, and advised the reference of subjects of dispute to their arbitrament and decision. If they were not considered as being infallible, no confidence could be placed in their decisions, as being sanctioned and approved of God. If the Presbyterian Church vests infallibility anywhere, it certainly is in its General Assembly. Every church has agreed to the establishment of a body of this kind; and to their decisions, in relation to doctrines and discipline, all the members of the church, and all the inferior judicatories of the church, are bound to submit. And shall we for a moment suppose, that less authority is vested in the General Assembly of the Presbyterian Church, than in a council of divines, called together by the civil authority, or less power than is possessed by a Baptist Association, a Methodist Conference, or an Episcopal Convention? It cannot be. The universal practice has been, to regard with reverence the decisions of such bodies, composed, as they are, of men who have devoted their lives to endeavours for the conversion of unbelievers to the Christian faith, and

the edification of the church. So the force of the decisions of these general councils, by whatever name they may be called, is acknowledged by their respective churches. We are all familiar with these facts. We all know that the decisions of all such bodies are final, as regards the questions submitted to them. Their decisions are the law of all the churches over which their respective jurisdiction extends. I need scarcely remind you, that none of these councils has jurisdiction in reference to what concerns their neighbours. If the members of other churches do wrong, they must leave the correction of that wrong to the proper judicatories of the church to which the disorderly members belong. One church cannot interfere with another. It is by the consent of all concerned, agreeing to the constitution of their respective churches, that this power of final decision is vested in the highest ecclesiastical court of each denomination. The decision of every council, to which parties refer a matter for adjudication, is binding, though it be a mere informal reference to a neighbour. How much more, then, the decision of these church judicatories, to which the members have committed their rights and powers in so solemn a manner, and bound themselves to submit by so many sacred obligations.

The decisions of the General Assembly, or any other of these general councils, is as binding on all the churches and congregations within its jurisdiction, in spiritual affairs, as the decision of a state tribunal in civil affairs. All are bound to submit to such decisions; though the situation of the several churches in this republican land, is very different from that of an established church, which is closely connected with the state. In such a church, the Episcopal Church of England, for example, the king, or head of the state, is the acknowledged head of the church. There, the British parliament has assumed the right to try a minister for an infraction of his duties as a minister of the established church, and may even pass sentence of suspension, debarring him from the privilege of exercising the clerical functions: as indeed was actually done, in at least one case on record. But the disseverance of civil from ecclesiastical jurisdiction, puts more power in the possession of the churches in this country, in relation to spiritual matters, the state being constantly debarred from interfering with spiritual affairs, as fully as the church is prohibited from intermeddling with civil affairs. Happily for us, the connexion between church and state, which in the old world has been for ages considered as being essential to the very existence of civil government, has no place in our country. Here, the church occupies its own ground; and both it and the civil government prosper, without an improper interference with each other. Each is sufficiently powerful in its own sphere, to maintain and enjoy its own rights, without the one encroaching upon the prerogatives of the other. We understand as little of the reasons for the differences of opinion amongst Christians, as we do of the sublime doctrines of the Christian religion, some of which are admitted to be mysterious, by the members of the different sects themselves. The thunders of the Vatican are not now felt throughout all Christendom. If uttered at all, a murmur-

ing sound, like distant thunder, is the most that can be heard in this country. The effect is not felt.

The members of the Roman Catholic Church are bound by their decrees; but none others are. So in regard to every religious denomination; the power of the church, within its legitimate province, is felt by all, and will be felt by all, whilst she acts as a nursing tender mother towards her children. We have indeed all witnessed the effect of this power, whether exercised as the tender mother's blessing, or as the withering of the father's curse. Depend upon it, the influence of the church is in its strictest sense the very essence of power. Their influence extends through all the relations of society, and is felt in the governments which have been instituted among men. To this none of us will object, whilst that influence is exerted independently, and without any interference with the civil government, though it is no less powerful than the still small voice which arrested the prophet's attention when he stood at the entrance of Horeb's cave.

How then is this influence exerted? Having no aid from the civil power in execution of their decrees, and having within their own power no civil disabilities or penalties to inflict, how are these church judicatories able to give effect to their councils? What imparts such strength to this bond of air? It is neither more nor less than the power of *conscience.* Talk to the profligate and profane man, who disregards the obligations of morality and contemns virous principles, about the decisions of these ecclesiastical councils, and they are of no influence with him. He treats them with perfect contempt. But lead him under the influence of religious considerations, bring him to appreciate his obligations, give his *conscience* to the church, and then the decisions of that church *bind* him, and he renders a ready acquiescence. It is thus the potency of conscience that gives effect to the decisions of ecclesiastical courts.

The churches have jurisdiction over spiritual concerns. The decrees of their councils, in their legitimate sphere of operation, are binding, and from their judgment there is no appeal to the secular courts, as there is in another country, from which we have received many of our maxims of common and parliamentary law. The civil courts have nothing to do with the affairs of the church, except to protect all the members as citizens; and, certainly, they have the same right to protection, as other citizens have. This cannot, and will not be denied. There are one or two authorities which I will read, and, if they do not sustain me, I will not, like my learned friend, threaten to throw my books into the fire; because, I presume that you would rather rest on law, than on the mere assertions of the council. I will show you what is the law in Europe, and particularly in England, from which country we have derived the first principles of our jurisprudence. There the government does not interfere, and even in Asia, the sovereign will does not interfere with the decrees of the church. When we come down, in the page of history, to our own Pennsylvania, we find that the very foundations of government were laid in this state, while it was an

infant colony, on the principle of freedom of opinion, and liberty of conscience. The principle of noninterference with the rights of conscience, the illustrious founder of Pennsylvania, the great and wise William Penn, made the basis of all law, when he proclaimed to all who should settle in the colony of Pennsylvania, that no man should be molested, nor deprived of his civil rights, on account of his opinions in relation to religion and matters of conscience. Vattell, also, the universal authority on the law of nations, maintains that the rights of conscience are sacred, and the decrees of the church should not be interfered with by the civil power. (Vattell, B. I. ch. 12, sect. 133.

Now, applying these principles, what have you and I to do with the exclusion from the communion table, of Presbyterians? What with any decisions of the General Assembly? Absolutely nothing! We contend that we have, as the highest judicatory of the Presbyterian Church, all the powers that were guarantied to the Roman Catholic Church, by the laws of England, before the reformation; except so far as they are modified by the constitution of the United States, these powers being, in this case, of course, limited to our own members.

The power of the church may, being properly exerted, become like the light of the sun, which extends throughout the world, dispensing its blessings everywhere. This power necessarily includes that, of dismissing from the communion all who refused to obey the decisions of the Presbyterian Church, as expressed by the General Assembly, which has full power to determine all questions in relation to the mysteries of religion, as connected with their order. Much has been said as to the power which the civil courts have over ecclesiastical decisions. On that subject, we may refer to Judge Duncan (7 Sergeant and Rawle, page 557) where the position is distinctly laid down, that each church having its platform, that platform is its own, and their decisions are binding. So that we can only look at the facts whether Presbyterians, &c. have kept to their own jurisdiction. "It is the part of a good Christian to submit to the decisions of the church." A little further forward the same expressions are used by the Chief Justice of Pennsylvania. I am thus bringing to your minds what the law is in relation to the present case. Another authority is the decision of the Supreme Court of New York (9 Wendell, page 400, Field *vs.* Field): "So long as the conditions (of their association) are complied with, the courts have no right to interfere." Thus, they all declare that the courts of law are incompetent to interfere with the decisions of the ecclesiastical courts. Had the General Assembly undertaken to inflict fines or imprisonment for noncompliance with its mandates, or to take the property of individuals on account of their refusal, and for the purpose of compelling them to a submission to the decrees of the church; the civil courts could then interfere, and they ought of right to interfere. For unlimited as are the rights and powers of the church in regard to ecclesiastical matters, the power of inflicting fines and imprisonment, or any other penalty, except merely ecclesiastical censure and exclusion from the church, does

not belong to them. Such powers belong to the civil government, which is constitutionally prohibited from inquiring into the opinions of the citizens with regard to religion. Should the church therefore undertake to interfere with the civil power of the state, it would overstep its proper bounds. But happily the constitution of our country wisely prohibits both the church and the state from transcending their proper bounds, and thus encroaching on the rights of each other. Happily, the civil power is restrained from interfering with the actual and positive rights of the church, as well as the church from interfering with civil rights.

The General Assembly is an ecclesiastical assembly, and it is granted that by the constitution it has no temporal power. It has no power to inflict penalties of a temporal character in order to compel any to conform to its requisitions. But when they have agreed on any thing in relation to spiritual matters, however contrary it may be to human laws, the civil courts cannot interpose, unless such decisions of the church are an infringement on the civil power. So far indeed, it is not difficult to get over what at first view may appear to be a contradiction. No church establishment can exercise or assume, in this country, the civil jurisdiction, which belongs to the state, and which the state alone can exercise; and the state, on the other hand, can in no case interfere with religious establishments, while they confine themselves to the spiritual affairs of their own church. It is the right of each church to make its own disciplinary regulations, to prescribe what shall be required of its members, spiritually and morally; and with these church regulations the civil power ought not to interfere. But should such church establishments undertake to exercise a temporal power, they would then be obnoxious to the charge of interference with the powers of the civil government, which is not to be permitted. The church has a right to make rules or laws for its own government, and every member is morally bound to submit thereto, because he has chosen to become a member of that church with the knowledge of what her faith and practice was, and it is impossible for the state to interfere with these legitimate concerns of any church. Such an interference by a temporal or civil power would be a departure from the first principles of our republican government. In support of this position we have the high authority of the present Chief Justice of Pennsylvania, Judge Gibson. (5 Watts, 48.) Members of the church have nothing to do, but voluntarily to depart, if they will not submit to the rules, regulations and decisions of the church. They may go whenever they please, for no church can compel them to remain in its communion against their wills. The church cannot extend its penal inflictions beyond excommunication from church fellowship. This is the ultimatum of its power. And though it is presumed that every man chooses to belong to some church, yet there is no compulsion, and he may not belong to any if he does not choose so to do. But most good citizens will choose to belong to some church, in order that they may enjoy the advantages of joining in the social and public worship of Almighty God. Every one is at liberty to belong to what church he pleases.

And if he belong to any church, he must contribute to the support of that church whilst he is a member thereof, and is morally bound to comply with its disciplinary regulations and decisions. Or if he belong to none, and consequently in religious matters is perfectly free from the constraint of any, he is not the less bound to render homage to God according to the dictates of his conscience, though, unless he be a member of the church, he cannot be entitled to its privileges, and must forego the advantages arising from the administration of the sacraments and the communion of the church. But there is no legal obligation resting on the citizen to enter any church at all, or to remain within its pale any longer than he chooses.

Over those who do belong to the church, however, her power is supreme, her decisions binding, final, and without appeal to the civil tribunals, in relation to all matters of spiritual concernment. So long as the church adheres to her own principles, no civil court can invalidate her determinations. So far we have no disagreement. We all rejoice in this wise arrangement in relation to these matters in our country. The members of the church are such on the principle of voluntary association; and when the powers of any church are exercised in accordance with the principles on which they have thus voluntarily associated, the civil courts, the judicial tribunals of the state, cannot interfere with them. To this effect we have a decision 5th Watts 43, that "when the church power is exercised according to the appropriate jurisdiction of the church, the courts of law cannot touch them. There has perhaps been a decision in Massachusetts of a different character. But, such is the law of Pennsylvania, and of every other state of the American Union excepting Massachusetts, where, as was the case till recently in Connecticut, the law requires that every man shall contribute to the support of some church, even if he does not attend worship in any. This law was among the early enactments of the pilgrim fathers of New England. Whether it is a wise regulation in the existing state of society, I will not now undertake to determine. I leave that to the good people of the Bay State.

Well, gentlemen, we proceed to inquire what sort of power had the General Assembly? What but ecclesiastical legislative power? It was not strictly legislative nor judicial, like civil power; but, for church purposes, it was both. We maintain that there is no power in church or state which can compel any man to enter the church. But we assert that the whole power of the Presbyterian Church was vested in this really powerful General Assembly. Had it not legislative powers? It certainly had, over all the churches of the Presbyterian communion. And whence indeed came the idea which has been so much dwelt on by the opposite party, that the General Assembly had no legislative power? Whence, except that the term judiciary or judicatory is applied to it and to all the subordinate bodies of the Presbyterian Church. I see nothing but the mere sound of the name, on which to build this presumption. But this is surely insufficient. Judicatory, say they, means court, and not legislature. Well, the very word court is itself applicable to a legislative body. The term court originally means *cut off*, as

the yard of a country house is cut off or enclosed from the adjoining premises, and called a court. So we speak of certain peculiar sections of the city, as, for instance, Ranstead *court*. If from their sessions being held in such places, it came to pass that certain legislatures of state are denominated courts, then there would seem a peculiar fitness in the coincidence that these proceedings of the General Assembly, which are styled acts of legislative power, occurred in the church in Ranstead court. But however that may be, certain it is that they speak of their legislature in England as of the high court of Parliament, and the high court of Massachusetts is its legislature; and I might probably cite other examples of the same kind.

But by whatever term we designate the powers of the General Assembly, its jurisdiction was strictly ecclesiastical, and not temporal, because the power of temporal or civil legislation is vested in the legislature of the state; and as the judicial power is vested in the courts of law, so the ecclesiastical power of the church resides in the judicatories of the church. The General Assembly cannot send out decrees for temporal effect, for such a decree of the church would not be binding on any civil officer. Nor could it be further binding on any person, than to command and compel offenders to depart from the church. So far the decrees of the church are binding, and these are the circumstances under which I said that we undoubtedly had jurisdiction, and with which the civil courts cannot interfere. The whole power of the Presbyterian Church is concentrated in the General Assembly. Notwithstanding, that supreme judicatory of the church has entrusted the exercise of this power, in many cases, to the inferior church judicatories, the synods, presbyteries and church sessions, yet, as the General Assembly exercises an appellate jurisdiction over all these inferior judicatories, and is the tribunal of dernier resort, the whole power of those judicatories concentrates in the General Assembly as the primeval fountain of ecclesiastical power. It exercises the same power over the decisions of the inferior judicatories that the Supreme Court in this state exercises over the decisions of the inferior courts. And you cannot arraign the supreme court, on an accusation of abusing its power by reviewing the proceedings of the inferior court; whilst it would undoubtedly be an abuse of power should the inferior refuse to allow an appeal to be taken from their judgment. I think there can be no doubt of the correctness of the principles which I have laid down. We have also the authority of Blackstone in support of our claim. Blackstone says that such power is expressly acknowledged to belong to the church by act of Parliament. I said that in reference to itself the church has power. I do not mean that it can exercise the civil power of the state, as when the ministers of the church sat in the Scottish Parliament in Holyrood House. It cannot be contended that the power claimed for this church is anomalous; as the only difference which I see between the power of the church in this and in other countries, is, that there the church exercises temporal as well as spiritual jurisdiction, and here spiritual jurisdiction only. But the power which

we claim exists in the church every where. It is universal, and means every thing. It is common law, because it is thus universally adopted by the common sense of all mankind. We all feel its influence, whether we are willing to acknowledge it or not. Sir Matthew Hale, who was one of the best, most upright and enlightened judges that the world ever produced, adds the weight of his authority to those to which I have already referred, in support of the view that I have taken. The great principles of the common law place the power in the General Assembly, over the synods and presbyteries of its own creation, that the legislature has placed in the supreme court over the several inferior courts. The supreme court is the highest judicial tribunal of the state, and in like manner the General Assembly is the highest judicatory of the Presbyterian Church; and so it must ever be in every church in this country: it must have a tribunal from which there is no appeal. The words have been rung in our ears again and again, that the conduct of the General Assembly of 1837 was unjust and arbitrary. But that of itself is no reason why the civil courts should interfere. I admit that the civil power may of right and ought to interfere to suppress all outrages and infractions of the civil law. But suppose that these two parties in the church had gone on debating, fighting, tearing and devouring each other, we present the question to you: Could the civil courts exercise a power over them whilst they confined themselves to the ecclesiastical concerns of the church?

Again we present to you the manner in which the judicatories of the Presbyterian Church exercise the judicial power with which they are clothed. The forms of proceeding are very different from those used in the transaction of common business. When those judicatories are acting in the exercise of judicial powers, the form of proceeding is one which is very uncommon in this country, and, of course, different from their own forms of proceeding in other cases. I will not read the rule which requires the observance of this particular form, as it was fully presented to you by my colleague. But the rule requires that the Assembly should appoint a judicial committee; and as in Congress, to that judicial committee the examination and preparation for trial of appeals and other judicial business is always referred. And always, when the General Assembly resolves itself into a judicial attitude, by taking up judicial business, a special appeal is made to the Throne of Grace, and the blessing of the divine power on their proceedings is solemnly invoked. The whole proceeding is more solemn than is usual in other cases. I have not my book to refer to; it has been taken away by accident; but a case is reported in 1832, which exhibits this solemn form of proceeding, when, in a case of judicial trial before the Assembly, it was scrupulously observed. As I said, the mode of proceeding in such cases is altogether different from that pursued in the transaction of the ordinary business of these bodies. Another example is furnished in the case of Dr. Riley, in the General Assembly of 1837, as appears by their minutes, page 429. The moderator reminded the members of their high character as a court of Jesus Christ, and the solemn duty in which they were

about to act. You may take up any one of the minutes of the General Assemblies which have been held since the first institution of that body in 1789, and you will find, in every case of judicial trials, that the mode of proceeding is similar. I took up this, by mere accident, as the first copy of the minutes which fell under my eye here on the table, and this case immediately presented itself. As I said, similar cases occur in them all. And not only is this the mode of proceeding in the General Assembly, but in all the judicatories of the church, from the highest to the lowest of them. Others of the judicatories fall indeed far short of the omnipotence of parliament, which is vested in the General Assembly, yet there is justice in carrying through this principle in them all. Another paper of this character has accidentally come into my hands. I refer to page 132 of the minutes of 1832, where a similar record occurs. Indeed, we may take up any of these minutes at a venture, and find the same thing. Thus you see, gentlemen, that the form of proceeding is not the form used in legislative proceedings in the General Assembly; but the principle is not confined to that assembly, but may be viewed as extending to all similar bodies all over the world. It is not confined to Presbyterians.

Again, in these minutes of 1832, we find examples of business, which we may consider as legislative. Here are overtures Nos. 1, 2, 3, &c., all of them relating to business not judicial. All these are in their character legislative acts. In page 325 of the same minutes there is still more to the same purport. Here is also a resolution recommending a season of fasting and prayer, and inviting other denominations to participate. Here are also petitions, which of course are addressed to the Assembly as a legislative, and not as a judicial court. But the Assembly also originates business, and acts on it, itself; something certainly very unlike a court of justice. These different forms proceed from a principle in the constitution of parliamentary bodies, and it is by these forms that the ends of justice are reached, and the appropriate ordinances enacted, and though in the Presbyterian Church it is not exactly as in some others, they pass their ordinances as they are applied for, but they cannot extend their power in the enactment of laws, without the desire of the constituent judicatories.

I will now take up the Confession of Faith, which contains the Laws of Government of the Presbyterian Church, some of which have been already adverted to. Confession of Faith, chapter 31, section 1 and 2.

"For the better government and further edification of the church, there ought to be such assemblies as are commonly called synods or councils: and it belongeth to the overseers and other rulers of the particular churches, by virtue of their office, and the power which Christ hath given them for edification, and not for destruction, to appoint such assemblies; and to convene together in them, as often as they shall judge it expedient for the good of the church."

II. "It belongeth to synods and councils, ministerially, to determine controversies of faith and cases of conscience; to set down

rules and directions for the better ordering of the public worship of God, and government of his church; to receive complaints in cases of mal-administration, and authoritatively to determine the same: which decrees and determinations, if consonant to the word of God, are to be received with reverence and submission, not only for their agreement with the word, but also for the power whereby they are made, as being an ordinance of God, appointed thereunto in his word."

Now it would be difficult to embrace in half a dozen words any thing more comprehensive or explicit than this, "to set down rules and directions for the better ordering of the worship of God, and government of his church." Not being much of a theologian, I, at least, could not suggest more in a few words than is here stated of a *quasi* legislative character. There is the highest authority of the Presbyterian Church, using the same words as are used to express legislative powers by the British Parliament. So in page 363 of the same book; in the 12th Chapter of the Form of Government, the General Assembly is described as the highest judicature of the Presbyterian Church, as purely representative in its character, composed by delegation, &c. And does not this language indicate to every reader the character of a legislative body? In the 5th section of this 12th chapter, also, it is said:

"To the General Assembly also belongs the power of deciding in all controversies respecting doctrine and discipline; of reproving, warning, or bearing testimony against error in doctrine, or immorality in practice, in any church, presbytery, or synod; of erecting new synods when it may be judged necessary; of superintending the concerns of the whole church; of corresponding with foreign churches, on such terms as may be agreed upon by the Assembly and the corresponding body; of suppressing schismatical contentions and disputations; and, in general, of recommending and attempting reformation of manners, and the promotion of charity, truth, and holiness, through all the churches under their care."

Again, in the 4th section of the same chapter:

"The General Assembly shall receive and issue all appeals and references, which may be regularly brought before them from the inferior judicatories. They shall review the records of every synod, and approve or censure them: they shall give their advice and instruction in all cases submitted to them in conformity with the constitution of the church; and they shall constitute the bond of union, peace, correspondence, and mutual confidence, among all our churches."

Now I have fully established what I proposed, viz. that the General Assembly possesses, strictly speaking, neither legislative nor judicial powers, but ecclesiastically both. The articles of the Form of Government are, throughout, indicative of the power of the General Assembly, in accordance with my position, and that so much legislative power should be given to the Assembly, is perfectly natural. But whether it were so or not, here is our authority. I now speak of the terms used in the Confession of Faith of the Presbyterian Church; and they are sufficient for our purpose.

Though the language applies to other bodies in a limited degree, yet in this highest tribunal of the church the power is unlimited, as to the administration of the discipline of the church. So much for the powers and character of the General Assembly.

Well, what were the proceedings of that body in 1837, which are so much complained of? In form they are merely a series of resolutions standing upon the minutes. They were, in substance and form too, a mere discontinuance of "a regulation," for such was the Plan of Union of 1801. The Assembly had the power to bring those regulations to a termination by a suspension of that plan, which was as subject to abrogation as any other regulation. It was the terminating of an agreement, which they might as well terminate as an agreement to ring a bell, or do any other thing. It was terminating an illegal agreement, an agreement with a heterogeneous body, which could not be assimilated to the General Assembly. It is a general principle with all deliberative bodies, that they have a right to terminate the existence of their own sessions, and of all legislative bodies, that they can repeal their own acts. It would be outrageous indeed if they could not. Every deliberative body has the power and the right to sit on its own adjournment, and to make its sessions of what length the members please. The principle is universal, extending through all deliberative bodies. It prevails in the Congress of the United States, as well as in the General Assembly of the Presbyterian Church.

The power to decide when was the right time to terminate its session, or to repeal a former act, was certainly inherent in the church, and was vested by general consent in the General Assembly. The Presbyterian Church had been assiduously engaged for many years in extending blessings to Congregationalists in the new settlements. And thus the Congregationalists had grown up, and grown strong under the superintending care of the General Assembly. And had not the General Assembly power to determine when the connexion between them should cease? It would be absurd to say that they had not. It would be outrageous to say that they could not say to these Congregationalists, "we have done what you needed, you are now strong enough to help yourselves." They had a right to dissolve the connexion, without assigning any reason for declining to continue what had been abused. It was only opening the window, as "my uncle Toby" did to the poor fly, saying, "there is space enough in the wide world for us both." The proceeding of the General Assembly of 1837, speaking in a somewhat different sense, was a proceeding in conformity to the precepts of the gospel of peace. It was founded on principle, and designed to terminate strife. They acted wisely in thus adopting the language of the great patriarch Abraham to his nephew Lot, "the land is not able to bear us both, but let there be no strife between us, for we are brethren; is not the whole land before you? Therefore separate yourselves from us, either to the right hand or to the left; if you will take the right hand, we will go to the left; or, if you prefer taking the left hand, then we will depart to the right."

The proposals of the General Assembly were similar both in the

letter and in the spirit of them; and as they refused, there was a necessity for removing or disowning the recreant synods, in order to end the strife. It was then a disowning in part, and in part re-modelling them, regulating them, as they had a perfect right to do, for it would be inconsistent to say that the General Assembly had not the power of regulating the four synods, when they had a right to regulate the internal affairs of the whole Presbyterian Church, and every part and parcel thereof.

The Plan of Union of 1801 did great injustice to the Presbyterian Church. Though it was intended for good, yet it did mischief instead of good, bringing in Congregationalism and heresy into the church. But, the whole power of the Presbyterian Church being concentrated in the General Assembly, they had power to organize a General Assembly of a similar nature, as the one to which the act of incorporation was granted by the legislature; and that was a purely Presbyterian General Assembly; holding to the Calvinistic creed without any intermixture of Congregationalism, Swedenborgianism, or any other *ism* or heresy. The Presbyterian Church still inflexibly adheres to the Westminster Confession of Faith which their ancestors brought over with them to our land, and their Form of Church government is founded on the same model of republicanism as our republican government. It is in strict conformity with the law of Pennsylvania, which has been read and will be read again. The General Assembly has power to dissolve and re-organize both the synods and the presbyteries at pleasure; and the four synods of Utica, Geneva, Genessee, and the Western Reserve, depend upon it, were mere eleemosynary institutions, which grew up under that system of universal charity, which permits the ministers of the Presbyterian Church to preach the doctrines of the church to all persons, and which spirit has characterized the Presbyterian Church since her first institution; as is manifested in her zeal for the propagation of the doctrines of the gospel, by sending out missionaries at great expense to labour without any reward, except the satisfaction of well-doing.

The very origin of the organization of this respectable body appears to have proceeded from the same spirit. It was, because conceived "to be most conducive to the interests of religion, that the synod," (of New York and Philadelphia,) then the highest judicatory of the Presbyterian Church, was, in 1780, "divided into four synods;" as we learn from the Digest, page 37.

Here again I would have you notice, gentlemen, that synods preceded the General Assembly. The preliminary proceedings for procuring the charter of the General Assembly show that the object of that charter was to provide for the safe keeping and disposal of certain charitable funds entrusted to the General Assembly. The corporation is of a peculiar character, in this, that the trustees are not of the essence of the body for whose benefit the incorporation was obtained. That is the General Assembly, or the ministers and elders of the Presbyterian Church.

The General Assembly is composed of the ministers and elders, who, by the act of incorporation, have the appointment of those

trustees. So that the General Assembly is in the strictest sense the corporation, yet as the legal corporation is styled "The Trustees of the Ministers and Elders of the Presbyterian Church in the United States of America," and as the act of incorporation itself placed the trustees under their control, the General Assembly may be called (as it has been) a *quasi* corporation; and this *quasi* corporation has more power than the corporation itself. The power vested is in reality in the General Assembly. The trustees are the mere hinge on which the corporate power which the law gives the General Assembly turns. This General Assembly was originally composed of synods, and, but for its relation to law, by the incorporation of these trustees, might return to synods again. As the Assembly was originally constituted, by one synod dividing itself into four, and the representatives of the presbyteries composing those four synods meeting in General Assembly, so, but for its legal relations by the charter, the Assembly might, if it should see fit, again be merged in the synods embraced in its communion.

True! [in reply to a suggestion from the court,] presbyteries were in their existence antecedent to the synods, and the General Assembly, under the constitution of the church, is composed directly of a delegation from the presbyteries, and not from synods—but, in the account given of the division of the Synod of New York and Philadelphia into four synods, for the purpose of erecting the General Assembly it is said, (Digest, page 38,) "that out of the body of these synods a General Assembly shall be constituted," by every presbytery deputing commissioners, &c. Moreover, the General Assembly has the power of changing the ratio of representation of presbyteries in the Assembly, and of changing the proportionate representation of different portions of the church, by dissolving presbyteries and annexing their members to others, either in the same or in different synods. Thus the ratio of representation has been changed from six to twenty-four, showing that the right existed in the General Assembly to alter the representation from time to time as they shall see fit.

I am told that the alteration of the ratio of representation has been made by the presbyteries themselves, it being done by amendments to the constitution. Well, be it so. But the thing is in the control of the General Assembly, as they can affect, as I have said, the proportional representation by the dissolution of presbyteries and synods.

Thus, the very basis of representation in the General Assembly, as it is now organized, consists of a delegation from presbyteries belonging to synods. The minutes of 1834 show, that the Presbytery of the Chesapeake was then dissolved by the General Assembly. In 1835, the Synod of Delaware was dissolved; thus showing the power of the General Assembly to dissolve presbyteries and synods, and establishing it beyond doubt. The presbyteries that remained in connexion with the General Assembly, were thus affected by the dissolution of other presbyteries, and the General Assembly by dissolving some of the presbyteries, and attaching their constituent churches to other presbyteries, might change the

representation at any time. I do not mean to say that they could do this contrary to the established laws of the Presbyterian Church; but I mean to say, that in accordance with those established rules, they could and did, in 1834, and at other times, dissolve presbyteries and synods, and attach their fragmentary portions to others. And if the General Assembly possessed this power in 1834, it certainly did in 1837.

But the proceedings of the General Assembly of 1837, surrounded as that body was by peculiar circumstances, may be referred to in another point of view. That they had a right to pursue the course which they did, is proven by reference to the proceedings in the case of the Third Presbytery of Philadelphia. To this I would call your particular attention, and you will be good enough to recollect, that not a word was said in Ranstead court, in 1838, of these being acts of usurpation; an evidence that they were not viewed as such. Instead of that, they confined their complaints to the proceedings in the case of the four synods, and undertook to consider the act declaring *them* to be dissolved, as null and void. They did not consider a similar act, relating to the Third Presbytery of Philadelphia, null and void. And they did not, even in 1837, pretend that the General Assembly had not power to dissolve that presbytery, but their only question was as to timely notice having been given, which, I have already shown you, could not avail them in the least in this Court, as the fact of their jurisdiction shields their acts from investigation. That the General Assembly was transcending its power, was not suggested, in 1837. It was not, then, even supposed by any, not even by these New School gentlemen themselves. In 1838, when these gentlemen rose in their places, and denounced the proceedings of the General Assembly of 1837, they said nothing about the dissolution of the Third Presbytery of Philadelphia. They were silent as to the question of power in 1837, as appears by the Protest of the minority, a New School paper, which was presented to the General Assembly of that year, and which abounded with protestations against the dissolution of that presbytery, but altogether irrelevant to the question of power. That protest is recorded in the minutes of 1837, p. 487.

By the minutes of the Assembly, you may perceive that the history of the Third Presbytery of Philadelphia, is a history of its dissolution and resuscitation, and from the beginning to the end of the controversy in relation to that presbytery, the unlimited power of the General Assembly was admitted and claimed by the members of that presbytery, in opposition to the Synod of Philadelphia. They did not once raise the objection that the power of the General Assembly was limited. The objection that they raised was, that those proceedings conflicted with the several previous decisions of the General Assembly. The power of the General Assembly over the inferior judicatories, was not questioned by these New School men, during the whole course of the proceedings in relation to the Third Presbytery of Philadelphia; on the contrary, it was acknowledged to the fullest extent. And the General Assembly dissolved the Synod of the Western Reserve, and the other synods, by the

same authority that they exercised in dissolving the Presbytery of the Chesapeake, the Synod of Delaware, and the Third Presbytery of Philadelphia. Yet, there was no usurped authority in the case of those bodies. Why, then, should there be in the cases of the four synods? Add to this Dr. Patton's resolution, strengthening this position. It speaks of presbyteries as deprived of this right to be represented in the General Assembly, alludes particularly to those of the four synods, but says not a word about the Third Presbytery of Philadelphia. In the case of that presbytery, the General Assembly overlooked the synod, and went directly to the presbytery. But there is no difference in principle. The exercise of power was the same as in the other cases. Dr. Mason also confined himself to the presbyteries of those synods. He distinctly mentioned the presbyteries when he made his motion. Thus we have an acknowledgment on the part of Dr. Mason, that the act dissolving the synods, extended to and bound the presbyteries. He also thereby admitted the propriety of the proceeding by which the Third Presbytery was dissolved; else, why had not Dr. Mason, when he rose, one commission from the Third Presbytery of Philadelphia.

It is perfectly consistent to conclude, that there was the same power to dissolve the *four* synods, that there was to dissolve the Third Presbytery of Philadelphia, and the omission of Dr. Mason to present the commissions from that presbytery, is therefore the admission of the power and right, vested in the General Assembly, to dissolve those synods. It is a plain admission, as any in the world. They have chosen to apply to themselves a law which is all-sufficient for our purpose. So long ago, at least, as 1834 and 1835, we find the cases before referred to, of the dissolution, by the General Assembly, of synods and presbyteries. I refer to them again to satisfy you that here were precedents, which are the true interpretation of law, the same in principle, as the case they have raised. They acquiesced in these, and what is still more to the point, without referring to those proceedings in any terms.

I return now to the consideration of the Plan of Union, to show that it involved neither legislative action nor any thing in the nature of a contract. It was not even properly called a "Plan of Union." It is a mere set of *regulations*, adopted by the General Assembly and the General Association of Connecticut; and I ask, speaking as a lawyer, where is there any appearance of a contract? What is the *consideration?* Where are the parties to the contract? Where the *equality* of the parties? If there is a contract to prevent the Assembly from dissolving these synods, produce it, and let us see it! They produce "the Plan of Union between Presbyterians and Congregationalists in the New Settlements." But that is not a contract. The General Association of Connecticut has nothing to do with it. They may tell you that it was some kind of agreement or plan formed between A and B; but, I ask, where is the contract? There was none, because there is no consideration, and no penalty for a violation or neglect to fulfil the agreement, in any sense expressed, from beginning to end; and if it were in the form of a contract, it would be void, for the General

Assembly of course has no power to make such a contract. I will read for the enlightenment of your minds on this point, from "The Encyclopedia of Religious Knowledge;" a work written by a New England Congregationalist, and which may be referred to by all as authority. You must bear in mind that they are not Presbyterians but Congregationalists. Presbyterianism does not extend in that direction beyond the Synod of Albany. In the South, the Calvinists are generally Presbyterians. In New England, and in the western and northern sections of the state of New York, and in the northern portion of Ohio, known by the name of the Western Reserve, they are generally Congregationalists; and, as we see by this authority, the Congregational Associations are limited as to their powers; as are also another class of ecclesiastical bodies, termed Consociations. These Congregational Assemblies are "Associations of Ministers" only, having no power of making laws, and only extending a mere advisory counsel to the Congregational churches. Those churches are not bound by any decision of either the Association or Consociation. Here, under the title "Connecticut," we also read, that "in 1791," a mistake of ten years, "a plan was adopted between the General Assembly of the Presbyterian Church, and the General Association of Connecticut, by which Presbyterians and Congregationalists, in the New Settlements, were entirely amalgamated;" and further, that "four hundred of these Union churches have been planted by Congregationalists of Connecticut alone."

"Pierced through the very vitals," indeed we seem to be by this Plan of Union, as my learned friend said on another subject in application to the opposite party. Here it has been shown by this book, that those Congregational churches, which have been established under their construction of the "Plan of Union," have now grown up to *four hundred* in number. When they have thus become great, and even the majority in some of the synods and presbyteries, even greater than the stock into which they were grafted, are we to be told that "the Plan of Union" in the New Settlements must be continued to them, and that we have no power to terminate it? On the one side it may be urged, that it is productive of benefit to them, but on the other side may we not urge its injurious effects on us? Congregationalists cannot, with propriety, be represented in the presbyteries; for if they can do this, they may shortly abstract the whole power of the Presbyterian Church, in violation of the charter of incorporation. They never had power to enter into any contract at all; and yet they claim to enter on our premises, and seize our property by virtue of what they had not power to make: as though it were for that very purpose of seizing the property of the Presbyterian Church that they entered it. I am showing, that the "Plan of Union," the abrogation of which is complained of, was not a law or a contract. It wants the validity, the formality, and the legality of a contract. Even a contract with the sexton for opening the church (the place of worship) in the morning and evening, is made in the proper form, and it would be singular indeed that a contract for opening the door to

the communion and privilege of the whole Presbyterian denomination should be without form. It is a safe regulation which requires all contracts to be made in proper form, and they can have no force of law without. I hold in my hand what they will not be disposed to deny. Again, on page 5 of this book—

Mr. Wood. I would respectfully suggest, whether this is consistent with the practice of this Court. If the opposite counsel is allowed to go on in this manner, reading and commenting on what is not in evidence, and from books which may have been got up, as has been intimated, for the express purpose of prejudicing this case, I have something to say in relation to what I offered in evidence; and to which they objected. Your Honour will recollect, that there is nothing in evidence as to the Third Presbytery of Philadelphia.

Mr. Ingersoll. The Third Presbytery of Philadelphia was referred to by Mr. Meredith.

Mr. Wood. We offered the minutes of those very proceedings in relation to the Third Presbytery, to show the manner in which the dissolution of that presbytery was effected; but they objected, and the testimony was ruled out by the Court, and I think it would be exceedingly unfair to permit them now to put their own construction on it; unless it is distinctly understood that I am to be allowed the same liberty. From an unwillingness to interrupt, we have sat by and listened to a mass of matter entirely irrelevant to the case, and extended comments on statements in books not in evidence, and of the correctness of which statements there is not a shadow of proof, as well as to a long argument on the case of the Third Presbytery of Philadelphia.

Judge Rogers. The course complained of is irregular and improper, as has been a great deal of what has been introduced into this case; but when the opposite counsel was sitting by and did not interfere, it was a matter of great delicacy in a case of this peculiar character for the Court to interpose. Objection being now made, the counsel must return to the consideration of what is in evidence in the case.

Mr. Ingersoll. Still I may argue that the case of the Third Presbytery of Philadelphia is analogous to those which were included in the motions of Drs. Patton and Mason in the General Assembly of 1838. But I am not particular about it, if exception be taken.

What I am now about to bring to your notice, the acts of 1837, I suppose will not be excepted to, unless because it is so long since it was given in evidence that my learned friends may have forgotten it. I have something to say of the proceedings of the General Assembly of 1837 different from the mere abstraction which I first proposed. I allude to the various proceedings in relation to the four synods. The dissolution of those four synods was effected by a decided majority of the members of the General Assembly of 1837. The first of those excinding resolutions, as they have been called, was the act of the Assembly declaring that the Synod of the Western Reserve no longer continues to be a part of the Presbyterian Church. By a subsequent proceeding of a similar character

the other three synods were declared to be no longer a part of the Presbyterian Church. The Western Reserve is a term of peculiar import, and may need some explanation. The name "Western Reserve," has been applied to a large tract of country lying on Lake Erie and comprising seven counties in the north-eastern part of Ohio; the right of soil in which tract was reserved to the state of Connecticut. Thus the epithet, New Connecticut or the Western Reserve, came to be applied to it by the first settlers, who were mostly emigrants from Connecticut. The other three excinded synods lie in the western part of the state of New York.

The Synod of the Western Reserve was erected from the Synod of Pittsburgh in 1825, as the Synod of Pittsburgh was erected from the Synod of Virginia in 1802. But I desire now to call your attention to the state of the parties existing at the time when the proposition was introduced by the Old School party into the General Assembly of 1837. The New School party then agreed with the Old School men that a division of the church was necessary to further the advancement of the Redeemer's kingdom. But the proposition was defeated by the New School party. Judge Jessup, who afterwards proposed a citation of the synods which were complained of, the very man who afterwards proposed this measure, together with his friends of the New School, opposed it when the Old School party introduced the proposition and were willing to agree to it. So inconsistent were these New School men, as you will perceive by the manner in which all these things were done. The several measures were deliberately debated and considered, and, as, when in legislative proceedings those who are fond of speaking have exhausted the subject, the house must resort to something to put an end to what would otherwise be interminable, a motion was made for the *previous question*, which put an end to the debate and brought the house immediately to action on the proposition before it. The proceedings in relation to the Plan of Union took place in the General Assembly on the 19th and 20th of May 1837. These proceedings have been submitted to you, and you see that they were perfectly regular. Now, if I have not shown you by positive testimony, that the reasons alleged for the abrogation of this plan are true, I have them here in the resolution itself. The authority of that Assembly of 1837 is ample testimony to the truth of those reasons, unless they are disproved. The burden, therefore, lies on them. And why have they not, from May 1837 to this day, adduced one particle of evidence that those reasons were not true, that the disorders did not exist, or that the General Association of Connecticut had authority to make contracts? The answer is, *they could not do it.* Their objections to the repeal of the Plan of Union were inconsistent, and shall they cause all the funds of the church to fall into their hands merely by taking advantage of their unsuspecting brethren? The General Association of Connecticut had no power to enter into a contract with the General Assembly of the Presbyterian Church. They had no power to regulate the churches and congregations in Connecticut. The extent of their power was advisory merely. And if they had entered into such a contract with the General As-

sembly it would have been unconstitutional, null and void. The learned counsel (Mr. Wood) rose in the midst of my argument on this subject and objected to my proceeding, alleging that it was not in evidence. I was taken by surprise, but the burthen of the day is on them, and it is not for us to sustain them if they are determined to destroy themselves. I care not whether it comes from books or not, so that it is argument. If they do not undertake to meet it, they admit the impossibility of meeting it.

The Plan of Union having been abrogated, the next business in the series of these transactions taken up by the Assembly, was the subject of citation, the very thing which was not carried into effect on account of their stubbornness. You may ask, why was it proposed to bring up those presbyteries by citation? Dr. Elliott, and others of his friends, were on the side of citation; and Mr. Cleaveland, Dr. Beman, and their associates, opposed it with all the force of a powerful minority vote. You will perceive that the *previous question*, here or elsewhere, is resorted to, to put an end to interminable debate; a very harmless and usual course, but always regarded as being oppressive, by the minority. The debate had continued until a late hour of the evening, and there had been ample time allowed. Amongst the "yeas" on that question, we find the names of Alexander Junkin, Cornelius C. Cuyler, and others; and, on the other hand, Mr. Gilbert and others of the New School party. The question was carried by a small majority, indicating, perhaps it might be supposed, that the majority were soon to become the minority; and the minority entered their protests against what they now claim to be *the only right way*, the very thing which ought to have been done instead of excision. But when it was found that the New School opposed the proposition for regular proceedings, what was the only alternative? It is found in the proposition of Mr. Breckinridge, of which notice was immediately given, and which was formally introduced the next morning, and a committee appointed to effect an amicable division. Mr. Preston reminds us, that at a certain stage there was no difference between them on the propriety of *this* measure. Yes! Those scenes of scandal should have been avoided, and might have been avoided. The parties would have been happy, if they had agreed to a proposition for a division. After that, all things with regard to the property could have been arranged. Not as Solomon proposed, to divide the living child. The Old School party were willing to divide the property with them, but they would not divide their allegiance to the Presbyterian Church, and the division did not take place, because they determined to remain the Presbyterian Church. The New School being willing before, *now* refused, unless *we* would divide our allegiance to the Presbyterian Church. That you may the better judge of this matter, the fact should be stated that they acknowledged that a division of the Church had become necessary. The Theological Seminary and funds at Princeton, they acknowledged belonged to the Old School party, and they disputed about nothing, nothing but a name. It was a measure in

which they were all agreed, that division was necessary, that it must take place.

What divided them was, that the Old School insisted that they would all adhere to Presbyterianism, that they would "remain" the General Assembly; while the New School contended, that the funds should be "*transferred*" to the Old School as a body to be constituted, as well as themselves. They insisted on remaining a part of the Presbyterian Church, and unless the Old School party could thus compromise their principles they would not agree. The Old School party could not be brought to think with the poet,

> "For modes of faith let graceless zealots fight,
> His cant be wrong whose life is in the right."

But they rather chose to contend earnestly for the faith, which they believe was once delivered to the saints. The maxim of the poet was wrong; radically wrong. So Presbyterians believe, and of course a compromise could not be effected on that ground. That this maxim was wrong, we think will shortly be manifested in the life and conduct of him who adopts it

Where Mr. Meredith got his supposition that we refused to agree to an amicable compromise, I know not. It is they insisted on having one-half the living child, though at the expense of depriving it of life. We insist on being the Presbyterian Church. We say, take the property if you will, only leave us the church and the principles, which we revere. Only leave us the succession to the Presbyterian Church, the church of our fathers, and we are satisfied. That is the point, which, in our estimation, is worth more than all the money in the world. On this question of faith, they separated and disagreed. The one party wished to remain as it was. The other would not give up to it. Both agreed as to what men of the world would say was all that was worth contending about, and they differ as to the succession. What did the New School care for the seminary at Princeton? What for the boards of missions, and of education? Nothing! No, nothing but the name; and that they speak of as "immaterial," a mere "trifling" consideration. The separation of the committee resulted from the fact that the Old School adhered to Presbyterianism in doctrine and practice, and the New School did not. In regard to the necessity of division, proposition No. 1, of the majority, is very strong, but not so strong as No. 1 of the minority, on the same subject. They add, that the measure is necessary "to advance the glory of the Redeemer's kingdom." The proposition was made, which was fair and reasonable, and they objected to it, notwithstanding it had been unanimously agreed that a division of the church was necessary and proper. The minority refused to agree to any proposition that would acknowledge us the majority, as the successors of the fathers in the Presbyterian Church.

There is a seeming inconsistency between the final report of the minority, and their subordinate report, called No. 1. This says, that long experience had proved that the body was too large, and

that they believed that the glory of the Redeemer's kingdom would be advanced by a separation. They did not doubt it: and yet in their final report to the Assembly, they say that they had not deemed a division necessary, but had been induced to yield that point, because the other party were so strenuous for it. And, having thus yielded, the only point of difference between them and the other portion of the committee, they say, was "whether the preliminary arrangements should be sent down to the presbyteries, or adopted now." But mark the points in which they actually differ from the majority. They appear to differ only as to the shape which the agreement should assume. They propose a slight difference in the phraseology, they do not say in the substance; and yet that slight difference was so very material, that they have contended for it to the last. Can you reconcile it? They have now turned over a strange page, and deprecated a separation. They are the most accommodating gentlemen in the world! There is an obvious and marked difference between what they proposed then, and what they claim now. I do not wish to be understood as casting reproach on these gentlemen; far from it. But they now wish to make it appear that they were willing to remain, unwilling to divide the church, and that, as reluctant as they were, we were determined to cut the church asunder. The only material part of the discrepancy between the two proposals, was that the Old School party wished to adopt the preliminaries immediately, and the New School party, with a very little delay; and that the Old School party were determined to retain the name and character of the Presbyterian Church, whilst the New School party were determined that they should not. The Old School adhered, with pertinacity, to the succession of St. Peter. The New School consider this a trifling circumstance. To this the Old School reply, by simply referring to the preceding papers, as containing their final answer. No. 4, of the minority, then proposes to unite in a report, that the two parts of the committee are agreed on the general principle on which a division should be effected, and request the Assembly to decide whether it should be consummated now, or referred to the presbyteries. To this, the committee of the majority reply, that they consider it a waiver of the whole subject. They had no objection to take a new name themselves, and they strenuously insisted that the Old School party should take a new name also. Now, in regard to the proposition which Mr. Meredith so much ridicules, what is the difference between the proposition of the two parties? They were willing that the Old School party should have the Princeton Theological Seminary, and the funds. The Old School party proposed that they should remain with the body retaining the name of the General Assembly of the Presbyterian Church in the United States of America. The slight alteration proposed in the phraseology, by the New School party, was, that they should be transferred to the body to be called by that name. They were willing that the Old School party should hold the Princeton seminary and the funds, to the end of time, if we would compromise our principles. Of the propositions, No. 5, of

the majority, closes the correspondence, as it was evidently useless to continue it any longer, since, if a definite conclusion had been come to by the General Assembly, neither party would have considered themselves bound by it; but each would pursue its own course. Thus, though in appearance the difference in the phraseology is but little, yet they differed essentially as to the *modus operandi* of the plan of separation proposed.

This negotiation having thus proved abortive, by the stubbornness of the New School party, and their refusal to accede to the liberal and generous proposition of the Old School, the latter were forced to adopt some other measure; and, the plan for citation appearing ineffectual, even if it had not been virtually suspended by the large minority against it, a resolution was immediately introduced, and received the sanction of the majority, declaring that the Synod of the Western Reserve was no longer a part of the Presbyterian Church in the United States of America. It was well observed, that as we had tried every other remedy, and the New School would not take it, we must therefore resort to severe measures. The abrogation of the Plan of Union was deemed essential to the prosperity of the church, and the Synod of the Western Reserve, which came in under that Plan of Union, was dissolved, as a necessary consequence of the abrogation of the plan itself. But the resolution was followed by protest upon protest.

Now, is the authority of the General Assembly declarative? Here is their declaration. Is it controlling over synods? They have here legitimately exercised it. A resolution of a similar character, respecting the synods of Western New York, but more at large, with a modification extending to the Western Reserve, was subsequently introduced by Mr. Breckinridge, and, after various obstacles from the New School party, was carried. This was the first measure which prevailed by a large majority, 130 to 80. I now wish you to give your attention, for a single moment, to the resolution offered by Judge Jessup, which was introduced by the minority, when the proposition of Mr. Breckinridge had nearly reached its final result. The majority, composed of the Old School party, desired the separation on amicable terms. The minority would not accede. They were driven from every measure which they desired to pursue for the preservation of harmony and peace. The New School party raised objections to every proposition that could be devised, and now, on the eve of the passage of these resolutions, Mr. Jessup proposes to substitute a resolution to cite these synods to the bar of the next Assembly. They refused our proposition, though it was the same in substance, though that extended to all inferior judicatories, wherever situated, and this included only the three synods; because they were the very ones of which complaint had been made. But the previous question cut off all the proposed amendments, and brought the original proposition directly before the house, and so Mr. Jessup's substitute was lost.

I will here read these excinding resolutions, as they are termed, which were then adopted. [See previous pages 56 and 57, resolutions numbered 1, 2, 3, 4.]

Now, gentlemen, you would think that there was extreme churlishness on the part of those who would not thus come in and participate with the Presbyterian Church in the transaction of its business. They refused to be put in order, and in consequence thereof were put out, and then they refused to be put back again. Those who were so willing to break off, when the division was under consideration, will not consent to break up those synods as now constituted. They will not obey the mandate of the General Assembly; but they were before determined to contend about a name merely. They are now determined to contend about something else. And so this compound or New School party are outrageous in their denunciations of the General Assembly, for having cut off the four synods, dissolved then in consequence of the abrogation of the "Plan of Union." They were not cut off, were not dissolved, nor excluded. No, nothing! only they were told to come in as Presbyterians. Where is the hardness of this transaction dissolving the synods, if it is dissolving them? but it is not; it is only disowning the Congregationalists in those synods. Every Presbyterian may come in under the very provisions of these resolutions. Every church and every presbytery belonging to those synods could have enjoyed the whole of their rights and privileges to the full extent, by complying with a simple and reasonable requisition. The Presbyterian churches within those bounds, were not affected by the resolutions. It is therefore manifest, that they are not of the Presbyterian Church at all, or they would have willingly complied with Presbyterian order. Many of them were Congregational churches, which were presided over by Presbyterian ministers, and these Congregational churches could not be represented in the General Assembly, either directly or indirectly, after the abrogation of the "Plan of Union," if even they had the shadow of a claim under that "Plan." When there is only one of the *twenty-four* ministers belonging to one presbytery who is a pastor of a Presbyterian church, it is an evidence that Congregationalism has taken deep root. The injury, the injustice, was manifest, and from it they could not escape in any other way than by adopting just such a resolution as they did. You may call those resolutions by what name you please; but disownment it is not, unless you say that we disowned them precisely as we did the Synods of the Chesapeake and Delaware. The General Assembly disowned nothing but what was not Presbyterian. They only dissolved those four synods, because their constituent parts were Congregationalists, who had come amongst the Presbyterians, where they had no right to come. Such as were really Presbyterians, were not affected by it, as the door was never closed against them. The resolution merely attached them to some presbytery, which was regularly formed. But, said they, "that is not the thing we wish. The name is exactly the thing. Give up your name, and we are satisfied." It was more than churlish in these men. It is the indulgence of churlishness which works infinite mischief. But why, they ask, was not the Synod of Albany dissolved or excinded, when one of the presbyteries belonging to it, was as deeply imbued with the heresy

of Congregationalism as some of the presbyteries belonging to the four excinded synods. I answer: because it was not then deemed necessary, as the Synod of Albany had a number of Presbyterian presbyteries belonging to it, and it might be presumed that there was yet sufficient strength in that synod to remedy the evil complained of. The General Assembly certainly had the power to dissolve the Synod of Albany, the Presbytery of Montrose, or any other synod or presbytery, or to change their boundaries, as they are all bounded by geographical lines, and generally formed of churches which are contiguous. They are not always bounded by the geographical lines of the states. For instance, the Presbytery of Montrose, in Susquehanna county, Pennsylvania, belongs to the Synod of New Jersey. Whether any part of that synod is in the state of New York, I do not know. But I need not take up much of your time in the examination of this part of the subject, as there was not a man, or church, or presbytery, which was truly Presbyterian in doctrine and order, interfered with by the resolutions which have been so liberally anathematised. If any were interfered with, they were Congregationalists, and not Presbyterians. They were Congregationalists, and would not submit to the decrees of the Presbyterian General Assembly. That is what produced the wrong results. That is the meaning of their protests, and nothing else; and such it must appear in a court of justice.

On the great question of priority, or power, there is no difficulty where parties are disposed to do right. The congregations are parts of the synods, and as such fell with them. I find in the minutes of the Assembly for 1837, that the important reasons for the protest presented to the General Assembly against the resolution relative to the Synod of the Western Reserve, were the *modus operandi*. Information was drawn out from the members, catechetically, &c. Perhaps we shall understand this by and by. At present, I only observe that the three cardinal measures of the Old School party were the abrogation of the "Plan of Union," the resolution declaring the Synod of the Western Reserve no longer a part of the Presbyterian Church, and a similar resolution relative to the Synods of Utica, Geneva, and Genessee. Now, if they did not wish to drive us to these measures, why did they oppose an amicable separation? Why did they not bring themselves to agree to the measure, when it was proposed by the majority? They, the minority, would not; and we found that it was useless to pursue the subject further. Can a Christian assembly meet together in harmony, where there are two parties, and they are each determined to bear rule over the whole church? Can they not act more advantageously apart? Let me illustrate this.

The colonizationists and abolitionists both have the same object in view, the amelioration of the condition of the negro race, and the ultimate emancipation of every slave: and yet they cannot agree with each other, because they differ as to the means to effect the objects they both have sincerely at heart. Both these societies are labouring assiduously, and at great expense, to promote the extinction of what they both consider the greatest curse which has

ever fallen on any part of our beloved country. Yet, as they differ widely as to the means to be employed to effect that momentous object, they are the very antipodes of each other in their action. Thus, whenever the colonizationists and abolitionists come in contact, there is any thing but harmony and peace. Each contends earnestly in support of his favourite plan, and assails the other with language more violent and abusive than they apply to their common opponents. And these two parties can no more come together in harmony and peace in the Presbyterian Church, than colonizationists and abolitionists in one society. The self-will of the leaders of the two parties, or an actual difference in opinion, will for ever keep them apart. They cannot harmonise together, and it would be cruelty to force them into contact with each other. It is enough to establish this, which is shown on these very minutes. There are "important differences in doctrine." The New School party differs from us on points of theology. They will not give up the name of Presbyterians. Not they: and yet they acknowledge that there is a difference between them and the Old School party on points of theology. I must confess that I do not understand them, and will not attempt an investigation of them. They now say, that those points of difference in theology are not essential. The Old School men say that they are. No matter which is right, they cant agree together, and they must part. Every church in its turn has been subject to such intestine convulsions, and could not be tempered down to an agreement between the parties. Agreement has generally been found to be impossible where theological disputes have arisen. Amongst the early reformers, Luther and Calvin never could agree in any thing except a zealous opposition to the Church of Rome. Such has been the case, and probably will be, until the promised millennium, when Christ shall reign in the brightness of his glory for *a thousand* years. The Old School party believe that they are on the right ground, and that the others have gone off and left them. They had better keep apart. There is between them, a wide and irreconcilable difference in doctrinal principles.

There is also another difference; namely, in the Form of Government of these churches. I would not say with my colleague, who opened our case, that the Presbyterian government is an aristocracy. I would rather call it a representative democracy, while the Congregational government is vested in each congregation as an independent church, and is a pure democracy. Now, how can these two, so different in principle and practice, be united without strife and confusion? They are now disintegrated, and peace and harmony may be restored if they are not again connected. Sixty thousand Congregationalists cannot come into the Presbyterian Church without endangering the stability of the church itself. They cannot come in without invading the sanctuary, as the devils in pandemonium waged war against heaven itself. But as the demons there suffered a defeat and an overthrow, so here it might be expected to be the case. But, with this difference in feelings, what would be the strife between these two parties if they should come together again? What would the New School party do in

the church which they have resisted, and are now resisting by an appeal to the arm of flesh? Can the fleshly arm of the civil power change them into true Presbyterians? As well might we expect the Ethiopian to change the colour of his skin or the leopard his spots. It is not by appeals to law, that they can prove their desire for the restoration of peace and harmony. The manner in which these suits have been commenced, must be considered. The first step towards appealing to the law was taken on the 7th day of June, 1837. See also their notice served on the trustees. Yes, before that Assembly was dissolved, their language, in effect, was, "we are going out from you; we are not satisfied with the jurisdiction of the spiritual court;" and these measures were introductory to a series of judicial process, which I would immediately present to you, but pause for the sake of doing away an impression, if it has been made on your minds, (and it has been industriously endeavoured,) that these proceedings were mere amicable suits. There is no such thing. And I here proclaim that the Old School have had no part in bringing these suits, but have deprecated them in every form. They have brought suits against us in divers ways, and with great industry; and however we may be willing to abide the issue of them, it would be unjust to our party to suppose that we desire litigation. The Old School party have come here, because they have brought us here. We had nothing at all to do with it. This should be borne in mind, that the New School party have forced us into this court, as they had before forced us to record the unhappy differences in the church. It may, however, be permitted for a trial of their faith, as the faith of the disciples of our Lord was severely tried by adversities which came upon them. There is nothing in the principles of the Old School which can be considered as the elements of law suits. But let parties like these consider what must be the consequence of each one endeavouring to bring as many law suits as possible for the annoyance of the other party. Where would it end? There is something odious to us in the contemplation of these suits. They have brought suit upon suit, as though they intended to place a great gulf of unfathomable depth between us and them. Judge Brown has brought no less than five suits. (I intend to tell the truth.) Not one suit merely, but when dissected, it amounts to no less than five. He puts himself in the front of the battle. Thus Judge Brown, Mr. Squier, and Mr. Hay have commenced no less than fifteen suits against different members of the Old School party. The trial of one of these suits would answer, if they only wished to obtain the decision of a mere abstract question, of a matter of law and fact. But this principal suit is worse than all the rest, and the worst that could possibly be adopted, and that is to be decided by yourselves, gentlemen. You are to decide whether this outrageous blow, aimed at the head of the venerable father of the Presbyterian Church, (Dr. A. Green,) shall be successful. Like political demagogues, claiming seats in the national or state councils without the shadow of right, and merely by a quibble of law; so in the church, persons may claim to have been elected trustees without even the shadow of right in

justice and equity; and all for the purpose of casting reproach on the Presbyterian Church. But you will rebuke them. There may be Christians in name and in principle on the other side, but they are not Presbyterians. They have adopted force, and my friends on the other side never would have brought forward the grave charges they have done, without consultation with their clients. These New School men have shown a disposition to produce all these evils. In their consultation they said that they had now passed the Rubicon, as Cæsar said when he passed the little stream which flows through the environs of Rome, and by which I suppose they meant that they crossed the boundary and got out of the Presbyterian Church. They have passed it, and they know it. Reconciliation between these two parties is impossible. Their separation is for ages. Their enmity is as lasting as their lives. The end thereof neither they nor their children shall see. In all respects the controversy has been bitter; and they have used towards each other hard words, the very warmest epithets that could be adopted. Wounds deep and grievous have been the consequence; which ages cannot heal. This has been done against the wish, and contrary to the best advice of a large majority of Presbyterians, and specially of those men who are the defendants in this cause. I shall not go back to former times lest I shall be accused of injustice. There was and is a majority of the Old School party. No doubt of it. In Pennsylvania they are to the New School men as thirty-three to three. If there are hundreds in favour of their measures, there are thousands opposed. Where they have thousands the Old School party have tens of thousands. Whilst they claim sixty thousand, we have hundreds of thousands of worshippers.

Now to another point. It is a fundamental principle of Presbyterianism, that the majority must govern. So it is distinctly laid down in a note to chapter 12 of the Form of Government. The majority were desirous to effect an amicable adjustment of all their difficulties; but the New School party would not agree to the proposition. They suffered a mere shadow of a shadow to turn the scale. They objected to what could not have produced any practical results. And let them succeed if they can in this system of practical vexation; it will avail them nothing, for ultimately the majority must prevail. I must come to the fact. They must be defeated. So the courts of law have decided. I refer to your own reports, the Pennsylvania Reports, in 7 Sergeant & Rawle, page 534, the decision in the case of St. Mary's church in this city, to show that the majority must govern in such cases. The majority must govern. The protests of the New School show that they were the minority, and to say that the minority shall govern, would, in this country, be every thing that is odious. They must come to it. The majority must govern.

The decisions referred to in 7 Sergeant & Rawle and 9th Wendell, extend to every part of the whole case. The voice of the majority is omnipotent and binding, however that voice may be ascertained, whether by the silent process of the Quaker, or the formal vote of other ecclesiastical bodies. Even if the New School could

gain this case, their triumphs must be short lived, and they would soon all be sorry and ashamed. In every thing of those most extraordinary proceedings in Ranstead court, they were wrong. Even their own friends acknowledged that they were wrong. The clerk evades the question, but Dr. Hill tells you that their response was an indecent and indecorous Aye. To avoid the scandal, the clerk gathers and records the proceedings in such manner as to give a decent appearance to their minutes. Some advantages were gained by suppressing what did not suit their purpose. Their minutes must be regarded as being *ex parte*, and therefore should be received with some allowance. On the other hand this consideration must be self-evident, that we have nothing to gain by concealment. The Presbyterian Church has never been charged with limiting its power. On the other hand a very serious charge was preferred against that church, some years ago, when Dr. Ely, and perhaps some other gentlemen, were accused of exerting a kind of homogeneous influence, in order to extend the power of the church by effecting a connexion between church and state. Much was then said of the danger the community was in from the influence of a powerful sect. As it is wholly irrelevant to my argument, I shall not now undertake to inquire into the truth or falsity of these charges. What I have now to advance, as necessary to my argument, is that amongst all the charges that have been made against the Presbyterian Church, they have never before been charged with limiting or attempting to conceal their power, as they are now accused of doing. But it is somewhat difficult to meet vague charges in such a multitude of shapes and hues, as they sometimes assume. The best way perhaps is to treat all charges which are not proveable as slanders. The Presbyterian Church has no doubt wished to extend her influence by propagating the gospel, and their zeal in this respect is proverbial. That they should wish to engraft their principles on the stock of the wild vine, by a conversion of the heathen and others to Presbyterianism, is perfectly natural; and that the churches which they have planted and nursed with so much care, should yield a ready obedience, is altogether reasonable. But the church is without civil power, and does not claim to exercise it. Nor have they ever exercised their power for the purpose attributed to them. The church certainly can exercise the legitimate power conferred on it by its charter. On this subject there need be no controversy. The propositions which were made by the Old School party did not interfere with any of the great interests of the minority.

This abrogation of the Plan of Union, in order to justify the clamour which has been raised against it, must be shown either to have been the violation of a contract, or to have affected the rights of property acquired under it. Was the plan, then, a contract? I have asked, where are the parties? but I cannot find them. From its language it was merely a regulation or series of regulations, approved by the Assembly, but no contract, having no consideration which is essential to the nature of a contract. It was merely a regulation for a charitable purpose, like the sending of missionaries

to Rangoon, Ceylon, or any where else. There was nothing in the manner of a contract. The Plan of Union was not in the form of a contract, and did not contain the essential requisites of a contract. The General Assembly had no power to enter into a contract to admit Congregationalists into the Presbyterian Church. Neither party supposed that such would be the effect of the Plan of Union. The General Association of Connecticut had no power to enter into a contract at all. It is Congregationalists only who are supposed to be affected by the abrogation of that plan. But the New School party have taken part with the Congregationalists. They are the advocates of retaining their connexion with the Congregationalists. They will not consent that they shall be excluded from them. Each party was at liberty. It was perfectly in the power of each (the Presbyterians and Congregationalists) to terminate the Plan of Union at any time, and without injustice to either. The power was mutual, and either could terminate it at pleasure. The question need not be raised whether the power extended to both Presbyterians and Congregationalists. It is admitted that it did. Those Congregational churches could not exercise any power in the Presbyterian Church without the consent of said church. The state of Pennsylvania is a government within another government, that of the United States; and the legitimate powers and functions of each being defined by the constitution, neither can exercise the powers of the other. If the state of Pennsylvania should declare war against a foreign government, or raise troops within the jurisdiction of a foreign government, it would be treason, and punishable as such by the laws of the United States. If any portion of the citizens refuse to obey the laws of the United States, such refusal is war against the government. So when a portion of the Presbyterian Church refused to obey the laws of the church, as decreed by the General Assembly, it was treason. The General Assembly had the authority to govern the whole church under the constitution. If I make a false assumption the other party can correct me. I refer for support of my position to "Vattell's Law of Nations," page 95.

The Plan of Union was, however, gentlemen, a mere temporary arrangement for the new settlements on the western frontier, those who were not yet ready to enter into the Presbyterian Church, and it could be terminated at any time when the necessity which originated it had passed. But what I wish to turn your attention to, is a point on which there will be little difficulty in obtaining a full understanding. Mr. Meredith did not commit himself on this point. The Plan of Union was not entered into in a constitutional manner, because neither the General Assembly, nor the General Association of Connecticut had any power to enter into such an arrangement. Mr. Meredith did not enter into an investigation of this point. He took it for granted that they had the power. But strike this out, and the whole will manifestly appear to be irregular and void. The land marks should not be overlooked, or we may often, without consideration, defend an act of usurpation. If, indeed, the plan had been constitutionally enacted, and rights acquired under it, those rights must be regarded.

During the protectorate of Oliver Cromwell, the election of members of parliament passed into a mere shadow. During that most daring usurpation, every thing was organized according to the will of the nominally republican head of the English nation, who was a monarch in every thing but the name. Yet, during that usurpation, the enlightened and independent judge, Sir Matthew Hale, did not fail to administer the laws with an impartial and strict regard to justice, and there was perfect security for the citizen and his property, though under an usurped government. And after the king was restored, in justice to others, every contract which the government, under the usurper, had made, was fulfilled. The nation remained the nation still. So the French king, who succeeded that arch usurper Napoleon Bonaparte, redeemed the credit of the nation, by fulfilling all contracts which had been entered into by the usurper, as head of the French empire. Such must always be the case with a body which continues in existence; as the nation was not dissolved by the usurpation. But the General Assembly of the Presbyterian Church exists only during its sessions in each year. It is totally dissolved when it closes its session; and a new General Assembly is summoned to meet the next year. Consequently, the acts of a Presbyterian General Assembly are, and would be, void, when they undertake to bind a future General Assembly, and so far as they are at variance with the law of the land, or the principles of Presbyterianism. The Presbyterian Church has been remarkable for the zeal with which they have adhered to their strict form of church government. Now it must be evident that if committee-men are admitted into the church sessions or presbyteries, the Presbyterian order of government would be so far overturned. It would make no difference from what church they came, so as they were not Presbyterians. The Presbyterian Church ordains elders for life, and these only, together with the ministers, can enter into the church sessions, and other judicatories of the church. Committee-men cannot consistently sit in the General Assembly, nor can they be represented there. All the ministers and one lay member from each session compose the presbytery, and the presbytery alone can send an elder as a lay delegate to the General Assembly. The elders, as well as the ministers, are ordained for life, and retain their stations unless they are removed by the authority of the church. But this plan introduced a representation not Presbyterian. The other party have alluded to the inequality of the clerical and lay constituency of the Presbytery of Newburyport. I refer to it only to say that it is a matter with which the courts have nothing to do. It was a matter exclusively for the General Assembly, and they have attended to it. The Presbyterian Church has ever professed and maintained the doctrine of Divine decrees, which was promulgated by John Calvin, and for refusing to acknowledge which Michael Servetus was driven from Geneva. That the Plan of Union provided for the support of this doctrine does not appear.

But there is something of more importance with which we have to do. That is, the inconsistency of the Plan of Union with the act of incorporation. That act incorporates as trustees, ministers and

elders, and it extends no further than to Presbyterians. If it incorporates any thing else, I am not able to perceive it. This plan introduced committee-men. The corporation is to be elected by the General Assembly, and to be directed by them, so that in fact the General Assembly is, after all, the essence of the corporation, and not the trustees, they being but the name of the corporation, all the actual power of which is in the General Assembly, though the trustees are in law the real corporation. The books distinguish cases of this kind. The "ministers and elders" then are essential to the existence of the corporation, because, as they elect the trustees, the corporation would be vacated unless vacancies were supplied by the General Assembly, in the manner provided for in the act of incorporation, that is, by ministers and elders regularly constituting the General Assembly. It would be a violation of that act to admit Congregationalists to the enjoyment of the corporate privileges, or the election of trustees, as much as if different sects under different church governments should be permitted to enjoy those rights and privileges in common with the Presbyterians. Now, had the Assembly chosen to associate in their body Mussulmen and Hindoos, would it not be a violation of the charter? And if a subsequent General Assembly did not interfere to correct the irregularity, would not the charter be forfeited? They must admit that if the Plan of Union introduces any thing into the Presbyterian Church that is not strictly Presbyterian, it is null and void. The court must consider it an encroachment on original rights which were inherent in the Presbyterian Church a century ago. Something was said by the counsel about fundamental right; and divers laws were referred to. But what the supreme court has set aside as unconstitutional, or what the legislature has repealed, confers no right at all. If the construction of the Plan of Union, by which those Congregationalists within the bounds of the four synods came in be correct, then any others may come in, in the same manner, and connect themselves with the Presbyterian Church.

But let us look for a moment at the condition and character of the churches which came in under the Plan of Union. The opposite counsel would persuade you that they were all Presbyterian. Mr. Squier tells you in his testimony that some of them were in an initiate state. But it seems that according to the wishes of those gentlemen, they may be initiate for ever! Such a state of things is not provided for in the constitution, even if a young church could not comply with the order in full. And it appears that these initiate churches are permitted to exercise a controlling influence over Presbyterianism in some of these synods.

Now, a word in regard to the argument from acquiescence, which has been urged on the other side. On this subject the authority of Dallas is full and conclusive, that no length of acquiescence in an unconstitutional act can make it valid. He lays down the position, in accordance, indeed, with all our notions on these subjects, that "the legislature must conform to the constitution, or its acts are void." And again, that "the constitution remains stable and permanent, amid all conflicts of parties;" and that it is the

"duty of the courts to stand by the constitution" in every emergency. I refer to this to show that the Plan of Union being unconstitutional, no length of acquiescence could give it force or prevent its being repealed. Beside, the nature of the case prevents the argument having any appropriate place here. Acquiescence, indeed, in matters of conscience! It is impossible. Though acts committed in ignorance may be innocently done, yet when the error is discovered, the act is void. To this effect are the decisions of the courts in cases of marriage, when a previous husband is subsequently ascertained to be alive; and of administration of an estate, when there is an executor ascertained to have been appointed by will. On this subject of acquiescence, also, his honour has led the way in a signal case, deciding that where property is given or devised for any particular purpose, the will of the donor must be carried into effect, however long an acquiescence in a contrary course may have been yielded. In the case of the Franklin Square in this city, which was devised by William Penn to the city of Philadelphia for a specific object, that of a public square, and part of which had been occupied as a burial place by the German congregation, for upwards of a hundred years. But as their occupation thereof was ascertained to be contrary to the will of the donor, they could not retain possession. Though their occupancy originated in an innocent misapprehension of their right, and their possession had been acquiesced in for so long a period, the case was not altered. This principle is frequently acted on by nations as well as individuals. It is older than the Declaration of Independence. It was acknowledged when King John subscribed that famous document called *Magna Charta*. It existed even in the days of Egbert. It is the common law of England and America. Recently in the city of New York, property to the value of millions of dollars was recovered on this ground. I might produce many proofs of the correctness of my argument on this point. The decree of Chancellor Pennington, of New Jersey, in the case of the Society of Friends, may be adduced as one. I allude to that decision so far as it related to the property immediately in dispute, which was decreed to the Orthodox party, which had commenced the suit. I do not refer to the advice which he gave to the parties to settle all controversies amicably; which was regarded as being favourable to the other party. I merely refer to his decision as regarded the property which was the immediate cause of that suit. The decision in the case of Duncan against the Ninth Presbyterian Church in Philadelphia, turned on the construction of a will which Mary Duncan had given. The case of the Duane-street Presbyterian Church in New York turned on the same principle.

The will of the donors is an important point in the question now before you. The will of the donors was, that the property should belong to the General Assembly of the Presbyterian Church, and the ordination of elders is an essential article in the government of that church. Our country has recently been filled with apprehension of a war with Great Britain respecting our north-eastern boundary. We had acquiesced in a state of things which left a large

territory in the possession of England for many years; yet now, when we understand our right, we claim it at every point. Of the same sacred character are constitutional principles and constitutional rights, and however long acquiescence may have been given to their violation, when the wrong is discovered, it must be corrected. The Plan of Union then must be invalid, as it interferes with these rights. And it will be strange indeed if you by your verdict do not restrain these New School men from interfering with the charities and charitable funds of the church. At least we think that it is specially necessary that the common law relative thereto should be enforced, so as to prevent such an interference.

But is there any allegation of a violation of rights of property, by these acts of 1837? the only question which could properly have been brought to the jury. There is no such thing. The evidence of the contributions from these synods, was admitted only to show the acquiescence of the Assembly in their connexion. I am corrected; it was to show the recognition of the presbyteries in those bounds, by the Assembly, as a part of the church. Well, it was not as a claim of property, for the settlement of an account. Therefore, all questions in regard to property, will be rightly adjusted by our victory in this suit. They have not a particle of claim to the property. None of their funds have gone into the coffers of the General Assembly: they have cost us far more than we have received from them. They were recognised, or their anomalous relation acquiesced in, it is true. It was always a bad arrangement, and it was particularly so in 1837; therefore we abrogated it. They had, then, no claim on the score of property. Nor, above all, was there any ground for the pretence, that the acts of 1837 were a condemnation without a hearing. There was no trial, nor condemnation. The Assembly had no jurisdiction to try or condemn them. These Congregational churches did not belong to us, and all that we did by those acts, was to say so; to abrogate the plan, and declare the churches not to be connected with us. We are not willing that the jury should be under a wrong impression in relation to ecclesiastical law. It is not as has been stated. The resolution of 1837, in relation to the Western Reserve synod, was not a resolution of condemnation and disownment, but it was a declaration resulting from the abrogation of "the Plan of Union." That Plan of Union was never sent down to the presbyteries, and, of course, was unconstitutional. When the resolution in relation to the Western Reserve synod was adopted, it had been fairly proved that no plan of separation could be devised, which the New School party would agree to. But if that resolution, and the one relative to the other three synods, were wrong, that was not a justification of these New School men, as two wrongs never made a right. They protested, throughout, against being made the subject of rebuke, and yet they now insist that citation and trial would have been the proper course of proceeding. How inconsistent! Do they complain of us because we had the majority? They cannot complain that they had not the same opportunity of voting that we had. That they should be ministers and elders was a necessary qualifi-

cation for voting in the General Assembly. If they are not ministers and elders, they cannot rightfully be represented, nor vote in the General Assembly. But the union of the Associate Reformed Church with the General Assembly, is alluded to in glowing terms by the opposite counsel, and they say that that church only received the standard of the church in substance. They make all to turn on the one little word "in substance." But those words, as used by the Associate Church, do not refer to the Confession of Faith, nor to the acknowledgment of it, as these New School claim the privilege of using it. On page 44 of the constitution of the Associate Church, you will see that they receive it as "in substance," the only form of government given by the great Head of the church. They fully receive the Westminster Confession of Faith, and that is the great polar star of Presbyterians. They who do not receive the whole of it, are not Presbyterians. A small alteration was made in their constitution in 1799, but none took place afterwards, and these New School gentlemen cannot prove that they are Presbyterians on this ground. On the contrary, it appears by the minutes of 1801, that they were Congregationalists who were thus brought into the church. Well, our opponents show you the presbytery of Newburyport, for the purpose of exhibiting a long list of ministers and licentiates preaching to Congregational Churches; and that presbytery in the Synod of Albany was retained, while the Synod of the Western Reserve, and others having no such churches, were cut off. A word of explanation may be necessary in relation to this, as Mr. Meredith placed so great stress on it, and endeavoured to make you believe that it was similarly circumstanced with the Synod of the Western Reserve, or far worse than that.

But the General Assembly ascertained that the Western Reserve synod contained the larger body of Congregational churches, while those alluded to in the Synod of Albany, did not belong to the presbytery, and the other presbyteries in that synod contained none. Those Congregational churches were not represented in the General Assembly, while in the synod of the Western Reserve they were, although they were not reported as Congregational churches. Why, says my friend, may not a Presbyterian minister preach to Congregationalists, when he may preach to heathen without censure? But that is quite a different thing from Congregationalists being represented in the General Assembly, a matter which must be regarded as receiving no sanction from that body. Though they were willing to put on the list all ministers who had a right to belong to a presbytery, there should not be one of the Congregational churches represented in the Assembly.

The argument of my friend, respecting the excision of Presbyterian ministers, merely because of their removing into the bounds of the excinded presbyteries, is equally delusive, as they would not be cut off, if they had not become connected with those presbyteries.

Nearly the whole of some presbyteries were composed of mixed churches, or Congregationalists. I do not allude to this for any other purpose than as a collateral circumstance. They have ex-

claimed against the General Assembly, because it disowned the Western Reserve synod, which admitted Congregationalists, because the General Assembly does not admit Congregationalists at all. I do not know how they could admit a presbytery to be represented, which is composed of one-half Presbyterians, and one-half Congregationalists. For if they can do this, they can admit a presbytery to be represented, one-half of which are Christians, or no Christians. Confusion must be the consequence of all such unnatural mixtures and amalgamations. There is no single congregation in the Western Reserve synod, which is purely Presbyterian in doctrine and order, and yet, in 1837—

[Mr. *Wood* objected. He said, such was not at all the fact, nor was there any such thing in evidence.]

With all respect for the opposite counsel, and for you, gentlemen, I must insist on what my duty to my clients requires of me. I do not know what point this case may turn on, and therefore I wish to lay all the points before the jury, as they occur to me. I wish to show, that in 1837, the resolutions which were adopted merely for the purpose of preventing their thus introducing Congregationalists, has been improperly termed an excision. Certainly, an inquiry in relation to that of which the New School party complain, will not be deemed irrelevant, as it is material to a correct decision. I know of no exception to the remark which I made, except the congregation of Middlesex. But I will refer to page 125 of the minutes of 1837, as they have been given in evidence, with a view of showing, that though there were belonging to the synod of the Western Reserve one hundred and thirty-nine churches, there are only twenty-five that are purely Presbyterian. But as it is objected to, I will not mind it. It is a matter of no consequence. The case will not turn on it. The General Assembly decided the question as they had a right to decide it, when they determined that the synod of the Western Reserve should no longer be considered a part of the Presbyterian Church. The resolution afterwards passed, relative to the other three synods, was nearly of a similar character. I shall not enter into an examination of the particulars.

We have then shown you, gentlemen, that the abrogation was within the power of the General Assembly, and that in consequence of it, those synods were properly declared to be out of the Presbyterian Church. But if I have failed in this, the other side have yet to show the validity of their organization in 1838. The latter question is held to depend, in a great measure, on the former; therefore, was it necessary to review every thing that was done by the General Assembly in 1837? I wish you, gentlemen, to recollect that the validity of the proceedings of the General Assembly of 1837 was acknowledged in 1838. Both parties treated those proceedings as valid. Now the relators in this case come here claiming to be the legitimate trustees. They acknowledge the validity of the election of trustees in 1837, though they were elected by the General Assembly of 1837, after the passage of the acts of excision, as they have been termed.

In approaching this part of my argument I should be extremely glad to avail myself, if my friend Meredith had furnished it, of a glossary for his text. There was need of this, as he interlarded so much classical lore in his argument; and there is no man better acquainted with the classics than he is. But besides this, he seems to have come into court with his Ovid faculty for turning every thing to suit his purpose, and converting, as is necessary for his case, every thing into its contrary. He makes every thing on their part orderly and beautiful, and on ours, outrageous and scandalous. It is my duty, however, to turn aside from the most agreeable picture which he has drawn of his New School friends, and bring you back to the actual facts in the case. At no distant day you will have to decide the question, whether the charitable funds of the Presbyterian Church, which have been accumulating for fifty years, shall be given to this New School party, or whether they shall remain where the will of the donors intended that they should: whether that venerable gentleman, (Dr. A. Green,) shall be ousted from the office of trustee, which he has held for fifty years; whether it has been reserved to a time like this to countenance such scandalous proceedings, to take from him what he holds dearer than life itself, the name and character of the church of his fathers. Shall the friends of anarchy and arbitrary power be permitted to turn them out, and hold them up to the world as having become apostates and tyrants? There has no event taken place of late years, in this land, which displays the innate depravity of man in so striking a manner, as the scenes enacted in Ranstead court on the 17th of May, 1838. There were beheld two bodies, each claiming to be the true church, and each denouncing the other as false. It is our duty to find out which of these bodies was the true General Assembly of 1838, after their separation from each other.

We set out on the broad basis, that the moderator and clerks were in the proper discharge of their duty; and it being anticipated that there would be interruption to the regular proceedings by these New School men, a crowd was drawn together out of curiosity.

There was, then, a moment when Dr. Elliott and the clerks were in their proper place, they were duly there. Here, then, is an argument of which they cannot deprive us, though they are bound to do so, in order to have any ground to stand on. When Mr. Meredith assigns to my clients the situation of conspirators, there is not a doubt that he has described the position of the other party. At the close of the minutes of the Assembly of 1837, you read what seemed the dissolution of the Assembly. There has been some little question, but it is not material in regard to the exact nature of this closing act. According to it, however, the Assembly separated in peace, and the new body came together at the proper time. It certainly was not an adjournment. We contend that it was a dissolution. Yet not strictly and entirely a dissolution, not an annihilation, because the officers held over. Strictly speaking, the moderator of the General Assembly of 1837 was the germ of the General Assembly of 1838. There was remaining just enough of vitality to secure a regular organization in the new Assembly. As in the

House of Representatives of the United States Congress, the clerk calls the new House to order, and may be said to preside until a speaker is elected and the new House organized. The long and short of the matter is, in the Presbyterian Church, a germinating principle was preserved from the old Assembly, which was the connecting link between the old and the new, and that germ was the moderator and the clerks. If they had not standing rules to go by, the newly elected Assembly might be thrown into confusion. The new General Assembly was duly summoned and convened. The presbyteries thereof were, according to the standing rule of order, directed, at the close of the Assembly of 1837, to elect commissioners to another General Assembly to be held the next year. The synods are overlooked, and the delegates come direct from the presbyteries. All things were thus prepared, for a formal, and as we hoped, for a harmonious organization. Nothing had occurred with us, as with the other party, of consultation with "counsel learned in the law." Nor had we formed plans for any unnatural commixture of others with Presbyterians. Well, when the delegates meet, the moderator constitutes the new Assembly, by a solemn appeal to the throne of grace. The germinating property remains in the moderator and the clerks of the old Assembly; and it was an outrageous interruption of the proceedings, to interfere with the moderator and clerks whilst they were engaged in the discharge of their duty, in the incipient stage of the organization. But the New School party had held a council previous to the meeting of the General Assembly of 1838. There were more than a hundred convened in that council, but the result of their proceedings reminds me of the remark of the former vice-president of the United States, Aaron Burr,—that "in the multitude of counsellors there is sometimes confusion." Ten to one but you will find it so in all caucuses. The scene exhibited in the Seventh Presbyterian Church was contrary to both law and gospel. Their counsellors led them into confusion. The appointing of the trustees was in legal form, we admit, provided the New School Assembly shall be adjudged to be the true legal General Assembly of the Presbyterian Church. That, therefore, is the important point for you to determine. Our province is to show you that they were not legally organized as a General Assembly. The rule of order requires, that in case the moderator should fail to execute the duties of his office, the next preceding moderator should take the chair. To call another member to the chair, under any pretext whatever, was a violation of order. As there were several present, who had been moderators since Dr. Beman was, it was peculiarly disorderly to place him in the chair.

This rule should have been regarded, for such persons as were present who had been moderators, must have had the preference, according to the rule, over every other member. But we must examine the several points particularly. What now should have been done in this stage of the proceedings? All was plainly prescribed, and the practice uniform. I will recite the opening minutes of the Assembly of 1837, as an example, in conformity with the

prescribed forms. [See previous page 47.] All others are like this, and show that questioned commissioners must be referred to the committee of elections. So they did in 1832, and on other occasions; so their rules required, and so, indeed, from the nature of the case they must do, as a parliamentary body, independently of any rules or practice on the subject, if they had not such rules. But the minutes always show this practice. A trifling variation is only found in the minutes of 1835, from those which I have now presented, and that case has been explained. It was *but a trifle.* Dr. Hill's testimony shows, if there were otherwise any doubt on the subject, the uniform practice to refer to a committee of elections. So all general principles show the same thing. Every deliberative body must decide on the right of persons to sit as members, and for this purpose a committee of elections is appointed. And this must be before the house is organized.

You must also bear in mind, that the first business of the General Assembly is to hear read the report of the committee on commissions. Dr. Hill has given you a succinct account how the practice of referring the commissions to the clerks of the former Assembly originated. Every General Assembly had power to make laws to bind themselves and future General Assemblies, until they are repealed. By the rule which had been adopted, the clerks were to examine all commissions which should be presented to them. All commissioners were required to present their commissions to them, as a committee on commissions; and it was their duty to enter all regular commissions on the roll, and report them to the house, which was done in this case.

Now, suppose that a member happens to have left his commission at home, as was the case of Mr. Bayard of Princeton, should the house be thereby diverted from the practical purposes of its creation? The effect would be disastrous in the extreme. It is therefore required, that such cases, together with all informal or defective commissions, shall come under the supervision of the committee of elections. Those whose commissions are rejected, must appeal to this committee.

The old manuscript minutes which have been read by the other side, are apparently brought forward from a misapprehension of our opinion in regard to the time when the committee of elections should be appointed. But on that subject we agree to all which Dr. Hill has said. The time, however, for this appointment, is immediately after the clerks have read their report as a committee of commissions.

Even if all but fourteen commissioners were rejected by the clerks, there could be no great danger in awaiting the decision of the committee of elections; as, when those rejected commissioners should afterwards take their seats, which they would be permitted to do if they were entitled, the proceedings of the Assembly, previously had, could be revised, and if necessary, reversed. So that the very worst that can be alleged is, that there would be a short delay by awaiting the regular action of the committee of elections. The numerous body, the house, could and would have de-

cided the case, when it should have come up in regular form by the report of the committee of elections. Then, and not till then, could the subject be properly presented to the house for legitimate action. Even Dr. Hill himself admits it to be a possible case, that there may not be more than fourteen undisputed commissioners present, and that in such a case those fourteen could legally proceed to the transaction of business. The law in the case is absolute; and such a provision was absolutely necessary.

At this point, therefore, the most important in the case, we say, that the appointment of the committee of elections was prevented, at the proper time, only by the interruption of the New School members. On the other side there was no opposition. Dr. Elliott was perfectly acquainted with his duty. In entering on an examination of those proceedings in 1838, I do not mean to repeat the arguments of the learned counsel who preceded me on the same side.

My learned friend on the other side, avoided a full investigation of one point connected with these proceedings during his argument, though he so liberally strewed the flowers of his rhetoric around him. The fact to which I now call your attention particularly, is the arrangements which had been entered into for the purpose of defeating the measures of the General Assembly. Now these proceedings were all prepared before-hand. I shall principally confine myself to what is proved by the acknowledgment of the New School party.

That they had entered into such an arrangement by the advice of counsel learned in the law, has been rung in your ears by every witness. The bugbear of a lawyer was continually held up to our view. What did they want with advice of counsel, in a religious assembly, if they had not been plotting to deprive us of our rights? In every stage of this business, the moderator, who constituted the General Assembly with prayer, was infinitely better acquainted therewith than the counsel could possibly be. Dr. Elliott was better acquainted with his religious duties than all the legal counsel in the land. And yet they expressly stated, that they they were acting by "the advice of counsel learned in the law." Then, in regard to the time when the several motions were made; Dr. Patton was very desirous to offer his resolutions *at that time.* They particularly marked the time when they were to act. Dr. Mason also was very desirous to have the names of the rejected commissioners added to the roll *at that time,* and the same consideration appertained to what was spoken afterwards by Mr. Cleaveland, who had been advised by counsel that that was *the time.* Their plan of proceeding is thus shown to have been preconcerted, or at least premeditated. Dr. Hill told them, I suppose in caucus, that they were wrong. I do not complain of caucuses. Every body has caucuses, if they please; but this, if not a conspiracy on the part of the New School men, yet this premeditated plan for defeating the Assembly was radically wrong. So much so, that Dr. William Hill, a witness called by themselves, condemned it entirely. Dr. Hill informs you that he told them beforehand, that such a course of proceeding

would be wrong, and that he opposed it during their preliminary meeting.

All must see, that in the measures of these two parties, there was far more manœuvring on the part of the New School men, than there was on our part. Those measures were the result of a consultation, and when a case like this depends on circumstances, each one of which is small in itself, while the whole, collectively, are important to the issue, it is necessary that they all should be laid before you. You will then bear these little things in mind.

What Dr. Hill stated was, that the measure was wrong, and can they then come into this Court and charge us with a conspiracy to defraud them of their rights, when the conspiracy was altogether their own. Dr. Hill tells you that he was afraid violence would have been the consequence of these proceedings, and under this impression he was greatly excited. It is, therefore, not likely that he could give as clear an account of events like these, as he could have done under different circumstances. He heard the "ayes," however, and pronounces them "indecently and offensively loud." He goes further, and tells you that he was surprised that there were no more "*noes*," and he added very significantly, that "if they did vote on the question at all, he had thought that there would be a *thundering no*." In a very candid manner he adds, that he supposed that "they had not been well trained," or "well drilled," whichever was the expression. Now I understand where Mr. Meredith got his military notion. The Old School party had not been well drilled. It is surprising that there should have been just enough noes to show that they were not unanimous, and were not "well drilled." But the New School party were well drilled. They had their men as well drilled as the French general, or as Julius Cæsar, who, it is said, knew every man in his army. It was shown by the few straggling and scattering noes, that the Old School party were not well drilled. But Mr. Meredith metamorphoses these unsuspecting Christian ministers into a warlike army. Yet it appears that the other party, by the advice of their "counsel learned in the law," were carrying into effect their plan by taking advantage of their unsuspecting brethren. They were determined to organize a new Assembly, "at that time and in that place;" and in such a manner as would put the whole of the property of the Presbyterian Church at their disposal. Yet they were surprised to find that Dr. Elliott and his friends did not conquer them by voting them down! Were they guilty of great indiscretion in not voting, when they did not suspect what was intended by their adversaries? The Old School men were in fact the unsuspecting party, and yet they say that all the disorder was on the part of the Old School, after their own interruption of the regular proceedings of the General Assembly. Well, the New School were not endowed with prescience. They were surprised too. They never expected that Dr. Elliott would refuse to put the question, which they wanted to have decided against them, and on the ground of such decision they intended to base the organization of their new Assembly. But they were grievously disappointed. By the arrangement previously

agreed to by them, Dr. Patton was to rise at the very time he did, and then Dr. Mason was to rise at another stage of the proceedings; and they did not know that they had not the majority, as Dr. Hill tells you. They had previously agreed to interrupt the proceedings of a deliberative assembly, in the manner which was presented to you, the other day, by the witnesses. The paper which Dr. Patton held in his hand indicated the course they were to pursue. But what course Dr. Elliott would take they did not know; and when he declared the appeal to be out of order, they were taken all aback: but as they were pre-determined to break up the Assembly, they struck out a new course, altogether new to the mass of the New School party. Dr. Patton can't get his question put, and Dr. Mason sits down in utter disappointment; and recollect that he and Mr. Cleaveland were in a pew together. Mr. Cleaveland did not then rise in his order, because, as is quite plain, they were altogether disconcerted by the refusal of Dr. Elliott to put the motion of Dr. Mason. Like the individual who would sacrifice himself, rather than suffer others to escape his vengeance, they proceed to throw the whole body into confusion. Another of these gentlemen applied himself to the task. Mr. Squier comes to their help, though his help was merely nominal, something like the help of young lawyers, more for their own advantage than their clients. Up jumps Mr. Squier and demands his seat. But, poor Squier! he was all wrong. He had no right there at all, and he started altogether in the wrong place to help his friends, and was compelled to sit down in utter consternation, when Dr. Elliott said to him, "We do not know you, sir." Really, every one of these men acted in a manner which showed that they were disconcerted indeed.

But Mr. Cleaveland at length arose with a paper in his hand. Where is that paper? Where is Mr. Cleaveland himself? and where is Dr. Beman, the next prominent actor in the tragedy? Where are their depositions? and why were they not read in evidence? How do you know that their depositions were taken? Dr. Patton said he had seen them in the possession of the counsel. Yes, they had actually taken their depositions, and yet they have not presented them to you. They are the men who must know whether the questions which were put by themselves were reversed or not. If they were reversed they must know it better than others could. Why then not let them speak for themselves? Dr. Patton told you that their depositions had been taken, or my colleague would not have been at liberty to comment on the circumstances of their not being produced. The question was asked Dr. Patton, in the course of his cross-examination, if he had read the depositions of Dr. Beman and Mr. Cleaveland, and he told you that he had read them. Other gentlemen have been called on to detail these circumstances. But certainly there must be some reason for suppressing those depositions. It is strange, indeed, if every one of the witnesses produced by them both saw and heard the motions reversed and the negative votes thereon, if these men knew nothing about it; and yet we are left to infer this. Else why are they with-

held when you had a right to expect them? They would have been the very best testimony in the case, according to the universal law of evidence. Mr. Cleaveland is the very man who put that most important question which is the hinge on which this whole controversy turns, and Dr. Beman is the very man who put that other very important question, the nomination of Dr. Fisher. But they are somewhere else. The one is in Detroit, and the other is gone to Europe. Testimony has been produced which renders this unquestionable. Dr. Beman has taken an early voyage to Europe on account of his health, and Mr. Cleaveland is in Michigan. When they knew that Dr. Beman was going abroad they took his deposition, and they might have taken it if he had been going to China, for there is no part of the globe to which justice will not reach. Why did they not let us see that paper? The Old School party would like that you should see that paper. Because, if Mr. Cleaveland had been examined, he could have told all about those things, in which he took such a conspicuous and active part. No doubt but those depositions would have been produced, if they had not apprehended that they would be to their own injury. When people are going to do wrong, they are not able to see the consequences of the wrong they contemplate, and are frequently caught in the net which they have spread for others; according to an old and very expressive stanza, in the Version of Psalms bound up in an ancient edition of the Bible, sometimes called the Bishop's Bible, printed in 1608,

> "He digs a ditch and delves it deepe,
> in hope to hurt his brother,
> But he shall fall into the pit,
> that he dig'd up for other.
>
> "Thus wrong returneth to the hurt,
> of him in whom it bred,
> And all the mischiefe that he wrought,
> shall fall upon his head."

Dr. Elliott, as I have said, was not in the secret; and yet he disarranged and spoiled their plan of operations. He brought the broad principles of the law to bear on them by calling out for commissions which had not been presented to the clerks, and by saying to them, "you are in the wrong place." On this point another gentleman has enlightened us considerably. I allude to Dr. Mason, and with great propriety I can vouch for him as my witness. He states that when Dr. Elliott had made the call for other commissions, that they listened to the call; that he responded to the call, and that Dr. Elliott replied, "You are out of order at this time, sir." I wish you to pay particular attention to this one thing. He says, that the call was neither more nor less, than for those who "had not had opportunity to present their commissions to the clerks," now to present them. Thus, notwithstanding Dr. Mason was acting a part somewhat similar to that of Francis Wronghead (in the play) amongst the country members of the house of commons, yet he was not sufficiently drilled for the occasion. The moderator

states the matter as Dr. Mason did, with scarcely an immaterial variation. Mr. Hubbell reminds me that Dr. Elliott stated precisely the same thing. But we have it from Dr. Mason, an honourable and conscientious man of their own party. They would not have called him as a witness, if they had known that his testimony would be against them. But there was at least one man who understood the call of Dr. Elliott, and instantly acted in obedience to that call, and that was Mr. Joshua Moore, of Huntingdon, who rose, and this explains the whole mystery. He rose and walked to the clerks' table, and explained to them that he discovered that he had left his commission at his lodgings. But he rose for the purpose of complying with the call of the moderator, as it was the right of every member to have his commission reviewed by the clerks, previously to his name being entered on the roll. But Dr. Mason interposed between the rights of the members (Mr. Moore, particularly) and the moderator. Two of the rules of order are worthy of particular notice in relation to this matter. [See the 4th and 5th rules, on previous page, 174.]

As to what I propose, these two rules will render it simple and plain that the appointment of the Committee of Elections could not be dispensed with, as the first business in the regular course of proceedings. The New School party, though they were the minority, had a right to vote for, or even to demand the appointment of that committee; but Mr. Squier had no right to make any demand whatever, because his name had not been enrolled, and therefore he was not a member of the house, and had no right to speak there. It may be that you all will now understand by what authority Mr. Squier comes alone. I can't do any individual injustice or wrong. But there is no alternative but this: if Mr. Squier was entitled to demand his seat in that manner, any other person was. And if such a course were to be persevered in by the commissioners from all the presbyteries represented in the General Assembly, it would involve the Assembly in insurmountable difficulties. In Congress there is no such practice. There, one who is absolutely entitled to his seat would not be allowed to demand it as Mr. Squier did. The first business is always the appointment of a committee, to whom the subject is referred; which committee must report immediately, or as soon as practicable after examining into the claim of the individual. Though, when no objection is made, such person will take his seat in the first instance, as a matter of course. But still the question is open to investigation in all cases of contested elections, because every man has a right to present his claim to be there; and the same principle is incorporated with all deliberative bodies. In Congress, one-half the session has sometimes elapsed before the question has been determined, which of two persons is entitled to his seat; and, in some cases, the house, not being able to determine the question, have referred the whole matter to the people, to decide by a new election. You recollect that this was done in the case of Moore and Letcher, of Kentucky, a few years since, and also in a case from North Carolina; and more recently in the case of the contested election from the state of Mississippi, be-

tween Messrs. Prentiss and Ward on the one side, and Messrs. Claiborne and his colleague on the other. Congress have sent the question back to the people in nine cases out of ten. We therefore should suppose that that was the best rule of action in such cases. But whilst the matter is under discussion, the members who have an undisputed right, vote on every question relative to the subject. The circumstance of the committee not reporting immediately is nothing. Such committee is always appointed as the very first business. The law on your table requires that the name of a member must be enrolled; in other words, that his right to a seat must be undisputed, before he can take his seat as a member of the house. This is a universal principle of order. Any departure from the rule is a violation of law. By what means shall Congress know a man to be entitled to his seat, previously to his being sworn in as a member of the house? Thus the proceedings of the New School party were revolutionary. Dr. Mason trampled on the rights of Mr. Joshua Moore, when he presented commissions which had been presented to the clerks. Nothing had arisen to justify the act. He was called to order because he was out of order *at that time*, and he took his seat. There was nothing to justify this disorder. Dr. Mason acquiesced in the second call to order, when he appealed from the decision of the moderator, as Dr. Patton had done in the first. The moderator was merely an officer of the house, and as such was bound to enforce the rules of order as far as it was in his power so to do. It was decided in the reign of Charles II. that before the speaker was elected, there was no house, and so it has been understood both in Europe and America since that time. Until a new moderator was chosen, a motion on ordinary business could not be put to the house. Yet Dr. Mason insisted on making his motion a question of privilege. But he found that he had not yet got out of his hornbook, that he had not yet learned his A B C in the process of parliamentary proceedings: and being thus instructed better by Dr. Elliott, he took his seat. Mr. Squier next played his part; for they were determined to turn the moderator out of doors and take his seat. There is a case recorded in English history which is the *converse* of this, for they had an Elliott there as well as here; but with this difference, that there, when the determination was to put the speaker, Sir John Elliott, out of his chair, Mr. Converse and his friends kept him in. Here Mr. Elliott occupied the chair, and Mr. Converse and his friends were endeavouring to put him out. For they had a Converse here as well as there, but on the opposite side of the question, "the very *ip-sissime*," &c. The case I refer to is the case of the King *versus* John Elliott. This scene was exactly like that in Ranstead court, excepting the difference between the keeping the speaker in the chair and the turning him out; and they were different in the penalty. Now, will our New School friends escape the penalty of their misdeeds? Mr. Cleaveland should undergo a similar penalty. There is the same reason why he should suffer the penalty in this case as there was that Mr. Elliott should in the other. If Mr. Cleaveland and Dr. Beman had been subjected to the same penalty, there might be

some good reason why they are not here. Well, Dr. Elliott replied to Mr. Squier, "We don't know you, sir," and much ado has been made about this. I want to know what Dr. Elliott could have said more appropriate. If any thing, it would have been, "Take your seat, sir." Mr. Meredith treated this matter in a very jocose strain, when he metamorphosed a very simple intimation into an awful denunciation, which he did by leaving out the word "sir." For Dr. Elliott did not say to Mr. Squier, "We do not know you;" but, "We do not know you, sir." The expression shows that Dr. Elliott was treating him with the utmost respect. If he had intended otherwise, he certainly would not have added the word "sir." When Mr. Meredith invented this high-wrought hyperbole, he reminded me of the necessity of speaking plain English in this country, even if he has to practise on the maxim "to talk English to every man, French to every woman, German to every animal, and Dutch—to whom it may pertain."

But now to the gleaning which I proposed when I began. I have a word to say in relation to Mr. Cleaveland in this connexion. Mr. Cleaveland, when he rose, did not address the moderator by his title. He did not say "Mr. Moderator." The very first duty of a member making a motion is to address the moderator by his title; and any man who should violate such an important rule in the Senate of the United States, or in the House of Representatives, would be called to order instantly. The speaker will not listen to any man who refuses respectfully to address him by his official title, "Mr. Speaker." I cannot speak too strongly on this point. No man can have the floor except he thus addresses the presiding officer. When the presiding officer designates the individual who shall occupy the floor, as is frequently necessary when two or more members rise at the same time, he designates him who is entitled to the floor, in the same respectful manner, as "the gentleman from Pennsylvania," or "the gentleman from Virginia." But Mr. Cleaveland did not face the moderator of that Assembly, neither did he address him. And recollect, that is what would have entitled him to the floor, and nothing else would or could. I do not now allude to the others. Mr. Cleaveland struck the severing blow. If it had not been for his conduct, we should not now have been engaged as we are in this court. He was out of order. He never was on the floor, any more than a member who is brought to the bar of the house by the sergeant-at-arms may be said to be on the floor, when thus arraigned for contempt of the house. He was out of order, and any member had a right to make a motion to censure or expel him. But at that time the whole power was vested in Dr. Elliott as moderator, as fully as the power of a court of chancery is vested in the chancellor. I might, in support of this position, refer to the proceedings of every legislative and judicial body. Again, Mr. Cleaveland introduced the matter before the Assembly was fully organized, and he turned his face from the moderator. He and his party then went to a different part of the house. He proposed an impracticable question. It was utterly impracticable. Dr. Elliott then filled the chair, being in the place usually occupied by the

presiding officer. Now, whatever difficulties may occur, there can't be two presiding officers in the same Assembly at one and the same time, or, in proposing a question, the member proposing it would not know which to address. Whilst, therefore, Dr. Elliott had the chair, the question proposed by Mr. Cleaveland, "that Dr. Beman take the chair," was not only out of order, but wholly impracticable. Take the chair? Why,

"Is the chair empty? Is the king dead?"

If Dr. Beman were a moderator, there were of course two presiding officers in the same Assembly at the same time; a thing impossible. In no government can two heads exist at the same time. The chair must be first deserted, or become vacant, before it can be filled. Dr. Beman could not have occupied it unless he had done as the king did, when he usurped the speaker's chair, and propounded such questions as suited him to the House of Commons. But in that case of usurpation, the members of the house refused to answer, declaring that they could only speak to the king through their speaker. And from the time of that usurpation, in the year of our Lord 1647, down to 1838, the world never witnessed a similar spectacle. No principle of parliamentary law can be more fully and permanently established than this, that it is impossible that two individuals can fill the chair at the same time. It was impossible that Dr. Beman could get in until Dr. Elliott was got out. Here is an important link out of their chain. For it is fairly and fully proved that Dr. Elliott remained in the chair. He must first have left the chair, and then Dr. Beman must have taken it by order of the house, before he could act as moderator. Otherwise, between Mr. Cleaveland and Mr. Moore and his friends, the moderator might be put into a dilemma indeed, and one as well as the other might turn him out for not attending to his claims. But if Mr. Cleaveland was presiding for the purpose of putting in a new moderator, he was the president of a preliminary meeting. But by rule twenty-fourth, in the Assembly's Digest, there was no moderator at all if Dr. Elliott was not, for they must give notice beforehand of their intention to proceed to the election of a moderator, or said election would not be legal. But what is of peculiar importance is, that there follows, gentlemen, a long string of rules, occupying three pages, every word and every letter of which must be read to every new moderator, before he takes his office. These were not read to Dr. Beman nor to Dr. Fisher. Who ever heard of such a moderator? To neither of them was the charge contained in these rules communicated. Dr. Fisher says, "Dr. Beman told me (just as I was going out of the house) that I was to be governed by the old rules." But Dr. Fisher was so ignorant of what the rules required, that he did not know that fourteen members made a quorum. Why did he not know? Because he was not familiar with them. Was it not infracting the law to omit reading the rules to him, when, by his own confession, he did not know them? The law requires that they should be read to him, line upon line. Dr. Fisher is called a moderator after Dr. Beman, and yet not a word of the

rules, by which the moderator was to be governed, was ever read to him. He was to govern himself "by rules to be afterwards adopted." There is a series of links necessary to make the chain of circumstances; and if they cannot show them all, the whole chain is broken. They were in every thing wrong, unless they were right in every thing. Whoever doubts this in point of fact, should recollect that every link in the chain must be perfect, or the chain itself is imperfect. That is not a mere negative—it is an affirmative.

There is another matter. The reversal of the question was not a mere negative. Mr. Lowrie has been acquainted with legislative proceedings for twenty-seven years, during which time he has been closely connected with legislative bodies. During eleven years of this time he was clerk of the senate of Pennsylvania, and for six years he was secretary of the Senate of the United States, and he says the questions were not reversed, because there was not sufficient time for a reversal. Several of the New School witnesses state that it was reversed. But Mr. Lowrie has more experience in such matters than all of them, and he says it was not, that there was not time. Now these two contradictions are not perjury, but they most likely explain the whole mystery. As if it was done, the reversal was so nearly in the same breath as the direct question, that it was, therefore, not a legal reversal of the question. The matter is still further explained by the intermingling of the "Ayes" and "Noes." One of the witnesses says that Mr. Cleaveland said, "in favour say, 'aye,' opposed say 'no.'" This might be done all in a breath. Mr. Lowrie expressly says there was not time for a reversal of the question. Mr. Meredith delivered you a lecture on the effect of familiar sounds, but it will not apply in this case. For all the members of the church were familiar with the tones of the human voice; and as to the clock, he may try it for a week if he chooses, and the sound of that instrument will not be noticed, whilst the attention is wholly engrossed with the more familiar sounds of the human voice, and the imagination excited by a deep interest in the subject, which the tongue of the orator is presenting in most glowing language. But it cannot be supposed that more than one half of the members of the General Assembly of 1838 were so well pleased with the short speech and proceedings of Mr. Cleaveland, as to have their whole attention abstracted from every thing else of what was passing around them. And even here, though the sound of the clock is quite familiar to us all, yet it would be quickly perceived if it should strike thirteen strokes at the hour of midnight. Depend on the fact, that no two persons could have certainly told exactly how that question of reversal was, except Mr. Cleaveland and Dr. Beman. We do not know with certainty that those questions were either put or reversed. They were the men that could have told us. If they had been here, or if their depositions had been read in this court, we would have been in no danger of being led astray on this point. We can have no doubt, whether the question was reversed or not, that there was no opportunity afforded for debate. There was not time. Mr. Lowrie tells you there was not time. Others say there was. But when a witness,

so well acquainted with the order of deliberative assemblies, as Mr. Lowrie, says there was not time, there certainly is reason to doubt there having been sufficient time. There is at least a doubt in the case. And where there is a doubt, or where there was no opportunity given to vote, those who remained silent are not to be bound by an intendment of law. They say that in 1837 the previous question was called too soon. But in 1838 the question on their motions was taken instantly, not only without debate, but without the formality of the previous question. It was not asked, "Are you ready for the question?" as is usual when the members of the house indicate by their silence or otherwise, whether they are ready or not. If they thus signify that they are ready, the question is then put. But it would be folly to deny that the Assembly had a right to debate the subject-matter of the motion previous to the question being put. It was a gross violation of the rights of every deliberative body. If it is not a right inherent in deliberative bodies, then deliberative bodies must cease to exist. After all, gentlemen, the question for you to try is not whether there was a reversal of the question, in point of fact, but whether those who were to vote knew it. Did all these men, who would have voted in the negative, hear the reversal? That is the question. All these men tell you that they did not. But the majority were not as well trained as the New School party were. Every man of them called "aye" at the very top of their voices. But if the question were reversed the Old School party did not hear it, and of course could not vote in the negative. There was no opportunity given them to vote at all. It may have been heard close by. The facts are given by that venerable old man, Dr. Hill, who was near enough to hear. He could put his hand on Mr. Cleaveland's shoulder, and he tells you that it was reversed, and there were noes, and he was surprised that they did not vote it down. He thought they had not been well-trained. The question was put to themselves, and the other party did not hear it. One reason for not putting the question to the house in such a manner that the Old School party could hear it was, they did not wish them to vote understandingly on it. I have stated this in order to arrive at a subsequent point in their proceedings, though I am driven to satiety with the review of such manœuvring, or I might have multiplied those circumstances to an interminable extent, which throw this matter in the shape of a doubt, and which put the other question in its true light, that there was no opportunity to vote. Of that there is no doubt. I can't bring the circumstances which show this fact too plainly before you. In regard to Dr. M'Dowell not being called as a witness, when it is said that he was where he must have known all about it, it is enough to say that he was not a member. Every man of the Old School party, who was a member, says that he did not know that Dr. Fisher was appointed moderator. And how is it that those proceedings took place without their knowledge? They learned it by accident, but knew it not by any observation. I admit that if an individual should stop his ears with cotton, or slumber on his post, it would be his own fault if he did not hear. But that was not the case here. Who is

responsible for the noise? If you are satisfied that there was noise on both sides, you will decide in favour of the Old School party. Who was the *primum mobile* that caused it? Why, it was said, by the ring-leaders of a riot which occurred in Philadelphia some months since, when a lawless mob set the incendiary torch to one of the noblest edifices in the city, an edifice which had recently been dedicated to liberty and free discussion, that the mob had "moved in an orderly manner," in the nefarious business of burning and destroying the property of others, and that the owners of the property had provoked them to the commission of the act. If there were such provocation here, though it did not excuse the one, it did not justify the other. One principal charge as an act of disorder or irregularity on the part of the Old School party, is their repeated calls to order. This charge is not confined to one member, but extends to the Old School party generally. We have also heard of coughing, stamping with the feet and other noises, and we are directly charged with having made these strange noises, to prevent ourselves from hearing. But those gentlemen in the immediate neighbourhood did not hear it. I will not charge the making of the noise on the New School party, but I deny that the Old School party made all the noise. As to the irregularity, on the part of Mr. Boardman, and Dr. Miller running across the house, I deny it altogether. These things are charged on particular members by the New School party. But there was not an act of the Old School party that tended to disorder; not one. Can we say so of the other side? Let me select a single instance, that of the very respectable Mr. Duffield. A young gentleman, Mr. Hamilton, told you that he had seen him striking on the seat with a cane. It is not necessary to repeat the whole relation, but he saw that certain thing. Now if Mr. Hamilton had been questioned, as he was recalled for that purpose, he perhaps could have explained this matter, but he was not called on. Instead of that another gentleman was called, who stated that during the time that Mr. Duffield staid at his house he did not carry a cane. There is no difficulty at all in the matter. Mr. Duffield could easily have borrowed or seized a cane for the purpose of the revolution. Sufficient has been elicited to show that amongst the New School men there was disorder in every possible shape and form. They meant to dissolve the Assembly, and their proceeding was revolutionary. They, with the assistance of Mr. Cleaveland, Dr. Beman, and Dr. Fisher, organized a new Assembly. Their proceedings were revolutionary, and from the necessity of the case they were guilty of all the disorder. Mr. Duffield voted, though he had no right to do so. Whether or not his was that most vociferous "aye," the sound whereof would have reached across Washington Square; that "indecent" "aye," as Dr. Hill calls it, he was at any rate disorderly in voting, as well as rapping with a cane; and yet we are charged with having acted disorderly by these respectable men. The only question as to Mr. Hamilton's testimony is, can it be relied on? and that it may, is rendered certain when the counsel on the other side did not impeach his veracity. Though Mr. Randall intimated something like a threat that he would ques-

tion him; I suppose that, on reflection, he thought best to leave the matter where it was. Yes, (on receiving a suggestion from Mr. Plumer,) Mr. Duffield's presence in the Assembly is confirmed, there is no doubt of it. Yes, and there were a great number standing on the seats, in the pews, and moving up and down the aisle, at the invitation of the ring-leaders of that particular Assembly which was constituted there. I doubt whether any Assembly ever was so disorderly as this ecclesiastical body, and it would appear from Mosheim and other historians, that ecclesiastical bodies are very prone to disorder.

There is another important point to which I must call your special attention. According to a rule agreed to by the General Assembly of 1829, the committee to review the commissions which should be presented to them, was to consist of the regular clerks. Now the Assembly was initiate. It was in transition. Who was to perform this office? Dr. Mason and Mr. Gilbert were the clerks of the pseudo Assembly. Did they inspect the commissions, or did those commissions undergo an actual inspection? Dr. Mason tells you that he had never done it before their adjournment to the First Church. They did not examine them after they went to Washington Square, and therefore the preliminary examination never took place in the world. Here was a trampling on all law and order. And yet this august Assembly, claiming to be the highest judicatory of the Presbyterian Church, professed to be governed by this very rule. But they prescribed for themselves what course they would pursue, whether according to the rule or not. It was indeed a most singular and humiliating spectacle which was presented to the world. Their anger towards their brethren turns on their own heads. When they described the stamping with the feet, the clapping with the hands, and the hissing, they were not aware that nothing that was done amidst such confusion could be considered as being obligatory on us. When silent members are understood as acquiescing on the principle that "silence gives consent," they must hear and know what is proposed. That is both law and order; but when every thing is in disorder and confusion, it is quite another thing. The house of prayer is converted into a den of thieves, is desecrated by indecent yells of "Aye, Aye, Aye!" It is necessary to preserve order in all deliberative assemblies; and for this purpose in all religious, as well as civil assemblies, a presiding officer is chosen, whose duty it is to preserve order; and questions of business are decided by ayes and noes, the majority determining the question in the affirmative, or in the negative. The only exception to this general rule is to be found in the society of Friends, which transacts its business in a manner essentially different from all others. It is not analogous to any other. In their yearly, quarterly, and monthly meetings, for the transaction of the business of their church, they have no presiding officer; as they acknowledge no head but Christ Jesus, whom they believe to be in the midst of them, and it is under the guidance of his spirit that they profess to act. Their church government is not a representative democracy as that of the Presbyterian Church; but it is a pure democracy,

every member of the church having an equal right to be present and to be heard in *propria persona*. Each one has equal privilege to make propositions to the meeting, and the business of the clerk, who is regarded as a public servant, is to form a minute of the transaction, which, when approved by the whole body, is placed on their records. They never decide by a majority merely, but by the unity or general consent, and thus conduct their business in a spirit of brotherly condescension and submission to each other, and in a most harmonious manner. By this course of proceeding the unbecoming and indecent yell of "Aye," or the boisterous and vociferous "No" is never heard amongst them, as in other deliberative bodies.

I have already referred to the authority of cases reported in Wendell & Watts, in support of my position, that silence cannot be construed into an assent to the measures proposed, unless there is an opportunity given to vote against those measures, or if members are prevented from hearing, or voting by force or fraud. All law and order would be otherwise completely overturned. What is done on similar occasions in other bodies? Business is suspended till the galleries are cleared. Courts suspend their investigations till order is restored, &c. In our courts of justice, or in legislative bodies, if a drunken man should enter the house, and commence one of those vociferations peculiar to the votaries of Bacchus, all proceedings must be immediately suspended until the cause of the disorder should be removed; and any question proposed during the interim, could not be legally acted on; nor could the silence of members, or their refusal to vote, under such circumstances, be construed into an acquiescence on their part. Because such motions would be put in violation of the rules of order, and the members acting in such disorderly manner would be subject to punishment, by the body, for contempt. Such measures either destroy or suspend the administration of justice.

The Old School party cannot be accountable, when they were prevented by the prevailing noise and confusion in the house at the time. The New School party prevented the ordinary proceedings from being effected, and at the same time rendered their own proceedings ineffectual by the noise they made. And this was a solemn, grave, deliberative, religious body. Can these outrages, so tumultuous, disorderly and rebellious, result in supplanting us and placing them in power as the General Assembly? It is impossible that any thing can be done effectually in such a state of things. No! they mistook their remedy. But why did they not try the issue in some other way than by a suit at *nisi prius* in this court. Why did they not proceed against the moderator and the clerks by a *mandamus*, if it is not the property which they want? They might have consummated their whole scheme, except the seizing of the property and funds of the church, in another manner, and have obtained their seats on fair and equitable terms. But let them not expect to triumph in their present course. Let them not expect to obtain the verdict of this intelligent jury! No, if your verdict shall be so, if the plaintiffs fail in this suit, they can form another Assembly in 1839 as they did in 1838, and without a repe-

tition of those disorders which occurred in Ranstead court, and they can carry it on for ages and generations without interruption from these defendants. They can become incorporated by an act of the legislature, securing to them all such corporate rights and privileges as they may reasonably desire. They would just stand where Mr. Meredith says they wish to stand, in the full exercise and enjoyment of their own rights, without interfering with the rights of others. But on the other hand, if your verdict should be against these defendants, if you throw them out of the Presbyterian Church, they are out for ever. For us there is no hope. "The iron" will have "entered into our souls," we must remain on the outside of the sanctuary, mourning like the Israelites, when their enemies had carried them captive. We will go away like Rachael and weep, we will sit down by the rivers of Babylon and weep, when we remember Zion. We will be obliged to hang our harps upon the willows in the midst thereof, whilst "they that have wasted us require of us mirth, saying unto us, sing us one of the songs of Zion."

ARGUMENT OF GEORGE WOOD, ESQ.

At the opening of the Court on Saturday, the 23d of March, (Mr. Ingersoll having concluded on the previous evening,) Mr. Wood commenced his argument, which was closed on the following Monday.

Mr. Wood bowed respectfully to the Court, and addressed the jury as follows:—

Gentlemen of the Jury,—After having floated for several days in the upper regions of the air, following the counsel on the other side in their flights of fancy, you may find it difficult and somewhat painful to come down to the earth again. I assure you, however, gentlemen, that you must come down, if you go along with me; for I propose to continue there. I am not used to being perpetually on the wing, and can only ask your attention to a plain statement of facts and argument, condensed as much as the nature of this complicated case will admit of. Your patience must be nearly exhausted, and my indisposition renders it difficult for me to proceed.

Much, gentlemen, has been said on points which have nothing to do with the case; and much testimony has been introduced which ought to have been dispensed with. You have observed that the Old School party claim to be the majority. They have certainly examined the majority of witnesses. We might have called hundreds. We could have gone on without end. But we were anxious to save time, and therefore, as you perceived, we abstained even from cross-examining their witnesses, that no waste of time might be made in this cause which we could possibly avoid.

Much has been said to you by the opposite counsel, concerning the absence of Dr. Beman and Mr. Cleaveland, and our omitting to read their depositions. True, their testimony was not laid before you. Neither was Dr. Nott's deposition read on the other side. The reason is obvious. They were taken before it could be known

what points would arise in the cause, and they did, in fact, relate principally to points which have not proved to be material. This, doubtless, was the reason why they did not read Dr. Nott's deposition. They offered it, but the judge refused to allow a great part of it to be read, because it was irrelative to the case, and they declined to read the rest. So of ours. Their depositions related to matters which have turned out to be irrelative. Dr. Beman is in Europe, and Mr. Cleaveland is in the far west. If they had been here, on the stand as Dr. M'Dowell was, it might justly have been inferred, from our not examining them upon the organization, as we infer from Dr. M'Dowell having been kept back on that subject, that there was a reason for suppressing the testimony.

You have also been told, gentlemen, that our opponents have not sought litigation, and resorted to the courts of law. This is true of them, as of all other wrong-doers. The law and the courts are no favourites of theirs. It is the injured who are forced to go to law and seek for redress. Much also has been said of the fact, that my clients had the advice of counsel. Is that strange? Is it extraordinary, that after two or three hundred thousand members of congregations had been cut off without notice, resort should be had to those gentlemen whose business it is to advise as to the means of redress. Whence could they seek aid, but from the civil tribunals of the country, after being violently shut out from the ecclesiastical judicatories? There is nothing in these suggestions, gentlemen, which ought to prejudice your minds against my clients.

Let us, then, come to the real issue in this case. Was the General Assembly of 1838, that elected these trustees, the General Assembly recognized and contemplated by the charter of 1799? Who are the trustees, is the actual issue. The election of our trustees is not disputed; and we are brought back to the collateral question, which of these two Assemblies of 1838, is the true General Assembly of the Presbyterian Church?

The counsel who last addressed you on the other side, stated that he considered the General Assembly to be, in reality, the corporation. In this, I think he went too far. The trustees are the corporation, under the act of '99. They form, however, a trust corporation, created for the General Assembly, and to act as their agents, or trustees. The General Assembly are the *cestui que trusts;* and, though not a corporation, yet they partake largely of the corporate character, under this charter. They cannot, it is true, in a strictly common law court, sue or be sued; but their trustees, under the act of Pennsylvania, hold property for them in a collective capacity, or, in other words, in a corporate capacity, having succession, and altogether different from a partnership of individuals. In this, their corporate and representative capacity, they are, under the charter, to receive from their trustees their funds, and to dispense them. In their collective, or corporate capacity, they are to feed or supply the corporation with its membership. They are to elect the trustees. They are a body corporate, in their organization and modes of proceeding, and for all the purposes of judicial and legislative action, and of administrative proceedings, to the extent of

their powers in these departments. What is the inference to be drawn from this? They are subject to that judicial control, and to those wholesome regulations which the court of king's bench, in England, and the supreme court of this state exercises and enforces over the subordinate institutions of the country. I admit that a common law court has no direct jurisdiction, by way of appeal or review, over the action of a mere ecclesiastical judicatory; but it has a right to inquire, and will inquire into the conduct and organization of a collective body, whether ecclesiastical or otherwise, intimately connected by the charter with a corporation, so far as may be necessary to settle a question of property or civil rights, and more especially of the right of membership in such corporation. The court will take care that such bodies do not violate any of those fundamental rules of policy or justice, which ought to be observed by all bodies, in the transaction of their affairs.

There is another point of view in which this subject may be considered. The General Assembly is subject to the law of public trusts, or charitable uses, as it is more generally termed, which was early introduced into Pennsylvania, as appears from the case of Witman and Lex, decided in this court, and in the case of Sarah Zanes' will, in the United States circuit court for this district. Under this law, this ecclesiastical institution would be subject to the jurisdiction of the chancery of England, in respect to property, by direct review and control, and the powers of that court in this state, must, to a certain extent, devolve upon this court. Under the law of public trusts, voluntary institutions established for the promotion of piety and charity, are recognized as acting in a corporate capacity, and their rights are protected through the attorney general. In the case of Moggridge *vs.* Thackwell, in 7 Vezey's Reports, several of these voluntary societies were selected as managers of the charity.

In order to find out the true legitimate character of this ecclesiastical assembly and its subordinate institutions, as recognized and contemplated by the legislature of Pennsylvania, in creating this corporation, it will be necessary to look at the composition of this General Assembly at the time the act was passed. These gentlemen tell us, it was, and ought to be a pure, unadulterated Presbyterian Church, of no mongrel character, not to be polluted by an intermixture with Congregationalism. Now, when the charter was granted by the legislature, this Presbyterian body was in the closest connexion with Congregationalists. By referring to page 296 of the Assembly's Digest, it appears that several years prior to this act of incorporation, a proposition was made by the General Assembly, and received and adopted by the Association of Connecticut, that delegates from the one body to the other, should deliberate and vote as members. What, then, was the character of the General Assembly in 1799, when this act of incorporation was passed? It was then in perfect accordance with its doctrines and discipline, or, if you please, with its ordinances of divine right, not merely to correspond with Congregationalists, but to allow them to sit and vote in this very General Assembly, the highest body known to

their church. It remained for the pure of 1837 to discover that such alliances were mongrel and bat-like, and not to be tolerated. Our inquiry now is, to ascertain what may be the composition of this General Assembly, in voting for trustees under this charter; and, surely I need not stop to say, that its character and its usage at the time the act of incorporation passed, must settle this question. I am clearly warranted, then, in saying that it does not destroy the Presbyterian character of this body, or affect the corporation, to make alliances with Congregationalists, and even to allow them to vote in the judicatories of the church. The counsel, (Mr. Ingersoll,) has stated to you, that in England a union once existed between these two religious sects. He might have gone further, and told you that such a union existed at the very time that Presbyterianism was introduced from thence into this country. It must be borne in mind, that it was introduced here from England, and not from Scotland. I think, then, I am warranted in saying, that connexions of this kind are consonant to the principles and spirit of Presbyterianism. And, gentlemen, this enlightened and liberal toleration should be admired, not declaimed against. It is in perfect keeping with the genius of all our American institutions.

The opposite counsel have, at every turn of their argument, given us oyer and view of the worthy and reverend Dr. Green, not to enlighten your judgments, but to excite your sympathies. No one can feel more respect for him than I do, but I should indulge in a mawkish and crocodile sensibility, were I to lament his being stripped of an office which yields no emolument, and under circumstances which every one knows cannot affect his character. It would be kindness, and not injury to him, to relieve him, in his old age, from the care of the temporalities of the church, which might better be under the control of younger men.

The General Assembly, or body purporting to be such, which elected these trustees in May, 1838, was first organized. If it was well organized, it must prevail, and no subsequent organization can be good. On the contrary, it was the duty of all to come in and join it, or else there might be as many Assemblies sitting at the same time, as there were quorums. There cannot, certainly, be two true and valid General Assemblies, sitting at the same time. Petty irregularities in the process of organization, will not vitiate.

Gentlemen, in all controversies of this sort, it is important to find out how far the parties differ, and where they agree. Both parties concur in saying that the General Assembly of 1838, was going on in the process of organization, up to the time of the motion of Mr. Cleaveland. There are irregularities alleged on both sides, but on different grounds. We say that their organization was defective and unlawful, and we were attempting to cure those defects. They say that our attempts were irregular. They charge us with producing and organizing a secession. We deny it, and allege that we only displaced officers who refused to do their duty, as is often done in every assembly, and that we then proceeded on in the regular organization of the General Assembly. This brings me to con-

sider the character of Mr. Cleaveland's motion, and the causes which led to it.

There was, gentlemen, a deliberate attempt to form an unlawful General Assembly of the Presbyterian Church, concocted by the moderator and clerks, and a clique of the Old School delegates, commencing in 1837, and continuing up to the time of Mr. Cleaveland's motion. On these attempts, and the proceedings connected with them, we found our right to remove these officers. I must be allowed to claim your attention to the details of this plan. Let us go back, then, to 1837, to the excinding acts, first in importance, as they are first in time. These are what the gentlemen say have nothing to do with the case: "mere portico-work," they called them. Cutting off six hundred ministers, fifty thousand communicants, and more than two hundred thousand members of congregations, without accusation, or notice, or trial, is mere portico-work, is it? What, then, is the temple which they have put behind this portico? Their petty points of order!! Whether the moderator stood, or had a chair, was in a pew, or in the aisle, with a hammer in his hand, or without one. Whether a motion was made on this side of the house, or that side of the house. These are the great and interesting topics which ought to occupy our time and agitate the breasts of the court and jury; while cutting off all, old and young, in large districts of country, is portico-work!

I now propose to show, that these excinding acts of 1837, did not, in law and justice, exclude any one from the church; that they are void and of no effect; that there was an attempt to carry out these acts in the organization of 1838, and to perpetuate the exclusion which they purport to decree; that such an attempt was fraudulent and unlawful, and void; that no lawful Assembly could have been organized in conformity with it; that it ought to have been resisted by all fair means, and that the means resorted to, were perfectly lawful and proper.

These excinding resolutions, gentlemen, I need not read again. Their intended effect was to cut off a large part of the state of New York, and a large portion of the state of Ohio. Now what is this charter of incorporation? Is it confined, in its benefits, to Pennsylvania? Does it extend only "from Pennsylvania to the Mississippi?" No: it is a charter for the Presbyterian Church of the United States of America. It is an expansive charter for the whole Union, as broad and expansive as our whole country.

And how were these people to be cut off? At one blow! No trial, no summons, no opportunity to be heard! The commissioners to the Assembly came together with no such powers; yet they attempted to cut off, at one fell swoop, all their brethren who resided in the infected district. What would be the effect of this, if it should prevail? To banish Presbyterianism from those large portions of country. Look at the map. See what a region has been declared to be infected, tabooed ground. In New York, it is more than three hundred miles in length, and of the width of all the northern part of the state. In Ohio, it is a large territory. It is, in all, equal to some four or five of the smaller states of our Union.

Every man in these regions was, by these acts, deprived of all his rights under this charter. These immense districts were made, so far as Presbyterianism was concerned, a desert, without an oasis to delight the eye; for all the purposes of Presbyterianism, dreary, and waste, and void.

But let us look, gentlemen, at the qualifications which are alleged to mitigate the severity of these resolutions.

"2. That the solicitude of this Assembly on the whole subject, and its urgency for the immediate decision of it, are greatly increased by reason of the gross disorders which are ascertained to have prevailed in those synods, (as well as that of the Western Reserve, against which a declarative resolution, similar to the first of these, has been passed during our present sessions,) it being made clear to us, that even the Plan of Union itself was never consistently carried into effect by those professing to act under it."

They say in this resolution, that the plan itself was never consistently carried into effect. Why not, then, rectify its irregularities? Or, if they must cut off, why not confine it to the mixed churches, or Congregational churches alleged to be formed under the plan? Why cut off the whole church in those districts? The resolutions do not even tell us what these irregularities were, though they say the disorders were ascertained. How were they ascertained? By trial, or notice? Had the accused a chance to meet the charges and disprove them? No. They tell us also, in the third resolution, that these resolutions are not to affect the ministerial standing, or pastoral relations of the ministers. Gentlemen, is not this mockery? What is meant by ministerial standing? And what is pastoral relation? Is it not a standing in all these judicatories? the highest, as well as the lowest? Does it not include the right of trial and complaint? Of ecclesiastical justice? Of security under the charter? And are they not cut off from all these?

You are, however, told that Pennsylvania was not cut off! I cannot believe that this remark was intended to enlist your prejudices and excite sectional jealousy. It would be unworthy of the high standing of the honourable gentleman; and you will not be willing to proclaim to the world, that you decide this cause upon such considerations. You, too, will see, if you carry out these excinding resolutions, that your turn will come next. Philadelphia, or all Eastern Pennsylvania, may be the next victim. The Old School party have some grounds of dissension remaining among them, still. Dr. Green himself may be excinded next, unless the honourable gentleman, who seems determined that nobody shall have the worthy Doctor, should take him under his immediate care. He may bear him away in his bosom, from the newly infected district to South Carolina, where, if he cannot have the right to excind, they must at least allow him the privilege of nullifying.

But we are told that these resolutions provide a mode for true Presbyterians to get back again into the church.

"4. That inasmuch as there are reported to be several churches and ministers, if not one or two presbyteries, now in connexion with

one or more of said synods, which are strictly Presbyterian in doctrine and order, be it, therefore, further resolved, that all such churches and ministers as wish to unite with us, are hereby directed to apply for admission into those presbyteries belonging to our connexion which are most convenient to their respective locations; and that any such presbytery as aforesaid, being strictly Presbyterian in doctrine and order, and now in connexion with either of said synods, as may desire to unite with us, are hereby directed to make application, with a full statement of their cases, to the next General Assembly, which will take proper order thereon."

That is to say, any one that chooses, may apply to an adjoining presbytery, of course out of the infected region, as all the presbyteries therein are cut off. This scheme was evidently devised, in order that no man, thus cut off, should get back into the Presbyterian Church, without the permission of the General Assembly. No commissioners from the excinded districts, were to be enrolled and admitted in the usual way, into the General Assembly. Thus the matter would be entirely under the control of the Old School party. The excinded are out of the church. If they will get back, they must come like strangers, to "unite with us." Look at the same minutes of 1837, and see how they were to be kept out.

"The report of the committee on the right of presbyteries to examine ministers applying for admission, which was adopted this morning, was reconsidered, amended, and adopted as follows, viz.

"That the constitutional right of every presbytery to examine all seeking connexion with them, was settled by the Assembly of 1835, (see minutes of 1835, p. 27.) And this Assembly now render it imperative on presbyteries to examine all who make application for admission into their bodies, at least on experimental religion, didactic and polemic theology, and church government."

They make it imperative on the presbyteries to examine all who would apply for admission on experimental religion and theology. Take the case of Dr. Richards. I take his case, because I have long known his high standing in the church. He has lived in the enjoyment of all the religious rites of this church, till the decline of life. Then he is tabooed, cut off, because he is in the ill-fated district; and, to be restored to his religious privileges, he must travel three hundred miles, get out of that district, apply to a presbytery, and be examined on experimental religion and theology. Men as good as Dr. Green, or any of them, must travel, beg for admission, and be examined on experimental religion by those who have thus cut them off. And these excinded presbyteries, can they send commissioners to the General Assembly, in the usual way? Oh no. They must apply to presbyteries out of the district, and through them, to the General Assembly; where their cases will be considered, after the Assembly shall be organized without them; when the same men who cut them off, must pass on their cases.

As judicial acts, these resolutions will not bear examination for a moment, as I trust, I shall satisfy you. I shall not only use, for this purpose, the law of the land, but shall refer to their own books,

to rules and principles established in this church, before these men began their career. Look at their Digest, page 323.

"SECT. 5. No person to be condemned without due notice of the accusation against him.

"It was resolved, as the sense of this house, that no man or body of men, agreeably to the constitution of this church, ought to be condemned or censured, without having notice of the accusation against him or them, and notice given for trial. Vol. I. p. 77. 1793."

This, gentlemen, is not only Presbyterian law, but it is justice, and it conformeth to the law of the land. The true doctrine is laid down in "Angel and Ames, on Corporations," page 244.

"In none of the above cases, wherein it is considered that there is just and sufficient cause for amotion, can the party be expelled, unless he has been *duly notified* to appear. And where a corporation strikes off one of its members, without giving previous notice, and affording an opportunity to be heard, a *mandamus* to restore him will be granted. J. H., a member of the Pennsylvania Beneficial institution, having been expelled from the society, and having applied to the Supreme court for a *mandamus* to restore him, the officers of the corporation made a return, showing cause why the said J. H. should not be restored to the rights of a member. It appeared by the return, that, by the articles of incorporation, each member was to pay fifty cents in specie, a monthly contribution, and that should any member neglect to pay his contribution for three months, he was to be expelled. J. H., it was stated, was three months in arrear, as was reported by a committee appointed for the purpose of making inquiry on that subject, whereupon he, together with others who were found to be in the like situation, were struck off the roll, as having forfeited their rights of membership in the society. There was no vote of expulsion, because in the opinion of the officers who made the return to the *mandamus*, the nonpayment of contributions for three months, was, *ipso facto*, a forfeiture of membership. But the Court were clear, that there must be some act of the society, declaring the expulsion; and that this could not be done without a vote of expulsion, *after notice* to the member supposed to be in default. For it was possible, that the member might either prove, that he was not in arrears, or give such reason for his default as the society might think sufficient. And the notice must be served upon the accused a reasonable time before the amotion; and when an amotion is shown, the notice must be particularly averred, and positively; if it be under a recital, as *licet summonitus fuit*, it is insufficient."

There was no notice, no trial or specific action whatever, and these *mere delegates* expelled, not only members of the Assembly, but all the churches, all the people of that sect, all the judicatories in a tract of country three hundred miles in length in New York, and an extensive portion of Ohio.

We are told that it is the practice to dissolve synods and other inferior judicatories as occasion may require. They do so, and

there is authority in the book for it; but when they dissolve a judicatory, they attach the parts of which it is composed to another, and no member is thereby put out of the church. How different this from excision, from cutting them off, declaring them out of the church, and depriving them of all their religious privileges. Why, look at the cases cited on the other side. The Synod of Delaware was dissolved in 1835, but its presbyteries were at the same time attached to other synods. So of the Synod of the Chesapeake in 1834. No one was disowned or cut off. It was a mere change of the local connexion. The Synod of Chesapeake was dissolved, and its presbyteries attached to other synods. In these cases merely the judicatory was dissolved. The word synod is used in a double sense. In these excinding resolutions, the entire district, and all the members living in the district over which the jurisdiction of the synod extends, are cut off from all connexion with the church; and if any of them wish readmission, they must apply anew as strangers, and go out of the infected and condemned district for the purpose. They are declared to be "*out of the ecclesiastical connexion of the Presbyterian Church*," &c. How frivolous and unfounded and false is it to attempt to justify these excinding resolutions, by resorting to the practice of dissolving a church judicatory. It can only impose upon a superficial intellect.

We are told, however, that these excinding resolutions were legislative measures, and that these proceedings are justified as legislative acts. They tell us, in the first place, that these legislative proceedings were justified by the abrogation of the Plan of Union; under which, as they say, the districts composing these synods grew up; and, secondly, they were authorized by the legislative power of the body, independently of the abrogation of that plan.

Let us, in the first place, look at this Plan of Union, which is charged as being so infectious as to require the purging away of every thing connected with it. It was nothing more nor less than an alliance with Congregationalism to promote union and harmony, not a whit closer or stronger than the plan of 1799, to which I have already called your attention. That union allowed the delegates from the allied bodies, not only to sit and deliberate, but to vote *as members*, and was in full force *when this act of incorporation passed.* The Plan of Union originated in a proposition of the General Assembly. These alliances have been approved of by Dr. Green himself; and not only by him, but by all the great men of the church in those days, Dr. Latta, Dr. Alexander, Dr. M'Knight, and others; and at the head of the list, let me name Dr. John Witherspoon, a man never to be forgotten while our nation stands. He was much more than a mere closet metaphysician; he was a statesman, a divine, a patriot, and in every aspect a practical man, of enlarged and liberal views. Through the whole period of our Revolution, he had seen the advantages of union and harmony, and had always promoted them. As a statesman, he saw that union was indipensible to our institutions; as a statesman and a Christian, he saw and felt that these plans of union among religious sects

would be, in the hands of the pious and the good, a power, like the lever of Archimedes, to raise up a moral and religious world.

But we are told that this Plan of Union brings Congregationalists into the body of the Presbyterian Church. Let us look at it, and see to what extent this charge is true.

"Regulations adopted by the General Assembly of the Presbyterian Church in America, and by the General Association of the state of Connecticut, (provided said Association agree to them,) with a view to prevent alienation and promote union and harmony, in those new settlements which are composed of inhabitants from these bodies.

"1st. It is strictly enjoined on all their missionaries to the new settlements, to endeavour, by all proper means, to promote mutual forbearance and accommodation, between those inhabitants of the new settlements, who hold the Presbyterian and those who hold the Congregational form of church government.

"2d. If, in the new settlements, any church of the Congregational order shall settle a minister of the Presbyterian order, that church may, if they choose, still conduct their discipline according to Congregational principles, settling their difficulties among themselves, or by a council mutually agreed upon for that purpose: but if any difficulty shall exist between the minister and the church, or any member of it, it shall be referred to the presbytery to which the minister shall belong, provided both parties agree to it; if not, to a council consisting of an equal number of Presbyterians and Congregationalists, agreed upon by both parties."

You see, gentlemen, that these two provisions do not bring a single Congregational minister into the body of the Presbyterian Church. The Congregational minister does not enter into any Presbyterian judicatory. He may be stationed in one of their congregations. This was always so: it is done every day in the Presbyterian Church. They now send their missionaries, where? To the pagan and infidel; to the heathen to convert them; and they do not wait for elders. They cannot find them there ready-made; they must convert them first. And have they got to this pass of religious spite and intolerance, that while they allow their ministers to preach to the heathen and the infidel, they will not permit them to address Congregationalists, of the same faith with themselves, under a plan formed by the great patriarchs of their church?

There is only one other feature of this plan to be noticed, and that is, the provision as to mixed churches. The difference between this article and the others, is the difference between tweedle-dum and tweedle-dee, to any one of enlarged and liberal views, out of the closet of metaphysics.

"4th. If any congregation consist partly of those who hold the Congregational form of discipline, and partly of those who hold the Presbyterian form; we recommend to both parties, that this be no obstruction to their uniting in one church and settling a minister: and that in this case, the church choose a standing committee from the communicants of said church, whose business it shall be, to call to account every member of the church, who shall conduct

himself inconsistently with the laws of Christianity, and to give judgment on such conduct: and if the person condemned by their judgment be a Presbyterian, he shall have liberty to appeal to the presbytery; if a Congregationalist, he shall have liberty to appeal to the body of the male communicants of the church: in the former case the determination of the presbytery shall be final, unless the church consent to a further appeal to the synod, or to the General Assembly; and in the latter case, if the party condemned shall wish for a trial by a mutual council, the cause shall be referred to such council; and provided the said standing committee of any church, shall depute one of themselves to attend the presbytery, he may have the same right to sit and act in the presbytery, as a ruling elder of the Presbyterian Church."

The only shadow of pretence for the accusation of its introducing Congregationalists into the church, is in the provision that a committee-man may sit and act in the presbytery; and can it be seriously pretended that this is a warrant for destroying and cutting off this large branch of the church? Suppose committee-men (Congregationalists) should come into the presbytery in this way. Is it not of the same character with the Union existing in '99, at the date of the charter, by which Congregationalists from the Association of Connecticut sat and voted in the General Assembly itself? Why, gentlemen, they have become wise too late. Men were as wise in 1799 and 1801, when this plan was adopted, as they are now. Dr. Green was as wise, and much more liberal then, when he approved this plan, than now, when he condemns it. This wisdom has come upon them too suddenly. It is discovered only thirty-six years after the plan has been in full operation. It darts upon them like lightning, like the flashes of wit and genius which have burst from their learned counsel. If the introduction of a Congregational committee-man had become all at once a serious objection, might they not, in a more Christian-like manner, have obviated the difficulty, than to engage in this work of revolutionary desolation? They had only to declare, that the delegate to presbytery from a mixed church, should be a Presbyterian, an ordained elder, and the whole difficulty would have vanished. But this was a mere pretence to veil over their covert designs.

But, say they, the Plan was void, because it was not sent down to the presbyteries. This is an admission that the legislative powers of the General Assembly requires to be bolstered up by the sanction of those inferior judicatories; an admission which I did not expect. The answer to it is this: after a usage of thirty-six years, and an acquiescence and co-operation by all the presbyteries during all that long period, the objection cannot be tolerated in the law. The sanction of the presbyteries by such long usage, becomes a presumption of law.

There is another circumstance of vast importance connected with this matter. In 1821 a new constitution was formed, and these very excinded presbyteries assisted in framing that constitution, and did as much towards it as Dr. Green's presbytery in Philadelphia. All then stood on the same platform, and now, by a part of

them, another part equally well entitled, are deprived of all its benefits. I ask you if you are prepared to say that these excinded presbyteries, thus joining in the frame-work of this constitution, are to have no part or lot in it; are to be cut off without mercy and without a warning.

They say this Plan of Union is repugnant to the charter which incorporates the trustees for the benefit of a *Presbyterian* Church, and that it cannot be Presbyterian if such an alliance exists. I should like to have either of the learned gentlemen put his finger upon any point of time, when such alliances did not exist. This is a singular discovery in the march of intellect, which seems to have moved rapidly with the Old School party for a short time past.

I shall not stop to inquire whether they had a right to abrogate the Plan of Union: I think they had, and have always thought so. I never considered it a *contract.* But surely such an abrogation should be made on great advisement, and all acquired rights ought to be preserved. Suppose the case of a pastor settled for life with a congregation, under this plan; shall they be allowed to break up such a contract? Aliens are, by statute, in many of the states, and I presume in this, allowed, under certain qualifications, to purchase real estate. Would a repeal of the law impair or destroy the rights formed or acquired while the law was in force? All that could or ought to be done on abrogating the plan, should be to prohibit other connexions of the kind from being formed in future. But, instead of sustaining acquired rights, this Old School party have destroyed them by wholesale. The only reservation is in favour of certain Simon Pure presbyteries. The General Assembly can readmit them, taking order thereon. This is very significant. They would admit such as suited *their own views*, and keep out all the rest. Could there be more monstrous injustice!

The gentlemen, however, undertake to palliate all these proceedings, by the conduct of the New School party of 1837; conduct declared to be outrageous, because, when it was proposed to cite these judicatories and try them, thus giving them a chance to be heard, that party voted against it. But look at the reasons why they voted against it.

"1. Resolved, that the proper steps be now taken, to cite to the bar of the next Assembly, such inferior judicatories as are charged by common fame with irregularities.

"2. That a special committee be now appointed to ascertain what inferior judicatories are thus charged by common fame, prepare charges and specifications against them, and to digest a suitable plan of procedure in the matter; and that said committee be requested to report as soon as practicable.

"3. That, as citations on the foregoing plan is the commencement of a process involving the right of membership in the Assembly; therefore, resolved, that agreeably to a principle laid down, chap. v. sec. 9th, of the 'Form of Government,' the members of said judicatories be excluded from a seat in the next Assembly, until their case shall be decided."

They were all to be excluded from their seats in the Assembly until *all* should be tried. It was plain to see that all were to be sacrificed. They had a clear right when a judicatory was on trial to exclude its members from voting, but not to exclude other members whose judicatories represented by them were not on trial. This was gross injustice. They had an occasional majority that year, and they were determined to perpetuate it. There was no charge, no specification; all was left vague and uncertain, floating on the breath of common fame. Notwithstanding the opposition of the New School, they carried their point. But the New School opposed the measure, and therefore, instead of being tried and heard, they should be condemned at once, and cut off by a summary resolution.

But we are also told, that the New School party opposed the division of the church, and therefore the Old School were justified in cutting them off at once. You will see their reasons for the opposition on page 431 of the minutes of 1837.

"The subscribers had believed that no such imperious necessity for a division of the church existed, as some of their brethren supposed, and that the consequences of division would be greatly to be deprecated. Such necessity, however, being urged by many of our brethren, we have been induced to yield to their wishes, and to admit the expediency of a division, provided the same could be accomplished in an amicable, equitable, and proper manner."

"From these papers it will be seen, that the only question of any importance upon which the committee differed, was that proposed to be submitted to the decision of the Assembly, as preliminary to any action upon the details of either plan. Therefore, believing that the members of this Assembly have neither a constitutional nor moral right to adopt a plan for a division of the Church, in relation to which they are entirely uninstructed by the presbyteries; believing that the course proposed by their brethren of the committee to be entirely inefficacious, and calculated to introduce confusion and discord into the whole church, and instead of mitigating, to enhance the evils which it proposes to remove; and regarding the plan proposed by themselves, with the modifications thereof as before stated, as presenting in general the only safe, certain and constitutional mode of division, the subscribers do respectfully present the same to the Assembly for their adoption or rejection."

The New School party finally yielded to a division, for the sake of peace. They believed that their differences were slight, and that there was no need for a division; but they yielded because their brethren thought otherwise. There was really no difference between them, except in metaphysical subtleties, which lie behind religion, and have nothing to do with practical piety or the affairs of life. Gentlemen, I should not have alluded to this matter, if it had not been dwelt upon with much stress on the other side, and in a way calculated to excite prejudice. Why did not the New School concur in the particular propositions for a division? Because the Old School insisted upon retaining the name and the succession, and,

upon the division being made at once without sending it down to the presbyteries for their concurrence. The concurrence of the presbyteries was indispensable. What then would have been the consequence of such a division? It would have been unlawful and not binding on the presbyteries. If these propositions had been acceded to by the New School, the presbyteries would have left them and treated them as seceders. The counsel pressed this matter as though they really believed the terms offered were fair. But the New School party would have been stripped of every thing had they fallen into this arrangement. These two features of their proposition will condemn it with all honest men. Perhaps it was not so designed, but it was clearly a trap, and the minority of every presbytery adhering to the Old School, they retaining the name and the succession, would have been entitled to all the property. But there was no alternative left. Divide as we prescribe to you, or we will abandon our judicial proceedings and cut you off by resolution. They held the knife to the neck, with their casual majority.

The idea is put forth in these excinding resolutions, and has been insisted upon by counsel, that these synods had their origin in the Plan of Union, and, therefore, they naturally fell when that union was abrogated. Hence these resolutions rather assume the appearance of declaratory proceedings than positive enactments. The proposition is vague and indefinite; and when analyzed and applied to the evidence, will be found wholly senseless. What do they mean when they say these synods had their origin in the Plan of Union? Do they mean to say that all the presbyteries and all the congregations in those excinded districts are of a mixed or congregational character, and were formed under that plan? If they do, it is altogether untrue. Mr. Squier, a respectable witness from that quarter, and fully conversant with the subject, tells you that in every presbytery there were the requisite number of clergymen and congregations of the pure Presbyterian form throughout the entire excinded districts. This evidence is uncontradicted. If by the abrogation of the plan, the mongrel churches, as they are called, had fallen to the ground, the presbyteries, sessions and synods would have stood as firm and as strong on blue-skin Presbyterian ground, as the Presbytery of Philadelphia. Why then did not the General Assembly take order for the presbyteries to purge themselves of the mixed churches as they did in reference to the district embraced in the Synod of New Jersey? It did not suit their purpose, and would not carry out their covert designs to cut off, that they might secure and perpetuate the majority to themselves. Their argument, if argument it may be called, proves too much. Suppose the union with Connecticut, which existed in 1799 when the charter was granted, had been abolished a few years afterwards, and some one had seriously pretended that such an abrogation actually destroyed the Assembly and the charter, because the charter had its root in such an alliance, what would we think of the argument? The complete analogy between the two cases must be seen at once.

If, then, the excision cannot be justified as a judicial act, nor as a consequence of abrogating the Plan of Union, can it be main-

tained as an independent legislative enactment? I will admit, for the sake of argument, that this General Assembly possesses legislative power. If so, what becomes of the notion that they are not acting in a *quasi* corporate capacity? The legislative power of all subordinate institutions, is very different from the power of any sovereign legislature. It is circumscribed within reasonable limits. Look at the control which the court of king's bench, in England, and the supreme courts in this country, hold over the by-laws of subordinate corporations. How often do they declare them void, because in principle they are unreasonable, oppressive, or unjust? The power here claimed, is by by-laws, or resolution, called legislation, to cut off and banish from all right of membership a large portion of the community. This is not legislation. It is not embraced within strictly legislative power. It is a high sovereign act of political revolutionary power—a power denied to nations by jurists, Puffendorf, B. 8, c. 5, s. 9., and reprobated in its exercise by all historians. Wherever it has been exercised and has prevailed, it was owing to the want of a supreme controlling power. If a government should cut off a province and send it adrift from the family of nations, resistance would follow if there was sufficient power to resist. Civil war would kindle its fires. The god of battles would preside over the scene and award the victory. And who is it, claims to exercise this kind of power? A subordinate institution, religious too! existing under the law, and upheld by the law. A representative body too, responsible to its constituents, and attempting to cut off those very constituents or a large portion of them. For their own views of their powers see their Digest, p. 29.

"1. That no delegated body has a right to transfer its powers, or any part thereof, unless express provision is in its constitution.

"2. That this Assembly is a delegated body and no such provision is in its constitution."

There is no provision for excinding in their constitution. These are correct views, and were taken before they had become so deeply imbued with the spirit of despotic authority. Why, gentlemen, if this extraordinary doctrine is to prevail, what is to be the end of it? If the Assembly of 1837 can cut off districts of 3 or 400 miles long, the Assembly of 1840 may cut off Pennsylvania. If this Christian General Assembly may do this, every civil, political, and ecclesiastical institution in the country may do the same. If our courts and juries sanction such proceedings there will be no peace. There are to be found in all bodies, differences of opinion, and more or less party excitement; and once establish the rule, that an occasional majority may perpetuate its power by cutting off the minority in large districts, and tumult and violence will follow without bounds. What man, possessing in his bosom one spark of that spirit of freedom which animates the whole social system of this country, would join himself to an institution that claims such tremendous power?

Gentlemen, this power to deprive of rights, to disfranchise, is in its nature and essence, a *judicial* and not a legislative power. It can never be legitimately exercised without trial and notice of the

charges, and an opportunity for defence. The gentlemen will find no instance in all their law books on corporate powers, where disfranchisement is treated as an act of legislation. (See Angel & Ames, pp. 244, 245, as before recited.) Assembly's Digest, p. 323, "no man or body of men, agreeably to the constitution of this church, ought to be condemned or censured, without having notice of the accusation against him or them, and notice given for trial." It is punishment, and can only be inflicted for offences of a nature fairly warranting that species of punishment. Thus, if disfranchisement is attached as a penalty to an ordinary by-law, for an offence not warranting that species of punishment, it is void. In Pennsylvania, sir, you have declared a by-law void which disfranchised for an offence not warranting disfranchisement.

But we are told, gentlemen, there was no hardship or punishment in this excision. They who are thus cut off, can form new relations. Is it no hardship to deprive these people of their rights under this charter? To deprive them of their relationship to this long established and time-honoured institution? To cast upon them the stigma of being turned out of their church? If there be any thing which is hardship and punishment to a pious man, who is devoted to his religion, it is to be cut off from the institutions of his church. When the captive Jews hung their harps on the willows by the rivers of Babylon, they lamented the loss of their home and their country, but they wept when they remembered their Zion. They mourned for the loss of their religious privileges, of those institutions and associations which bound them to the God of their fathers, to the God of Abraham, of Isaac, and of Jacob.

Gentlemen, in a moment of party excitement, in the phrenzy of power, this Old School party have inflicted upon their brethren the deepest punishment which can be inflicted upon persons of their views and character. They call it legislation! So are acts of attainder, passed by the British parliament, called legislation. But what makes them so? The omnipotence of sovereign power. It is doing violence to the nature of things. It remained for the General Assembly of this Church to attempt, in this country, to act out the worst proceedings of the British Parliament, in the worst periods of English history, by stripping large masses of men of all their rights of membership, and then calling this forfeiture an act of legislation.

But we are told that the ecclesiastical power is entirely independent of the civil power. That these acts of excision, however violent and improper, having been passed by the highest body in the church, must prevail, and that they cannot be reviewed in the civil courts. I admit the independence of ecclesiastical tribunals upon the civil power as to all mere ecclesiastical purposes; the civil courts will not review their proceedings, on appeal. But when these ecclesiastical institutions acquire property, when they acquire corporate rights and privileges, either directly or indirectly, through trustees, this property and these rights are held under the law, and must be protected by the law. Every member of such an ecclesiastical institution has a right to resort to courts of justice for pro-

tection, in respect to his property and his privileges. If the ecclesiastical tribunals keep within their *jurisdiction*, and act never so indiscreetly or erroneously, their proceedings will be deemed valid; but if they transcend their powers, or violate any of those *great fundamental principles of law or justice*, which are deemed *sacred under the common law*, they will be arrested. And it is immaterial whether they have done so in the pretended exercise of judicial legislative or administrative power. Such a control has constantly been exercised by the common law courts.

Look at all that class of cases where the civil courts have reviewed the conduct and opinions of parties in a church, each charging the other with holding erroneous doctrines in reference to the *fundamental tenets of their church*: in all those cases courts have passed upon these differences to settle a question of property or civil rights. 3 Mer. R., 367, 419; 2 Bligh's R., 529; 2 Jac. & Walker, 427; 20 Pickering, 172; 9 Kendall, ; 7 Halsted 206; 4 Halsted 390. These were not judicial questions in the church.

A striking illustration of the principle for which I am contending will be found in the exercise of the visitatorial power over eleemosynary corporations. There is no principle better settled than that this power of visitation is entirely independent of the civil power. But suppose the visiter transcends his power, exercises a jurisdiction not given to him by the founder, or in his proceedings, violates any of the great cardinal principles of justice, attempting to decide without hearing or notice, or to act in a case in which he himself is concerned in interest, his proceedings will be reviewed and arrested by the civil tribunals of the country. 2 Term R. 338; 1 W. Bl. R., 22; 1 Term R. 650; 2 Lord Raymond, 1347, 1348. In this case, I do not hesitate to say that this General Assembly of 1837 stepped entirely beyond their powers, in attempting to pass these excinding resolutions. That the power thus to disfranchise is in its nature judicial and not legislative, and that this *representative* body, not *sovereign* but *subordinate*, in attempting thus, by a legislative act of attainder, to strip a large mass of its constituency of all their rights of membership, have violated the great cardinal rules of justice, and their whole proceedings ought to be treated as absolutely *void in law*, in reference to the civil rights of those members, under this charter of incorporation.

Equally unfounded is the pretence of their right to exclude our members from the Assembly of 1838, on the ground that every Assembly has the right to judge of the qualifications of its own members. Congress has this power. It is given to them by the constitution, absolutely and without appeal. They are therefore the sole judges, and the courts cannot collaterally review their decisions. But the case is entirely different with these subordinate bodies. They are, it is true, independent of one another, but not of courts of justice. If the Assembly of '37 attempted to control the Assembly of '38, by converting the moderator and clerks into dictators, the attempt was unlawful. If the Assembly of 1838, either in obedience to such mandates or from any other cause, should attempt

to exclude from their seats those who are lawfully entitled to them, the courts of law will tell them their proceedings are void.

[Mr. Ingersoll here interposed to correct what he considered a misapprehension on the part of Mr. Wood, in stating the effect of the fourth resolution of excision in relation to the return of the excinded members to the church. Individual members were not to apply to the General Assembly, but to presbyteries, and the presbyteries were to apply to the General Assembly, not to state the cases of those individuals, but upon their own application to be admitted. Mr. Wood, in explanation, read the resolution in connexion with the resolutions requiring examination in experimental religion. He also read the clause of the constitution which declares a presbytery to be bounded by territorial limits, and contended that the effect was to send them (the said individuals) out of the excinded district, because there was no presbytery there to apply to, all being cut off; but it would be idle for them to apply to a presbytery within whose bounds they did not reside, because, by the constitution, presbyteries could have no members except within a certain district: they must therefore apply to the General Assembly. This must be the case with both presbyteries and individuals. They, of course, while thus excluded, could not come in and participate in the organization. They could not come in at all, except on the terms of being examined on experimental religion. The presbyteries could not send commissioners to the Assembly, because they were not presbyteries. They could not go to the Committee on Commissions, they could only wait till the Assembly was fully organized; when they could be allowed, perhaps, to show, on their knees, that they had been examined in experimental religion, on doctrine and discipline, and then they might be let in or not, at the pleasure of the Assembly.]

Gentlemen, I was remarking on the difference between these subordinate institutions and sovereign bodies, such as legislatures, in deciding questions of membership. These subordinate bodies must do right. From necessity they must decide upon all questions of defect or irregularity in the commissions. But if the General Assembly should attempt to sever their own body, to exclude a portion of its members against law, they are thereby attempting to form an unlawful Assembly; and all reasonable and proper efforts should be made to resist such an attempt. It is proper that there should be a control over such attempts in these inferior institutions, lodged in the higher courts of judicature. If they were to judge with impunity upon the qualifications of their members, and such decisions should be final, gross injustice would be done, and the rights of membership would be often violated. Why, gentlemen, I might refer you to the Parliament of Great Britain, to the House of Commons, which is a sovereign body, and has the right to judge of the election and qualification of its own members in the last resort, and does not allow the courts at Westminster to touch the question. Did that body give general satisfaction in its decisions? No. It was found necessary to establish a committee of elections drawn by ballot, to avoid party predominances. Mr. Fox, on an

interesting occasion, where his right to a seat was involved, remarked hat he did not expect favour, nor did he know that he should receive bare justice from that house. He was called to order. He repeated the remark that it might be taken down, and in support of its truth, referred to the establishment of that very committee. What reliance could be placed upon the purity and correctness of decision in these subordinate institutions, if divested of all responsibility to judicial power, so far as property and right are concerned? Let this very case furnish an answer.

Every Assembly so constituted as not to give every member who has a right to a seat an opportunity to attend the Assembly, is unlawful; and of course, an attempt to exclude those who have a right, is an attempt to create an unlawful Assembly. Angel and Ames on Corporations, 275, 276, 277; 6 Viner's Abridgment, 269, sec. 11. This is not confined to municipal corporations, but extends also to those which are private in their nature. Stow *vs.* Wise, 7 Connecticut Reports, 219. Even an order to summon is not sufficient. Wilcox on Municipal Corporations, 445.

I think, then, gentlemen, I have established beyond doubt the principle I have laid down, that every attempt to form an Assembly without giving every member an opportunity to sit and vote, is an attempt to create an unlawful Assembly. This doctrine is clearly established by their own books. In their minutes of 1826, page 40, we have the following regulation:

"That the Committee of Commissions be instructed to examine the commissions, and to report to the Assembly on those commissions which are unobjectionable, and on those, if such there be, which are materially incorrect, or that are otherwise objectionable. That those whose commissions are unobjectionable, immediately take their seats as members, and proceed to business; and that the first act be the appointment of a Committee of Elections, to which shall be referred all the informal, or otherwise objectionable commissions, with instructions to report thereon as soon as practicable."

Now this, gentlemen, is acting out the principle which I have stated, that in case of informal commissions, the Assembly of course must judge of their validity. But every member having a regular commission must be reported by the clerks. These excinding acts were wrong, grossly wrong; like the case of a city council attempting to cut off some of the wards. They were void in law, and commissioners from presbyteries thus cut off, in coming up to a subsequent Assembly, should and must be admitted. Their commissions were all regular and formal. This is admitted. They were all regularly appointed. What then should keep them out? The proceeding of 1837: the excision, as it is called. It might better have been called "a deed without a name." No lawful General Assembly could be constituted without allowing every member with a regular commission to sit. Every man of them had a full right to a seat. Not a commission was informal, not an election contested. By the rule of 1826, they should have been enrolled,

and the Assembly of 1838, constituted without allowing them their seats, was an unlawful Assembly. This is the law of the land; it is carrying out the principles which I have just adverted to, and is in perfect accordance with the doctrines of their own books.

It will be borne in mind that I do not claim any right of interference with these ecclesiastical bodies by the temporal courts, farther than is necessary to protect property and civil rights. If these ecclesiastical institutions come under the protection of the law and acquire property, they must not be allowed to sport wantonly with the rights of their members.

I shall now proceed to show, gentlemen, that there was a concerted plan to prevent any organization of the General Assembly of 1838 which should admit commissioners from the excinded districts. This plan was commenced in 1837, and was to be carried out through the instrumentality of the moderator and clerks. They knew very well that each of these Assemblies is independent of the others. One Assembly may repeal the acts of another, but it cannot destroy the body. The institution of the General Assembly is permanent, though composed successively of different bodies, no one of which could destroy the institution itself. In the Assembly of 1837, a plan was contrived which they supposed would provide the only mode by which the members from the excinded districts could get back into the church. They adopted a course of reasoning by which they satisfied themselves that, as ecclesiastics, they were beyond and above the law; yet they seem to have had some misgivings upon the subject. They bring up their trustees to the sticking point of carrying out their plans of excision, which they were so desirous to perpetuate, by passing a resolution to indemnify them, if legal proceedings should be commenced against them for carrying out their measures. They knew the moderator and clerks were efficient officers, and hence they pledged them to carry out their plans. They first introduced into the Assembly of 1837 a resolution to that effect. This was withdrawn after these clerks had given to them their understanding of their duty, which was to carry out all their measures. This, in my opinion, amounts to a pledge; and it was undoubtedly so felt and understood at the time. After, and in consequence of this avowal, the resolution disappeared. The clerks left all this off the minutes, for which they afterwards, in the Old School Assembly of 1838, got a rap on the knuckles. Why did it not appear on the minutes? There is no reason except that they were ashamed of it. Dr. M'Dowell, the clerk, said the views of 1837 were not his views. He could not receive the commissions, though he did not approve of the excinding resolution. I am not surprised that he left it off the minutes. No doubt, in the language of one of our classic writers, he would willingly have dropped a tear upon it and blotted it out for ever.

I have now done with the conduct of the Assembly of 1837. I have shown their proceedings to be void, and that they endeavoured to infuse their action into the subsequent Assembly. I now come down to the transactions of 1838.

In the first place, gentlemen, we find, in 1838, the Old School

commissioners met apart in secret convention, concocting their plans, based upon the acts of 1837. Then the clerks refuse to receive or enrol any commissioners from the excinded regions. In the next place, the moderator, Dr. Elliott, refuses to entertain or put to the house any motion, the object of which is to bring in these excluded commissioners and have them put upon the roll. The convention, on the other side, did not purport to be, and was not, in fact, an ex parte or New School convention. All were invited to attend it, and some of the Old School party actually did attend. They passed in that convention these resolutions:

"*Resolved*, That while we regard with deep sorrow the existing difficulties in our beloved church, we would fondly hope that there are no insurmountable obstacles in the way of averting the calamities of a violent dismemberment, and of securing such an organization as may avoid collisions, and secure the blessings of a perpetuated harmonious action.

"*Resolved*, That we are ready to co-operate in any efforts for pacification, which are constitutional, and which shall recognize the regular standing and secure the rights of the entire church, including those portions which the acts of the last General Assembly were intended to exclude.

"*Resolved*, That a committee of three be now appointed, respectfully to communicate the foregoing resolutions to those commissioners now in session in this city, who are at present inclined to sustain the acts of the last General Assembly, and inquire whether they will open a friendly conference for the purpose of ascertaining if some constitutional terms of pacification may not be agreed upon.

This was sent to the Old School convention, and an answer was received, that they cannot for a moment consider the excinding acts of 1837 as unconstitutional, and that they have provided a fair and easy mode for the excluded to get back into the church. Now, gentlemen, here is full and complete evidence that the Old School party were determined to organize an Assembly on the principles of the exclusion of 1837. They deny the proposition of the convention, and say to them,—We mean to exclude all except those who have applied to other presbyteries, and been examined on experimental religion. In short, gentlemen, they meant to exclude the excinded from the General Assembly, unless their special regulation for re-admission were complied with, and which put the terms of re-admission completely in their power. The excluded must come back, not as members, but admitting that they are shut out, they must come asking for re-admission and for relief. There was a deliberate plan formed to exclude them entirely, until after the organization, and to organize the Assembly without them. This was the design of those Old School delegates, who took their seats in the church at nine in the morning, to be ready for the meeting of the Assembly at eleven, and of the clerks, who required the door to be shut. This was the deep-laid plan. Hence they clustered around the moderator and clerks in that part of the church, in a

manner never known before. The design was to exclude from participation in the organization of the house, all but their own clique, and to organize an ex parte, exclusive, unlawful Assembly.

I come now to the clerks. Their duty is fully pointed out in the rules:

"That the committee of commissions be instructed to examine the commissions, and to report to the Assembly on those commissions which are unobjectionable, and on those, if such there be, which are materially incorrect, or that are otherwise objectionable."

They were bound to put all the regular commissions on the roll, and to "report to the Assembly those that were incorrect or otherwise objectionable." Did they do it? No. They refused to examine the commissions from the districts cut off by these unlawful and void excinding acts, even to touch them. Now, if these acts of exclusion of 1837 were void, they ought to have been disregarded by the clerks. A void judgment of a court of record will not justify a sheriff in acting under it. And are we to be told that a mere clerk shall carry out a resolution originated in fraud, upon the rights of others, and stripping of all their rights in the church 50,000 communicants, without giving them even a chance to be heard.

Let us look next at the moderator. He too was ready to carry out these views. The first motion made in the Assembly, was that of Dr. Patton. Its object was to get these commissioners placed upon the roll. The moderator decides him to be out of order. He appeals, and the appeal is declared to be out of order. It is immaterial whether the moderator used the expression, out of order, or out of order at this time. It conveys, either way, the same idea. It was part of the plan to exclude the members from the excinded district, effect the organization without them, and through their majority, thus secured, perpetuate the excinding resolutions. Next in order comes the motion of Dr. Mason. He produces the commissions rejected by the clerks. His motion is decided to be out of order, and no appeal from the decision of this dictator, to the house, is allowed. Then Mr. Squier, a commissioner from a presbytery within the excinded district, holds his commission in his hand, free from all irregularity, and demands to be enrolled and to be allowed to take his seat; but he too, is refused. He had been with his commission to the clerks, who had refused to receive it. The Old School minutes of that year state that Joshua Moore, at the same time, came into the Assembly, presented his commission, which was received, and his name immediately, and without any motion or resolution, enrolled by the clerks. Why was this difference shown in the two cases, between Mr. Moore and Mr. Squier? Because the moderator was carrying out the acts of 1837. He was carrying out the plan. What say the minutes in respect to the interrogatories put by the moderator? Where are you from? From the Presbytery of Geneva. Is that in the Synod of Geneva? It is. Then we don't know you. You were cut off

in 1837. You can't come in unless you have been examined in experimental religion. Come after we are organized and present your case, and we will take order thereon.

Suppose the clerk had left off some of the Old School commissioners, would they have been told by the moderator, we do not know you? And what is their excuse for not receiving those commissions? They say they had called for those only which had not been presented to the clerks. Dr. Elliott's own testimony sets this right. He tells you that he called for commissions which were in connexion with the General Assembly.

If these fifty commissioners had been Old School men, would he have rejected them? No body believes it. And he would have done right in receiving them. The clerks had grossly violated their duty in not reporting all. Cannot the General Assembly correct the error of their clerk? If not, then he might have excluded all but fourteen to form a quorum, and there could be no remedy. Shall the moderator, in the plenitude of his power, say this is not the time? When is the time? They were on the eve of completing their organization. When would be the time if not then? Shall they wait till after the committee of elections has reported upon their cases? Why this committee is not appointed till *after* the organization, and then they are to pass upon those commissions only that are *informal*—not regular or constitutional. Now it is seriously contended that the clerks are clothed with all this power. The moderator did not intend to let them go to the committee of elections. Dr. Mason sought to bring these commissions before the house and he took the last point of time when he could do it. If the moderator intended to prevent it, as he unquestionably did, he took the time best fitted for *his* purpose. He refuses to entertain the motion, refuses to put the appeal. He knew they could get to the committee of elections *only through the house;* that was the only way; and he was determined to prevent their coming upon the table of the house. But, gentlemen, there is some dispute as to the words of the moderator at this time. Let us look at the Old School minutes, their own minutes of 1838. They are referred to by Dr. Elliott, who says they are true as far as they go. They say he asked if these commissioners belonged to the Assembly at the close of the session of 1837. Now if he wished to know whether these commissions had been to the clerk, this question was nonsense. If he wished to carry out the illegal acts and reject the commissions it was a pertinent question. The moderator declared Dr. Mason out of order. He called for commissions from presbyteries in connexion with the General Assembly at the close of its session in 1837. He puts out all these and calls for others. Does not this show as plain as day, that the object of the moderator was the same as the Old School convention, to keep out these commissioners? To keep them from the committee of elections even, (for that was the only door to that committee) unless they should come in afterwards and show that they had been examined on experimental religion. And the reply to Mr. Squier was to the same effect. He did not know Mr. Squier as a commissioner. He knew

him personally. He knew that Geneva was always in their connexion before. He knew Mr. Squier was entitled to his seat, except that he was cut off in 1837, and he meant to say to him, you can't come in unless you are examined on experimental religion.

Now, gentlemen, let me ask you on what possible ground the moderator refused to put the appeal to the house? By their rules the house was sufficient for this business. Now, Dr. Mason's only object was to show that the clerks had refused to do their duty. It was the first business after they were ready for business. If he had waited longer the house would have been organized. The Old School convention the day before had said they did not belong to the Assembly. The object of the moderator was plainly to prevent them from coming in. If there is any principle which is clear, it is that the moderator must allow an appeal from his decision. It is laid down over and over again in the book, no matter whether the rules are in force or not. If they are, then they give an appeal. If they are not, then, by the very nature of the case, there must be an inherent right of appeal, unless the moderator be a dictator. Now, gentlemen, I have shown you that the clerk refused to enrol these commissioners according to their own rules. The moderator refused to put motions—refused to put appeals from his own decision in violation of the established order of the Assembly. They thus were all guilty of gross violations of duty. It remains now to show that these violations of duty justify their removal.

[On the opening of the court, on Monday morning, Mr. Wood examined the construction of the excinding resolution, as to the presbyteries strictly Presbyterian in doctrine and in order getting back into the church. (See the resolution, which he read, No. 4, at the top of page 57 of this report.) This seems to imply that the presbyteries may come to the General Assembly. They cannot however, according to these excinding acts come by and through their commissioners, for the right to appoint commissioners could only exist while they are in connexion with the Assembly. Besides they cut off the synods, and this disarranges the whole Presbyterian plan. Suppose commissioners from these presbyteries should come and be admitted, there would be no synods to which they were amenable—the gradation of judicatories is destroyed. Now these synods are, as is alleged on the other side, of divine right. Then admitting these commissions from presbyteries belonging to no synod would violate the divine injunction according to their view of it. But, gentlemen, they are not of divine right by the Confession of Faith. They are only *agreeable to scripture.* The great thing is, they must come as if *out of us, not belonging to us,* and come "*to unite with us*" on examination on experimental religion.]

Gentlemen, I have shown to you that the act of 1837, was unconstitutional and void. That the Old School delegates and the moderator and clerks determined to carry out in 1838 these illegal acts. *Their* Assembly of 1838 acted on that principle of exclusion. They

excluded the commissioners from the excinded districts to the end. They began wrong and they continued wrong, and that Assembly was born rickety and lived so. In 1838, after having organized on the exclusive plan, they passed an act (reads "3d section of act I." of Old School Assembly of 1838,) declaring that no one should be considered as belonging to the Church unless he was willing to adhere to *their* Assembly, on the basis of the proceedings of 1837 and 1838; and that the minority of every subordinate judicatory so adhering should be the true presbytery. Thus they not only organized on the principle of exclusion, but they carried it out to its fullest extent to the very end, (vid. statistics) making the minority the true stock. In their statistical table they exclude us. Why then should we have waited till after their organization? Only to have given them the opportunity to perpetuate their action. Why do they tell us they would have received us back again, and have killed the fatted calf? Yes they would have killed the fatted calf for their own festival of triumph, and the exclusives alone would have eaten of the banquet. Why did they refer to the prodigal son, to that passage of scripture as remarkable for the beauty and simplicity of conception as for the fine moral it conveys? Is there any parallel? Had that son been driven out from his home and cut off without a hearing? And Missouri too, had she been thus driven out and excluded from the Union? They might better take the case of Poland, the land of Kosciusko, where despots divided the country, and drove out, without warning, a large portion of the people.

The gentlemen on the other side are entirely wrong in supposing that we meant to make a new organization. This was not so. We only meant to continue the organization already begun, on those legal principles which the others were violating. We turned out the officers for cause. If these officers had been taken sick, and others had been appointed, it clearly would not have been a new organization, but only a mere change of officers and continuance of the old organization.

The learned counsel also said that, having knocked down Mr. Cleaveland, he should give him a few more blows. This would be ungallant in a gentleman of his bearing. I will vindicate the gentleman against himself. He has not knocked Mr. Cleaveland down, nor kicked him after he was down. Had the Assembly power to remove its officers? If an officer refuses to do his duty, he may be removed. This is in the nature of all bodies. It is and must be an inherent power, or else he is dictator. Jefferson's Manual states that a speaker may be removed. See also Angel and Ames, 247: Ministerial officers may be removed at pleasure without notice. And so in the constitution: he is moderator "till another be chosen." This implies right to remove. A removal of such an officer does not disfranchise. Not so an officer who is of the essence of the corporation, as a mayor, an alderman, an integral part of the body. The case in 9th Wendell, 402, shows the power of amotion. It is there explicitly laid down that they ought to have removed the clerk. Was there cause to

remove these officers? This was no petty irregularity, no hasty sally of temper, that might happen to any man, no trivial omission of duty. It is a case of wrong, deep and deadly. No one has ever heard of such a case. This excinding process was a new machine to cut off, at one stroke, at one drop of the axe, two hundred thousand. It is isolated. It stands alone in its own gloomy grandeur. I say with pride as an American, that our civil, political and ecclesiastical history, does not furnish any thing like it. Refusing to put a motion on an appeal! They say there was no house; that the moderator and clerks are every thing; that they make the house; and that only when organized the house is ready to act. Gentlemen of the jury, you are men of business; you have all been often concerned in organizations. How do they organize bodies? The members come together, mutually exhibit their vouchers, and sit together and act in a process of organization. So here, the Assembly, in its incipient stage, is formed and constituted by prayer. They have ransacked the minutes, and find it is always so. The General Assembly then exists, not fully organized, but as a body in process of organization. The clerks report to whom? The Committee of Commissions are acting as a committee of the house. There is no house! They report to the house. There is no house! According to this notion, all is in a state of chaos until moulded and organized by the old moderator and clerks! Why, if sheep scattered through a country were to be formed into a flock, they might not be able to get on without a shepherd; but a body of rational men need no such shepherd to collect them together. They use the moderator and clerks as conveniences. Suppose there were no moderator there, or the moderator and clerks should be taken sick, could they never organize? Suppose the clerk should refuse to enrol more than ten, so that no quorum could be formed, could nothing be done? There is no house, and all must pocket their commissions and go home! I lay down this proposition, that the mutual coming together of the members, with the knowledge among themselves of their respective claims to membership, derived from a mutual exhibition of their vouchers or otherwise, constitutes a preliminary Assembly sufficient for the purpose of appointing, removing, and re-appointing officers, of establishing or changing the time and place of meeting, receiving motions, adopting resolutions, and doing all necessary and proper acts incident to the process of complete organization. The regulation that the officers of a preceding body shall officiate till others are chosen, does not divest the body thus organizing of the same power over them as it would have over officers chosen by itself. It is a mere rule of convenience, to dispense with the trouble of choosing officers in the first instance. The usual course in organizing bodies is to appoint a chairman. Some member rises and moves that A. B. take the chair, and C. D. be clerk, and a committee be appointed to examine the testimonials of the members. That was just the case here. The only difference was, that the old moderator and clerks by rule perform these services. And by the same rule, this old moderator is only to preside till another is chosen; and it was never dreamed before that the

body, in the process of organization, was completely under their control. If they will not do their duty, or if they are absent, the body appoints others. This occurs in thousands of instances every year in this country, which has in it more of these various associations than any other in the world. Now, it is true, gentlemen, the old moderator and clerks entered upon their duty, but they refused to do their duty, and a refusal to go on and complete the organization, upon principles of law, and according to the settled rules of the house, is surely equivalent to being sick or absent. The clerks, by the rule in the minutes of 1826, page 40, are bound to put *all* on the roll. They did not: they refused to enrol regular and constitutional commissioners, and violated the rule and the principle of law. The moderator refused to do his duty. Efforts were made to compel the clerks to do their duty, and the moderator refuses to put motions to the house, refuses to put appeals, makes himself a dictator, and obstructs every effort to make a constitutional organization. Is not this a refusal to do his duty? It is more: it is concert, collusive contrivance to carry out a plan, of which the Old School conventions of 1837 and 1838, the excinding acts of 1837, the pledge of the clerks, and this concert in 1838, were parts. Fraud vitiates every thing: no principle is better settled. It destroys all proceedings. Even the decisions of courts, the title to property, fines, recoveries, the strongest assurances in the laws, crumble to pieces if infected with fraud. Now, gentlemen, I do not intend to impeach motives. The moderator was under excitement: he supposed it was right to cut off his brethren by hundreds of thousands; but in law, under the laws of Pennsylvania, this is a fraud. Suppose a man becomes embarrassed and fails, and makes an assignment, but keeps back a part of his property for himself and his family. He does it conscientiously, perhaps, but it is wrong; it is in law fraudulent. So this was a fraudulent conspiracy, not only to destroy our rights, but to continue and sustain the principle of exclusion.

The next ground of objection to our proceedings is, that Mr. Cleaveland was called to order, and that a call to order arrests all proceedings. Can it be, gentlemen, that these gentlemen, who have come from Congress to instruct us in parliamentary rules, are right? Can the moderator thus preserve his power and make himself dictator? The rule that business stops on a call to order, is good for usual practical purposes. But is it true that when a chairman refuses to do all his duty, and a motion is made to remove him, if he raps with his hammer and cries order, he is safe, and the business of the meeting cannot be done? But there is another view of this matter. The motion to put these commissions on the roll was a privileged question. It must be so from the nature of the case, inasmuch as it related to the formation of the house, and of course it took precedence of all other questions. They say that there was an easy way to get these commissions on the roll; that is, through the committee of elections. Now let us advert again to the rule on that subject:

"That the committee of commissions be instructed to examine the commissions, and to report to the Assembly on those commissions which are unobjectionable, and on those, if such there be, which are materially incorrect, or that are otherwise objectionable. That those whose commissions are unobjectionable, immediately take their seats as members, and proceed to business; and that the first act be the appointment of a committee of elections, to which shall be referred all the informal, or otherwise objectionable commissions, with instructions to report thereon."

All commissions, formal and informal, must be reported upon by the clerks, the regular ones enrolled, and the informal and defective ones only go to the committee of elections. Now, the clerks had not put on all the regular commissions, as required by the rule. The house was not ready for business; the next business was not to appoint a committee of elections, but to complete the roll of regular commissions: and the effort of Patton, Mason and Squier was directed solely to getting upon the roll the regular commissions left off by the clerk; and this must be done before there can be a house fully organized to appoint a committee of elections. They say, on the other side, the motion for a committee of elections was before Mr. Cleaveland's motion. This is not so. They are mistaken. It was pending Mr. Cleaveland's motion. Their minutes, proved by the moderator to be correct, say, that while Mr. Cleaveland was speaking, Mr. Moore was enrolled; and *afterwards* it was moved to appoint a committee of elections.

Now, observe, gentlemen, here were about sixty commissioners, whose commissions were regular, and not put on the roll. Dr. Patton tries to get them on, is refused, and his appeal is refused. Dr. Mason tries, is refused, and his appeal is denied; and Mr. Cleaveland rises. There was no motion previously pending, as they say. Now, according to the principles of the other side, the house could not correct the grossest error of the clerks. It has no control over these officers.

This was carrying out their plan with a vengeance. It was for ever excluding every man from the excinded region. A more admirable plan for a casual majority, arrogant and overbearing, to perpetuate power, was never contrived.

Gentlemen, I must request your patience while I follow these gentlemen through the positions they have taken.

Another objection is, that Cleaveland's object was to have a portion organize the Assembly, excluding the Old School members, that "We," means the New School, not the General Assembly, have consulted counsel. Why, gentlemen, if there be a fact in this case proved beyond dispute, it is that their object was to secure a general organization, embracing all, as they stood in the beginning of 1837, while the other side sought a partial organization. Look at the conventions and the notes interchanged between them. The New School say they wish all to come in. The Old School say, No, you must exclude the excinded. Look at our Pastoral Letter. What is the meaning of "we," as there used? It means

the General Assembly. Look at our statistical tables, and you find that *we* means the *whole church*, New School and Old, in opposition to a clique who have determined to tear off a large limb of the church. Look at our convention. "We," means *all*. The advertisement calls for all. It opens the doors for the whole church, invites consultations and asks for the prayers of all to preserve unity and peace, declares that party-conventions are to be deprecated, invites all the delegates to meet. Some of the Old School did come, and if others did not, it was their own fault. So too, Mr. Cleaveland by "We," means *the house*, *the Assembly*, *all*, not a part, but the whole.

The next objection is, that the old moderator and clerks were not *expressly* displaced; that is, they did not say that Dr. Elliott was displaced. Gentlemen, Mr. Cleaveland's object was evidently to do as little violence to the feelings of Dr. Elliott as possible. When he rose, he faced the moderator, but turned gradually round facing the whole house, for the motion was of such a nature as not to be made to the moderator; and he stated that he wished to be as little discourteous as possible. Gentlemen, the doctrine is distinctly laid down by every writer on corporations (vid. Wilcox, 246,) that the power to amove may be used simply by appointing another; and the language of their constitution is to the same effect. He is only to preside, says that constitution, till another be chosen. Is it now right, gentlemen, to defeat all the object designed, which was to bring all the parts of the church together, Dr. Green and Dr. Barnes and all, as they were before that excision took place, because the displacing of the old officers was not formally mentioned?

But we are told that Mr. Cleaveland stated that he should proceed with as much expedition as possible. Well, gentlemen, is that wrong? Look at the circumstances. Every thing must be judged of by its circumstances. The trustees of the church had ordered that no proceedings should be had in the church except under the old moderator and clerks, manifestly forming a part of the great plan of the Old School clique to perpetuate the exclusion through the instrumentality of these officers. Mr. Cleaveland then might have said, "We cannot use this church unless we do as the old moderator and clerks choose; let us go into the street." The case of Field v. Field, in 9 Wendell, furnished by the other side, proves this. They cited this case because there the exclusives had with them the clerk and here they had the moderator: they knew, that in relying upon little circumstances like this, instead of great principles, only serves to lead us astray. But, gentlemen, we must look to principle. What is the principle of that case? Why, that if part are about to organize an exclusive, partial, and unlawful Assembly, those who wish to organize lawfully, if otherwise prevented, may take *to the open air* and organize there. In that case there was an attempt to exclude a part. Here there was an attempt to exclude a part. There the party who remained in the church had a legal right to the church. Here there was a right to the church in the exclusives also, or in those leagued with them, which is the same thing. They had a right, gentlemen, to go out of the building into

that Ranstead court, or to the nearest convenient place, and organize there. But they did not go, they staid under all their embarrassments, and made the effort to secure the co-operation of the whole church, exclusives and all.

But we are asked, why did not Dr. Fisher take the chair? Dr. Fisher says he feared a riot. Look at the circumstances: their determination to carry on their unlawful organization. Dr. Elliott plainly did not intend to allow them to do any thing. As soon as he heard the first word about *counsel learned in the law*, his hammer began to operate. Suppose Dr. Fisher had tried to take the chair. The resolution obtained from the trustees, to secure Dr. Elliott in his seat, furnished ample evidence that he did not mean to give it up. Dr. Fisher says, they were afraid of the trustees, and therefore they proceeded with as much expedition as possible, and this too after the resolutions were sent to the Old School convention, explaining the principle upon which they were to act, that *all* must be admitted. Now, suppose in the case in 9 Wendell they had addressed the other party and remained in the house, instead of organizing in the open air, surely it would have done as well as to go out of the church. They say, however, that we went to the rear of the Assembly, a position unfavourable for hearing. But, gentlemen, keep in view the circumstances. Was not this necessary? We could no' go front for the noise, the cries of *hear, order*, and for the moderator's hammer. The same principles as would justify going outside of the house to organize, would surely sustain an organization made inside of the house, in the rear. The Old School could have heard if they had been so disposed.

The next objection is, that it was very unlawful not to take the last previous moderator in lieu of Dr. Elliott. Others were present. This does not apply to the case. The rule is to take the last moderator, and if he is *not there*, then the next behind him. But he was there, refusing to do his duty, going wrong. The constitution gives the power to choose, and the person to be chosen is not limited to any class. They might choose another. That power is inherent in all bodies; to appoint another when the moderator refuses to do his duty. But suppose they should have taken the last moderator present, Dr. Witherspoon, and did not, what would have been the effect? Why the house dispenses with its own rule, it did so in 1835, and it did not vitiate. When Dr. Beman left the chair they did not go back, but took up the business where it had been left by him. Removing a moderator is not a revolutionary act, but an act in the course of business, rendered necessary by the conduct of that officer.

The next point on the other side is, that the majority was against removing the moderator. That we rely upon an intendment of law, is the burden of their song from beginning to end. How shall we ascertain the majority, gentlemen? By putting it to vote, of course. This was done, and if they would not vote, we could not make them. In Angel & Ames, 67, it is laid down that a majority of those voting prevails, even if the majority *protest against going into a vote.* This venerable institution, while under the dominion of common sense,

have established rules of their own, singularly conformable to the principles of law in all their course, as I have already remarked. Such was their wisdom before passion had obscured their judgment. Their 30th rule, found at page 455 of the book called the Confession of Faith, is explicit in regard to silent members, that they "must be considered as acquiescing." But, gentlemen, this talk about majority must be intended only to excite prejudice. A majority cannot force an illegal organization upon the minority. The case of Field v. Field, in 9 Wendell, was referred to by the other side, to show that a majority may force any thing through. Is this the principle of that case? By no means.

There, the majority tried to prevent the minority from making a lawful organization in the house, which was the usual place of meeting. The minority withdrew, went outside, and there organized under a tree, and what say the supreme court of New York? Why, that the minority was the lawful Assembly. It was in that case objected, that the minority could not organize a lawful Assembly because a minority could not form a quorum; but the court said this common law principle, that a majority of the whole is necessary to form a quorum, does not apply, because the majority principle does not apply in that religious society. The constitutional rule of the General Assembly is, that fourteen may form a quorum. The case of Field v. Field fully establishes the principle that a minority may withdraw and organize a lawful assembly, when a party, though a majority, are attempting illegally and erroneously to organize an unlawful assembly. This doctrine of majorities is much too little understood. When acting in the ordinary course of duty and within the pale of their authority, they are to prevail. In our country majorities have no right to do wrong. Suppose the case of three ship-owners, can a majority excind the other and take the whole ship to themselves? Yes, this is the principle contended for on the other side, and it is about the amount of the excinding acts.

All must have an opportunity to vote as I read to you the other day, especially in delegated bodies, where a man does not act for himself alone. But, gentlemen, don't let us stop here. I want to know how they found out they had the majority to sustain, in 1838, this principle of excision, this ecclesiastical guillotine, which cuts off without mercy. Have we not shown you that even their own party could not all be brought up to the sticking point. Look at Mr. Phelps's testimony. He says, from careful examination, they would have stood on the question of sustaining these excinding acts 136 to 140, and this is uncontradicted. They rely, on the other side, upon the majority staying with their Assembly; but this only shows that they sympathized with the Old School, but not that they approved of the excinding principle, or would have sustained the moderator and clerks in carrying it out, if the moderator had put the question to the house. If there was to be a separate organization they chose to go with the Old School. What says Dr. M'Dowell. Why he thought, as clerk that he was bound to do as he did. He was pledged to it. But how would he have voted in the house? What was his language in committee? What was his private opinion? So of others. There is not the least particle

of evidence to contradict Mr. Phelps. The truth is, that having got a majority in 1837 they are so proud of it, that they can't use any other word in describing themselves, nor any word but minority for the other party. Their own pastoral letter of 1837 shows that parties were about equally balanced. In that letter they say, "What are called the Old School and New School parties are already separated in fact; in almost every part of our country where those parties exist, they have less ministerial or Christian communion with one another than either of those parties have with Christians of other denominations; and they are so equally balanced in point of power, that for years past it has been uncertain, until the General Assembly was fully organized, which of those parties would predominate in that body." Yet they now claim to be a clear majority. Suppose they are, on what principle can they claim to trample on the minority?

Another objection is, that Mr. Cleaveland should have addressed the chair. This is a most extraordinary position. The moderator determines to keep every thing from the house, a member rises to displace him for that cause, and the motion must be made to this very moderator! It is too glaringly erroneous to admit of serious argument. Why in all cases affecting the moderator or presiding officer, personally, the motion is put by some one else. Why, if under the circumstances of the case, the moderator refusing every thing, thumping with his hammer, crying out order, &c., Mr. Cleaveland had put that motion to the moderator, the next motion of his friends should have been to send him to a mad house. In the minutes of 1835, page 7, on the question of removing the moderator, the question was put, not by the moderator, but by Dr. Ely. There is a case in the Digest, page 332, in which the moderator being interested in a question before the Assembly, withdrew, and Dr. M'Knight took the chair, without, as far as appears, any question being put. In the case cited from Gray, the house directed the clerk to put a motion. The motion that the clerk put, must have been made and put by a member. In this case, the moderator clearly would not have put it; it is ridiculous to suppose he would. Nor would the clerks have put the question. They were combined with the moderator, and like him, it would have been absurd to ask them to put the question, when the very next motion was to remove the clerks themselves. The motion was personal to the clerks as well as to the moderator. A member must put it. It was the only proper course. Really, gentlemen, it seems to me unnecessary to answer all these objections, but I must do it to satisfy my clients, and you must excuse me.

The next objection is, that the motion was not to appoint a moderator, but that Dr. Beman take the chair. Now, four-fifths of the witnesses say, that the motion was to appoint the moderator. The constitution, however, says, "take the chair;" and in common sense, there is no difference. The force and substance of the motion is, to put another in the place of the moderator.

I come, now, to the next objection. The New School did not do what they wanted the other side to do. After choosing a mode-

rator and clerks, they did not repeat the same motions which they had previously made. Now the object of the New School was to secure an entire organization of all the members; to get all on the roll. Mason and Gilbert, as soon as they were chosen, did add these excinded members to the roll. They checked from Krebs' roll, and then added the others. They put them together; they considered it the roll in their hands, and it was the roll. There was, therefore, no need of a motion to compel the clerks to do what they were willing to do, and actually did. There was no motion to put Joshua Moore on the roll, yet Krebs put him on. So Mason and Gilbert put these on without a motion. We have thus their own practice to confirm ours. But they say we cannot consider it a roll, unless the commissions are in the hands of the clerks. This is idle, gentlemen. Why, displacing the clerks is not a reorganization. It is only a continuance of the old organization. They took up the business where the old clerks left it. Can it be seriously contended, that the house cannot go on against a refractory clerk, unless by main strength they take him by the shoulders, and force the papers from him? Can he thus destroy the body?

The next objection is, that these motions are entirely out of order. This is a grand doctrine for the Old School members! There is some question as to what Dr. Elliott called for; they allege that he only said, "the next business was to appoint a committee of elections;" that is to say, no motion can be made to compel the clerks to do their duty. Nothing can be permitted to be done, the object of which is to prevent an organization without the excinded members. Every thing must be in our power. They must wait till we take order thereon; let them come on their knees, be examined on experimental religion, doctrine and church government. The whole was based on these excinding acts; and are we to be told at this time of day, in this land of law, that such acts are valid and operative? Were these commissions irregular? No. I ask every honest man, as well as religious men, if they were to be excluded by those acts? By the rule of the Assembly, the committee could not be appointed till the roll was completed. It is the next business after the house is thus ready for business; that is, after all are on the roll. This attempt to violate all right, must give the house the right to displace these officers, in the view of all sane men. Let us have the converse of the proposition. Let us suppose that our bull had gored their ox. Suppose sixty Old School commissioners like Joshua Moore, had presented themselves to New School clerks, who refuse to put them on the roll, and go on and organize partially, by which means they get a preponderance, meaning to carry their measures, and allow them to get in only as the New School clerks please. They present themselves, and say to the moderator, that the clerks had refused to put them on the roll. Would the moderator have said, "the next business is to appoint a committee of elections?" No, gentlemen. He would say, the clerks have not reported all; he would read the rule, that the clerks shall report all that are regular, and till all are thus reported,

the house is not ready for the business of appointing a committee of elections.

But there is another objection. It is said the house did nothing wrong, if the clerks and moderator did. Why, gentlemen, we don't pretend that the house did any thing wrong. It was the moderator and clerks, and for their wrong the house displaced them. If any did not choose to vote, it is no matter. And, gentlemen, we go much further than that. Suppose the majority had voted down the propositions, then the minority, being a quorum, would have a right to organize on the true principles, at the nearest convenient spot, admitting all the members. To say a delegated body has power, by a majority, to bind and manacle the minority hand and foot, is against all law. To organize an unlawful assembly, is a matter of great importance. It may become an assembly *de facto*. Its acts might be binding till questioned on direct review. The minority, however, must organize on the principle of admitting all; and, in this case, if they had chosen to come to Washington Square, to vote us down, they had a right to do it, on questions of business, but not to exclude. But they never did so. It has not been shown that there was a majority to do this. They never got the assent of a majority, in 1838, to the acts of 1837. They dared not put the motions to the house. They determined to force them through, against the majority.

The next objection, gentlemen, is, that the question was not reversed. And here the gentlemen lay much stress on the not reading of Cleaveland and Beman's depositions. These depositions could be read on the other side, and, depend upon it, if they contained evidence that the questions were not reversed, or any other evidence in favour of the defendants, they would have read them. As I before said, there was the same reason for not reading them, as for not reading Dr. Nott's, on the other side. They say, too, that Mr. Cleaveland must know what he said. But, according to their own account, he was so agitated as not to be more likely to remember than others. He did not read the paper; he spoke partly extempore, and the substance is on the minutes.

There are too many witnesses who say the question was reversed, to leave a shadow of doubt. There were also negative votes from that quarter of the house. Dr. Elliott says he heard some noes. It must have been reversed. Dr. Hill, too, whose testimony on this point must prevail, says he heard noes, and he gives the reason for his remembering it. He thought the Old School would not vote on it; if they did, they would vote it down. The testimony on this point is distinct and abundant. There can be no doubt. Witness after witness says he heard the question put, and heard noes; but there was a majority of ayes. When a number of witnesses say they did hear, others saying they did not hear do not contradict it. It is a rule of evidence, that the affirmative testimony prevails. Suppose a man walking up Chestnut street with an umbrella in his hand. Some persons say they saw the umbrella, and give reasons for remembering it; others say they did not see it; can there be any doubt whether we should believe that the man had an umbrella?

Another objection is, that we should have waited till they had organized, and then applied to be received; and the first counsel on the other side, said they would have received us, and killed the fatted calf and feasted together. In the heat of his commendable zeal, and with the eloquence which we cannot but admire, he persuades himself, and thinks to persuade you, that if you give him a verdict, still they will let us in and kill the fatted calf for us. This, too, after the acts of 1837; the pledging of the clerks; their conduct in 1838, even to their statistics; after all this, if we could believe that they would let us in, our credulity might call forth the exclamation of the Roman orator—

> "Oh judgment! thou art fled to brutish beasts,
> And men have lost their reason."

It is also objected, that there were two moderators in nomination, and there ought to have been a call of the roll, and a division. Dr. Elliot in nomination! No. There was no question but whether he should be displaced. There was no other nomination than Beman, and on their own principles, the question need not be reversed.

But they say there was no time for debate. Well, did any body want to debate? Ah! but Mr. Cleaveland prevented it, by saying he would proceed in the shortest possible time, &c. This, gentlemen, was only an apology to Dr. Elliott. It was saying that there was nothing personal to him, but if any had interfered, they could have debated. No one offered to debate. No one rose to debate. Has any one of all this long list of Old School witnesses said he wanted to debate? Not one. If any one wished to debate, he should have arisen for that purpose, and an opportunity would have been given.

They further object, that when Dr. Fisher was appointed, the rules were not read to him. Now, gentlemen, you will recollect that the witnesses said that Dr. Beman did announce to Dr. Fisher his election, and did declare that he was to be governed by the rules to be adopted. You will attend to one circumstance. It was not formerly the practice to re-adopt the rules. They were considered permanent rules. Then it was proper to read the rules to the house, through the moderator. As soon, however, as they acted upon the idea that they were not the rules till they were adopted, it ceased to be proper to read them. This old parliamentary practice, that the rules were not binding till they are re-adopted, was introduced on Mr. Breckinridge's suggestion. A change in the practice of reading should, of course, follow. It would be nonsense to read the rules which are not rules. But, gentlemen, these small matters are of no importance whatever. It is idle to waste your time on frivolous points like these. What difference does it make, whether a man rise or sit, in making a motion, or whether there be a little noise, or not. If the motion is fairly passed, such matters do not vitiate.

The next, and the last objection is, that the motion was not put to the house in so loud and distinct a voice that members could vote understandingly

Was the motion distinct and audible? There are a host of witnesses whosay it was loud. Mr. Patton, Mr. Gilbert, Mr. Norris, the Episcopalian, (by the way, I wonder how they came to find him!) was near the door in a crowd, in the very nucleus of the Old School men, and one of their own witnesses; he said it was very loud. No one denies it. If we bring witnesses from every part of the house, who say they heard it, it must have been audible. Now, Mr. Gilbert, in the south-east corner, among the Old School, heard it. Mr. Elmes, in the south-west, heard every thing, till his attention was called to the Old School disturbance. Mr. Grimell heard it all, clearly; he was near the Old School, who were whispering. He was the one who turned to them and said, "that was pretty conduct for ministers." He is unimpeached; the fact that Dr. Phillips and others did not notice it, does not invalidate his testimony. Mr. Norris, in the south-west door, heard; Mr. Dingey, in the gallery, heard all, till the appointment of Fisher, and then he was coming down stairs, and did not hear for that reason. Now, these witnesses who did hear, fully establish the fact that the motion was audible. Why did not the Old School brethren hear? Because of the noise on their part of the house. The moderator's hammer. Cries of "shame!" "order!" "What disgraceful proceedings!" "Can nothing be done to prevent it?" "I have done all I can." Coughing, scraping, &c. It was very natural that they should not hear. Dr. Phillips only says he did not hear. He found himself saying, in an under tone, "order!" "order!" "Can we not have order?" They must have been agitated themselves, and could not observe it.

They also went on and transacted business. Their own minutes (page 8) say of the time while Mr. Cleaveland was speaking: "During which, the Rev. Joshua Moore, from the Presbytery of Huntingdon, presented a commission, which being examined by the Committee of Commissions, Mr. Moore was enrolled, and took his seat.

"It was then moved to appoint a Committee of Elections to which the informal commissions might be referred." And this motion Dr. Elliott, in his testimony, says, that he, as moderator, entertained.

Here was the reception of a member, and a proposition for a committee of elections, during thet ime of Mr. Cleaveland's proceedings.

Not only did the commissioners to the Assembly make disturbance, but Dr. Miller also, a man of great mildness and politeness of manners and respectability of character, went out of himself, and though not a member, cried out, "What a disgraceful proceeding." Mr. Breckinridge was twice on the floor, and you find one of them, Mr. Boardman, rising with the Pagan maxim in his mouth, "Whom God wishes to destroy, he first makes mad." He so far forgot the propriety of his character and situation, as to apply this to his brethren. Now all this was done, to prevent what? A perfectly pacific proceeding, the whole object of which was to effect a legal and constitutional organization of the General Assembly. While they are explaining their object, apologising for their course to Christian brethren, and trying to bring in 50,000 communicants, 200,000

members of congregations, and 500 ministers, they are told by a brother, "your God wishes to destroy you; he has made you mad." And this is said to his brethren! They had worshipped together and sat together for years, but because they stand on constitutional ground, for the rights of their brethren and of the church, they are thus denounced. Another reason for not hearing was, they did not wish to hear. "There are none so blind as those who do not wish to see." So none are so deaf as those who do not wish to hear. Mr. Breckinridge, Wilson and others say they did not try to hear. No man has said he wanted to vote and could not. If you take the testimony of the witnesses, you will have no difficulty in ascertaining why the Old School did not hear and others did hear,—there is no need of impeaching character or credit.

There was a strong sympathy with the one side or the other. The Old School having the opinion which they had, that it was all wrong and disorderly, attended to the moderator, and of course did not hear the others. They, on the other hand, who believed it was all regular, they wanted to hear, and they did hear. There is no reason to believe the New School party were disorderly, they only voted a hearty and emphatic aye, and rose. Take their own witness, Professor M'Lean, of the Old School. He says, there was not more disorder than was necessary for such a proceeding. The disorder, he says, consisted in its being against the calls to order of the moderator, that is, it was, *in his opinion*, out of order.

But suppose there was some disorder, what could they do? Their only course was to go back to the middle of the church a few steps. They could not go forward. The conduct of the moderator and clerks prevented it, the resolution of the trustees prevented it. If in the case in New York they might go into the street, they might surely go back a few feet. You must think, gentlemen, from the evidence, that they did all they could to do right, and preserve order and prevent disturbance. Suppose some could not hear. Why nine-tenths of the business of the House of Representatives is done when a part of the members cannot hear from conversation or other causes, and if necessary the question is repeated. If, instead of trying to put down the movement, they had said they wished to hear, the question would have been repeated. It is too late now to say they did not hear.

But, gentlemen, in bringing this subject to a close, there is one remark made on the other side, to which I will call your attention. They say there are other suits, suits against individuals which ought to have been tried first. If there be such suits, gentlemen, let individuals attend to their own business. We have nothing to do with them. We say that here we go for the whole church. We say and contend that all are entitled. The other side say part are out of the Presbyterian Church. That question could be easily tried in such a case as this. We make that issue, and if we had taken an individual suit, they would have said, why not bring a *quo warranto* and try the general question. Trover will not lie. A mandamus will not lie, it is impracticable. A member one year, is not a member the next. The sessions are short. There could be no trial.

We do not bring this suit against Dr. A. Green, who has been so often alluded to on the other side. If we succeed, all are in the church,—Old School as well as New, Dr. Green and all. We seek to exclude no one; Dr. Green will be as before, in the enjoyment of all his ecclesiastical rights. It takes from him a mere temporal office, which would be better in the hands of a layman.

Gentlemen, I wish to see it decided, whether men can be thus cut off and stripped of their rights. In Pennsylvania, I think, there can be no hesitation as to the decision, judging from the current of decisions heretofore. And I trust there is firmness enough in her courts and juries, to pass with strict impartiality upon the rights of the parties in this cause.

Mr. Wood having concluded his argument at an early hour on Monday the 25th of March; request was made to the Court, on behalf of one of the jurors, that on account of sudden and distressing sickness in his family, the jury might be discharged till to-morrow, before receiving the charge of the court.

Judge Rogers said that he was ready to address the jury; but that in view of the consideration named, the indulgence could be granted with the consent of the parties.

The indulgence was granted, and the Court adjourned.

CHARGE OF THE COURT.

Tuesday, March 26.

At the opening of the Court this morning, the Hon. *Molton C. Rogers* addressed the jury as follows:

Gentlemen of the Jury,—In the course of the remarks which I shall make to you in relation to the cause now to be submitted to you, I shall endeavour to present all the points having a bearing on the case. I shall omit all mere collateral points which have been introduced by counsel on either side.

My anxiety is to obtain your unbiased opinion on the *facts* in the case, on which it is your province alone to determine.

My remarks will be full and decided on those points, on which I consider it my duty to expound to you the law applicable to the case.

If in any views of the law, I err, there will be no difficulty in having that error corrected before a higher tribunal.

Your closest attention is now desired to the points in this deeply interesting case.

Before the year 1758, the Presbyterian churches in this country were under the care of two separate synods and their respective presbyteries; the Synod of New York and the Synod of Philadelphia.

In the year 1758 these synods were united, and were called "the Synod of New York and Philadelphia." This continued until the year 1788, when the General Assembly was formed. The synod was then divided into four synods; the Synod of New York and

New Jersey, Philadelphia, Virginia, and the Carolinas; of these four synods the General Assembly was constituted.

In 1803, the Synod of Albany was erected. This synod has been from time to time sub-divided, and the Synods of Genessee, Geneva and Utica have been formed.

The Synod of Pittsburgh has been also erected, out of which the Synod of the Western Reserve has been formed.

These constitute the four excinded synods, viz: the Synods of Genessee, Geneva, Utica and the Western Reserve.

The General Assembly was constituted by every presbytery, at their last stated meeting preceding the meeting of the General Assembly, deputing to the General Assembly commissioners in certain specific proportions.

The Westminster Confession of Faith is part of the constitution of the Church. The constitution could not be altered, unless two-thirds of the presbyteries, under the care of the General Assembly, propose alterations or amendments, and such alterations or amendments were agreed to by the General Assembly.

The form of government was amended in 1821. The General Assembly now consists of an equal delegation of bishops and elders from each presbytery in certain proportions.

The judicatories of the church consist of the session, of the presbyteries, of synods, and the General Assembly.

The church-session consists of the pastor, or pastors, and ruling elders of a particular congregation. A presbytery, of all the ministers and one ruling elder from each congregation within a certain district. A synod is a convention of bishops and elders, including, at least, three presbyteries. And the General Assembly of an equal delegation of bishops and elders, from each presbytery, in the following proportions, viz: each presbytery consisting of not more than 24 ministers, sends one minister and one elder; and each presbytery, consisting of more than 24 ministers, sends two ministers and two elders; and in the like proportion for every 24 ministers in any presbytery. The delegates so appointed, are styled Commissioners to the General Assembly.

The General Assembly is the highest judicatory of the Presbyterian Church. It represents, in one body, all the particular churches of this denomination of Christians.

In relation to this body, the most important undoubtedly are the various presbyteries; for, as was before said, the General Assembly consists of an equal delegation of bishops and elders from each of the presbyteries. If the presbyteries are destroyed, the General Assembly falls, as a matter of course, as there would no longer be any constituent bodies in existence, from which delegates could be sent to the General Assembly.

The presbyteries are essential features in the form of government in another particular, for before any overtures or regulations, proposed by the General Assembly to be established as constitutional rules, can be obligatory on the churches, it is necessary to transmit them to all the presbyteries, and to receive the returns of at least a majority of them in writing, approving thereof.

A synod, as has been before observed, is a convention of bishops and elders within a district, including at least three presbyteries. The synods have a supervisory power over presbyteries, but unlike presbyteries, as such they are not essential to the existence of the General Assembly. If every synod in the United States were excinded and destroyed, still the General Assembly would remain as the highest tribunal in the church. In this particular there is a vital difference between presbyteries and synods. The only connexion between the General Assembly and the synods is, that the former has a supervisory power over the latter.

Having thus given you an account of such parts of the form of church government as may, in some aspects of the cause, be material, I shall now call your attention to the matter in issue.

This proceeding is what is called a "*Quo Warranto.*" It is issued by the Commonwealth, at the suggestion of James Todd and others, against Ashbel Green and others, to show by what authority they claim to exercise the office of Trustees of the General Assembly of the Presbyterian Church in the United States of America. I must here remark, that it is not only an appropriate, but the best method of trying the issue in this cause.

It is admitted, that until the 24th of May, 1838, the respondents were the rightful trustees; but it is contended by the relators, that on that day, the 24th of May, 1838, in pursuance of the act of incorporation, the General Assembly of the Presbyterian Church changed one-third of the trustees, by the election of the relators in the place and stead of the respondents.

On the 28th of March, 1799, the Legislature of Pennsylvania declared Ashbel Green and 17 others, (naming them,) a body politic and corporate, by the name and style of Trustees of the General Assembly of the Presbyterian Church in the United States of America.

The sixth section provides that the corporation shall not, at any time, consist of more than 18 persons; whereof, the General Assembly may, at their discretion, as often as they shall hold their sessions in the state of Pennsylvania, change one-third in such manner as to the General Assembly may seem proper.

It was the intention of the Legislature, by the act of incorporation, to provide for the election of competent persons, who, as an incorporated body, might, with more ease and in a better manner, manage the temporal affairs of the church. It is only in this aspect that we have cognizance of the case.

In this country, for the mutual advantage of church and state, we have wisely separated the ecclesiastical from the civil power. The court has as little inclination as authority to interfere with the church and its government, farther than may be necessary for its protection and security. It is only as it bears upon the corporation, which is the creature of the civil power, that we have any right to determine the validity, or to construe the acts and resolutions, of the General Assembly.

Although neither the members of the General Assembly, as such, nor the General Assembly itself, are individually or aggregately members of the corporation, yet the Assembly has power, from

time to time, as they may deem proper, to change the trustees, and to give special instructions for their government. They stand in the relation of electors, and have been properly denominated in the argument, *quasi* corporate. The trustees only are the corporation by the express words of the act of the Assembly.

Unhappily, differences have arisen in the church, (the nature of which it is not necessary for us to inquire into,) which have caused a division of its members into two parties, called and known as the Old and New School. These appellations we may adopt for the sake of designating the respective parties, the existence of which will have an important bearing on some of the questions involved in this important cause. It gives a key to conduct which it would be otherwise difficult to explain.

The division continued to increase in strength and virulence until the session of 1837, when certain decisive measures, which will be hereafter stated, were taken by the General Assembly, which at this time was under the control of members, who sympathise, (as the phrase is,) with the principles of the Old School.

At an early period, the Presbyterian Church, at their own suggestion, formed unions with cognate churches, that is, with churches whose faith, principles and practice, assimilated with their own, and between whom there was thought to be no essential difference in doctrine.

On this principle a Plan of Union and correspondence was adopted by the Assembly in 1792, with the General Association of Connecticut, with Vermont in 1803, with that of New Hampshire in 1810, with Massachusetts in 1811, with the Northern Associate Presbytery in 1802, and with the Reformed Dutch Church, and the Associate Reform Church in 1798.

These conventions, as is stated, originated in measures adopted by the General Assembly in 1790 and 1791. The delegates from each of the associated churches not only sat and deliberated with each other, but also acted and voted by virtue of the express terms of the union.

In further pursuance of the settled policy of the church to extend its sphere of usefulness, in the year 1801, a Plan of Union between the Presbyterians and Congregationalists was formed.

The plan, which was devised by the fathers of the church to prevent alienation and to promote harmony, was observed by the General Assembly without question by them, until the year 1835, a period of thirty-four years.

At that time it was resolved by the General Assembly, that they deemed it no longer desirable that churches should be formed in their Presbyterian connexion, agreeably to the plan adopted by the Assembly and the General Association of Connecticut, in 1801. They, therefore, resolved that their brethren of the General Association of Connecticut be, and they hereby are, respectfully requested to *consent* that the said plan shall be, from and after the next meeting of that Association, declared to be annulled. And also resolved, that the annulling of said plan shall not in any wise

interfere with the existence and lawful association of churches which *have been already formed* on this plan.

To this resolution no reasonable objection can be made, and if the matter had been permitted to rest here, we should not have been troubled with this controversy. It had not then occurred to the Assembly that the Plan of Union was unconstitutional. The resolutions are predicated on the belief that the agreement or compact was constitutional. They request that the Association of Connecticut would *consent* to rescind it. It does not seem to have been thought that this could be done without their consent. And moreover, the resolution expressly saves the rights of existing churches which had been formed on that plan.

I must be permitted to regret, for the sake of peace and harmony, that this business was not suffered to rest on the basis of resolutions which breathe the spirit of peace and good feeling. But unfortunately the General Assembly, in 1837, which was then under another influence, took a different view of the question.

"As the 'Plan of Union,' adopted for the new settlements, in 1801, was originally an unconstitutional act on the part of that Assembly—these important standing rules having never been submitted to the presbyteries—and as they were totally destitute of authority as proceeding from the General Association of Connecticut, which is invested with no power to legislate in such cases, and especially to enact laws to regulate churches not within her limits; and as much confusion and irregularity have arisen from this unnatural and unconstitutional system of union, therefore it is resolved, that the Act of the Assembly of 1801, entitled a 'Plan of Union,' be, and the same is hereby abrogated." See Digest, pp. 297—299.

The resolution declares the Plan of Union to be unconstitutional. 1st, because those important standing rules, as they call them, were not submitted to the presbyteries; and secondly, because the General Association of Connecticut was invested with no power to legislate in such cases, and especially to enact laws to regulate churches not within their limits.

The Court is not satisfied with the force of these reasons, and does not think the agreement, or Plan of Union, comes within the words or spirit of that clause in the constitution which provides, that before any overture or regulations shall be proposed by the General Assembly to be established as constitutional rules shall be obligatory on the churches, it shall be necessary to transmit them to all the presbyteries, and to receive the returns of at least a majority of them approving thereof. Nor is it, in the opinion of the court, in conflict with the constitution before its amendment in 1821, which provides that no alteration shall be made in the constitution unless two-thirds of the presbyteries under the care of the General Assembly propose alterations or amendments, and such alterations or amendments are agreed to by the Assembly.

It was a regulation made by competent parties, and not intended by either as a constitutional rule; nor was it obligatory on any of the Presbyterian Churches within their connexion. Those who were competent to make it, were competent to dissolve it without

the assent of the presbyteries, as such, which could not be done, were it a constitutional rule, within the meaning of the constitution. Whether one party may dissolve it, without the consent of the other, it might be unnecessary to decide. My opinion is that they can. The Plan of Union is intended to prevent alienation, and to promote union and harmony in the new settlements.

It is not a union of the Presbyterian *Church* with a Congregational Church, or churches, but it purports to be, and is, a Plan of Union between individual members of the Presbyterian and Congregational churches, in that portion of the country which was then denominated the New Settlements. It is advisory and recommendatory in its character—has nothing obligatory about it. A Congregational church, as such, is not by force of the agreement incorporated with the Presbyterian Church. It has no necessary connexion with it; for it is only when the congregation consists partly of those who hold the Congregational form of discipline, and partly of those who hold the Presbyterian form, and there is an appeal to the presbytery, (as there may be in certain cases,) that the Standing Committee of the Congregational church, consisting partly of Presbyterians and partly of Congregationalists, may, or shall attend the presbytery, and may have the same right to sit and act in the presbytery as a ruling elder. And whatever may have been occasionally the instances to the contrary, this I conceive to be the obvious construction of the regulation. That part of the agreement was intended as a safeguard, or protection of the rights of all the parties to be affected by it, without any design to confer upon the Standing Committee all the rights of a ruling elder.

I view it as a matter of discipline, and not of doctrine, the effect of which is to exempt those members of the different communions, who adopted it, from the censures of the church to which they belong, and particularly the clerical portion of them.

The Court is also of the opinion, that after an acquiescence of nearly forty years, and particularly after the adoption by the presbyteries of the amended constitution of 1821, the Plan of Union is not now open to objection. The plan has been recognized by the presbyteries at various times, and in different manners, under the old and amended constitution. It has been acted on by them and the General Assembly in repeated instances, and is equally as obligatory as if it had received the express sanction of the presbyteries in all the forms known to the constitution.

That acquiescence gives right, is a principle which we must admit. The constitutionality of the purchase and admission of Louisiana as a member of the Union, was doubted by some of the wisest heads and purest hearts in the country; but he would be a very bold man, indeed, who would now deny that state, and Mississippi, Arkansas, and Missouri, to be members of the confederation. In the memorable struggle for the admission of Missouri into the Union, this objection was never taken.

Nor am I satisfied with the second reason, that the General Association of Connecticut was invested with no power to legislate in such cases, and especially to enact laws to regulate churches not

within their limits. Although the General Assembly had the right to annul the Plan of Union without the assent of the General Association of Connecticut, yet I must be permitted to say, that after having acted on the plan, and reaped all the advantages of it, it is rather discourteous, to say the least of it, to attempt to abrogate it without the consent of the other party. Although the Association may be an advisory body, yet it does not appear that any difficulty has been started by them, or by the churches under their control. All parties acquiesced in it for thirty-six years, and it would be too late for either now to object to its validity. Nor is there any thing in the idea that they have no power to regulate churches not within their limits. This is a matter of consent, and there is nothing to prevent churches in one state from submitting themselves to the ecclesiastical government of churches located in another state. The Presbyterian Church has furnished us with repeated examples of this kind.

So far from believing the Plan of Union to be unconstitutional, I concur fully with one of the counsel, that, confined within its legitimate limits, it is an agreement or regulation, which the General Assembly not only had power to make, but that it is one which is well calculated to promote the best interests of religion.

If, as is stated, the standing committee of Congregational churches have claimed and exercised the same rights as ruling elders in presbyteries, and in the General Assembly itself, it is an abuse which may be corrected by the proper tribunals; but surely that is no argument, or one of but little weight, to show that the Plan of Union is unconstitutional and void.

Although, in the opinion of the Court, the Assembly have the right to repeal the Plan of Union without the consent of the General Association of Connecticut, yet it was unjust to repeal it, without saving the rights of existing ministers and churches. But this is a matter, the propriety of which they must determine.

But whether the Plan of Union be constitutional or not, is only material so far as it is made the basis of some subsequent resolutions, to which your attention will now be directed.

At the same session, and after failure of an attempt at compromise, the character of which has been the subject of much comment, the General Assembly "resolved, that by the abrogation of the Plan of Union of 1801, the Synod of the Western Reserve is, and is hereby declared to be, no longer a part of the Presbyterian Church."

"*Resolved*, That in consequence of the abrogation by this General Assembly of the Plan of Union of 1801, between it and the General Association of Connecticut, as utterly unconstitutional, and therefore null and void from the beginning, the Synods of Utica, Geneva, and Genessee, which were formed and attached to this body, under and in execution of said Plan of Union, be, and are hereby declared to be, out of the connexion of the Presbyterian Church in the United States of America, and that they are not, in form or in fact, an integral portion of said church."

These resolutions refer only in name to the four synods, and if we were called on for the construction alone, it might be well doubted whether they were intended, or could be made to include, the presbyteries within their limits, the constituents or electoral bodies of the General Assembly itself. I should be inclined, for the purpose of protecting their rights from a resolution so penal in its character, to say that they were not included, either in the spirit or the words of the resolution. But this construction we are prevented from giving by their declarative resolution. It is there in effect said, that it is the purpose of the General Assembly to destroy the relations of all said synods and all their constituent parts to the General Assembly and to the Presbyterian Church in the United States. In the fourth resolution it is declared, that any presbytery within the four synods, being strictly Presbyterian in doctrine and order, who may desire to be united with them, are hereby directed to make application, with a full statement of their case, to the next General Assembly, which will take proper order thereon.

There is no mistaking the character of these resolutions. It is an immediate dissolution of all connexion between the four synods and all their constituent parts, and the General Assembly. They are destructive of the rights of electors of the General Assembly. The connexion might be renewed, it is true, by each of the presbyteries making application to the next General Assembly, but they are at liberty to accept or refuse them, provided they, the General Assembly, deem them strictly Presbyterian in doctrine and order. As they had the right to admit them, they had the right, also, to refuse them, unless, in their opinion, they were strictly Presbyterian in doctrine and order.

By these resolutions, the commissioners, who had acted with the General Assembly up to that time, were deprived of their seats. At the same time, four synods, with twenty-eight presbyteries, were cut off from all connexion with the Presbyterian Church. The General Assembly resolved, that because the Plan of 1801 was unconstitutional, those synods and their constituent parts are no longer integral parts of the Presbyterian Church.

You will observe, that I have already said the Plan of Union is constitutional. That reason therefore fails. They have resolved that it is not only unconstitutional, but that it is null and void from the beginning. Instead of a *prospective*, they have given their resolutions a *retrospective* effect, the injustice of which is most manifest.

But admitting that the Plan of Union is unconstitutional, null and void, from the beginning, I cannot perceive what justification that furnishes for the exciding resolutions. The infusion of Congregationalists with the presbyteries, or the General Assembly itself, does not invalidate the acts of the General Assembly. They had a right, notwithstanding the charter, which recognizes elders and ministers as composing the Presbyterian Church, to perform the functions committed to them by the constitution. And among them to establish and divide synods, to create presbyteries, as in their judgment the exigencies of the church might demand.

Accordingly, we find that the four synods, and all the presbyte-

ries attached to them, have been formed since the year 1801. The Assembly creates the synods, and the synods the presbyteries. Sometimes the Assembly creates the presbyteries—a course pursued with some of the presbyteries which have been excinded. They have been established since, but this is no evidence that the four excinded synods were formed and attached to the General Assembly under, and in execution of, the Plan of Union. The compact, as has been before observed, was intended for a different purpose, and imposed on the Presbyterian Church no obligation to admit churches formed on the plan, as members. It was a voluntary act, and not the necessary result of the agreement; nor does it appear that the presbyteries were formed and incorporated with the church on any other terms or conditions than other presbyteries, who were in regular course taken into the Presbyterian connexion.

But, gentlemen, when resolutions of so unusual a character, so condemnatory, and so destructive of the rights of electors, the constituents of the Assembly itself, are passed, we have a right to require that the substantial forms of justice be observed. But so far from this, the General Assembly, in the plenitude of its power, has undertaken to exclude from all their rights and privileges twenty-eight presbyteries, who are its constituents, without notice, and without even the form of trial. By the resolutions, the commissioners, who had acted as members of the General Assembly for two weeks, were at once deprived of their seats. Four synods, twenty-eight presbyteries, five hundred and nine ministers, five hundred and ninety-nine churches, and sixty thousand communicants, were at once disfranchised and deprived of their privileges in this church.

This proceeding is not only contrary to the eternal principles of justice, the principles of the common law, but it is at variance with the constitution of the church.

This is not in the nature of a *legislative*, but it is a *judicial* proceeding to all intents and purposes. It is idle to deny that the presbyteries within the infected districts, as they are called, were treated as enemies and offenders against the rules, regulations, and doctrines of the church. If there is any thing that a man values, it is his religious rights.

And of this opinion were the General Assembly themselves; for, only a few days before, they came to the following resolutions:

"*Resolved*, 1. That the proper steps be now taken to cite to the bar of the next Assembly, such inferior judicatories as are charged by common fame with irregularities.

"2. That a special committee be now appointed to ascertain what inferior judicatories are thus charged by common fame, prepare charges and specifications against them, and to digest a suitable plan of procedure in the matter, and that said committee be requested to report as soon as practicable."

Nothing further appears to have been done in this matter in the General Assembly, for, after failure of the attempt at compromise,

they appear to have discovered a much more expeditious, if not a more agreeable method of effecting their object.

I have said that excinding the presbyteries without notice, and without trial, was not only contrary to the common law, but it was contrary to the constitution of the church. And it is only necessary to open the book of discipline to see how very careful the fathers of the church have been to secure to the accused a full, fair and impartial trial.

Notice is given to the parties concerned, at least ten days before the meeting of the judicatory. The accused are informed of the names of all the witnesses to be adduced against them. When the charges are exhibited, the time, places and circumstances are stated, if, by possibility, they can be ascertained; citations are issued, signed by the moderator or clerk, by order, and in the name of the judicatory.

Judicatories are enjoined to ascertain, before proceeding to trial, that their citations have been duly served. And, to secure a fair and impartial trial, the witnesses are to be examined in the presence of the accused, who is permitted to ask any question tending to his own exculpation. The judgment, when rendered, is regularly entered on the records of the judicatory.

If these proceedings, before judgment, are requisite in the case of the meanest member of the church, (the omission of which, by any of the inferior judicatories, would call down on the offenders the severest censure of the General Assembly,) it is inconceivable that similar precautions are not necessary to protect the rights of presbyteries, which consist of many individuals, from the injustice, violence, and party spirit of the General Assembly itself. Constitutions are intended to protect the weak, the minority, from the injustice of the majority.

The majority, for the most part, are able to protect themselves. It is the minority that need protection, and for this purpose it is necessary to encircle them with at least all the *forms* of justice.

This, as has been before observed, is a judicial act; and if a regular trial had been had, and judgment rendered, the sentence would have been conclusive. We should not have attempted to examine the justice of the proceeding; but inasmuch as there have been no citations, and no trial, I instruct you, that the resolutions of the General Assembly excinding the four Synods of Utica, Geneva, Genessee, and the Western Reserve, are *unconstitutional*, *null* and *void*.

The judgments of all courts, whether ecclesiastical or civil, whether of inferior or superior judicatories, are absolutely void when rendered without citations, and without trial, and without the opportunity of a hearing.

But admitting this to be in the nature of a legislative proceeding, still it is void; for I deny the right of any legislature to deprive an elector of his right to vote, either with or without trial.

This is a power which can only be exercised by a judicial tribunal, who act under the sanction of an oath, who examine witnesses

on oath, and who conform to all the rules of evidence established by the usages of the law.

If the Legislature of Pennsylvania should dare, by resolution or otherwise, to deprive one of you, gentlemen, of your right as an elector, it would be the duty of the Court to declare such an act null and void. I am unable to distinguish the difference between the two cases.

Whether the General Assembly are the proper tribunal, in the first instance, for the trial of offences, or whether the presbyteries are amenable to their judicatories, in this or any other mode, it is unnecessary to decide; as the Court are clearly of the opinion, that if they have the right, it must be exercised with the same rules and regulations which are applicable to the inferior judicatories.

Personal process in each case may be "tedious, agitating and troublesome in the highest degree;" but it is obviously not impossible. Nor does it strike me as impossible to devise a plan under the constitution to correct heresy and schism, without resort to personal process in each case. But if it were so, this is an excuse, but it is no justification of the excinding resolutions.

Offenders, according to the rules of the church, may be brought before a judicatory by common fame. But I perceive no power given to convict on common fame.

You will remark, gentlemen, that the presbyteries, by the constitution of the church, are the electors of the General Assembly. Their right of representation has been taken away without trial, without the examination (as far as we know) of a single witness.

Whether these presbyteries have Congregational churches in their connexion, is not now material. It is possible that had a trial been had, that point, which is deemed so important, might have been disproved. At any rate, it would seem a singular reason for dissolving a whole presbytery, that one church was contaminated with false and heretical doctrines, or doctrines not strictly Presbyterian; that a whole presbytery should be ejected, because a single church was governed without the benefit of ruling elders. It would be a reason, perhaps a good one, for cutting off that church from the Presbyterian connexion, but none for casting out the whole presbytery. And this, gentlemen, would be particularly severe on the members and congregations, when the fact was known at the time the presbytery was created that such connexion did exist.

If, however, after having condemned this (as it is called) unnatural connexion, the presbyteries should obstinately continue to adhere to it, then they would justly expose themselves to the severest censures of the church. But whether there is any mode known to the constitution, by which a presbytery can be deprived of the right of representation on the floor of the General Assembly, is a point which is not necessary to the case, and which I shall not undertake to decide.

I have been requested by the respondents' counsel to instruct you, that the introduction of lay delegates from Congregational establishments into the judicatories of the Presbyterian Church, was a violation of the fundamental principle of Presbyterianism, and a

contradiction of the Act of the Legislature of Pennsylvania, incorporating the Trustees of the church: that any act permitting such introduction would therefore have been void, although submitted to the presbyteries. As an abstract question on this point, I give an affirmative answer, although, gentlemen, I am unable to see the bearing it has on the matter at issue in this cause.

You have already seen that the Court is of the opinion, that the excinding resolutions are unconstitutional, null and void; yet this did not of itself dissolve the General Assembly. The General Assembly was dissolved only at the termination of its sessions. You will perceive in the course of the remarks which I shall have to make to you, that the acts of this Assembly will have an important influence on the proceedings of the Assembly of 1838.

The General Assembly of the Presbyterian Church is entitled to decide upon the right claimed by any one to a seat in that body, but unlike legislative bodies, their decision is the subject of revision. Ecclesiastical judicatories are subject to the control of the law.

I also instruct you, that a *Mandamus* would not reach the case, for before the remedy could be applied, the General Assembly would be dissolved, and it would be impossible to foresee whether the next Assembly would persist in their illegal and unconstitutional course of conduct. You will recollect that the commissioners are elected a short time before the meeting of the General Assembly, and that that body, which sits but a few weeks for the transaction of business, is dissolved, and a new General Assembly is called at the termination of the sessions.

Having thus disposed of the proceeding of the General Assembly of 1837, we will now direct our attention to the acts of 1838. It will perhaps conduce to a proper understanding of the somewhat extraordinary proceedings which then took place, to advert to the practice of the General Assembly in times of less excitement and interest than existed on that occasion.

After the business of the Assembly is finished, the General Assembly is dissolved, and another General Assembly is directed to be chosen in the same manner, to meet at a time and place designated by the Assembly.

The moderator, or in case of his absence, another member appointed for the purpose, opens the next meeting with a sermon; he is directed to hold the chair till a new moderator be chosen. As this is for the purpose of organization, it is not necessary that he be a member, nor is it necessary that the clerks should be members, who are requested to attend for the same purpose.

By the practice of the Assembly, in pursuance of a regulation for that purpose, the stated and permanent clerks are a standing committee on commissions. To them are submitted the commissions of members; they decide on them in the first place, and if unexceptionable in form or substance, they are enrolled as members of the house: if exceptionable, they report them as such in a separate list. The moderator, after divine service, opens the session with prayer. He takes his seat as moderator, and proceeds to organize the house. The first business in order is the report of the

clerks, who are the Committee on Commissions, who make a report stating on the roll those who are members, and designating either in the roll, or in a separate list, those whose commissions have been examined and found defective either in form or in substance.

The next business in order is to appoint a committee on elections from the list of members who have been enrolled.

To that committee are referred the commissions of such persons as may claim seats, whose commissions have been examined and rejected.

It is usual to appoint the committee on elections on the morning of the first day of the session, and they, unless in cases of difficulty, report to the house in the afternoon, and the house decides upon the propriety of the report. It would seem also to be the practice, that when a commissioner has omitted to hand in his commission to the clerks, before the meeting of the Assembly, he may do so in the Assembly, and the Committee of Commissions may add his name to the roll of members.

After the house is organized, they proceed to the choice of a moderator, and stated and permanent clerks, to preside over their deliberations, and to keep their records during their session.

You will observe that I am speaking of the rules of practice in the sessions of 1837 and 1838.

As the church increased in numbers, and, I may add without giving offence, after the spirit of contention increased also in the same or a greater ratio, the simplicity of the ancient practice gradually changed. The changes have been stated with great clearness by one of our venerable fathers, but as we have to do with existing rather than ancient rules, it is not necessary for me to notice them.

The jury will recollect that the Court has decided that the excinding resolutions of the General Assembly of 1837, were unconstitutional, null and void.

It results from this opinion, that the commissioners from the presbyteries within the bounds of these synods, had the same right to seats in the General Assembly as the members from other presbyteries within the jurisdiction of the Assembly, and were liable to be dealt with by them in the same manner as commissioners from other presbyteries.

It was under these circumstances they presented themselves, with commissions in proper form, to Mr. Krebs and Dr. M'Dowell, the clerks of the former Assembly. They not only rejected their commissions, but refused to put their names on the roll at all.

I shall not now stop to inquire whether these gentlemen were, or were not, pledged to the course they thought proper to pursue, nor into the question whether they were the judges of the constitutionality of an act of a former Assembly, as I am clearly of the opinion, and I so instruct you, that they grossly erred in refusing to place their names on the list of rejected applicants. They were the committee on commissions to whom such questions are in the first place referred. It was their duty to decide on the propriety of the application and to refer the decision to the further action of the House,

by adding their names to the roll of members whose commissions had been examined and rejected.

They cannot consider commissions, in other respects regular, as alien and outlawed, merely because they proceeded from presbyteries that had been unconstitutionally put out of the pale of the church without citation and without trial.

It is, therefore, the opinion of the Court, that in this there was a palpable violation of the rights of the proscribed commissioners. And this, gentlemen, was the second error committed, and which led to the scene of disorder which ensued, so little creditable to a Christian Assembly.

After the moderator, Dr. Elliott, had taken the chair, Dr. Patton addressed the chair, and stated that he had certain resolutions to offer. The moderator decided that he was out of order, that the first business was the report of the clerks, who, you will recollect, were the committee on commissions.

Dr. Patton stated that his motion or resolution had reference to the formation of the roll, that it was his intention to make his motion and have the question taken without debate. The moderator said the clerks were proceeding with their report. Dr. Patton reminded the moderator that he had the floor before the clerks. The moderator still decided he was out of order, whereupon Dr. Patton respectfully appealed from the decision of the chair. The moderator decided that the appeal was out of order, and stated as a reason for the decision, that there was no House to which the appeal could be taken.

The Court is of the opinion that the decision of the moderator was correct, for the reason given by him. It is a rule of the Assembly that no persons shall be permitted to vote unless they are enrolled, and until the report of the committee on commissions it cannot be judicially known who are members of the house, and as such, privileged to take part in the organization. If, however, there was a majority for it, arising from the absence of the moderator or the refusal of the clerks to report the roll, there would be no difficulty in organizing the Assembly. The decision of the moderator was correct, if the reason assigned was the true reason.

After this disposition of Dr. Patton's motion, the clerks made a report, omitting, improperly, as has been before stated, the names of the commissioners from the excinded presbyteries, and the moderator announced to those who had not presented their commissions, that now was the time to present them, and have themselves enrolled. Some of the witnesses say that the moderator announced that, if there were any names *omitted*, this was the time to present their commissions. The one side say that this was a distinct intimation from the moderator himself, that now was the time to present the commissions of the commissioners from the excinded presbyteries. The other say it included those only who had *not* presented their commissions to the clerks. That the only course to be pursued as to those who had presented their commissions and had their claim to be enrolled, refused, was to have their case referred to the com-

mittee on elections, on whose report only it would come properly before the Assembly.

However the fact may be, and this of course you will decide, at this time Dr. Mason, a member whose seat was uncontested, and who had been reported by the clerks to the house as a member, moved that the names of the commissioners from the excinded synods should be added to the roll. He had the commissions in his hand, and at the time of the motion, stated that they were the commissions of commissioners, which had been rejected by the clerks. The moderator inquired from what presbyteries those commissioners came. Dr. Mason replied, they came from the Synods of Utica, Geneva, Genesee and the Western Reserve. The moderator declared Dr. Mason *out of order*, or said that he was out of order at that time. The witnesses differ as to the precise expression, but whatever may have been the reason assigned, they all coneur that the moderator declared Dr. Mason out of order. Dr. Mason said, that with great respect for the chair, he must appeal from the decision. The appeal was seconded. The moderator refused to put the appeal, declaring the *appeal* to be out of order.

In this stage of the cause it is unnecessary to decide whether the original motion was or was not out of order. I shall put this part of the case on the refusal of the moderator to put the question on the appeal. The question is not whether an appeal may not be out of order, but it is whether this appeal was out of order. If the moderator had put the question on the appeal, it is possible the house might have decided that the original motion was out of order. They might have thought that the matter was properly referable to the committee of elections—that it was a privileged question; or the Assembly might by possibility have taken a different view of the question. And whatever they might have thought and decided, would have been conclusive.

But by refusing to put the question, the moderator took all the power to himself over this question. No reason was given by the moderator. It rested simply upon *his will*. In the opinion of the Court, it was a dereliction of duty—a usurpation of authority, which called for the censure of the house. He could not then allege, as he had done on a former occasion, that there was no house to which the appeal could be taken. At that time, you will recollect, that the clerks had made their report, and it was then ascertained what members had a right to vote.

Had the question on the appeal been allowed, it could then have been ascertained whether a motion had been made for the appointment of the committee on elections. As it is, it is doubtful whether the motion was made before or after the motion made by Dr. Mason.

And here, let me remark, that I look upon the refusal of the clerks to put the names of the commissioners on the roll, and this refusal of the moderator to put the question on an appeal to the house, as most unfortunate.

If the excitement did not *then* commence, yet it, with the uproar and confusion which ensued, from this time greatly increased. After the refusal of the moderator to allow an appeal, the Rev. Miles

P. Squier arose and said, that he had presented his commission to the clerks, which they had refused to receive. The moderator asked from what presbytery he came. He said from the Presbytery of Geneva. The moderator asked if it was within the bounds of the Synod of Geneva. He said it was. The moderator then replied, *we do not know you.* The precise meaning and import of these words has been the subject of comment. It will be for you to give them such weight as you think them entitled to, in another part of this cause.

And here, let me remark, that the witness had not a right, (whatever injustice he may have suffered,) either to speak or vote on any question before the house. He had not been reported as a member by the clerks; and the rules of the General Assembly required, that before a member speak or vote, he must be enrolled.

To this time the witnesses substantially agree in their statement. There was but little noise, and but little confusion. Every person saw, and every person heard, all the transactions in the Assembly.

And here, gentlemen, it will be your solemn duty, respectfully, but firmly, to decide upon the conduct of the moderator.

Was he performing his duty as the presiding officer of the house in its organization? or was he carrying out the unconstitutional and void proceedings of the General Assembly of 1837, which cut off from the body of the Presbyterian Church, 4 synods, 28 presbyteries, 509 ministers, and near 60,000 communicants, without citation and without trial?

I put the question to you because it is the opinion of the Court, that the General Assembly has a right to depose their moderator, upon sufficient cause.

This power is necessary for the protection of the house, otherwise the moderator, instead of being the *servant* would be the *master* of the house. There is nothing in the constitution of the church that restricts or impairs the right.

It applies to all moderators, whether moderators for the session, or moderators for organization. The right is, perhaps, less questionable in the latter, than in the former case. He is a ministerial as well as a judicial officer.

Nor do I think that they are restrained in their choice to a moderator of a former year, who may be present. That rule applies only to ordinary cases, when the moderator of the last year is not in attendance, or is unable, from some physical reason, to discharge the duties of the office. It does not apply to the peculiar and extraordinary circumstances of this case.

The deposition of a moderator, and the election of another in his place, it appears, is not without precedent in the history of the church.

There is one thing certain, that the deposition of a moderator, and the election of another, if in other respects regular, will not of itself vitiate the organization.

After Mr. Squier had taken his seat, upon the emphatic declaration of the moderator, "we do not know you," Mr. Cleaveland arose. Mr. Cleaveland held in his hand a paper, from which he read, at

the same time accompanying it with remarks not on the paper. It is not distinctly in evidence what he did say, but in substance it was perhaps this:

That as the commissioners to the General Assembly of 1838, from a large number of presbyteries, had been refused their seats, and as we have been advised by counsel learned in the law, that a constitutional organization of the Assembly must be secured at this time and in this place, he trusted it would not be considered as an act of discourtesy, but merely a matter of necessity, if we now proceed to organize the General Assembly of 1838, in the fewest words, the shortest time, and with the least interruption practicable.

Mr. Cleaveland then moved that Dr. Beman, of the Presbytery of Troy, be moderator, or, as some of the witnesses say, that he take the chair. The motion being seconded, the question was put by Mr. Cleaveland, and was carried, as the witnesses for the relators say, by a large majority, and by this they mean that a large majority of voices voted in the affirmative. The question was reversed, and, as the same witnesses say, there were some voices coming from the south-west corner of the church, who voted in the negative. This is denied by the respondents.

Dr. Beman, who was sitting in a pew, the locality of which has been described to you, stepped into the aisle and called the house to order. A motion was then made that Dr. Mason and Mr. Gilbert be appointed clerks. There being no others put in nomination, the question was put by the moderator, Dr. Beman, in the affirmative and negative, and there was a majority of voices in their favour.

Dr. Beman then stated, that the next business in order was the election of a moderator. A member nominated Dr. Fisher, and no other person being in nomination, the question was put affirmatively and negatively, and Dr. Fisher was elected by a large majority of voices. There were no negative votes on this nomination; several of the witnesses say he was unanimously elected.

Dr. Beman then announced the election of Dr. Fisher as moderator, and said, he should govern himself by the rules which might be hereafter adopted.

Dr. Fisher stepped into the aisle, moved towards the north end of the church, and called for business; and Dr. Mason and Mr. Gilbert were chosen clerks, no others being put in nomination.

Dr. Beman stated that some difficulties had been made by the trustees about the occupation of the church in which they were then sitting. To avoid difficulty, a motion was made to adjourn to meet forthwith at the lecture-room in the First Presbyterian Church. The question was taken on the motion, and was decided in the affirmative, there being no votes in the negative. The result of this vote was announced by Dr. Fisher, who then stated, that if there were any commissioners who had not presented their commissions, they might then and there attend for that purpose. The members of the house then repaired to the lecture-room of the First Presbyterian Church, proceeded with their business, and on the 24th of May, 1838, elected the relators trustees, in the place and stead of the respondents.

This is the relators' case, and here I will direct your attention to some of the points which have been raised by the respondents' counsel.

The respondents contend, that Mr. Cleaveland had no right to put the question. They object, also, to the time and manner of putting the question. Under one or other of these points I will endeavour to include the question which has been raised, and which has been argued with such force and with such a variety of illustrations.

Had Mr. Cleaveland a right to put this question? It must be conceded, that unless he was authorized to take the sense of the house, the members were not bound to vote upon it. In ordinary cases, it is usual for a member who moves a question, to put it in writing, and deliver it to the speaker, who, when it has been seconded, proposes it to the house, and the house are then said to be in possession of the question. But this, the relators say, is not an *ordinary* question, but one of a peculiar nature. They allege, that the moderator had shown gross partiality and injustice in the chair; that he was engaged in a plan or scheme to carry out the unconstitutional and void acts of 1837, which deprived certain commissioners of their seats; that this authorized the house to displace him, and to elect another to discharge the duties which he failed or was unwilling to perform. If this were so, of which you are the judges, Mr. Cleaveland had a right to take the sense of the house on the propriety of the moderator's conduct. It would be worse than useless to require him to put the question on his own deposition, for this the house were authorized to believe he would refuse to perform, as he had failed in the performance of his duty before. The law compels no person to do a vain or nugatory thing. The law maxim is, "*Lex neminem cogit ad vana, seu impossibilia.*" Nor, gentlemen, was it necessary that it should be taken by clerks, if they, as well as the moderator, were engaged in the same plan, to deprive members of seats to which they were justly and constitutionally entitled. It is the opinion of the Court, that a member, although not an officer, is entitled to put a question to the house in such circumstances.

The motion which Mr. Cleaveland made, after explaining his object, was either that Dr. Beman be moderator, or that Dr. Beman be called to the chair. It is of no consequence in which form the motion was made. They are substantially the same. The motion amounted to this: that Dr. Elliott, who occupied the chair, should be deposed, and that Dr. Beman should be elected chairman and moderator in his stead. It was a pertinent question, easily understood, and not calculated to mislead the dullest member of the Assembly. It was in proper form and in proper time: for, gentlemen, it was not necessary to precede it by a motion that the house should now proceed to the choice of a moderator. All these requisites are substantially comprised in the motion which was made. There was nothing in the question, or in the manner of putting it, which was disorderly, or which should have led to disorder. Mr Cleaveland put the question to the house, which, under certain cir-

cumstances, of which I have already said you are the judges, he had a right to do. In the course of his remarks, he turned himself partly round from the moderator; but this, so far as any point of law is involved, is of no sort of consequence. It is also contended by the respondents, that the claim of members to seats, according to the standing order of the house, was referable to the committee on elections, and further, that the house cannot enter into business until the organization is complete. The latter point the Court answers in the negative. There is no doubt the house may elect a moderator, although the seats of some of the members are contested. In general, they would prefer to await the report of the committee on elections; but this would be a matter of discretion. The right to seats would be as well, if not better decided, after the house was organized by the election of a moderator, as when it was in its inchoate or incipient state. Such an objection would not vitiate the organization, whatever cause there might be on the part of those who had been deprived of seats, to complain of the precipitation of the Assembly in proceeding to business, particularly if done with a view of preventing them from partaking in the business.

In deciding on the first point, and others which have been raised by the respondents, it is necessary to advert to the nature of the questions themselves.

Dr. Mason moved that the names of certain members who had been unconstitutionally and unjustly deprived of seats in the Assembly, should be added to the roll. The motion of Mr. Cleaveland, and the subsequent resolutions or motions, were the consequences of the decision of the moderator, that Dr. Mason's motion was out of order, and the refusal of the moderator to allow an appeal to the house. The right of members was unjustly invaded, and from this moment it became a question of privilege, which overrides all other questions whatever. A question of privilege is always in order, to which, privileged questions, such as the appointment of a committee of elections, must give way. The cry, therefore, of "order," from the moderator, or from any member whatever, under such circumstances, would be disorderly. Two inconsistent rights cannot exist at the same time, and it is obvious that if a member, or the moderator, may put a stop to a proceeding which involves in it the conduct of the moderator himself in the discharge of his high functions, and a question of privilege, by the cry of order, it would be an easy and effectual mode of destroying the rights of members in any deliberative assembly. It is usual, when it is intended to prevent a member from proceeding with a motion, to rise to order, and a requisition is then made by the moderator that the member take his seat. It is the opinion of the Court, that Dr. Mason had the right to make his motion before the appointment of the committee on elections. Indeed, I know of no other mode of getting this question before the committee on elections, except by bringing it before the house, who might either decide it themselves, or, if they thought proper, refer it to that committee, in whose report it would again come before the house. In this point, I wish you distinctly to understand, that it is the opinion of the Court, and

that I so instruct you, that if you believe that the conduct of the moderator and clerks was the result of a preconcerted plan with a portion of the members to carry out the unconstitutional and void acts of 1837, which deprived the members from certain presbyteries of seats in the Assembly, then, in this particular, the requisitions of the law have been substantially complied with.

That the fact that Mr. Cleaveland put the question, instead of the moderator, the cries of order when this was in progress, the omission of some of the formula usually observed when there is no contest and no excitement, such as standing in the aisle, instead of taking the chair occupied by the moderator, not using the usual insignia of office, putting the question in an unusual place, and the short time consumed in the organization of the house, and three or more members standing at the same time, will not vitiate the organization, if you should be of the opinion that this became necessary from the illegal and improper conduct of the adverse party.

It is a singular point, gentlemen, that this part of the respondents' case rests upon standing rules which were not then in existence. You will recolleet, that each Assembly adopted its own rules; indeed, both the relators and respondents have appealed to these rules. I will remark, that the roll of members reported by Mr. Krebs and Dr. M'Dowell was the roll of the house. As such, it was virtually in the possession of the clerks afterwards chosen, provided they were regularly and duly elected. It is the opinion of the Court that the existence of a house competent to perform all the functions of a General Assembly, does not depend on the observance or nonobservance of the standing order of the house. You, however, must take this opinion with the qualification that you believe that the house had been substantially organized for the transaction of business; that you should believe that the deviation from the accustomed course was the necessary result of a preconcerted plan unconstitutionally to exclude the members from the excinded presbyteries from their seats in the Assembly. And here, gentlemen, let me request your particular attention to the point in issue. The relators say that they are trustees regularly appointed by the General Assembly of the Presbyterian Church. In other words, they affirm that the house which assembled in the lecture-room of the First Presbyterian Church was the General Assembly of the Presbyterian Church. This is an affirmative proposition, which the relators are bound to support.

The question is not which is the General Assembly, but whether they are the General Assembly, and as such had a right to elect the relators trustees. This allegation the relators must sustain to your satisfaction, otherwise your verdict must be in favour of the respondents.

The respondents strenuously deny that the portion of brethren who assembled in the First Presbyterian Church are the General Assembly. On this point, both parties, the relators and respondents, have put themselves upon the country; and you, gentlemen, are that country.

Let me now briefly call your attention to the relators' case. The

moderator, Dr. Elliott, proceeded to organize the house. The clerks, Mr. Krebs and Dr. M'Dowell, reported to the house the roll of members, omitting those who were not entitled to seats. Dr. Patton offered a resolution on the formation of the roll. This motion was declared by the moderator to be out of order; also his appeal was declared to be out of order. Dr. Mason then moved that the names of the members from the presbyteries within the excinded synods should be added to the roll. This motion was declared by the moderator to be out of order. An appeal from that decision was demanded, which was also declared to be out of order. On motion of Mr. Cleaveland, the former moderator was deposed for sufficient cause, and Dr. Beman was elected moderator, and Mr. Gilbert and Dr. Mason were elected clerks. After organization, Dr. Fisher was elected moderator, and Mr. Gilbert and Dr. Mason elected clerks for the Assembly. The Assembly being thus organized by the appointment of officers, adjourned to meet forthwith at the lecture-room of the First Presbyterian Church, and accordingly met in pursuance of the adjournment, and on the 24th of May, 1838, in due form, elected the relators trustees. This, gentlemen, is a summary of the plaintiffs' case; and if the facts are as stated, your verdict should be rendered in favour of the relators.

The respondents deny that the portion of brethren who assembled in the First Presbyterian Church, are the General Assembly.

Their objection, in addition to the points which have been already stated, is, that there was not a full and free expression of the opinion of the house.

They allege that the various motions for the appointment of moderator and clerks, and for the adjournment, were not carried by a majority of the house.

It is hardly necessary to observe that spectators had no right to vote, nor had members not enrolled by the clerks, although entitled to seats, a right to vote. But notwithstanding this, it is the opinion of the Court, that if, after deducting those who voted and were not entitled to vote, there was a clear majority in favour of several motions, this irregularity, or, if you please, something worse, would not vitiate the organization. The presumption is, that none but qualified persons voted; but there is proof that some voted who were not enrolled, yet this of itself will not destroy the relators' right of action. You, gentlemen, will, in the first place, inquire whether there was a majority of affirmative voices of members entitled to a vote.

If there was not, there is an end of the question, and your verdict must be in favour of the respondents.

But if there was a majority, you will further inquire whether the question on the several motions was reversed.

If they were not reversed, your verdict must be in favour of the respondents; for in that case it is very clear the members had no opportunity of showing their dissent to several motions or propositions which were submitted to them.

These, gentlemen, are questions of fact for your decision. I will content myself with referring to the evidence and the arguments of the counsel, and at the same time observing to you that it is your duty to reconcile the testimony of your case, and with one other observation, that affirmative testimony is more to be relied on than negative testimony.

And here, gentlemen, I wish you distinctly to understand, that it is the majority of those who were entitled to vote, and who actually voted, that is to be counted on the various questions which were submitted to the house. I wish you also to understand, that it is the majority of members that had been enrolled, that must determine this question. When there is a quorum of members present, the moderator can only notice those who actually vote, and not those who do not choose to exercise their privilege of voting. "Whenever," says Lord Mansfield, "electors are present, and don't vote at all, they virtually acquiesce in the decision of those who do."

And with this principle, agrees one of the rules of the General Assembly itself, which must be familiar to every member.

"Members (30th rule,) ought not, without weighty reasons, to decline voting, as this practice might leave the decision of very interesting questions to a small proportion of the judicatory. Silent members, unless excused from voting, must be considered as acquiescing with the majority."

This is not only the doctrine of the common law, of the written law, as you have seen, but it is the doctrine of common sense; for without the benefit of this rule, it would be almost impossible, certainly very inconvenient, to transact business in a large deliberative assembly.

Of this rule, gentlemen, we have had very lately a most memorable instance. The fundamental principles of your government have been altered; a new constitution has been established by a plurality of votes; forty thousand electors, who deposited their votes for one or other of the candidates for governor, did not cast them at all on that most interesting and important of all questions. But notwithstanding this, the amended constitution has been proclaimed by your executive, and recognized by your legislature and by the people, as the supreme law of the land. This, gentlemen, has been stigmatized as a technical rule of law, a fiction and intendment in law. It is sufficient for us, gentlemen, that it *is* a rule of law. We must not be wiser than the law; for if we attempt this, we endanger every thing we hold dear; our life, our liberty, our property.

Nor, gentlemen, can we know any thing of any fancied equity as contradistinguished from the law. The law is the equity of the case, and it must be so considered under the most awful responsibility, by this court and this jury. In my opinion, a court and jury can never be better employed than when they are vindicating the safe and salutary principles of the common law.

But the respondents further object that the design of the New School brethren was not to organize a General Assembly according to the forms prescribed by the constitution, but that they intended,

and it was so understood by them, to effect an ex parte organization, with a view to a peaceable separation of the church. If this was the intention, and was so understood at the time, the house which assembled in the First Presbyterian Church, cannot be recognized as the General Assembly, competent to appoint trustees under the charter. Having chosen voluntarily to leave the church, they can no longer be permitted to participate in its advantages and privileges. If a member, or a number of individuals, choose to abandon their church, they must at the same time be content to relinquish all its benefits.

But this is a question of fact, which you must decide. In this part of the case, the burthen of proof is thrown on the respondents. They must satisfy you that such was the intention of the New School party, in organizing the house, and adjourning to the First Presbyterian Church. But granting that the motion of Mr. Cleaveland was in order, that Drs. Beman and Fisher, and the clerks had a majority of votes, that the intention was to organize the General Assembly, and that they did not intend an ex parte organization, the respondents say that such was the precipitation and haste of these proceedings, their extraordinary and novel character, the noise, tumult and confusion, that they and the other members of the house had no opportunity of hearing and voting, if they had wished to do so, and that therefore this is an attempt at organization, which is null and void.

It is very certain, that if individual members of a deliberative assembly, by trick and artifice, by surprise, noise, tumult and confusion, carry such a question as this, it ought not, it cannot be regarded. The members must have an opportunity to debate, to vote if they desire it, and for this reason it is, the negative question must be put, and that the several questions must be reversed.

It will be for you to say, whether the members had this opportunity. To this part of the case, I request your particular attention.

If you believe that the several motions were made and reversed, that they were carried by a majority of affirmative voices, whatever may be your opinion of the relative strength of the two parties in the Assembly, your verdict must be for the relators. I hold it to be a most clear proposition, that silent members acquiesce in the decision of the majority. It is of no sort of consequence for what reason they were silent; whether from a previous determination, or otherwise. The effect is the same, provided they had an opportunity of hearing and voting on the question. It is not necessary that all should hear or vote.

If persons who are members of an assembly, by surprise, by noise, or violence, carry such a question, such a vote cannot be considered as the deliberate sense of the assembly; but when members are aware of the nature of the proceedings, and choose to treat them with contempt, or to interrupt the business themselves, by stamping, noise, talking, cries of order, or shame! shame! or requesting silence with a view to interruption, or attending to other business, when they ought to be attending to this, they cannot be permitted afterwards to allege that they had no opportunity to vote.

They cannot take advantage of their own wrong, or their own folly. In such a case, their silence, or, if you choose, noise, shall be viewed as an acquiescence in the vote of the majority. But when members are prevented from hearing and understanding the question by the noise and confusion, or by the indecent haste with which the business is conducted, the organization is not such as can give it any legal validity. It is of no consequence whether the members are prevented from voting understandingly on the question by the persons engaged in conducting the business, or by the spectators. But when it comes from the members of the other party, they shall not be permitted to object, when they themselves are the causes of the difficulty.

If the facts be so, they (the members of the Old School,) did not hear, because they would not hear; they did not vote, because they would not vote. They caused the disorder, and let them reap the bitter fruits of their injustice. The court, and you, gentlemen of the jury, have nothing to do with consequences, with fancied majorities and minorities, but with majorities legally ascertained. We are placed at this bar under an awful responsibility to do justice, without regard to the numerical strength of the contending parties.

If you, gentlemen, believe that the questions were not reversed, that they were not carried, that the members of the Assembly had not an opportunity of hearing and voting upon them, your verdict should be in favour of the respondents. But if, on the other hand, you believe they intended to organize the Assembly; that the questions were severally put; that the noise, tumult and confusion which prevailed in the Assembly, were the result of a preconcerted plan, or combination, or conspiracy between the clerks, the moderator, and the members of the Old School party, to sustain the unconstitutional and void resolutions of 1837, which deprived members of seats to which they were justly entitled, your verdict should be in favour of the relators.

And here I do not wish to be understood as having expressed, or even intimated an opinion as to the facts of the case. The facts are for you, the law is for the Court.

And now, gentlemen, I entreat you, *as you shall answer to God at the great day*, that you discard from your minds all partiality, if any you have, fear, favour and affection; that you decide this interesting cause according to the evidence, and that you remember that the law is part of your evidence. The Court, and you, gentlemen, are placed at this bar under an AWFUL RESPONSIBILITY TO DO JUSTICE.

VERDICT.

The jury, after a short absence, returned into Court and rendered their verdict, which, as read to them, and ordered to be recorded, is, "THAT THEY FIND THE DEFENDANTS GUILTY."

Some question was made by counsel for the defendants, in regard to the *form* of the verdict, when it was announced from the bench, that the Chief Justice had prescribed this as the technical form of

the verdict, (under the issue in this case,) if the jury should find that the relators were the trustees of General Assembly; that is, that the Assembly which held its sittings in the First Presbyterian Church, was the true "General Assembly of the Presbyterian Church in the United States of America," under the charter.

SUPREME COURT IN BANK.

On the 29th of March, 1839, *F. W. Hubbell, Esq.*, for the defendants, moved the Court for a rule on the plaintiffs, to show cause why a new trial should not be granted.

The rule was granted, and the 17th of April assigned for hearing the argument. The following papers were filed by the counsel for the defendants.

I. *Specification of Points on which the Defendants intend to rely, in support of the Motion for a New Trial.*

1. His honour, the judge, erred in refusing to permit the defendants' counsel to cross-examine the plaintiffs' witnesses, touching a plan of action concerted between these witnesses and others, previous to the 17th of May, 1838, for the government, &c., of their conduct, in or on the occasion of the organization of the General Assembly of the Presbyterian Church, for the year 1838.

2. In refusing to permit the defendants to give evidence of the existence of the concert, mentioned in the first point, and to explain the nature and character thereof.

3. In not charging the jury upon certain points submitted to him in writing, by the defendants' counsel; which points so submitted, are hereto annexed.

4. In refusing to permit the defendants to give evidence that the churches of the synods, which were disowned in 1837, had not contributed to the funds under the control of the General Assembly.

5. In not permitting the defendants to prove the existence of Congregational or mixed churches, within the bounds of the disowned synods, and in connexion with those synods.

6. In not permitting the defendants to prove:—That many churches and ministers had complied with the terms by which the disowning resolutions, or acts, were qualified: that they had applied to the presbyteries most convenient to their respective localities, and had been admitted into them.

7. In permitting the plaintiffs' concluding counsel, to read passages from the minutes of the Old School General Assembly of 1838; which had not been given in evidence, particularly as the plaintiffs had objected to the defendants reading the whole of these minutes in evidence, and this objection had been sustained by the Court.

8. In rejecting the deposition of Dr. Eliphalet Nott, except such part merely as narrated the transactions that took place at the organization of the General Assembly of 1838.

9. In charging the jury, that the acts of the General Assembly of the Presbyterian Church, of the year 1837, by which the synods of the Western Reserve, Genessee, Geneva and Utica, and their component parts, were disowned or declared to be no longer in ecclesiastical connexion with the Presbyterian Church, were unconstitutional and void.

10. In charging the jury, that the Plan of Union (so called,) of 1801, was constitutional.

11. In charging the jury, that the two reasons assigned by the General Assembly of 1837, declaring that Plan of Union to be unconstitutional, were not sufficient reasons; these reasons were as follows, viz:

1st. Because they were important standing rules, and adopted without being submitted to the presbyteries.

2dly. Because the General Association of Connecticut was invested with no power to legislate in such cases, and especially to enact laws to regulate churches not within their limits.

12. In charging the jury that said agreement or Plan of Union, did not come within the words or spirit of that clause of the constitution of the Presbyterian Church, which provides: "that before any overture or regulation proposed by the General Assembly to be established as constitutional rules, shall be obligatory on the churches, it shall be necessary to transmit them to all the presbyteries, and to receive the returns of at least a majority of them in writing, approving thereof." Nor was it (his honour charged the jury,) in conflict with the constitution, before its amendment in 1821, which provides, "that no alteration shall be made in the constitution, unless two-thirds of the presbyteries under the care of the General Assembly, agree to alterations or amendments proposed by the General Assembly."

13. In charging the jury, "That the Plan of Union" was a regulation made by competent parties, and not intended by either as constitutional rules; nor, was it obligatory on any of the Presbyterian churches in their connexion.

14. In charging the jury, "That that part of the agreement, (Plan of Union,) which provides that the standing committee of the churches, consisting partly of Presbyterians, and partly of Congregationalists, may or shall attend the presbytery, and may have the same right to sit and act in the presbytery, as a ruling elder, was intended as a safeguard to the rights of all the parties to be affected by it."

15. In charging the jury, that "I view it" (Plan of Union,) "as a matter of discipline, and not of doctrine; the effect of which is to exempt those members of the different communions who adopted it, from the censures of the church to which they belonged; and particularly the clerical portion of them."

16. In not permitting the defendants to prove that there were, at the time of the disowning acts, numbers of Congregational churches,

and churches on the mixed plan, within the bounds of those synods so disowned; and that these churches were represented in the presbyteries composing these synods, by unordained, lay delegates.

17. In not permitting the defendants to prove, that at the date of the disowning acts, there were, within the bounds of the disowned synods, numerous churches on the mixed and Congregational plan; formed under the Act of Union of 1801, and connected, by means of that act, with the Presbyterian Church.

18. In charging the jury, "That after an acquiescence of near forty years, and, particularly, after the adoption by the presbyteries, of the amended constitution of 1821, the Plan of Union is not now open to objections. The plan has been recognized by the presbyteries at various times, and in different manners, under their old and amended constitution. It has been acted upon by them and the General Assembly, in repeated instances; and is equally as obligatory as if it had received the express sanction of the presbyteries, in all forms known to the constitution."

19. In taking from the jury the question of acquiescence by the presbyteries, in the Plan of Union of 1801. The facts of recognition, or forbearance, which enter into the idea of acquiescence, were facts for the jury. To support the position of acquiescence, it was necessary that the presbyteries which were declared to have acquiesced, should have had full knowledge, or the means of knowledge, that there were churches and presbyteries formed on the Plan of Union, and claiming rights under the Plan of Union. The existence of such knowledge, or means of knowledge, is a fact for the determination of the jury.

20. In charging the jury, that the "Plan of Union" did not provide that the delegates from standing committees from mixed churches under the Plan of Union to the presbyteries, should exercise the same rights as ruling elders in those presbyteries.

21. In charging the jury that it was unjust in the General Assembly to repeal the Plan of Union, without saving the rights of existing ministers and churches.

22. In charging the jury that there had been acquiescence in the rights claimed under the Plan of Union for thirty-six years; there being no proof that any of the churches formed upon that plan, had existed thirty-six years.

23. In charging the jury in regard to the fourth resolution; which provides the method by which churches, ministers, and presbyteries, within the disowned synods, who are strictly Presbyterian in doctrine and order, may continue their connexion with the General Assembly and the Presbyterian Church; inasmuch as he represents, that it only provides for presbyteries, and omits the provisions in favour of churches and ministers.

24. In charging the jury that the resolutions of 1837, disowning the four synods, were in the nature of judicial proceedings, and that the presbyteries within the four synods, were treated as criminals and offenders against the rules, regulations, and doctrines of the church.

25. In charging the jury in regard to the resolutions of 1837,

"That the proper steps be now taken to cite to the bar of the next Assembly, such inferior judicatories as are charged, by common fame, with irregularities," &c.; that nothing further appears to have been done in this matter in the General Assembly.

26. In charging the jury that the proceedings of the General Assembly of 1837, in regard to the four synods, were not, nor was any part of them, conclusive in this collateral inquiry.

27. In charging the jury that to effect the objects proposed by the disowning resolutions of 1837, it was necessary that citations should have issued to the presbyteries within the bounds of these synods; and that all other judicial process prescribed in the book of discipline, should have been resorted to.

28. In charging the jury, that the disowning of these synods was depriving electors of their right to vote; and in declaring that it was not distinguishable from an attempt by the legislature of Pennsylvania, by resolution, or otherwise, to deprive one of the jurors of his right as an elector.

29. In charging the jury, that "The presbyteries, by the constitution of the church, are the electors of the General Assembly; their right has been taken away without trial, and, so far as we know, without the examination of a single witness."

30. In charging the jury, that it is now immaterial whether the presbyteries in the disowned synods have Congregational churches in their connexion or not; and that it was possible, if a trial had been had, that fact might have been disproved; "at any rate, it would be a singular reason for ejecting a whole presbytery, because a single church was governed without the benefit of ruling elders."

31. In charging the jury, that although he was of opinion that the introduction of lay delegates from Congregational Establishments, into the judicatories of the Presbyterian Church, was a violation of the fundamental principles of Presbyterianism, and in contradiction of the act of the legislature of Pennsylvania incorporating the trustees of the church; and that any act permitting such introduction would be void, although submitted to the presbyteries; yet he was unable to see the bearing of this proposition on the matter in issue in this cause.

32. In charging the jury, that although the General Assembly is entitled to decide on the right claimed by any one to a seat in that body; yet that, unlike legislative bodies, their decision is the subject of revision; and that ecclesiastical judicatories are subject to the control of the law.

33. In charging the jury, that a mandamus would not reach this case; for, before the remedy could be applied, the General Assembly would be dissolved, and it would be impossible to foresee whether the next Assembly would persist in their illegal and unconstitutional course of conduct.

34. In permitting evidence to be given on the issue joined in this case, of the proceedings, actings and doings of the General Assembly of the year 1837.

35. In charging the jury, "That the committee of commissions grossly erred in refusing to put the names of the commissioners

from the four synods, on the list of rejected applications. It was their duty to decide on the propriety of the application, and to refer the decision to the further action of the house, by adding their names to the roll of members whose commissions had been examined and rejected." "It is, therefore, the opinion of the Court, that in this there was a palpable violation of the rights of the proscribed commissioners."

36. In referring it to the jury to decide, whether the proper course of those whose commissions had been rejected by the committee of commissions, was to have the same referred to the committee of elections or not.

37. In charging the jury, "that Dr. Elliott's declining to put Dr. Mason's appeal, was a dereliction of duty—a usurpation of authority, which called for the censure of the house; that he could not then allege, that there was no house to which the appeal could be taken. At that time, the clerks had made their report, and it was ascertained what members had a right to vote."

38. In repeatedly stating to the jury, "that 60,000 communicants had been cut off from the body of the Presbyterian Church," there not being any evidence to that effect.

39. In committing to the jury, to find, whether Dr. Elliott "was performing his duty as the presiding officer of the house, or was he carrying out the unconstitutional and void proceedings of the General Assembly of 1837."

40. In charging the jury, "that there is nothing in the constitution of the church, which restrains or impairs the right of the house, to depose their moderator for sufficient cause; whether he be moderator for the session or for the organization."

41. In charging the jury, "that the house was not restricted in their choice of a moderator, to a moderator of a former year who may be present; that rule applies only to ordinary cases, when the moderator of the last year is not in attendance, or is unable, from some physical reason, to discharge the duties of the office. It does not apply to the peculiar and extraordinary circumstances of this case."

42. In charging the jury, "that Mr. Cleaveland had a right to make the motion, that Dr. Beman take the chair—that said question need not, under the circumstances of the case, be put by the clerks, or one of them—that the question amounted to this, viz. that Dr. Elliott, who occupied the chair, should be deposed, and that Dr. Beman should be elected in his stead—that it was a pertinent question, easily understood and not calculated to mislead the dullest member of the Assembly. It was in a proper form and in a proper time: for, gentlemen, it was not necessary, to precede it by a motion, that the house should now proceed to the choice of a moderator. All things requisite are substantially comprised in the motion which was made."

43. In charging the jury, "that the refusal of the moderator to put the appeal was a breach of privilege, in which not only Dr. Mason, but the whole house was interested: they might have pro-

ceeded against him for a breach of privilege, or they might depose him on the ground of partiality and injustice."

44. In charging the jury, "there was nothing in the question or in the manner of putting it which was disorderly, or which ought to have led to disorder."

45. In charging the jury, that "the motion of Mr. Cleaveland, and the subsequent resolutions or motions, were the consequence of the decision of the moderator that Dr. Mason's motion was out of order, and refusal of the moderator to allow an appeal to the house. The right of members was unjustly invaded, and from this moment it became a question of privilege, which overrides all questions whatever. A question of privilege is always in order, to which, privilege questions such as the appointment of a committee of elections, must give way. The cry, therefore, of "order" from the moderator or from any member whatever, under such circumstances, would be disorderly."

46. In charging the jury, that "Dr. Mason had the right to make his motion before the appointment of the committee of elections. Indeed, I know of no other mode of getting this question before the committee of elections, except by bringing it before the house, who might either decide it themselves, or, if they thought proper, refer it to that committee, on whose report it would again come before the house."

47. In charging the jury, "that the fact that Mr. Cleaveland put the question, instead of the moderator; the cries of "order" when this was in progress, the omission of some of the formalities usually observed when there is no contest, and no excitement; such as standing in the aisle, instead of taking the chair occupied by the moderator; not using the usual insignia of office, &c.; putting the question from an unusual place; and the short space of time which was consumed in the organization of the house; and three or more members standing at the same time; would not vitiate the organization, if you should be of opinion, that this became necessary, from the illegal and improper conduct of the adverse party."

48. In charging the jury, "that this part of the respondents' case rests upon standing rules that were not then in existence. You will recollect that each Assembly adopts its own rules."

49. In charging the jury, "that the roll of members reported by Mr. Krebs and Dr. M'Dowell, was the roll of the house. As such, it was virtually in the possession of the clerks afterwards chosen, provided they were regularly and duly elected."

50. In charging the jury, "that the existence of a house competent to perform all the functions of the General Assembly, does not depend on the observance or non-observance, of the standing orders of the house. You must take this opinion with qualifications," &c.

51. In charging the jury, in application to this case, "that affirmative testimony is more to be relied on, than negative testimony."

52. In charging the jury that the proceedings of the General Assembly of 1837, had any bearing or operation on the General Assembly of 1838, or that any design, by any portion of the members of the Assembly of 1838, to carry into effect the acts of the Assem-

bly of 1837, could have any effect upon the organization of 1838, or confer any rights upon any person whatever to violate or set aside rules of order.

53. The verdict of the jury is not a proper finding upon the point in issue between the parties.

54. The respondents having pleaded severally, to the information or suggestion filed in this case, and having different defences to the same, the verdict is erroneously given against them jointly.

55. The verdict of the jury is against law and the evidence.

56. His Honour, the judge, erred in not putting the position of the defendants, in regard to the design of the "New School party," fully to the jury. The defendants contended, among other things, that the "New School party" designed to form an organization, in despite of and against the will of the majority, however expressed; and that Mr. Cleaveland's motion was not addressed to them, and had they voted negatively on the same, their votes would not have been regarded.

57. In charging the jury that the real state of the parties as to majority or minority, was in no respect to be regarded, that the majority was only to be known by the vote.

(Signed,) F. W. HUBBELL, *for Defendants.*

March 29, 1839.

II. *Additional Specifications of Points, on which the Defendants will rely on the motion for a new trial.*

The resolutions adopted by the General Assembly of 1837, were within its jurisdiction, as an ecclesiastical tribunal, and were duly passed; and they are not subject to the control or decision of the courts of justice.

The language of the moderator in the preliminary Assembly of 1837, in addressing the Rev. Mr. Squiers, was not precisely or even substantially the language quoted by the judge.

The judge erred in omitting to give due effect (in the proceedings of 1838,) to the fact, that the members did not understand, and could not hear the propositions, which are said to have been submitted to them; and in pronouncing the call to order, by individuals of the Old School party, itself out of order.

The evidence was clear, positive and unquestionable, that no opportunity was given to the members who attended in 1838, to debate the propositions that are said to have been introduced; yet the judge withdrew the attention of the jury from the true point, which was, that there being no opportunity for debate, whether the proceedings were thereby vitiated.

The judge omitted to charge, that in a scene of tumult and disorder, such as was admitted on all sides to exist, there was necessarily suspension of effectual measures, and that any thing which occurred at such a juncture was without operation or effect.

The judge charged, that if the organization of the New School party was intended to be ex parte, with a view to a separation, the General Assembly so organized, could not be recognized, &c.; yet he refused to permit evidence to be given by the defendants of the

circumstances that attended that organization, and of the intention of the New School party, as manifested by their preliminary acts and declarations.

The judge erred in declaring, that if the members had an opportunity of hearing and voting, the majority of those entitled to vote, and who actually voted, is to be counted; and that it is of no sort of consequence, for what reason the silent members are silent. Whereas, the silence may have proceeded from an inability to know what were the measures proposed, and that inability produced by the precipitancy and disorder of the New School party: and the omission to vote might have proceeded from the calls to "order" on the part of a presiding officer yet occupying the chair.

The burthen of proof rested on the party objecting to the resolutions of 1837, to show the invalidity of these resolutions; every fair presumption being in their favour; yet no proof whatever was given of the facts alleged in the protest of the New School party, as sufficient to impair the resolutions.

(Signed,) F. W. HUBBELL, *for Defendants.*

III. *Points upon which the Judge was asked to charge the Jury.*

His honour, the Judge, is respectfully requested to charge the jury on the following points:

That the act of the General Assembly of the Presbyterian Church for the year 1837, abrogating the Plan of Union of 1801, was constitutional and valid.

That the act of that Assembly declaring the Synod of the Western Reserve not to be a portion of the Presbyterian Church, was within the constitutional powers of the General Assembly, and, therefore, conclusive; and not capable of being impeached in this collateral inquiry.

That the act of that Assembly declaring the Synods of Utica, Genessee and Geneva, and their constituent parts, to be out of the ecclesiastical connexion of the Presbyterian Church of the United States of America, and that they are not, in form or fact, an integral portion of the said church, was within the constitutional powers of the General Assembly, and, therefore, conclusive; and not capable of being impeached in this collateral proceeding.

That the General Assembly of the Presbyterian Church is entitled to decide upon the right claimed by any one to a seat in that body, or in other words, on any claim of membership.

That the General Assembly of 1801, being a representative or delegated body, and a party to the arrangement, called "the Plan of Union" of 1801, any of the succeeding General Assemblies, who are affected in the exercise of their power by that arrangement, are entitled to declare that arrangement void, and so treat it, whenever it bears upon any of the acts or doings of these General Assemblies; provided the General Assembly of 1801 exceeded the authority delegated to it, by entering into that arrangement. And this, independently of the question, whether the General Assembly's powers be judicial or legislative.

That the General Assembly having the power to determine on the right or claim of membership, whenever the right of membership is claimed under the "Plan of Union" the General Assembly has a right to treat that "Plan of Union" as void, and to refuse seats to, or to deprive all such persons of their seats who claim under that "Plan of Union."

When the constituent, viz., a presbytery, is composed in part of materials furnished by the "Plan of Union," or of other unconstitutional materials, or in other words, when it is composed partly of unordained lay delegates from Congregational churches, then the General Assembly, as incidental to the power of judging of the qualifications of those claiming membership, is entitled to require such presbyteries to expurge these unconstitutional materials.

That the introduction of unordained lay delegates from Congregational Establishments into the judicatories of the Presbyterian Church, was a violation of the fundamental principles of Presbyterianism; and in contravention of the act of the legislature of Pennsylvania, incorporating the trustees of this church; that any act permitting such introduction, would therefore have been void, although submitted to the presbyteries.

That the "Plan of Union" contemplated but a temporary aid to the churches formed under it, and guarantied to them no continued connexion with the Presbyterian Church, unless they adopted its discipline and form of government. There is, therefore, no breach of faith, in refusing to such churches a further continuance of connexion.

That the body which held its sessions in the First Presbyterian Church, in the spring of 1838, have by their own acts acknowledged the continued existence of the General Assembly of 1837, up to its formal dissolution.

These acts of acknowledgment, are,

1st. By organizing at the time and place fixed by the decree of that body, on the last day of its session.

2dly. By recognising the validity of an election of trustees by that body, after the Synod of the Western Reserve had been disowned.

That the acts of the General Assembly of 1837, being powerless to render void the organization of 1838, are foreign to the issue now trying; except so far as the *defendants* might have invoked their aid, to explain or justify the acts of the committee of commissioners in forming the roll of 1838.

The General Assembly of 1838, did not reject the delegates or commissioners from the four disowned synods; and did not, in any wise, recognize or adopt these disowning acts of the General Assembly of 1837.

The committee of commissions for the year 1838, possessed the power, under the standing rules of 1826, to determine on the constitutionality of the commissions presented to them; and to refuse to put them on the roll for that reason. That, in the exercise of this power, they are only amenable to the General Assembly; and the propriety of their decisions can only be reviewed by that body.

That, by the standing rules of the General Assembly, (vide Rules

of 1826,) the commissions which were rejected by the committee of commissions, must be referred to a committee of elections.

That, by the same standing rules, the first business of the General Assembly, after the Assembly is constituted with prayer, is, to hear the report of the committee of commissions on the roll.

That no commissioner has a right to vote, or otherwise participate in the business of the house, until his name is so reported.

That until such report is made, there is no house to transact any business, or to entertain any motions or appeals.

That the motion of Dr. Patton being made before the committee of commissions had reported, was out of order, irregular, and nugatory; as was likewise his appeal, there being no house to entertain the motion or the appeal.

That the proclamation or call of the moderator, for any other commissions which had not been presented to the committee of commissions, was part of the process of forming the roll; and the report of that committee cannot be considered as made, until all commissioners had the opportunity afforded by that proclamation, of presenting their commissions to this committee.

That Dr. Erskine Mason's motion was out of order.

1st. Because an interruption of this proclamation; not being responsive to it, as the commissions, which he offered, had been presented to the committee of commissions.

2dly. Because the report on the roll was not complete, until those called by the proclamation of the moderator had the opportunity of being enrolled.

3dly. Because the first business of the house, after the report of the committee of commissions, is, by the standing rules of 1826, to appoint a committee of elections.

His, Dr. Mason's appeal, was nugatory, until the moderator's proclamation had been answered to, and time had been given for that purpose: for until then, the roll was not completed. Had the appeal been put to the house, Joshua Moore, and it might have been, others who had undisputed commissions, and which they were in the act of presenting, would have been excluded from voting on that appeal.

If the refusal to put Dr. Mason's appeal was wrong, it was a breach of that member's privilege; and the remedy was, by a proceeding against the moderator, on a charge of breach of privilege. That the motion of Mr. Cleaveland can, in no sense, be considered such proceeding; for in addition to its want of form, the charge made was the refusal to admit the commissioners from the disowned Synods; and not the refusing to put the appeal. If the moderator erred in declining to put the question submitted to him by Dr. Mason; it was a breach of privilege on the part of the moderator, and authorized proceedings against him as in other cases of breach of privilege; but did not authorize Dr. Mason, or any other member, to assume or exercise the functions of the moderator, in doing that which he had declined to do, and that Mr. Cleaveland's conduct was a usurpation of those functions, it belonging to the moderator alone to put motions. Mr. Squier's motion, or application, was

properly treated by the moderator, as his name not having been enrolled, he had no *status*, or right upon the floor of the house; he should have procured an enrolled member to make the motion for him.

Mr. Cleaveland's motion was nugatory, void, and a mere disorder, which neither the Assembly, nor any member thereof, was bound to notice; and being a mere disorder, it could be the foundation of no subsequent, regular action, and that for many reasons, viz:

1st. Because there was no error, crime, or misconduct in the Assembly, or its officers, to justify it.

2dly. It professed to proceed on the false position, that certain members had been *refused* their seats.

3dly. It was not put by the proper officers: i. e., if not by the moderator, by the clerk.

4thly. It was made and persisted in under or after a call to order.

5thly. It was designed and intended, and professed to be a revolutionary motion, organizing a secession.

6thly. It was unintelligible, from its indirection. The purpose is now said to be, to remove Dr. Elliott, for a misdemeanor in office; but the motion made, was to put Dr. Beman in the chair, which did not express the true purport of the proceeding; and was, therefore, deceptious and misleading.

7thly. It was sudden, unexpected and unusual, and gave the members no opportunity of understanding its meaning, purpose or effect.

8thly. It having been put from an unusual place, and not by an officer of the house, it is incumbent upon those who rely upon the rule, that silence is an affirmative vote, to show that every member present had a full opportunity of hearing.

9thly. It was put and persisted in, after and during a motion to appoint a committee of elections, which by a standing order or rule of the Assembly, was to be the *first* business of the house after the report of the committee of commissions on the roll.

10thly. The preface by which it was introduced, professed to address it to a portion of the commissioners of the General Assembly, and professed to be an interruption of proceedings then regularly *progressing*. If it were really intended to be addressed to the whole house, then its terms were deceptive and fraudulent, and cannot affect those who did not vote upon the same.

11thly. The question not being reversed, or if reversed, done so suddenly and precipitately, and so immediately followed by another motion, as to give the dissentients no opportunity to vote, the vote upon it can in nowise be considered the act of the General Assembly.

12thly. It being proved that the dissentients had a large majority, it is incumbent on the party seeking to bind them by the vote upon the question, to show that it was put by the proper person, at a proper time, in a proper form, and in distinct, plain, undeceptive and intelligible shape.

13thly. The rules of order prescribe that the question made by a member be repeated by the moderator before it is put, in order to give the members an opportunity of understanding it. In this case, the *moderator* did not repeat the question, nor was there any thing equivalent to it, as the motion was stated but once, and the question immediately put upon the motion.

The organization under Drs. Beman and Fisher, was subject to the same infirmity as that from which they dissented, for the resolutions re-admitting the disowned synods was not passed until they had elected their permanent moderator and clerks.

If the refusal of Dr. Elliott to put a motion or an appeal, authorize the member aggrieved to put a motion to the house, such irregularity must be proportionate to the exigency, i. e., the member aggrieved could himself put that motion, (and no other,) to the house, which had been so refused.

The moderator of the Assembly of 1837, was constitutionally the moderator of 1838, until the moderator for that year was elected; and was incapable of being removed until the moderator of the year 1838 was elected.

In case the moderator of 1837 was incapable for any reason of presiding at the organization of 1838, then, by the standing rules of the Assembly, the last preceding moderator present is to preside; and as at the time Dr. Beman was put in the chair there were two more recent moderators present, they, by said standing rules, were entitled to the chair, in preference to Dr. Beman.

That the Plan of Union was always subject to be revoked at the will of the General Assembly; either from the nature and character of the agreement, or from the fact that there was no reciprocity: the General Association of Connecticut being invested with no power to legislate in such cases, and especially to enact laws to regulate churches not within her limits, (vide minutes of 1837, page 421.)

That said Plan of Union, by introducing unordained lay delegates from Congregational churches, into the presbyteries, which are the constituent bodies, violated fundamental provisions of the constitution of the Presbyterian Church, in those articles of the constitution which provide that the churches shall be governed by ruling elders, and shall be represented in the presbyteries by ruling elders.

That this alteration of fundamental articles of the constitution, transcended the powers of the General Assembly, and could only be rendered valid, if at all, by the approval of a majority of the presbyteries.

That as no direct approval of this measure, viz. Plan of Union, was ever given by the presbyteries, the same never having been transmitted to them for their approbation, in order to supply this defect by long acquiescence, it must be proved that the acquiescing presbyteries had full and entire knowledge of the exercise of rights under this Plan of Union.

That, if the jury believe that a majority of the presbyteries were in regions of country where churches were not formed on the Plan of Union, and the statistical reports from the presbyteries of those

regions where churches were formed on that Plan, disguised these churches under the denomination of Presbyterian churches; then their continuance for any number of years, is no proof of the acquiescence of a majority of the presbyteries.

In the inquiry touching the constitutionality of these acts of Assembly of 1837, disowning the four synods, it is to be taken as proved that the churches composing those synods were Congregational; the defendants having offered to prove that fact, and the Court having rejected that testimony.

(Signed,) F. W. HUBBELL, *for Defendants.*

Wednesday, April 17, 1839.

At the opening of the Court this morning, Mr. Hubbell and Mr. Sergeant appeared for the respondents, in support of the rule; and Mr. Meredith and Mr. Randall for the relators, to show cause against it.

Chief Justice Gibson, and Justices Rogers, Kennedy, and Huston, on the bench.

ARGUMENT OF F. W. HUBBELL, ESQ.

Occupying Wednesday and Thursday, the 17th and 18th of April.

The subject which we are about to submit to your honours, is so extensive and various, so full of business and matter, that it would be treacherous to our cause, and trifling with your attention, to attempt any preface or exordium; we will, therefore, endeavour, in this particular, humbly to imitate the great masters of epic song, and enter at once in *medias res.* As your honours have perused the printed statement of the case, you are familiar with the facts from which this controversy takes its rise. The most general divisions under which this subject can be intelligibly considered are, first, the complainants' gravamen, or cause of complaint; second, the means adopted by them to rectify this supposed grievance and to vindicate those rights which they allege to have been violated. As his honour who presided at the trial charged on the whole subject broadly against us, this motion for a new trial involves the whole controversy; and we propose to show under the first of these divisions, that our adversaries have suffered no injustice, that their alleged grievances are altogether suppositious; and under the second, that the ex forensic remedy, to which they resorted, was abortive, unconstitutional, revolutionary, and an outrage upon the rights of their opponents.

The supposed grievance which is the cause of our adversaries' complaint, is the acts of the General Assembly of 1837, popularly called the excinding acts, and the preliminary act called the abrogation of the Plan of Union. You have perused these acts in the printed statements which are in your hands. By those acts, four synods, viz., the Western Reserve, Utica, Genessee, Geneva and their constituent parts, heretofore integral portions of the organization of the Presbyterian Church, were declared to be out of eccle-

siastical connexion with that body, and the material of which they were composed, viz., churches and clergy, were provided with other means of adhesion to the great Presbyterian system.

In order to justify these acts we shall show that there was a disease in this body politic, which required immediate eradication, and that the measures of salutary vigour, which were used, were the only ones adequate to the exigency, and that they were in strict consonance to the constitution of this church.

You are aware that there is a body of worshippers within the bosom of this church, chiefly emigrants from New England or their descendants, called, from their form of church government, Congregationalists, that there is a general assimilation in their doctrines and tenets to the Presbyterian faith, both professing Calvinism, though the Congregationalists subscribe no written Confession of Faith and receive the Calvinistic standards merely for *substance of doctrine*. The radical difference between these two sects are to be found in their forms of church government, and as each church professes its own form to be of divine or apostolical origin, and, therefore, in its great distinctive features, not capable of being lawfully changed or altered, it follows that in fact these differences of form are differences of faith.

The great body of Presbyterians likewise believe that the healthy discipline of these forms is necessary to a perseverance in their standards of doctrine and that if relaxed, all manner of heresy is let in.

An insidious attempt to intermingle these two systems, or rather an attempt to tumble Presbyterianism from its pedestal and to place Congregationalism in its stead, with all its errors and looseness of doctrine, (the natural result of its want of written standards) is the cause of these convulsions in the church. The very acts of 1837 which we are now considering, are the throws of the Presbyterian Church to relieve itself from the heterogeneous principle of Congregationalism which has been surreptitiously introduced into its system. Presbyterians are not themselves without censure in regard to this attempted amalgamation; the fathers of this church, in 1801, with short sighted benevolence consented to a partial and strictly limited union, both the use and abuse of which has led to the necessity of those acts which we are now examining. This partial union, to which I refer, you will find in the printed evidence before you, and is called a Plan of Union between Presbyterians and Congregationalists in the new settlements. This unconstitutional and ill advised plan gave to Congregationalists their first foot-hold in our system, of which they have not hesitated to avail themselves. It was intended as a temporary provision for weak churches on the frontiers, too weak to organize as separate denominations for social worship, but capable by conjunction of forming congregations. This plan of ephemeral union which should long since have disappeared with the supposed necessity to which it owed its origin, has laid the broad foundation of permanent churches, presbyteries, and synods, governed as regards themselves, and only submitting to Congregational forms, but exercising presbyterial domination over the rest of the church. In the Synod of the Western Reserve it is in evidence

there are 139 churches, and that of these 109 are Congregational, and in the other three excinded synods (as we offered to prove on the trial) two-thirds of the churches are Congregational. His honour excluded this evidence, and therefore, for the purposes of this argument the exclusion is equivalent to the proof. But whatever may be the inconveniences of this incursion of Congregationalists unless we can show that it is not compatible with the constitution of this church, we shall inveigh against it in vain. The Presbyterian Church has a written constitution, and its government in any of its departments can only exercise the powers conferred upon it by that constitution. We will now proceed to show that there are fundamental provisions in that constitution at utter variance with Congregationalism, and that any act of the government of this church engrafting Congregationalism upon the system must be void. Many of the provisions of this constitution are essential, that is, as has been said before, they are deemed of scriptural origin, and not to be changed by man; others are alterable, and a provision is made for such alterations by the constitution itself.

"Before any overtures or regulations proposed by the Assembly to be established as constitutional rules shall be obligatory on the churches, it shall be necessary to transmit them to all the presbyteries, and to receive the return of at least a majority of them in writing, approving thereof." *Form of Government, cap.* xii. *sect.* 6.

Now let us inquire what principal constitutional provisions this unnatural conjunction with Congregationalism violated. Whether the provisions so violated were alterable, and if alterable whether they were altered constitutionally, that is, by the method which I have just cited from the constitution. And here let me observe, that these remarks will be confined to the Plan of Union of 1801, the only alliance attempted to be justified. If congregationalists have obtained admission into our system by any other means, it is mere usurpation, without any pretence of legal justification. That such usurpations have been frequent and extensive we are well aware, and that small part of the Congregationalism with which our system is infected, can claim the protection (poor as that is,) of the Plan of Union. The more important provisions of our constitution which have been violated by the Plan of Union are these. The government of the Presbyterian Church is committed to ruling elders set apart by ordination, and who hold their offices for life. The church members at large exercise none of the functions of government, except in the original election of these elders. *Constitution, cap.* iii., *sect.* 2—*cap.* v., *cap.* xiii.

Another important and vital provision of the constitution is its system of subordination and appeals. The primary council of judicature and government is the church session, composed of the ruling elders and pastor of a particular congregation. Next above this is the presbytery, composed of ruling elders and ministers, delegated from a number of churches, or rather of church sessions, within certain local bounds. This body entertains appeals from the church sessions, and elects delegates to the highest judicatory; which delegates must be ruling elders and ministers. The

council next above the presbytery is the synod, composed of ministers and delegated ruling elders from the churches within larger local bounds than the presbyteries. This body entertains appeals from the presbyteries. Lastly, the great œcumenical Assembly which is composed of delegated ruling elders and ministers from all the Presbyterian churches in the United States. This august body, besides, like the inferior judicatories having other extensive powers, is the court of last resort, and finally determines appeals which have ascended successively from the session to the presbytery and from the presbytery to the synod.

The government by ruling elders, and this right of appeal by which any individual member of the church may have his case or his grievance submitted to the representation of the whole church, is in our faith scriptural, apostolical, divine, and therefore unalterable. See constitution ubi supra and cap. xii. in notes. Congregationalism knows no ruling elders; their government is exercised by the church members themselves, in a form simply democratic. It knows no subordination of judicatures or appeals, each church is independent and for itself governs its members, and adjudicates their complaints. They are, it is true, united into associations, but these associations exercise only an advisory jurisdiction.

We are now ready to compare the Plan of Union with these constitutional tests. It is on this Plan of Union that our adversaries attempt to justify the introduction of Congregationalism into the Presbyterian system. If we demonstrate the unconstitutionality of this, they are left without an argument. The parts of that plan essential to this argument are these: that a Congregational church may settle a Presbyterian pastor, (and it regulates the mode of determining disputes between them, but deprives this clergyman of the appeal to the presbytery to which he belongs, unless by the consent of his congregation;) and that a Presbyterian congregation may settle a Congregational pastor. It provides also for the erection of mixed congregations partly Presbyterian and partly Congregational, and substitutes for the church sessions, composed of ruling elders, a standing committee from the communicants of the church, and from the decision of this body it gives an appeal, if the party aggrieved be a Presbyterian, to the presbytery within whose local bounds the church may be situated, if a Congregationalist to the body of male communicants of the church, but deprives the Presbyterian of his ulterior appeal to the synod and General Assembly. It further contains this provision, "and provided the said standing committee of any church shall depute one of themselves to attend the presbytery, he may have the same right to sit and act in the presbytery as a ruling elder of the Presbyterian Church."

Cutting off any Presbyterian from the right of appeal to the synod and General Assembly, is unquestionably a violation of the constitution. What an incongruity is this in any civilized system: here is one member of the Presbyterian Church entitled to the judgment of the whole church, when under accusation, but here is his brother in equal good standing, whose doom is finally pronounced by perhaps a prejudiced local presbytery!!

But the most flagrant violation of the constitution is that provision, the words of which I have just cited, which admits unordained lay delegates to sit and act in the presbyteries with the same rights as ruling elders of the Presbyterian Church. In this provision is to be found the fountain of all the calamities which ensued. It is confined by the act of union to the mixed churches having standing committees, but under the latitude which it has established, Congregational churches, without any intermixture of Presbyterianism, have sent unordained lay delegates to the presbyteries, and have called the whole body of male communicants, to whom by the Congregational system the government of the church is committed, their standing committee, (see Mr. Squier's testimony omitted by accident from the printed evidence,* but to be found in the counsel's notes,) and under pretence of this and other provisions of the Plan of Union, one of the excinded synods denied, by a public act, that ruling elders were necessary to a Presbyterian Church. (See printed evidence, page 11.) Under pretence of this provision they have not only filled the presbyteries in the region of the excinded synods with lay delegates, but have openly claimed a right to seat them in the General Assembly itself, and have prevailed, (see printed evidence, page 46,) although they more frequently gained admission to that body by disguising themselves as ruling elders. (See Mr. Bissel's case, printed evidence, page 46.) For years this subject has been agitated and discussed, and the advocates for the rights of Congregational churches to send their lay delegation to the judicatories of this Presbyterian Church, have always founded its defence on this particular provision of the Plan of Union, without which they have no pretence for their intrusion. In the Synod of the Western Reserve there are one hundred and nine Congregational churches without ruling elders, and yet they are all represented in the presbyteries by unordained delegates, by men who are not pledged to our written Confession of Faith; and yet these presbyteries elect the delegates to the General Assembly. How is it possible for the General Assembly to enforce conformity to our standards, when its constituency is composed of men who do not admit these standards? Experience conformed to what might have been anticipated, and when Mr. Barnes was prosecuted for deviation from the Presbyterian standards, he was acquitted, in a great measure, by the votes of delegates from that constituency which does not subscribe to these standards. As we said before, this disturbance of the harmony of our system must be justified, if at all, upon the Plan of Union. The constitution is peremptory in its provisions, and those who set these provisions at defiance, have always pointed to the act of union, as a justification of their departure. If Congregationalism is not subject to expulsion from our system, it is because it has come in under the Plan of Union. Congregationalists themselves would scarcely desire the connexion unless it gave them a share in the

* The parenthetical notes found in this argument were inserted by the counsel. Not being willing to alter them, in his absence, it is necessary here to say, that the printed evidence referred to, is that submitted to the Court in a pamphlet, prepared by the counsel; to the pages of which pamphlet the figures in these parentheses refer. The evidence itself is in its proper place and order in this report.

government of the church, and therefore they consider the provision of that act which enables them to send lay delegates to the presbyteries, the most important feature in that plan. By this every individual Congregationalist was enabled to join in the government of the Presbyterian Church, but yet was himself exempt from its discipline; for if those whom he aided in governing through his delegates, attempted to enforce the discipline of that church against him, he could only be tried by his fellow communicants, who, like himself, were not pledged to the standards of faith, and from their decision there is no appeal to the higher tribunals of the church.

It remained for their own professional advocates in this cause to take away from their Congregational clients the only justification to which they have appealed for nearly forty years. The learned counsel has argued, and the learned judge has adopted this argument, that the provision of the Plan of Union which we are discussing, does not authorize the sending of unordained lay delegates to the presbyteries generally; that is, to participate in the general duties of the presbytery, but that it is confined to judicial cases of appeal from the standing committees, and that when that judicial proceeding is terminated, the lay delegate must retire. In this argument we might well acquiesce, and then the presbyteries of the Western Reserve, filled with lay delegates in the proportion of one hundred and nine to thirty, and in the presbyteries of the other excinded synods in scarcely a less proportion, are clear, unqualified unjustifiable usurpations of the rights of Presbyterians. But we will save our adversaries from themselves, and show that they have the justification of this provision in the Plan of Union, so far as an unconstitutional provision can justify them. His Honour, the judge who presided at the trial, distinctly admits, that upon our construction of this clause of the Plan of Union, it is clearly unconstitutional and void, and in endeavouring to show that the act of union did not contain such an unconstitutional provision, he forgot that he left our adversaries without any justification at all. The language of this clause is too explicit, it seems to me, to permit one moment's hesitation. It is true that the previous parts of the section pertain to trials by the standing committee, and appeals from that committee, and there might be some show of argument from thence to confine the clause in question to the subject of the context, had not the framers of this act, as if anticipating such a construction, and determined to exclude it, declared not only that the standing committee should have the power of sending delegates to the presbytery, but expressly defined the commission of such delegates, which is "the same right to sit and act in the presbyteries as a ruling elder of the Presbyterian Church," not to sit merely on the appeal, but in the presbytery, not merely as a judge of the appeal, but as a ruling elder, not merely judicially to determine, but to sit and act. This attempted construction of our adversaries is rendered still more untenable when we consider that it gives the right of sitting in the appellate tribunal to try appeals of a member of the court appealed from, that is, it gives him the right of sitting in judgment upon his own decisions; an absurdity always forbidden by the policy of this

church, and now by its constitution, and also abhorred by the common sense of mankind, and the universal practice of civilized nations.

See constitution Book 2d, Chap. vii., Sec. 3.—"Members of judicatories appealed from, cannot be allowed to vote in the superior judicatories on any question connected with the appeal." See also Assembly's Digest, page 332. In which it appears that as early as the year 1792 the General Assembly authoritatively settled the impropriety of a member of the body appealed from sitting on the trials of that appeal.

I have assumed the high ground that this Plan of Union conflicted with the unalterable parts of the constitution of this church, and I have laid before you at large some reasons for the position. Others may be added of equal cogency, one of which I will advert to succinctly. The act of the legislature of Pennsylvania incorporating, "the trustees of the ministers and elders, constituting the General Assembly of the Presbyterian Church:" any innovation by which the Presbyterian Church loses the distinctive character of Presbyterianism, conflicts with the charter, and such revolutionized church would be unable, legally, to perform the functions assigned to it by that charter. But assuming (for the sake of the argument only) that the portion of the constitution confiding the government of the church to ruling elders, and giving the right of appeal from the presbyteries to the synods, &c., may be altered, this alteration must be effected in a constitutional manner, that is, by the written approval of a majority of the presbyteries. The Plan of Union did not receive the sanction of a constitutional majority of the presbyteries, nor of any of them, in fact, for it was not submitted to them, it was passed by the sole authority of the General Assembly; it was therefore void from the beginning, and those who claim rights under it rely on an unconstitutional title. It has been argued with great vehemence, and the argument has received the sanction of his Honour who presided at the trial, that long acquiescence by the presbyteries in the existence of this Plan of Union, is equivalent to a confirmation. Acquiescence may be equivalent to positive approbation, but then it must be proved that he who is supposed to have acquiesced, was fully informed upon the subject upon which he is supposed to have given his mute or passive vote. Our adversaries are not guilty of the absurdity of contending that, the permitting an unconstitutional act to lie dormant upon the statute book in harmless inanity for any number of years, should be construed into acquiescence; but it is the long acquiescence in things done and institutions established under the Plan of Union, that they contend is equivalent to a constitutional vote in their favour.

There are some parts of the Plan of Union entirely unexceptionable when measured by the constitution of this church. Whether that provision, which enables a congregational pastor to preside over a Presbyterian flock, be so, it is unnecessary to determine, for there are not, nor has there been, any such existence. Congregational pastors have uniformly, when they come into our fold, conformed to our discipline and become Presbyterians, paying thereby

a tacit homage to the superiority of our institutions in securing the rights of the clergy.

But there is another provision of that Plan of Union which has been called into extensive exercise, which is the enabling Presbyterian ministers to preside over Congregational churches. This provision in no wise conflicts with our constitution. We may send our clergy as missionaries to the heathen! (not meaning by this expression any disrespect to the respectable denomination of Congregationalists.) Every church has, or should have, its *propaganda*. The minister so situated suffers some diminution of Presbyterian rights, but that is voluntary and temporary, to be resumed again when he leaves his Congregational charge. Such an arrangement is not obnoxious to constitutional censure, because it does not give such Congregational church any place in our system by representation or otherwise. Such church employs a Presbyterian pastor, and that is all; it has no voice in our tribunals. Such Congregationalists neither act upon us nor reciprocally do we act upon them. But it is in the provision for mixed churches contained in this Plan of Union, that we find the several collisions with our constitution that I have been pointing out.

Now to the bearing of these remarks upon the point of acquiescence, permitting the preaching of Presbyterian pastors to Congregational churches, cannot be considered as acquiescence in the change of the constitution by the Plan of Union, for that was tolerable and proper, independent of the Plan of Union, and does not conflict with or require alteration in any of its provisions.

It is only then in regard to the mixed churches with standing committees, or purely Congregational churches, which, treating or considering their whole body of male communicants as a standing committee, have sent delegates to the judicatories of our church, and have wound their parasitic tendrils round the goodly trunk of Presbyterianism, that the question of acquiescence arises. As to the last of these, viz: the pure Congregational churches sending delegates, it is a mere abuse; it has no sanction in any act of the church, constitutional or unconstitutional. There was, as regards these members, no subject for acquiescence; no proposition submitted to which the presbyteries could answer; no colour of right which by time and neglect of opposition might be deemed to be approved; no invitation, which, after many years it would be inequitable to revoke on constitutional grounds. Unless therefore our adversaries can show that there is an act of limitation, they must be content to give up the ground of acquiescence in regard to this class of Congregational churches. Knowledge of the state of the church is only imparted to the General Assembly, and disseminated by that body to the various constituent parts of the church by the presbyterial reports, which reports ought and profess to inform the General Assembly of the number of Presbyterian pastors who preside over Congregational churches, and of the number of Presbyterian and mixed churches in each presbytery. They profess to give the name of each church within the bounds of the presbyteries, and whether they be Presbyterian or Congregational. But these reports from the

presbyteries in the excinded synods have ever been illusory. Although there are one hundred and nine Congregational churches in the synod of the Western Reserve, yet they have been represented for years in the presbyterial reports as Presbyterian churches; and although Congregational churches abound in the other three synods, yet no trace of them appears in their presbyterial reports. Mr. Squier designated in his testimony certain churches within these bounds as Congregational, and yet, by reference to these presbyterial reports, we find those churches called Presbyterian. If these misrepresentations were intended to deceive, they are not reconcilable with good morals, but whether intended to deceive or not, they effectually put to rest the argument of acquiescence. If the church has made no effort heretofore to expel these intruders, it is because they appeared on the records not to be intruders but Presbyterians.

Another argument has been much elaborated by our adversaries. They say that the constitution has been repeatedly amended since the adoption of the Plan of Union, that particularly in the year 1821, it underwent almost an entire revision; and they find in this some evidence of the approbation by the presbyteries of that plan. I am unable to discover such evidence. Certain amendments, and in the year 1821 very extensive ones, but having no allusion whatever to the Plan of Union, are submitted to the presbyteries and approved by them. The provisions in the constitution as it stood in 1801, were sufficiently obvious in their opposition to the Plan of Union. Scarcely any amendment could have made them more so. Had therefore these alterations emanated from the presbyteries, the omission to aim one directly at the Plan of Union, could scarcely have been construed as an approval of that plan.

We have now, I believe, reviewed all that has been argued in justification of these unnatural espousals.

A more determined effort has been made by our adversaries, to condemn the means to which we resorted in 1837, to rectify this evil, whose encroachments had then become intolerable.

Let our adversaries deny it as much as they please for the purpose of this judicial contest, they cannot suppress the fact that there is a great schism in this church upon doctrinal tenets and fundamental points of religion. One of the learned counsel has designated it as a mere logomachy or war of words. He pays but a poor compliment to his clients, if this doctrinal controversy, in which they have embarked and persisted even to the rending of the church, is a mere war of words. These differences of religious sentiment may be comprehensively described as on the one part a strict adherence to the written standards of the faith, and on the other part a loose Neological and latitudinarian construction of them. The great object of the institution of the body politic of the Presbyterian Church is to preserve theological uniformity. It has adopted its standards to prevent the vagaries of speculation, and it has adopted its discipline to enforce conformity to those standards. The construction and interpretation of these standards are entrusted to its tribunals, and the decision of its highest judicatories, in the interpretation of its creed, makes the condemned opinion heresy. To

this issue was the theological controversy, which had for so many years distracted the church, about to be brought in 1837, and upon its determination the defeated party must either have seceded from the church or ceased to teach and profess the condemned opinions. Common justice required that in this domestic quarrel there should be no foreign intruders. That in the debate and strife concerning the construction of the standards, those should have no voice who entirely denied their obligation. It was then that attention was more intensely called to that imposthume, which had so long aggrieved the body politic, and the crisis emphatically demanded its eradication.

We maintain, notwithstanding the clamours of our adversaries, notwithstanding their vehement appeals to popular feelings, that the remedy to which we resorted was the best, whether considered humanly, divinely, politically, or constitutionally. Before, however, these measures were enforced, all that a Christian spirit could prompt amicably to adjust the difference, was submitted by us to our adversaries. We met them in conference, and it was solemnly agreed that a separation was necessary. An equitable division of the temporalities was proffered by our party and accepted by our adversaries. There appeared for a time every prospect that, like Lot and Abraham, the one party would have taken the right hand and the other the left, in peace, until our adversaries made one unreasonable demand, in which we could not have acquiesced without dishonour and without disturbing the ashes of our fathers! We were the decided majority; we represented the old seats of Presbyterianism; in our ranks were to be found its venerable patriarchs; we, therefore, claimed to have the succession to continue the church which had heretofore existed, and to keep alive its sacred fires. Our adversaries, on the contrary, insisted upon its destruction, that we should join in pulling down the venerable fabric, and that each party should erect for itself a new temple from the ruins of the old. The learned counsel on the trial discovered in our propositions, some sinister and esoteric meaning that perhaps served the purpose of popular effect with the jury. Our adversaries themselves, I believe, have never imputed to us any want of sincerity in these negotiations, and if they have, their imputations are without proof. These negotiations having failed, and it being conceded in the negotiations themselves that there was a difference of theological opinions which was incompatible with union, the struggle commenced to determine which was to be held as the orthodox opinions of this church. And as a preliminary in this struggle those recuperative and purifying measures were resorted to which have expelled these heterogeneous materials that impeded the true order of the system.

Will any one deny, who is unaffected with party prejudice, that Congregationalism had no proper place in this system, and that it ought by some means to have been removed? I believe not one. There is then but one question remains, Were the measures by which its expulsion was effected constitutional? This question is a very narrow one, were we to confine it strictly to the mere question of law. We have been discursive, perhaps tediously so, in order

to show the justice of our acts, when we might have confined ourselves simply to their legality. Strictly, this court can only inquire whether the acts of excision were within the powers confided by the constitution to the General Assembly; and if that be determined affirmatively, this court cannot rejudge its justice, cannot inquire into the *corpus delicte*, the nature or evidence of the delinquency which caused the exercise of these powers. This is a familiar principle in this court, enforced and newly illustrated at every session. If voluntary associations constitute their own tribunals, they must abide by the decisions of these tribunals, however partial or erroneous. The only aid that the malcontents can ask from the ordinary tribunals of the country, is to confine the special tribunals to the exercise of the powers committed to them. As to the mode of the exercise, the wisdom or justice of their decisions, they are independent and without visitation or appeal.

The first or preliminary act to which the General Assembly resorted to purify the church, was the act of abrogating the Plan of Union, or in other words declaring it to have been unconstitutional and void from the beginning. The right to abolish this Plan of Union for all future time seems to be conceded by the opposite argument; but they object to the retrospective effect of that act of abrogation. This act of abrogation is a mere nameless abstraction, without practical consequences; the acts of excision are those which have been carried into operation, and which are the real grounds of this controversy.

The acts of excision, so called, we say, will appear to be mere acts of dissolution, when resolved into these simple elements; and all that is urged against their legality will be found to be inapplicable, when they are denuded of certain unessential accompaniments which were unskilfully attached to them. The power of the General Assembly to dissolve synods has never been questioned.

It is not expressly given by the constitution, but is a necessary implication from the power to create them, an implication as necessary as that by which, in our own political constitution, we attach the power of removing to the power of appointing. Among the enumerated powers of the General Assembly in sect. 5, cap. 12, of the Form of Government, we find the powers of "erecting new synods when it may be judged necessary," and the exercise of the constructive and subordinate powers has almost always accompanied the exercise of that power, which is express and principal, for two synods originally embraced the whole territories of these United States, and consequently the creation of every new synod involved the partial dissolution of the old. The synods have express power to create or erect presbyteries, but no express power to dissolve them, but only to unite and divide them. Yet the power of dissolution has been exercised by them without question since the institution of the church, and this although they have not the higher and almost unlimited power conferred on the General Assembly by the words "of superintending the concerns of the whole church." In the Form of Government, cap. 5, sect. 12, see the act of 1834, Minutes of the General Assembly, dissolving the Synod of the Che-

sapeake. I have said that these acts of 1837 have been called excinding acts, disowning acts, and acts of expulsion; although in the heat of party they may have been moulded with these repulsive features, yet, when calmly considered, without passion or prejudice, they will be seen to be essentially no more than the exercise of the undoubted, the familiar, the conceded power of dissolution.

Excision must operate on the ultimate materials of the church, on its elemental subdivisions, either territorially, that is by excluding a territory with the Presbyterian materials within its bounds, from the domain of the church, or by retaining the territory and excluding such materials; any thing short of this is dissolution, the essence of which is elementary resolution.

Now these acts declare the synods in question to be no longer in ecclesiastical connexion with the Presbyterian Church, and in the third of the exegetical resolutions, appended to these acts, it seems to be asserted that these acts extend also to their constituent parts, but in the fourth of these resolutions all churches, ministers and presbyteries which are strictly Presbyterian in doctrine and order, that is, all the Presbyterian materials within those synods are provided for and in effect retained. In other words, all such churches and ministers are directed to apply for admission to those presbyteries which are most convenient to their respective locations; and such presbyteries as are strictly Presbyterian in doctrine and order, are directed to apply to the General Assembly.

Our adversaries, I am aware, have much to urge against this construction, in the phraseology of the resolution, and in its practical effects; the language of the fourth resolution, it is contended, imports that these Presbyterian materials have been removed from the church, for it uses the phrase "if they wish to unite with us," which imports that they have by these acts been excinded. We answer to this, that we are not inquiring what the General Assembly thought they had done, nor even what they intended to do, but simply what they *did*, and when we find that all Presbyterian churches, ministers and even presbyteries within those bounds were, so far from being expelled from the church, only in effect given the means of retiring at their option or continuing at their option, we aver that it was a dissolution and not an excision.

Let it also be observed that the word *unite*, when construed by reference to the subject of which it is predicated, is a strong corroboration of our argument; dissolution is the solution of union; by the dissolution of the synod, the ligament of union between the particular churches and the general church is dissolved, but not the obligation of the latter to furnish new means of union; which would be the case, were it an expulsion or an excision. But our adversaries endeavour to point out some practical inconveniences, and assert that these resolutions put it in the power of the presbyteries to which they, the churches and ministers, are directed to apply, and (in case a presbytery is the applicant) of the General Assembly to reject them. None have been as yet rejected, and when they have been that will be the first act of injustice. A mere possibility of injustice can be no sufficient reason for condemning

these acts and dismembering the church. As to these arguments from inconvenience, it may be said that so great a reform as the expulsion of these intruding Congregationalists could not be effected without these very inconveniences which are the subject of complaint. A synod is dissolved because it is deeply infected with Congregationalism, which cannot be otherwise eradicated; the Presbyterian materials, which are thus reduced to a fragmentary state, must be culled with caution, lest some portion of the Congregational materials be heedlessly picked up and confounded with them.

As this fourth resolution provides for such presbyteries as are strictly Presbyterian in doctrine and order, it is scarcely necessary to consider the power of the General Assembly to dissolve presbyteries, for here were none dissolved, they were invited to a reunion in their undisturbed integrity. It is true, this invitation is confined to those presbyteries which are strictly Presbyterian in doctrine and order; but these were all that were entitled to receive such invitation. A presbytery that is not Presbyterian, is a palpable fraud, undeserving notice, except for reprehension; Presbyterian in doctrine, that is, not Arminian, not Pelagian, not Socinian. Will our adversaries object to the terms of this invitation? It is true we have taxed them with Arminianism and Pelagianism, but they have not justified but denied the charge. Presbyterian in order, that is, composed of ruling elders, and not of lay delegates, thus, it is true, excluding Congregationalists, but that we meant to do, and by our right, so to do, we abide. But they must be strictly Presbyterian in doctrine and order; our standards know no difference as to doctrine between a strict Presbyterian and a presbyterian. The contest between the theological parties has been, what is strict Presbyterianism? They contend that we are deluded by our adhesion to the letter and that they construe according to the spirit of the standards: but, nevertheless, they contend that they are as strictly Presbyterian as we. Whatever, therefore, may have been the design of the framers of this resolution, they have not committed themselves by using language which our adversaries will admit is descriptive of them. As to the term strictness of order, it indicates, no doubt, such presbyteries as permit no lay delegates; those presbyteries whose general structure is Presbyterian could easily have accommodated themselves to this invitation (and were bound so to do) by expelling any lay delegates they may have entertained.

Had however the acts of 1837 dissolved the presbyteries as well as the synods, our adversaries could scarcely complain, for in the year 1832, the party of our adversaries, then dominant in the General Assembly, created a presbytery, and cited and relied on precedents in the years 1794, 1802, 1805, and 1826. If that body possesses the power to erect, it consequently possesses the power to dissolve, as I have demonstrated in regard to the erection and dissolution of synods.

Your honours will have observed, that in this argument I have contended that these were acts of dissolution only so far as Presbyterians were concerned: in regard to Congregationalists, they were no doubt measures of expulsion. That these Congregationalists

were deservedly obnoxious to expulsion, I believe that I have fully demonstrated. That a great majority of them were in the church without any pretence of right, and that they had kept their station there by disguising their true character, I think I also have demonstrated. The few, if any, who justified under the Plan of Union, I think I have demonstrated, had built their foundation upon unconstitutional grounds: as regards these, the General Assembly exercised a constitutional power, and swept away those whose best plea was the sanctity of venerable error.

Our adversaries have varied their modes of attack, and have endeavoured to show the impropriety of what we have done, by showing how much better it might have been done otherwise. They say that these synods could only properly be condemned by regular trial according to the forms of the constitution. On this proposition they have rung a thousand changes. The position is plausible and popular. Five hundred and ninety-nine churches, and fifty thousand communicants, say they, have been condemned unheard, without an opportunity of defence! And they invoke popular vengeance on the authors of this outrage. Upon this high tribunal the *civium ardor prava jubentium* will have no effect, and we will proceed calmly to demonstrate the folly of this charge. We should, say they, have tried these synods and proceeded to judgment by the regular methods pointed out by the constitution. This, we say, is absurd. Try an incorporeal existence—a mere *ens rationis!* The constitution contemplates no such proceeding; its whole system of judicature is aimed at natural persons capable of punishment. Suppose a synod is condemned, punishment cannot be inflicted; it is more incorporeal and impassive than the viewless air. It is capable of being dissolved, it is discerpible, and may suffer disintegration of its component parts; but this is not punishment. It may be a good measure of prevention to destroy it, but it is in no sense penal. The constitution contemplates process against the inferior *judicatories* of one kind only, and that is in the nature of a mandamus, not to punish, but to direct it in the path of its duty. See Book of Discipline, cap. vii., sec. 1, sec. 6.

But, again, why should we proceed judicially, when no offence or crime has been charged upon the synods? They were erected for convenience, and might be dissolved for convenience. Certain intruders had found shelter behind them, and it became necessary to pull them down in order to drive away these intruders. They were infected with Congregationalism: this was no crime, but a disease, which required, not punishment, but a remedy.

If our adversaries mean (and their meaning is not very clear on this point) that the process should be directed against individual Congregationalists who had intruded into our system, we answer that the plan of process was intended for Presbyterians, and not for intruders from other denominations—for denizens, and not for aliens. Besides, such Congregationalist might set our process at defiance, for it runs not into Congregational churches; he can only be tried by his own congregation, and from their decision there is no appeal. Those who really came in under the Plan of Union, if

charged with Congregationalism as a crime, might plead that plan in justification, though, from its unconstitutionality, it would be no bar to any proceeding for their removal. Much labour has been expended on either side, in proving or disproving that the General Assembly possesses legislative powers. If it were important, it would be easy to show that, within a certain scope, it does possess those powers. The power to dissolve synods is rather an administrative power, if we were compelled to give it a name. I am willing to put the abrogation of the Plan of Union on a more simple ground. The General Assembly was a party to the arrangement, and having discovered it to be unconstitutional, declares itself not bound by it. The same as an individual who has entered into an illegal compact, and afterwards discovers its illegality, might declare himself not bound by it. The illegality of the compact is that which discharges him, and not his declaration, which is but a promulgation of his rights.

The act of abrogation and the acts of excision were in themselves mere abstractions, not capable of being noticed judicially. It was not until some action took place under them that bore upon individual or associate rights, that they could assume the form of an injury cognizable by public justice. The first proceeding in pursuance of these acts was the striking from the roll of the General Assembly the names of the commissioners from these synods, and refusing to count their votes. What was this but *the judgment of the General Assembly upon the qualification of its members:* a power always entrusted to representative bodies, and not denied by the constitution to this. In the exercise of this high function, we claim for the General Assembly exemption from the visitation of the ordinary tribunals. Your honours, having ascertained the existence of the power, cannot control or review its exercise.

We have now finished the first, and come to the second of the great divisions into which we assorted our subject, to wit, the means resorted to by our adversaries to rectify their supposed grievances.

In the year 1837, after the act had been passed touching the Synod of the Western Reserve, which was prior to that concerning the other three synods, and after the names of the members of that synod had been struck from the roll, an election was had to fill certain vacancies which existed in the Board of Trustees; but as the members from this synod were not allowed to vote, they protested that the election was void. They and the members from the other three synods, after they were excluded, also gave notice to the Board of Trustees not to obey the drafts or orders of that General Assembly, as it became by dismemberment a legal inexistence. Had they persisted in this course, the question of the validity of these acts would have been brought before your honours by this proceeding; but they afterwards seemed to consider such position untenable, for, by repeated acts of great solemnity, they admitted the General Assembly of 1837 to have a legal existence up to the hour of its adjournment, and thereby, as we think, and will show in the sequel, have excluded, from this judicial inquiry at least, any

question as to the validity of these acts. For their pseudo Assembly in 1838, in electing their trustees, who are the relators in this proceeding, solemnly pronounced that there was no vacancy in the Board of Trustees, which declaration would have been untrue, had the election of 1837, to which I have referred, been void. Besides this, the last act of the Assembly of 1837 was to fix the time and place where the Assembly of 1838 should meet; and this act was the basis upon which the pseudo Assembly was built, and the occupation of that time and place was declared by them to be necessary and essential to their legal existence. This was another distinct recognition of the undismembered existence of the General Assembly of 1837.

The General Assembly is not perennial, but terminates its existence with its session, and a new Assembly is called for the succeeding year, which is not a continuation, but the successor of the preceding Assembly. See Form of Gov., cap. xii., sec. 8. When, therefore, the General Assembly of 1837 adjourned, by the confession of our adversaries it adjourned in its undiminished legal integrity; and the Assembly of 1838 was called into existence to run its career unaffected by the acts of its predecessor.

This view I think is important, for from it can be demonstrated that this inquiry ought to have been confined to the question of organization in the year 1838, and that the examination into the constitutionality of the acts of 1837, was entirely extrinsic to the issue.

We have it in evidence from the Pastoral Letter of the New School Assembly, although his honour excluded more direct proof of the fact, that the New School party met in caucus previous to the time fixed for the meeting of the General Assembly of 1838, to devise measures which should annul the acts of 1837. The sum of their deliberations and designs are embodied in the resolution, "that should a portion of the commissioners to the General Assembly attempt to organize the Assembly without admitting to their seats commissioners from all the presbyteries recognized in the organization of 1837, it will then be the duty of the commissioners present to organize the General Assembly of 1838, in all respects according to the constitution, and to transact all other necessary business consequent upon such organization."

This resolution is a key to the subsequent conduct of that party, and enables us to understand it in its true light, although our adversaries have since thought proper to place other interpretations upon it.

They say, "that should a portion of the commissioners attempt to organize without admitting," &c. This portion was the Old School party, who had at the preceding General Assembly of 1837 been a decided majority, and afterwards proved to be so in that of 1838; and that they would be so, this caucus most shrewdly suspected. Then this resolution declares, that should the Old School party, being the majority, attempt to organize without admitting to their seats, &c. *all* the commissioners—that is, should they attempt to exclude the commissioners from the four synods—"it will then

be the duty of the commissioners present to organize in all respects according to the constitution." It *will be their duty to organize!* In other words, that they *will* organize according to their views of the constitution! Who will organize according to the constitution? The commissioners present other than the *evil-disposed portion.* And that portion, as we have shown, were the Old School party, and the majority. It therefore follows that these sticklers for the constitution were the New School party and the minority; and the whole import of this resolution, though obscurely worded, is, that should the Old School party, who were the majority, attempt to carry out the acts of 1837, by excluding the commissioners from the four synods, the New School party, who were the minority, would make another organization, admitting those commissioners, and claim to be the constitutional Assembly! One of the members of this caucus commented on the boldness of this plan by exclaiming, "We have passed the Rubicon."

In order to understand the subsequent doings of the malecontent party, it is necessary that I should call your attention to some of the rules of order.

"No commissioner shall have a right to deliberate or vote in the Assembly, until his name shall have been enrolled by the clerk, and his commission examined and filed among the papers by the Assembly."—*Form of Government, cap.* xii., *sect.* 7.

Standing rules of order adopted in the year 1826. See minutes of General Assembly of that year.

I. Immediately after the Assembly is constituted with prayer, the moderator shall appoint a committee of commissions.

II. The commissions shall then be called for, and delivered to the committee of commissions.

III. After the delivery of the commissions the Assembly shall have a recess, until such an hour in the afternoon as will afford sufficient time to the committee to examine the commissions.

IV. The committee of commissions shall in the afternoon report the names of all whose commissions shall appear to be regular and constitutional, and the persons whose names shall be then reported, shall immediately take their seats and proceed to business.

V. The first act of the Assembly when thus ready for business, shall be the appointment of a committee of elections, whose duty it shall be to examine all informal and unconstitutional commissions, and report on the same as soon as practicable.

In 1829, (see minutes of that year,) it was resolved "that the permanent and stated clerks should be the standing committee of commissions, and that the commissioners should hand their commissions to said committee in the room in which the Assembly shall hold its sessions, on the morning of the day on which the Assembly opens, previous to 11 o'clock.

In pursuance of these rules of organization, Messrs. Krebs and M'Dowell, the permanent and stated clerks, stationed themselves in the church in Ranstead court, previous to the hour of the meeting of the General Assembly of 1838, on the day fixed for its assembling

by the last resolution of the previous Assembly. The commissions were presented to them, and they rejected those from the excinded synods and refused to put them on the roll. They considered themselves bound by the authority of the preceding Assembly, as the opinion of the highest judicature on the constitutionality of these commissions. The committee of commissions is the primary tribunal to determine on the constitutionality of the commissions presented. They had before them the decision of the prior Assembly, that these synods were built upon the Plan of Union, and as that Plan of Union had been abrogated the synod built upon it had fallen to the ground. To have disregarded this decision, would have been the height of arrogance. I do not think they were bound by the acts of 1837 as instructions, but as precedents, but it would seem that these commissioners thought otherwise. See printed evidence, (Mr. Krebs' statement, pp. 101, 102 of this report.)

It was said that this committee were pledged to carry out those acts? But upon inquiry we find that a motion was made in the Assembly of 1837 to exact a pledge, but was afterwards withdrawn. It was withdrawn because the committee expressed so strong an opinion of their duty, that a pledge was deemed unnecessary, and yet there is a wide difference between an opinion, however strong, and a pledge. The one may be changed, it may yield to proof or conviction; the other is an inflexible obligation upon the conscience. If this committee was in error, as to the power of the General Assembly of 1837 over them at the inceptive organization of 1838, or if they decided wrong upon any other principle in rejecting the commissions from the four synods, they being but an inferior and primary tribunal, their decision could be reviewed by the General Assembly, and that body has deputed this power of review to the committee of elections, who, says the fifth of the standing rules which I have cited, are to examine such commissions as have been rejected by the committee of commissions. These standing rules direct the committee of commissions to put all constitutional and formal commissions on the roll, but prescribe no other duties, as to the informal and unconstitutional commissions, than to reject them.

It is true a practice has arisen of reporting these commissions so rejected in a separate roll, a practice, which arose, no doubt, when all commissions were presented to the house, and referred to the committee, in which case, by parliamentary practice, there must be a report of the committee upon them in order to restore them to the house for its future action. This was a reason which ceased, when, under the new system, the commissions were no longer referred to the committee, but originally presented to them before the meeting of the Assembly. Such as they rejected having never been before the house, parliamentary order interposed no obstacle to their being presented to the Assembly by a member, and referred by the Assembly to the committee of elections. The stated and permanent clerks, it would seem, debated between themselves, in this exigency, which was the better course, and concluded by adopting the latter as more consonant to the language of the rules. If

their determination arose from any other reason, certainly it was sustainable on this. I have spent more time on this point than the consequences to which it leads seem to warrant, but as his honour who presided at the trial has made it a corner-stone in the temple, I could not well pass it without comment. Our adversaries came to this Assembly of 1838, with the design to organize a minority Assembly, if the majority should reject the commissioners from the four synods. Owing to their unskilfulness and their entire unacquaintance with the rules of order, their mine exploded prematurely, that is, before the commissioners from these synods had been rejected by the majority. They, now, having discovered their error, endeavour to give a new aspect to their proceedings, and contend that the officers of the Assembly wilfully committed various faults, and that their (our adversaries) proceedings were of a punitory character. As regards the clerks they could not say that they committed any crime in rejecting the commissioners from the four synods, because jurisdiction of that subject belonged to them, and therefore they sought the proof of crime in the omission of the clerks, to put them on the roll of irregular commissions. They next endeavoured to fix crimes upon the moderator. After the Assembly had been opened with prayer, but before the roll had been reported, Dr. Patton rose with certain written resolutions in his hand, which we have since learned pertained to enrolling of the commissioners from the four synods, and offered to move these resolutions, but was told by the moderator in substance that his motion was premature, for until the roll was reported there was no house to which a motion could be put. In this reason he acquiesced and sat down, and the propriety of the moderator's decision seems admitted in this argument, and was conceded by his honour the judge, in his charge to the jury. The roll was then reported and the moderator made a call, in the nature of a proclamation, for all those who had not had an opportunity of presenting their commissions to the committee of commissions to come forward and do so. This is a practice which has prevailed ever since the rule was enacted directing the commissions to be presented to the clerks before the meeting of the Assembly, and was intended for the benefit of those who, having come in since, had not had an opportunity or those who, from inadvertence or ignorance of the practice, had neglected to present their commissions to the clerks. It was to give such persons an opportunity, I say, before the roll, which was the only evidence of a title to vote, was pronounced complete, and to have the house ascertained, that this call was made. Neither in its terms nor its spirit was it intended for those who had been rejected by the clerks, for their commissions were to be passed through the ordeal of the committee of elections. Dr. Mason, however, thought fit to construe it to be an invitation for him to present the rejected commissions. He was told by the moderator that he was out of order *at that time;* he appealed to the house, he was told by the moderator that his appeal was out of order *at that time.* The roll was not then completed; the last finish was being put to it; at least one commissioner was at that moment

availing himself of the moderator's proclamation. Until the roll was completed, there was no organic body that could entertain an appeal, nor until then could the presiding officer know whom to admit to vote on the appeal. Dr. Mason informs us in his testimony that his appeal was made to the promiscuous throng there assembled, claiming to be commissioners. His motion was an interruption of business then having possession of the inorganic body: I mean the call for further commissions of a particular class. It was an interruption of the standing order of business, which directs that the first act of the Assembly, after the roll is reported, shall be the appointment of a committee of elections; the most important step as regards the rights of members, and on no pretence to be disturbed in its precedence, for the rights of many commissioners may be held in suspense until the tribunal is constituted which is to try their rights. It must be conceded that an appeal may be out of order, and if so, who is to be the judge of that, in the first instance, but the presiding officer? And yet it is upon this rejection of Dr. Mason's appeal that our adversaries now base their whole argument, and in which they seek the justification of their ulterior proceedings. The moderator, say they, committed a breach of privilege in rejecting the appeal, and thereby became liable to removal. I shall not notice the motion of Mr. Squier further than to say, that it was declared by the judge, in his charge, to have been properly rejected; but we will proceed to Mr. Cleaveland's motion. The crime, say our adversaries, was committed on Dr. Mason: Mr. Cleaveland inflicted the punishment. Is this a just representation of what they did, of what they intended to do, and of what they declared to be the purpose of their proceedings? Mr. Cleaveland read a written preamble, obviously prepared before he came there, and thereupon he moved, without addressing his motion to the moderator, himself putting the motion, that Dr. Beman take the chair; and this was followed by a series of motions, put in the same irregular way, to appoint a permanent moderator and clerks, and to adjourn to another place. While all this was proceeding, the moderator, who continued in possession of the chair, was endeavouring to stop these breaches of decorum by cries of order; and the majority of the house either sat still, awaiting the subsidence of the tumult, or joined in the moderator's cry of order. It was only the minority, Mr. Cleaveland's partisans, the malecontents of the New School party, who responded to these motions, and that in loud, tumultuous cries. After Mr. Cleaveland and his party had retired, or, as they affect to call it, adjourned, the majority remained, and quietly proceeded to the transaction of business. It is claimed for Mr. Cleaveland's proceeding, and those which ensued and were based upon it, that it was a regular process of organization, commencing by deposing the moderator and clerks for misdemeanours in office, and in the appointing of substitutes. The votes on these motions were unanimous, or nearly so, say they, for the silence of the Old School party is to be accounted as an affirmative vote, under the following rule:

"Silent members, unless excused from voting, must be considered as acquiescing with the majority." Rules for Judicatories, sec. 30.

Mr. Cleaveland, say they, addressed his motion to the house, because the moderator had forfeited his office by the breach of Dr. Mason's privilege in refusing to put his appeal. The object of the motion was to remove the offending officer; to put the motion himself, say they, for his own removal, would have been absurd, and the most convenient form for removing an incumbent, is to elect a successor. It is on this succession of sophisms, that our adversaries rely.

To deduce acquiescence from our silence, it must be shown that the proposition was submitted to us in an intelligible form, and that we had reason to believe that our assent or dissent was sought.

We have proved that our adversaries had published that they were coming to organize a minority assembly. If a portion, that is, our party, should reject, their party would organize an Assembly which would receive. We being the majority, it is obvious that their intention was not to count our votes, else they could not have organized, for they would have been voted down at every step. We put this question to one of their witnesses, "what was your design, in case our party had voted on Mr. Cleaveland's motion? "His honour excluded the question, otherwise a few words from the witnesses in reply, must have settled this case. He must have answered, in consistency with the caucus resolution, *we would have disregarded your vote.* Our party, then, understood there was to be an interruption which they would not be permitted to silence by a negative vote. Was there any thing in the preamble to Mr. Cleaveland's motion to undeceive them? It was in these words: "That, as the commissioners to the General Assembly for 1838, from a large number of presbyteries, had been refused their seats; and as we had been advised by counsel learned in the law, that a constitutional organization of the Assembly must be secured at this time, and in this place, he trusted it would not be considered an act of discourtesy, but merely as a matter of necessity, if we now proceed to organize the General Assembly of 1838, in the fewest words, the shortest time, and with the least interruption practicable. He therefore moved that Dr. Beman, of Troy, be moderator, to preside till a new moderator be chosen." At least, such is represented to have been the substance of the paper in the New School minutes for 1838. Its first statement is, that a large number of commissioners had been refused their seats, the caucus resolution anticipated such an event. The event, however, was not the *casus datus* of the caucus resolution, for the refusal of seats was not by any portion of the commissioners, but by the clerks, whose act was not confirmed by any portion of the commissioners; and if the testimony of the relators' own witness, Mr. Phelps, is to be credited, had the question been brought before the commissioners, the decision of the clerks would not have been confirmed. But this paper further proceeds to state: "And as *we* have been advised by counsel learned in the law." Who were *we?* Certainly not the Old School party, or the majority, but the New School party, the parti-

sans of Mr. Cleaveland. They had consulted counsel, as it is in evidence, and had been advised as this paper states. Mr. Cleaveland further reads, "he trusted it would not be considered an act of discourtesy, &c., if *we* now proceed to organize." *We* again! What *we?* the same who had consulted counsel, that is, the New School party. "If we proceed to organize with the least interruption." To whom is this interruption for which he apologizes? If this was the act of the whole body of commissioners, it was no interruption! Our adversaries cannot gravely deny, that their caucus resolved to organize a minority Assembly in a certain exigency, and that Mr. Cleaveland's motion was an attempt to carry out that resolution; and that however strong a negative vote had been given on his motion by our party, he would have disregarded it, his motion having been addressed solely to his own partisans. Because that exigency had not arisen, nor the state of facts on which the advice of counsel learned in the law, was predicated, they now disingenuously, we think, endeavour to give it another aspect. As our party understood the proceeding, as they did; as their language plainly purported, it was an *interruption* in which we had no part. It is not, therefore, fair to contend that we assented to it by our silence. Their caucus resolution was published, declaring their intentions. Their preface to their motion declares, in effect, its purpose to be, to carry out that resolution; and if there were concealed, under all this, another meaning and purpose, it is plain that we have been entrapped. Independently of the positive purpose evinced by the language of Mr. Cleaveland, irreconcilable with their present pretensions, was there any collateral intimation given by him, from which a mind, even not prepossessed by the declarations of the caucus, could have collected a design to punish the moderator for a breach of privilege, by removing him? Mr. Cleaveland treated the moderator with contempt, as a nullity; but he said not one word about punishment, nor degradation by removal, nor of the violation of Dr. Mason's rights. This fierce avenger, in the most lady-like terms, soft as the breathings of zephyr, apologized for the interruption! He expressly excludes the interpretation that his motion was to remove the moderator, for an act of oppression upon Dr. Mason, by telling us that the reason of his motion was, that a number of commissioners had been refused their seats, and that the object of it was to organize the General Assembly. We have scarcely patience to comment on these absurdities.

If the rights of Dr. Mason had been invaded, the utmost extent to which it would have authorized irregularity, would have been to bring his complaint before the house, in plain, intelligible terms; to have submitted some proposition bearing directly upon his grievance, and any question that rose upon it, should have been put to the house, (assuming our adversaries' doctrine, that the moderator's implication in the question incapacitated him from performing that function,) by one of the clerks. Such has been the almost immemorial parliamentary practice, both trans-Atlantic and cis-Atlantic. 2d Hatsell, 113, 211, 212; 6th Gray, 406, 448; Sutherland, 71, 72; Jefferson, 104. Nay, it is the established order of this very body.

See an instance in 1835, in the minutes of that year. When a member rises from his seat, and usurps the office of moderator, no member can know whether it be a mere disorder, or an irregularity, justified by necessity; it is the subject of opinion, and there may be differences of opinion; and no man should lose his vote, from an erroneous opinion. But if the question be put by an undoubted, although inferior functionary, then it is a sufficient caution to every man, that he should vote. But, say our prolific adversaries, the clerks were implicated in the crime intended to be punished, and would not have performed the duty. Did you try them? For the honour of our race, both ancient and modern story abounds with instances in which inclination has been sacrificed to duty. Had it been proposed to the clerks, though unsuccessfully, it would have aroused the attention of the members to the true state of the question. But should we concede all the preliminaries necessary to justify Mr. Cleaveland's proceeding, it would be easy to show that the motion itself was a violation of the established rules of order. This constitution has an expedient for almost every exigency, and it provides, particularly, for the actual, and, as we conceive, constructive absence of the moderator, caused by his incapacity. In such case, the next preceding moderator must take the chair. There were three moderators present, when Mr. Cleaveland made his motion, who had held the office more recently than Dr. Beman, (General Rules, II.)

In chapter xix. sect. 11. of the Form of Government, it is said to be the duty of the moderator "to propose to the judicatory every subject of deliberation that comes before them;" "he shall give a concise and clear statement of the object of the vote;" he "shall, in proper season, when the deliberations are ended, put the question and call the votes." The reverend gentleman, Mr. Cleaveland, by a single frisk, overleaped all these well-devised constitutional rules of government. He proposed to the judicatory, not the subject of deliberation, for it would be mockery to call it so, but the subject of action. He put the question and called the votes. But although he thus usurped the office and power of moderator, he forgot his duties, for he did not wait for the "proper season," nor until "the deliberations were ended." He gave no person an opportunity to deliberate, that is, to debate the question, nor even to ask of the mover the meaning or purport of his motion. He read the paper, as it is in evidence, with the trepidation of one who knew he was violating propriety, order, and decorum, and put the question in so hurried a manner, as to forget altogether to reverse it, or if he reversed it, he did so before the affirmative voting was ended. The whole process from his indecorous interruption to the tumultuous and vociferous adjournment, occupied from three to five minutes. In this brief space the comprehensive genius of these gentlemen deposed one moderator and elected two others; deposed the stated and permanent clerks, and elected two others, set aside every rule and order of government, and substituted their anarchical principles of necessity. Nature has kindly endowed them with this rapidity of intellect; their new and revolutionary theology has sharpened

their natural faculties; but they must allow the dull followers of the faith of their fathers the time for deliberation guarantied by the constitution. They beside had the advantage of us: they came prepared; each had his part assigned, and knew his exits and his entrances; but we read their conduct only by the feeble light of their own declarations and professions. They told us, from their caucus, that they intended to organize a minority Assembly, and we believed them. Mr. Cleaveland told us the same, and, as if to give us a pledge that he had no sinister meaning, his words were written down. An entire disregard of the officers of the house and the rules of proceeding, treating them alike as nonentities, assured us that their proceeding was revolutionary. And as there was no allusion, in all their proceeding, to the misconduct of the moderator, to breaches of privilege and designs to punish, we must be pardoned our want of super-human sagacity in not finding out all this. And we deprecate the mad injustice which would make our silence, under such circumstances, a voting away of our dearest rights. Our adversaries will not assert that we designed that our silence should be counted affirmatively.

We have claimed to be the majority. All the relators' witnesses who were questioned on the subject, admit, distinctly, that we were the majority. Allowing them the members from the four synods, we, it is in testimony, outnumbered them by twenty or thirty. But our adversaries, if they are upheld by this court, will have taught us the practical paradox, that, by ecclesiastical dexterity, the minority may be more numerous than the majority.

There are some other constitutional views which demonstrate the untenable character of our adversaries proceeding. The moderator of the preceding Assembly is required by the constitution to organize that which succeeds, and it is manifest, upon a careful perusal of the provisions of the constitution on this subject, that he is independent of the inorganic body which he is thus moulding into form. After he has completed the process, he is removed by the election of a successor. Deliberative bodies have the power of removing the officers whom they have created, but not those who derive their power from the constitution, independent of the body over whom they preside. The Assembly of 1838 could elect their own officers, but not the officers of the Assembly of 1837, to whom is confided, by the constitution, the power to organize. Those officers were the seminal principle, upon the preservation of which depended the reproduction of a General Assembly in the year 1838.

It is also most apparent that this constitution has deliberately refused to the members the power of appeal from the moderator's decisions on questions of order. The present constitution is entirely silent on that subject; and to show that it is excluded, *ex industria*, I will refer to the constitution as it existed before the amendments of 1821, and you will find, in the Form of Government, a chapter entitled "Privilege," in which the power of appeal is given, edition of 1806. It was stricken out in amending the constitution. Such a right cannot be implied, it must be express. See Jefferson's Manual, Sutherland's edition, page 116. A right of appeal is provided for

by the 9th of certain rules of order, adopted by the General Assembly, but this is no part of the constitution, and, as I have shown, unauthorized by that instrument. If I have succeeded in demonstrating this position, I have taken away from our adversaries their great reliance in argument,—the breach of Dr. Mason's privilege in refusing his appeal.

Having thus elaborated these principles, I will proceed to take up the exceptions to the Judge's charge, one by one, and show that they are sustained. (Here Mr. H. went through the exceptions at large, see pp. 530 to 542 of this report.)

Such, may it please your Honours, are the grounds upon which we claim a new trial. That is the form of our application, but if you concur in any of the great principles on which I have defended the acts of 1837, or condemned the New School organization of 1838, your decision (although, in form, the grant of a new trial,) will be in fact a final determination on the claim of the relators. If you uphold the acts of 1837, there will be peace in these two sections of the Christian church. If your decision is confined to a mere condemnation of the New School organization of 1838, there will be new agitations, and, no doubt, further belligerent measures, as much a reproach to decency and religion, as those which you shall have condemned. Our adversaries say that their design is union, and that they are endeavouring, by force, to throw around us the arms of their fraternal affection. In this they cannot be sincere; they know that your sentence of reunion in regard to ingredients that are immiscible, could not be carried into operation, and that such a sentence would compel us to abandon to them all the offerings which our pious fathers have placed on the altar of religion. Confirm this necessary separation, and each party will ultimately go on its way rejoicing; for our adversaries, after the first pains of defeat have subsided, will recognize this Court as a means, in the hands of Providence, to arrest their further progress in the paths of error.

Mr. Hubbell having closed his argument on Friday, occupying three days instead of two, as stated by mistake on page 542, the Court adjourned to Monday morning.

ARGUMENT OF WILLIAM M. MEREDITH, ESQ.

Occupying Monday and the morning of Tuesday, the 22d and 23d of April.

Mr. Meredith said: It has been stated by the learned counsel for the defendants, that the property under the control of the General Assembly amounts to one hundred and seventy thousand dollars, or thereabouts; and he seems to consider that this circumstance gives an importance to this cause which it might not otherwise have. I beg leave to differ from him. If the property at stake here were of the most trifling value, the importance of this cause would not be diminished. Considerations of property are of slight importance in comparison with rights such as those of which the relators here seek the restoration. They, and many of those whom they represent, by the lawless acts of the party to which the defendants are

attached, have been excluded from the enjoyment of all their ecclesiastical, and some of their most valued civil personal rights, as well as from all share in controlling the management and appropriation of the funds in question, in which it cannot be denied that they have an interest. The relators do not desire to exclude their adversaries from the full enjoyment of all their rights of person and property. We have excommunicated nobody. We wish to take away the property of nobody. We merely desire to be left in the peaceable and unmolested enjoyment of the rights which we hold in common with all the other members of the Presbyterian Church.

This case is in two respects quite unprecedented; first in the extraordinary number of the exceptions which have been taken to the law as laid down by the learned Judge who sat at Nisi Prius; and secondly, in the fact that in the argument on these exceptions, not a single authority has been produced from any elementary work or book of reports. One or two citations from Hatsell, Jefferson, and Gray's Debates, are all with which we have been favoured. It is obvious, therefore, that our learned opponents have found no support in the common law, in the law of the land, for the principles which they are asking a court, bound to administer that law, to apply in the decision on a civil right created and existing under it.

By the charter of the corporation here in question, the General Assembly of the Presbyterian Church is authorized at discretion to change one-third of the members of the corporation. The General Assembly itself is not incorporated. The relators allege that the General Assembly of 1838 did lawfully elect them in place of the defendants, and thereby amoved the defendants from their office and franchise as trustees. On this fact issue is taken.

It is not denied that the relators were elected, and the defendants thereby amoved, in due form, by the vote of a body claiming to be the General Assembly, and sitting at the Presbyterian church on Washington square. But the defendants allege that the body in question was not the General Assembly, but that the true General Assembly was another body, sitting at the Tabernacle in Ranstead court.

It may be well to state once for all, that the Court is to decide in this case on the civil rights of the parties under the charter of incorporation granted by the commonwealth. We have nothing to do with questions of theology.

The rights of electing members of the corporation and controlling the application of its funds, are in the strictest sense civil rights, and are entitled to the protection of the laws of the land.

You cannot refuse to determine the question of the election of the relators. That determination depends on the qualifications of the body of electors; and as that body is not itself incorporated, and cannot be made a party, the identity of the body itself, as well as the rights of individual electors, are legitimate subjects of inquiry in trying the rights of the elected. (Symmers *vs.* Regem, Cowp. 489. Townsend's case, T. Raym. 69.)

It is necessary to understand the general frame of the church government, so far as it concerns the General Assembly, to which

certain powers are given by the charter. The General Assembly has the right of electing members of the corporation, but is itself a delegated and temporary body, sitting annually, and composed of representatives from the several presbyteries connected with the church.

The presbyteries again are respectively composed of all the ministers, and a delegation of elders from the respective church sessions within certain territorial limits. The church session consists of the pastor of the particular church, and the elders elected by the members of the same, and holding their offices for life.

A synod is composed of all the ministers, and a delegation of elders from the respective church sessions, within certain territorial limits, embracing the territory of at least three presbyteries. The presbyteries, but not the synods, are represented in the General Assembly, which is, indeed, composed of a delegation from the several presbyteries.

The lowest judicatory is the church session; from its decision an appeal lies to the presbytery; from the presbytery to the synod; and from the synod to the General Assembly, which is the highest judicatory of the church.

The case of the relators may be thus stated:

1. That there were in 1837, twenty-eight presbyteries (composing the four synods of Utica, Geneva, Genessee, and the Western Reserve,) to which were attached sixty thousand communicants and six hundred ministers of the church. That these presbyteries formed part of the church, and were entitled to be represented in the General Assembly.

2. That the General Assembly of 1837 attempted to disfranchise these presbyteries, and all the ministers and members of the church within their bounds, and excluded their representatives from the Assembly, by the passage of resolutions which were wholly null and void.

3. That the moderator and clerks of the Assembly of 1837, at the opening of the Assembly of 1838, attempted to carry out these resolutions, and in this and other respects were guilty of official misconduct.

4. That the moderator and clerks were therefore lawfully and regularly removed, and others appointed in their places, by votes of the body duly taken.

On the other hand, the defendants allege:

1. That the presbyteries in question were never regularly attached to the church, but came in under an act of the General Assembly, called the Plan of Union, passed in 1801, which act they say was unconstitutional.

2. That the act of union was lawfully abrogated by the Assembly of 1837, and that, by virtue of that abrogation, the twenty-eight presbyteries were out of the church.

3. That the moderator and clerks of 1837 were not guilty of misconduct in the proceedings at the meeting of the Assembly of 1838.

4. That the moderator and clerks were not removed by votes of the Assembly of 1838.

1. It was fully proved at the trial, that the twenty-eight presbyteries which were excinded, were regularly attached to the Presbyterian Church. We showed this, 1. By the acts of the General Assembly erecting these presbyteries, at various periods from the year 1802 downward. The new presbyteries were in all cases formed by dividing presbyteries already existing.

2. The twenty-eight presbyteries were, from the times of their respective organizations, regularly represented in the General Assembly, and contributed to the funds of the church.

3. When the new constitution of the church was adopted in 1821, all these presbyteries (except a few not then erected) voted on the question of adopting it.

As to the twenty-eight excinded presbyteries and their constituent parts, we showed that they were in exactly the same situation as any other members of the church; and that even if the act of union of 1801 had provided for admitting persons not Presbyterians into the church, the bodies in question did not come in under any such provision.

But in fact the act of union made no such provision. That act provided that Presbyterian ministers might become pastors of Congregational churches, and that Presbyterian congregations might call Congregational ministers as pastors, without incurring the censure of the Presbyterian Church. It further provided that, in certain cases of appeal, a delegation from the standing committee of a mixed church, composed in part of Presbyterians and in part of Congregationalists, might sit in the presbytery. There was never a mode in which any individual could come into the Presbyterian Church under the act of union.

The Assembly of 1837 abrogated that act of union, declaring it unconstitutional. Whether it were so or not, is a question which does not concern us so much as Dr. Green and the other fathers of the church, who passed it. Whether it were just, by a sudden abrogation, to destroy the connexions which had for many years existed between Presbyterians and Congregationalists under it, is a question which the majority of the Assembly of 1837 probably considered and resolved to their own satisfaction. But when they proceeded to declare that by virtue of that abrogation, twenty-eight presbyteries, including sixty thousand members and 600 ministers of the church, were out of her communion, they exceeded their own powers and trampled on our rights.

It has been faintly argued on the other side, that the resolutions of 1837 did not profess to exclude us from the church, because they provided that all who were strictly Presbyterian in doctrine and order, might apply to adjoining presbyteries, and be admitted to connexion with them. So might a person who had been a heathen, a Mussulman, a Jew, a Brahmin, or even a Congregationalist.

To allege that these resolutions did not purport to exclude us entirely from the church, is a proposition too glaringly unfounded to require confutation. The allegation shows nothing but the consciousness of wrong.

We say that these resolutions, so far as they proposed so to exclude us, were null and void.

The powers of the General Assembly are to be ascertained by reference to, 1st, the constitution and form of government of the Presbyterian Church; 2d, the law of the land.

1. By the constitution of the church, the General Assembly is the highest judicatory, but its powers are not unlimited. No member or body of the church can be censured or excluded without an offence charged, notice, and the opportunity of a hearing and fair trial. (Mr. M. here cited several passages from the Form of Government, particularly cap. iv., v., and xii.; and from the Digest, particularly sec. 5, on page 323, given on pages 37 to 40 and 156 of this report.)

Now, the twenty-eight excinded presbyteries were charged with the offences of Congregationalism and gross disorders, or they were not. If they were, they were entitled to notice and a hearing, which it is not pretended they had. If they were not, then all excuse for the proceedings of the Assembly of 1837 is abandoned.

It is in vain for our opponents to say that judicatories cannot be cited and tried. If they cannot, their members can be. But it would be tedious, 'tis said, to try them individually; nay, even to select among the several presbyteries those which were perfectly sound in the faith, (and it is acknowledged there were some,) was too laborious a duty for these fathers of the church, the Assembly of 1837. What shepherds are these, who, on a suspicion that there are goats in the flock, drive the whole body of sheep out of the fold, because the task of discrimination is irksome! Do they expect to be thus judged?

But in point of fact, judicatories may, by the usages of the church, be cited and tried; nay, this very Assembly of 1837 had instituted proceedings to cite and try these very judicatories, which, with all their members, they afterwards ejected without trial. We have their own formal and solemn acts in direct contradiction to the arguments here used on their behalf. It is true they afterwards abandoned the judicial proceeding by citation, and resorted to another, in imitation of their respectable predecessors, who dropped the impeachment against Lord Stafford, and brought in a bill of attainder; but the reason was in both cases virtually the same, not that an impeachment would not lie, but that the defendants were likely to be acquitted.

The General Assembly of 1837 had no warrant then for their proceedings in the constitution and form of government of the church. They violated all law and all precedent.

If the excinding resolutions be tested by the principles of the common law, the result is the same. Our law knows of no disfranchisement, unless for sufficient legal cause and after a fair trial. (Baggs' Case, 11 Rep. 99. Comm. *vs.* St. Patrick's Society, 2 Binn. 448. Comm. vs. Guard's Poor, 6 S. and R. 469.)

In Symmers *vs.* Regem, (Cowp. 489) the common council had undertaken to disfranchise for defect of qualification, nineteen of their own body, who held under an election had ten years before. At a

corporation election subsequently held, the Mayor rejected the votes of the persons thus excinded. Lord Mansfield, speaking of the argument in support of the rejection of the votes of these persons says, (p. 502,) "The next ground is that they had been *disfranchised;* that the disfranchisement was still in force, and their restoration not till *after* the election. As to this objection, a great deal depends upon the use of the word *disfranchisement;* otherwise it creates a confusion. But on looking into it, this is no disfranchisement, nor is there a pretence for calling it so; but it is doing that which the common council had not the semblance of a right to do; taking upon themseles to judge of the validity of an election ten years before, and to declare it *null* and *void* for want of a qualification at that time. The word "disfranchisement," signifies taking a franchise from a man for some reasonable cause; which they do not do, but only say they never were common council men. What authority have the common council to do that? None. It could be done only by information in the nature of a *quo warranto.* But suppose it had been a disfranchisement, how does it appear to the court that the common council have a right to disfranchise? It is incident to the corporation at large to disfranchise, but not to a select body. It does not follow that the select body who has a right to elect, has from thence a right to disfranchise. But the fact is, it is no disfranchisement at all."

By the constitution of the church, and the law of the land, the excinding resolutions were absolutely null and void. The answer which is attempted to all this, that the resolutions were not *judicial* acts, amounts to nothing. Though passed by a body, purporting to be a *judicatory,* they were not in form or in substance judicial, and that is exactly what we complain of. They professed to do without notice, trial, or judgment, that which by law could not be done without all these. As corporate acts they would be therefore void. As acts of a body so connected with a corporation, as to make the rights of its members the legitimate subject of judicial consideration, they are equally void. No man, I think, will deny that when, as in this case, the title of the corporators depends on the acts of a body like the General Assembly, the court will apply to these acts by analogy the same rules which would be applied to the acts of a corporate body, founded as these rules are in justice and common sense, and supported as they are here by the provisions of the constitution of the General Assembly itself, and the form of government of the church.

It has been said, that by the constitution, the General Assembly has express power to erect presbyteries, and may therefore dissolve them; since the same power which can create, can also destroy. That is universally true of none but the Almighty power. Lord Mansfield's opinion, above quoted, is a sufficient answer to the proposition as applied to such a body as the General Assembly. Besides, if they could dissolve presbyteries at pleasure, they did not *dissolve* these, but ejected all their ministers and members from the church, which is a very different thing.

There is another view of this subject, which has been hinted at,

and which I will proceed to consider. It looks to a justification of the excinding resolutions, as a high act of legislation, necessary for the preservation of the church in its purity, and therefore above all ordinary rules and limitations. We are so prone in this country to political metaphysics, that I can scarcely wonder that even in this case we are invited to discuss them.

Supposing the Assembly to have been a body with general legislative powers unlimited, except where express limitations are imposed, (instead of being a mere judicatory with limited and enumerated powers,) I deny that they would, even in that case, have any right to exclude a presbytery and its members by a legislative act.

The Assembly is a body composed of the delegates of the presbyteries. The presbyteries were organized bodies before the General Assembly came into existence, and it was originally established by the act of these presbyteries. By the constitution, as adopted by the presbyteries, it is provided that no constitutional rule shall be adopted by the General Assembly without the formal consent of the majority of the presbyteries first obtained, and the constitution secures to each presbytery a representation as *such* in the General Assembly. When a portion of the territory forming one presbytery is divided by the General Assembly in the prescribed mode, and the two parts erected into distinct presbyteries, each retains in its new organization all the rights which had previously appertained to the old presbytery, and each stands on exactly the same footing as if it had had a separate existence when the constitution was formed and had become a party to it. In fact, almost all the excinded presbyteries were already formed, and voted on the constitution of 1821. It is further to be observed that a General Assembly is not essential to a Presbyterian Church. Such a church may be composed of a single presbytery, and be a true, genuine Presbyterian Church. For many years there were two Presbyterian churches in this country, consisting of the two disconnected presbyteries of Philadelphia and New York, by whose subsequent union the present Presbyterian Church was formed. It is to be remarked, also, that the effects and consequences of the excinding resolutions, if valid in the sense contended for by the defendants, are manifold, viz: 1. That the excinded presbyteries lose their right to participate in the exercise of the corporate franchise, and their interest in the common property. The right of electing members of the corporation is a corporate franchise, though the body to which it is granted be not a corporate body. The non-excinded presbyteries, on this hypothesis, retain to themselves the exclusive possession and enjoyment of this franchise and of the common property.

2. That the excinded presbyteries and their constituent parts cease to be members of the Presbyterian Church, and all property given to or held by them, or any of their constituent parts, as members of, or for the use of the Presbyterian Church, is diverted from them and subjected to the exclusive controul of the non-excinded presbyteries.

The question is, Are the excinding resolutions valid as legislative acts of the General Assembly?

We contend that they are not. That neither the General Assem-

bly, nor a majority of the presbyteries themselves, could exclude a single presbytery on the footing contended for on the other side.

By the constitution of the church, the General Assembly is prohibited from adopting any new constitutional rule, without having first obtained the consent of a majority of the presbyteries thereto. It is on this ground that the defendants maintain the invalidity of the Plan of Union of 1801. Grant, for the sake of the argument, the truth of all they have said on this subject. But by the same constitution, the presbyteries are the sole judges of the propriety of admitting members into the church, and the Assembly has full authority to erect new presbyteries. It cannot, therefore, with any show of reason be said that the acts of the Assembly for dividing old presbyteries and erecting their several parts into new and distinct ones, were invalid or unconstitutional. In the authority to erect new presbyteries, is necessarily included the right of deciding on the qualifications of the parties, and the decision of the General Assembly on that subject is final and conclusive, as far as concerns the validity of the establishment of the new presbyteries. Suppose, therefore, that these presbyteries were composed of Congregationalists, they would still be lawfully constituted presbyteries, and would retain their rights as such until they should be excluded by a judicial sentence. Is or is not a legislative act, excluding certain presbyteries from all participation in the Assembly, the adoption of a new constitutional rule? The constitution provides that *all* the presbyteries shall be represented in the Assembly, and a provision that one or more of them shall not be so represented is not only a new provision, but is wholly inconsistent with the terms of the constitution.

Again: Grant the Assembly to possess indefinite legislative powers; grant that they may destroy their own contracts, tear asunder pastoral relations existing for thirty-five years under their sanction, stigmatize the fathers of their church as the authors of "an unnatural and unconstitutional Plan of Union," or do any thing else which passion or prejudice may cloak under the name of self-preservation, there is still one thing which even in this hypothesis they cannot do. As a delegated body, they cannot destroy their own constituencies; they cannot abrogate the contract under which they sit, and from which alone they derive whatever of authority they possess. To say that, even as regards themselves, they have no *right* to do this, is merely to say that the right of self-preservation must run mad before it can include that of self-destruction. When I agree, that a man or body of men may, in case of necessity, do almost any thing to preserve their lives, I must except suicide. But I go further than denying their *right*, I say they *cannot* do it. They may refuse to perform their own duties as delegates, but they cannot destroy the compact made between the presbyteries, and to which the presbyteries are the only parties. Notwithstanding their attempt the compact remains in full force and vigour.

The attempt itself is an effort to revolutionize, and not to administer, the government of the church. In a civil government it would be revolution or rebellion, as thereafter might be. But the right of revolution or rebellion is too valuable to be granted away to a private corporation.

If the majority of the electors of trustees of the General Assembly of the Presbyterian Church, could, by a revolutionary measure, deprive the minority of their interest in the joint property to the amount of one hundred and seventy thousand dollars, we might have boards of directors appropriating the corporate funds to themselves under declarations of independence, and stockholders taking away their fellow stockholders' shares of the dividends, by voting themselves in a state of permanent insurrection. Unfortunately for the defendants, corporations are not states. In political revolutions, the parties trust in their own arms and appeal to the judgment of heaven; but in corporation contests, they must trust in *mesne* process, and appeal to the laws of the land. *Political necessity* is a phrase sometimes used to excuse a dishonest act perpetrated by bodies which are beyond control; but corporations and individuals are not beyond control, and courts of justice are expressly instituted to restrain them from *coups d'etat.*

Could the common council of a city, where the respective wards send members to that body, exclude certain of the wards from the city, and deprive their representatives of their seats in the council? The attempt would be wholly absurd, and any resolution for effecting it would be absolutely null and void. At the next election the excinded wards would elect their members as usual, and these members would have precisely the same right to take their seats in council as those from any other part of the city. Yet, absurd as such an attempt would be on the part of a city council, it seems precisely analogous to the course pursued by the General Assembly, and here gravely defended as just, lawful and meritorious.

If congress should pass an act, excluding a state from the union and her representatives from congress, or declaring the minority to be the state and that the representatives of the minority should sit in congress, such an act would be merely void of all legitimate effect. The citizens of the excinded state would still rightfully hold their elections and the members elected by the majority would be entitled to sit in congress.

The government may be dissolved, and a new one established; but, short of that, none of these things can be done without the consent of the parties to be affected, or an act of some wholly superior legislative power. It would be of no importance, in what manner the excinded state had originally come into the Union, whether rightfully or wrongfully, for acquiescence makes right. Should congress declare the state of Louisiana, for instance, to be no longer a member of the Union, because the act for her admission was unconstitutional, the declaratory act would be merely void. Should any of the states successfully adhere to the act of congress, they would be seceders from the Union, and those states which should refuse to adhere to such an act, and whose representatives should continue to sit with those of Louisiana, would be the rightful successors of the present government of the United States, as Rehoboam's kingdom continued to be the true kingdom of David, though ten tribes out of the twelve had seceded. On every ground, therefore, I repeat that the excinding resolutions of 1837, were merely null and void.

The presbyteries themselves could not exclude one of their number. The two presbyteries of Philadelphia and New York, were at one time united in a synod, and afterwards separated, in consequence of party divisions somewhat similar to those which now prevail. When these presbyteries united in a synod, they formed one government, just as the church now does, or was designed to do, under the General Assembly. Could one of these presbyteries, or its representatives in the synod, have excinded the other, retained the name of the synod and the common property, and taken the property, held by the other for the Presbyterian Church? Such an act of robbery and fraud was never contemplated by the venerable men who controlled the parties in the church at the time of the first separation. When the two presbyteries found that they could not agree in union, they agreed to separate; dissolved the government which they had formed into its original elements, and, instead of one synod, there were again two presbyteries, neither of them pretending to be the exclusive successors of the former synod.

Why could not so just and righteous an example have been followed now? It is true, the common property is now of greater amount, and offers a larger prize to ambition or cupidity. The temptation to err is thus increased, and therein lies the whole difference between the two cases. If the Old School presbyteries could no longer meet their brethren in harmony, they might leave them, and form a new organization of their own; but, having done so, they cannot claim to be still the same body. The charter was granted to trustees to be elected by the General Assembly as it was then, composed of members from *all* the presbyteries. A part of the presbyteries cannot break down the existing government of the church, establish a new one, including part only of the whole, and still claim to enjoy the privileges, which, by the charter, were granted to the whole.

We next come to consider the conduct of the clerks and moderator of 1837, at the opening of the Assembly of 1838. The clerks, it should be recollected, hold their offices during pleasure. Each Assembly elects its own moderator, and it is provided that the moderator of one Assembly shall, (if present,) open the next, and preside until a new moderator be chosen.

First, of the clerks. In order to avoid the waste of time and confusion which attended the verification of all the commissions of members in presence of the whole body, a rule has been adopted in modern times, by which the clerks are constituted a committee of commissions, whose practice it is to examine all the commissions which may be presented to them, before the meeting of the Assembly; to report as received those commissions of whose authenticity and regularity they are satisfied; and to report, for the judgment of the Assembly itself, those which appear to be irregular, unconstitutional, or not authentic. The latter class are referred to a committee of elections, whose appointment is the first business in order.

We allege, that the clerks were guilty of misconduct, in refusing to receive the commissions of the excinded presbyteries. It was

their duty, we contend, to receive and report them as regular to the Assembly. They refused even to examine them, grounding their refusal on the excinding resolutions of the Assembly of 1837. It is in vain that our opponents attempt to deny in argument, that the clerks, in their refusal, were carrying out the resolutions of 1837. The reply which they made to the application to receive the commissions, was too explicit to leave any doubt on this matter; and those gentlemen themselves have never alleged any other reason for their conduct, and would doubtless resent the imputation of having been governed by any other motive, as strongly as they resented, in 1837, the anticipation that they might possibly act otherwise. If, therefore, we are correct in saying that the resolutions of '37 were null and void, and that the rejection of the votes of the persons excluded by them would vitiate an election, (Cowp. 489,) it follows, that the clerks, acting as a committee of elections, violated their duty in rejecting our commissions. But, at all events, taking their own ground, it was their duty to report to the Assembly these commissions, as having been rejected, so as to leave the question of their reception to the Assembly itself. One of the clerks has very frankly stated that he thought then, and still thinks, they ought to have done so, but was overruled by his elder and more experienced colleague. They thus made themselves parties to the combination which had been formed to prevent the question of the validity of the excinding resolutions from being presented, in its legitimate order, to the Assembly of 1838.

The moderator of the Assembly of 1837, was another party to that combination. In the Assembly of 1838, his main effort seems to have been, to use his opportunities as moderator, to obstruct the lawful organization of the body, and to force it to organize in conformity with the illegal acts of '37. I pass over his rejection of Mr. Patton's motion and appeal, for the reason he gave was perhaps a sufficient one, that the house was not yet formed. But, after the clerks had reported the roll, and the moderator had declared the house to be formed, he persisted in the same course. When he had called for the presentation of commissions, (I shall not stop to discuss the conflicting evidence as to the precise phrase which he used,) and Mr. Squiers presented his own, the moderator refused to hear him, only after ascertaining that he came from one of the excinded presbyteries, thus showing, that the grounds of his refusal were the excinding resolutions. It has been said, here, that this refusal was right, because Mr. Squiers had not been admitted as a member, and therefore could not make a motion. The excuse may pass, and yet it is to be observed, that, by the universal usage of this Assembly, and the practice of this moderator himself, (as evinced in the case of Joshua Moore,) the persons claiming seats always presented their own commissions, and were received to do so, without a motion by any sitting member.

Dr. Mason then made his motion, accompanied by the presentation of the commissions: this motion, which was duly presented, was also rejected by the moderator. Dr. Mason appealed from his decision, and the moderator refused to put the appeal.

The motion of Dr. Mason is said to have been out of order for several reasons.

1. Because the moderator had called for commissions which had *not* been presented to the clerks, and these had been presented to them and rejected. The weight of the evidence is, that the moderator did not so limit his call for commissions, but I think it very immaterial whether it were so or not. The clerks having withheld from the house the fact that these commissions had been presented to them, the moderator could have no official knowledge of that fact. It is the undoubted right of the house to have all its members, and to determine on their qualifications. By the usages of the Assembly, the persons claiming seats were divided into three classes, —those who were reported by the clerks as having constitutional and regular commissions, those who were reported as not having such commissions, and those who were not reported by the clerks at all. It is true, it was the duty of the clerks to report on all the commissions presented to them, but here they had refused to perform that duty. There were but two courses to be pursued. One was, to compel the clerks to complete their report by inserting the omitted names; and this course the moderator decided to be out of order when he refused to receive Dr. Patton's motion. The other course was to consider those commissions as belonging to the class not reported on, and allow them to be presented with the others of that class to the house. The moderator, in effect, could have no right by limiting his call to postpone the claim of one member to that of another. When the house was formed, all the members, whose claims were not already before it, had an equal right to present themselves. The wrongful act of the clerks could not affect this right, nor could the wrongful act of the moderator. He could, as presiding officer, make no arbitrary distinctions: he could not say that he would receive commissions from those claimants only who wore whiskers, or motions from those members who wore wigs.

It is said that the moderator did not pronounce Dr. Mason's motion to be out of order absolutely, but only out of order "at this time." I again say that the weight of evidence appears to me to be against his use of the phrase "at this time." The question is of no importance that I can perceive, except that the use of the phrase "at this time," would be an admission that the motion was orderly in itself if made at a proper time.

But this motion was made at a proper time. There was no interference with Joshua Moore's presentation of his commission, for it was found that he did not come forward with it till afterwards. Nor was there any violation of the rule that the first business shall be the appointment of a Committee of Elections. It never was the usage of the Assembly to appoint that committee until after all the persons present claiming seats had presented their commissions. The moderator himself had called for commissions to be presented. The rule for the appointment of a Committee of Elections was itself not binding on the Assembly of 1838 as a rule, for they had not adopted or acted on it. And if it had been binding as a rule, it was one

which concerned the order of business merely, and must give way to a question of privilege, such as the reception of a member.

This is perfectly clear, whether as a question of corporation law or of parliamentary law.

In Austin *vs.* Osborn, (Com. 243,) the corporation of Hythe being assembled, admitted a freeman, then proceeded to continue and swear in certain officers of the corporation, and that being done, were proceeding to the election of a mayor. The mayor had laid down his mace, and the freemen had been summoned in the usual manner, by the blowing of a horn, to the election of a mayor; when certain persons presented themselves and claimed to be admitted as freemen.

They were refused admission on grounds similar to those taken here. They were not in order "at this time." Other business was actually in progress, viz. the election of a mayor. The rejected claimants then tendered their votes at the election of mayor, and were again refused, because they had not been admitted as freemen. The Court of King's Bench held that as these persons were in fact entitled to be admitted, the refusal of the mayor to admit them, (notwithstanding the time at which they offered themselves,) was a tortious refusal, and that being so, they should not be injured by it, and that their votes at the subsequent election ought to have been received.

The parliamentary law is equally well settled. "Although a question is moved, seconded, and proposed from the chair, if any matter of privilege arises, either out of the question itself, upon any quarrel between members, or any other cause, this will supersede the consideration of the original question, and must be first disposed of." (2 Hatsell 113-14.) And again,—"When a member appears to take the oaths, within the limited time, all other business is immediately to cease, and not to be resumed till he has been sworn and has subscribed the roll." (2 Hatsell 88.)

These authorities are irrefragable. If the law were otherwise, a member who happened not to be included in the first roll of the Assembly might be kept out of his seat altogether, if the moderator chose to keep him out, by a judicious succession of other business. The reception of a member is not provided for in the order of business of any deliberative body that I know of. The reason is, that it is always in order and should not be limited to a particular stage in the business of the day; but by these new principles of parliamentary law, which the defendants set up, I am not sure that it would ever be in order.

But suppose Dr. Mason's motion to have been out of order "at the time," how would that affect the case? He still had the right of taking the decision of the house on the question, whether he was in order. The moderator refused to put his appeal. How is this to be justified? By denying the right of appeal from a decision of the chair! Then the moderator of one Assembly has the absolute control over the next. I agree that such a moderator has all the powers of a presiding officer. I consider him, in regard to the extent of his powers, precisely as if he had been elected by the

Assembly of 1838 itself. But I deny that he has a power independent of the control of the body over which he presides. He is not an officer forming an integral part of a corporation: he is like the speaker of a legislative assembly, or the chairman of any deliberative body, and as such, is always, as Mr. Waller said, "*in potestate senatûs.*" (4 Cobb. 905.) His decisions on questions of order may be reversed by the house on appeal. He is the mere mouth-piece of the house: in fact, his decisions are of no force, as his own opinions; they derive their vigour only from the presumption that he has declared the sense of the house on the particular question: they stand as the judgment of the house, unless a member questions that they are so, and demands that the judgment of the house be expressly pronounced. There is a great misunderstanding of this matter. The decisions of a moderator or speaker have been spoken of as if he constituted a tribunal, from whose decree an appeal is to be taken. It is not so. There is no tribunal but the house itself. The foreman of a jury pronounces the verdict, and it is presumed to be the verdict of the jury; but if either party questions that presumption, the whole jury are called on to express their opinions. In the case of a jury, it is called polling the jury, in the case of a speaker, it is called appealing to the house, but in substance the two cases are alike.

The appeal must be taken immediately of course, otherwise the verdict or decision stands as the judgment of the jury or the house. Here Dr. Mason did appeal at once, and his appeal was duly seconded. Why did the moderator refuse to put it? This question is not to be answered by saying that the decision appealed from was in fact correct. That is of no importance whatever.

It is said that an appeal may be made too late, after the house has proceeded with other business. This is very true, but it is not pretended that Dr. Mason's appeal was made too late, and therefore I cannot perceive what bearing the suggestion has on the case.

But our adversaries are driven to take the broad ground, that no appeal can be taken from the decisions of the moderator, that what he chooses to decide must stand as absolutely conclusive. I admire their intrepidity.

The minute criticism which, in support of this position, has been made on the provisions of the present constitution, as compared with the former constitution of the church, I shall not pause to examine. It may be that the right of appeal is not expressly secured in the constitution of 1821. The right exists nevertheless. It results from the very nature of the Assembly, as a deliberative body. Like the right of debating, it requires no express provision.

But it is expressly provided for in the rules adopted by the General Assembly for their own government, and recommended by them to inferior judicatories. The minutes of the Assembly show its existence as a matter of usage. If our adversaries reply that the rules and usages of former Assemblies are not binding upon their successors, I have no objections to admit that such is the case. But the question here is, whether a power has been given to the moderator entirely beyond the control of the Assembly itself. If it

has been given, then a rule or usage to the contrary would be unlawful. Now our opponents do not pretend that the rules or usages spoken of, were unlawful. They admit, therefore, that the Assembly may control the decisions of the moderator if they choose, and by that admission they give up their argument, for in that case the moderator's power is not independent. In fact the idea that the presiding officer of a deliberative assembly is the absolute master of the body, seems so wholly preposterous, that I am at a loss to know how to consider it gravely. The constitution of the United States provides that the vice-president shall be president of the senate, but I do not recollect that it stipulates that an appeal shall lie from his decision on questions of order. But as such appeals have been always practised, and no man has yet been found to question their legality, I think I will leave this part of the case on the precedent afforded by the rules and usages of that body.

The moderator, then, was guilty of misconduct in refusing to put Dr. Mason's appeal to the house, if in no other respect. In his whole career, indeed, he was violating the duties of his office and obstructing the course of business which he was appointed to carry on.

We next allege, that the moderator and clerks were respectively, by votes of the house, removed from their offices, and others appointed to fill them, and that the Assembly adjourned its session from Ranstead's court to Washington square.

It is not necessary to go over all the motions and votes on this occasion, for all depend on the same principles for their validity. I will follow the example set on the other side, and confine my remarks to the motion made by Mr. Cleaveland for the appointment of Dr. Beman as moderator. If that motion were lawfully made, put, and carried, the case is with us.

That Dr. Beman was in fact elected moderator by the votes of a majority of the members present and voting, was a much contested part of the case before the jury, and has been *found in our favour by the verdict.*

Many witnesses were examined on both sides in regard to it, and as the learned judge, who tried the cause, left it fairly to the jury on the evidence, and has expressed no dissatisfaction with their finding, we may be spared the pains of a very critical examination of the testimony. I shall briefly notice the evidence in connexion with the questions of law connected with this part of the case.

Mr. Cleaveland's motion I am to contend was lawfully made, put, and carried.

1. It was lawfully made. It was made by Mr. Cleaveland and seconded by another gentleman, both the mover and seconder being actually sitting members of the Assembly, enrolled, and received as such, and whose right, neither the moderator, clerks, nor any one else, then, or at any time, denied or questioned. The motion was in proper form, being in effect to remove the moderator and put another in his place. It was not, as has been contended, insidious or ambiguous. It would have been sufficiently explicit under any circumstances, for as the Assembly could not have two

moderators at the same time, if the motion, "that Dr. Beman be moderator," were carried, the necessary effect would be to remove the former incumbent. But the form of the motion was peculiarly appropriate, as Dr. Elliott's tenure of the chair was, by the constitution, to continue only "until another moderator should be chosen." No instance can be produced from the minutes of the Assembly, in which the motion to choose a moderator was accompanied by a clause expressly removing the old one.

The motion was in itself a lawful motion. As the moderator was to continue only until another should be chosen, it seems odd that it should be urged by the defendants, that a motion could not be made to choose another.

The clause in the constitution which provided the tenure of his office, put him, in effect, in the same position as a moderator chosen by the Assembly of 1838, that is, he held the chair during the pleasure of the house. The speaker is the mere servant of the house, and though it is not usual to remove him capriciously or without reasonable cause, yet the house is the sole judge of the sufficiency of the cause alleged, and may remove without cause if they see fit to do so.

But here there was ample cause, if the misconduct of a presiding officer be such. The moderator, instead of promoting the transaction of business in a constitutional and orderly way, was disturbing it by all means, however unlawful and irregular, and at last his refusal to put Dr. Mason's appeal, showed that he was resolved to disregard all rules, precedents, and even the decencies of parliamentary proceedings, and surrender himself wholly to the guidance of his own passions and prejudices, and those of the other members of the unlawful combination to which he had attached himself. Am I asked to prove, that in such a state of things, the house could remove the moderator? It is to prove that the house could transact any business. The legitimate result of the principles propounded on the other side, is, that if a moderator refused to permit any question to be put or any member to speak, or if he persisted in deciding questions against a clear majority, and refused to allow the ayes and nays to be called, that the house, even if unanimous, could not remove him, but must remain in a state of paralysis, until his heart should be changed. But this is not, nor ever was the law. They have appealed on the other side to parliamentary law and precedents. There never was a time when the house of commons had not a right to remove their speaker in case of inability or misconduct.

In 1399, Sir John Cheney, speaker, declaring that by a sudden disease he was unable to serve, the commons chose Sir John Doreward in his room. (2 Hats. 201.)

In 1413, William Staunton, speaker, being taken suddenly ill, the commons again chose Sir John Doreward. (Id. 202.)

In 1436, Sir John Tirrel, speaker, being disabled from attending by sickness, William Boerly, Esq., was elected in his room. (Id. 202.)

In 1454, Thomas Thorpe, Esq., speaker, being detained a prisoner

in execution, by the overbearing power of the Duke of York, the commons elected a new speaker in his room. (Id. 202.)

In 1672, Mr. Speaker being ill, and desiring leave to retire, another speaker is chosen in his room. (Id. 203.)

In 1673, Mr. Seymour being speaker, Sir Thomas Littleton alleged reasons why he ought not to be speaker, (the reasons not founded on alleged misconduct in the chair) and moved for a speaker *pro tempore*. A long debate ensued, in a house in which the speaker's friends were in the majority, but no man, in the course of the debate, doubted or questioned the right of the member to make the motion, or of the house to pass upon it, and they finally got rid of it by the previous question. (4 Cobb. 589–591.)

Here is ample authority for the position which we maintain, if, indeed, any authority were necessary to establish a doctrine so reasonable in itself, and so essential to the existence of a deliberative body.

It is a mistake to suppose that Dr. Mason alone could make the motion, as he was the member whose appeal the moderator had refused. Every member of a parliamentary body knows that the whole body is injured by the misconduct of a member or officer, and that the right of moving on the subject is not confined to the party immediately connected with the transaction complained of. Indeed, from motives of delicacy, it is usual for some other member to propose a vote of censure or removal, in order that no colour of personal motive may be given to the proceedings of the house. In contests with the chair especially, the member directly involved may be ignorant of the rules of order, or too feeble in temper, or too inexperienced, to protect himself, and he is entitled to the protection of other members who may be more highly gifted, and who, in protecting the rights of the party assailed, are at the same time guarding their own, and vindicating those of the whole body.

There seems to be not the slightest ground for the proposition advanced on the other side, that if the moderator of the last year were removed, the next oldest moderator present should take his place. The constitution provides for but one moderator of a former year, (not as a germinating root, not as a primary formation and substratum for secondary deposit or alluvial increment—not as trap, stilbite, serpentine or puddingstone, nor as any other thing connected with any of the natural sciences,) but as a person whom it is convenient to place temporarily in the chair, till the Assembly shall choose a presiding officer for itself. It does not provide for a train of old moderators to pass in endless array across the chair, like the procession of the Pre-Adamites in "The Caliph Vathek."

2. Mr. Cleaveland's motion was lawfully *put*. It was put to the *house*, and not to a part of the house only. This fact has been found by the jury. On the trial many speculations were hazarded on the word "We," which it appeared Mr. Cleaveland had used in his preliminary remarks. The word "We" is used in various senses. In its royal and editorial sense it designates the respective individual monarchs to whom the government of the country or the press is confided. In its parliamentary sense, it means the whole assembly

in which it is used. And as Mr. Cleaveland was addressing a deliberative body of which he was a member, we thought and think it very obvious that he used the word in its parliamentary meaning.

The question was lawfully put by a member. The moderator would not put it: he endeavoured to prevent its being put at all, for the moment the motion was made, he and his friends began to be noisy, and continued so during great part of the subsequent proceedings. Besides, as the question concerned the moderator personally, it should have been, at all events, put by some other person according to our usages; and on high parliamentary authority (Sir Thomas Littleton, 4 Cobb., 889.) it may be said that the moderator should even have retired from the house.

The clerks were disqualified from putting the question as much as the moderator himself, for the course they had pursued showed that they were *participes* with him. Besides, while a presiding officer is actually in the chair, the clerk can receive no direction from the house, but through him. (2 Hatsell, 257.)

But apart from these reasons, peculiar to this case, I contend that it is a mistake to suppose that the clerk, as such, has any prerogative in this matter. Even in England he has none such, although there might be the shadow of a reason given for his possessing it there. The speaker of the house of commons must be approved by the king, and the clerk is appointed by the king. (2 Hatsell, 237; 4 Cobb. 1002.)

The house forms part of one of the king's courts, and it might with some plausibility be urged there, as connected with the royal prerogative, that if the speaker approved by the king could not act, the next recourse should be to the clerk appointed by him.

It is indeed usual for the clerk to put the question of adjournment when the speaker is absent, (2 Hatsell, 211–12,) and the question on the election of speaker, when it is put to a question, (2 Hats. 207;) but in these cases it is entered on the journals that the clerk puts the question "by order of the house;" and if that order were to be put to the question, none but a member could possibly put it. The entry of "ordered" merely on the journal, shows that the thing passed by common consent. If there be a debate, it is entered "ordered on the question." (Sir Thos. Meres. 4. Cobb, 929.) In 1678–9, a debate occurring on the election of speaker, Mr. Sacheverell moves "that the clerk may put the question for adjourning the house till to-morrow." (4 Cobb. 1094.)

From these authorities it appears that when the clerk puts a question, it is by order of the house, by common consent, and not by virtue of any privilege of his office. This consent is presumed to be given if no objection be made; and any member may therefore put the question by like common consent, as was done here by Mr. Cleaveland, nobody objecting to his so doing.

The notion that the clerk has a privilege superior to that of a member, is, I believe, new, and I am sure unfounded. But I will show a precedent which is conclusive. In the year 1628, Sir John Elliott moved a remonstrance on the subject of tonnage and poundage, "which, being refused to be read by the speaker (Finch) and

clerk, was restored to him again, and by him read, in these words following," &c. This was again offered to be put to the question, but the speaker said "he was commanded otherwise by the king." To this Mr. Selden answered, "Mr. Speaker, if you will not put the question, which we command you, we must sit still; and so we shall never be able to do any thing," &c. The speaker replied, "he had an express command from the king, so soon as he had delivered his message to rise." And thereupon he rose and left the chair; but was drawn to it again by Mr. Hollis, Mr. Valentine, and other members. Mr. Hollis swore, "God's wounds, he should sit still till it pleased them to rise." Mr. Selden again urged the speaker to proceed, which he still refused, "with extremity of weeping and supplicatory oration." In the mean time, "since neither advice nor threats could prevail, Mr. Hollis was required to read certain articles as the protestation of the house, the effect of which articles is as followeth, viz." &c. "These being read and allowed of, the house rose up, after they had sitten down about two hours." (2 Cobb, 488—491.) So that on the speaker's refusal, the question was put by Mr. Hollis, a member, and not by the clerks. Mr. Hollis was afterwards questioned before the privy council, not for usurping the office of speaker by putting the question on the articles, but "for placing himself above divers of the privy councillors, by the chair." (2 Cobb, 504.) On the meeting of the next parliament in 1640, the speaker was severely censured for his conduct by a vote of the house. (2 Cobb, 552.) And in his impeachment (art. 2) in 1642, his refusal to put the question was set forth as one of the high crimes and misdemeanors, a conviction of which he escaped only by flying the realm. (2 Cobb. 694.)

If it be said that these precedents occurred in turbulent times, and are therefore unsafe guides, I reply that the parliament of 1628 is universally acknowledged to have been one of the best, wisest and most judicious parliaments that have sat in England; and I think no precedent can be called unsafe, in establishing which such a man as Mr. Selden, to say nothing of others, actively participated. Even the parliament of 1642, whatever else may be said of it, was a good Presbyterian parliament, till the Independents administered Colonel Pride's purge to it; and it would scarcely become those who hold to the letter of the Confession of Faith adopted by the Assembly of Divines at Westminster, to treat with entire disregard the contemporaneous doctrines propounded by their fellow-labourers in St. Stephen's Chapel.

So much for the parliamentary law on this question. The principles of the common law are equally clear. Even where the charter required the presence of the mayor at a corporate meeting, (the mayor being an integral part of the corporation, and not the mere officer of the assembly,) if the mayor improperly declares the assembly dissolved, and goes away, the members of the body who remain may finish, in his absence, the business which has been commenced, but not proceed to new business. This goes far beyond the mere putting a question which the presiding officer has refused to put. Here the business was commenced when Mr.

Cleaveland made his motion, and might therefore have been gone on with, even if the moderator had been such an officer as a mayor, and had left the Assembly. (Barnad. 386–6. 6 Vin. 269.) The common law carefully guards against the undue increase of the powers of presiding officers, and therefore a by-law giving a casting vote to the senior bailiff is void. Such a privilege can be conferred only by express terms in the charter. (Rex *vs.* Ginever, 6 T. R. 735.)

We know of but one precedent in the proceedings of the General Assembly itself, and that was in 1835, when Dr. Beman first took the chair, and after holding it for a day or two, was removed, and another person put in his place. The question on Dr. Beman's leaving the chair was put by Dr. Ely, who was a member, and also stated clerk. So far, therefore, as regards the not putting such a question by the incumbent of the chair, the precedent is clearly with us; and it seems to be with us throughout, as I apprehend Dr. Ely put the question in his character as a member, and not as a clerk; for the permanent clerk is the officer of the house by whom the proceedings are minuted and recorded. The duties of the stated clerk are different, and occur between the close of one Assembly and the opening of another; and he does not stand to the house in the same relation as the clerk of the house of commons and other parliamentary bodies. He is more like a secretary of state. If Dr. Beman and his friends, on the motion for putting another in his place being made, in 1835, had commenced making all sorts of unseemly and disorderly noises, rapping with hammers, stamping with feet, coughing and exclaiming, the most material difference between the two cases would be removed.

If the question was properly put by a member, it was lawfully put in other respects. That it was audibly put, actually heard and understood, and that it was reversed, these are questions of fact, which the jury have found in our favour upon irresistible evidence, which I shall not weary the Court with recapitulating. That the moderator and his knot of friends, who were engaged during the proceeding in making unseemly noises, should not have a clear recollection on the subject, is by no means extraordinary. But we proved by clouds of witnesses all that was material to the validity of the proceeding, and a great part of it was substantiated by the witnesses for the defendants themselves.

3. We maintain that the question was lawfully *carried*. It was carried by a majority of the members present and *voting*. On the other side, it is contended that it could not be carried, unless by the votes of an actual majority of the members present. We insist that those members who did not vote are not to be counted, and that, as a quorum was present and voted, and a majority of those who voted, voted for the motion, it was carried.

To support our position, we again refer with confidence to the rules and usages of this particular body, to the general parliamentary law, and to the common law.

Among the rules of the General Assembly, is one which strongly recommends that all the members of a judicatory should vote,

urging on them as a motive for so doing, that otherwise, important measures may be decided by a small proportion of the members present. The universal usage, in conformity with this suggestion, of all the judicatories of the Presbyterian Church, was amply proved on the trial by uncontradicted testimony.

The parliamentary law is equally clear; indeed, so clear, that, until the trial of this cause, I cannot find that any question was ever made of it. Who ever heard a question taken by sound in a deliberative body, and does not know that most frequently not one-half of the members actually vote. Even on a division, it often happens that a considerable portion of the members do not rise on either side; nay, they do not always all vote when the ayes and noes are called. Yet in all these cases the question is determined by the majority of the votes actually given, without any regard to the non-voting members; it being necessary, however, in all cases where the ayes and noes are called, that a quorum should actually vote: and in case of a division, that at least a majority of a quorum should vote in the affirmative to carry the question: though even the requisition that a quorum should vote, has not been observed in the judicatories of this church.

But the rule of the common law on this subject, (which, after all, is the only authority on a corporation question,) is most incontrovertibly established. If a quorum of members be actually present, and an election be lawfully proposed, although the majority of the members present actually protest against holding the election at all, and refuse to vote under that protest, their protest and refusal are unavailing, and the candidate having a majority of the voting minority, is duly elected. (Rex. *vs.* Foxcroft: Oldknow *vs.* Wainwright, 2 Burr. 1017, 1020.) The majority can prevent it only by voting for another candidate. So if the majority vote for an unqualified person, the candidate of the minority is duly elected. (Clandgi *vs.* Evelyn. 5. B. and A. 86.) The same point was decided in Rex. *vs.* Parry (14 East. 561, vid. 559 *in not.*) and in Rex. *vs.* Hawkins (10 East. 214.) These authorities are full and abundant on the question, and go beyond the principle which we are called upon here to maintain.

The rule as thus laid down is founded on the strongest principles of reason. Business could not be carried on in a public body, if a portion of the members, by refusing to perform their duties, could stop all proceedings; and it would be still worse if the disorderly conduct of a part could vitiate the proceeding of the remainder. In either case a premium would be offered on misconduct, by giving an advantage to those who were guilty of it. The principle which we contend for as sufficient for the necessities of our case, is, that if a quorum be present and acting, those who, though present, refuse to act, and commit disorders with the view of disturbing the body, are in law considered as if they were absent.

I have thus attempted to display the main and essential features of this case, and shall not undertake to comment on the numerous minor points which have been made by the defendants.

In some of them the charge of the court appears to be misunder-

stood, and in others, the decision of the judge on questions of evidence.

For instance, I do not understand the learned judge to have charged, that there was any acquiescence of the presbyteries in the sitting of Congregational members in the Assembly under the guise of Presbyterians. Nor did we contend that there was any such acquiescence, nor was there any evidence that any such persons ever sat. In the year 1801, and for many years prior and subsequent, there were Congregational members received and sitting avowedly as such in the Assembly, under and by virtue of the previously existing plan of intercourse with the association of Connecticut and other Congregational bodies. But the acquiescence which the judge charged upon, was an acquiescence of the presbyteries in the Plan of Union of 1801, of which they all had full knowledge, and in which they certainly did acquiesce for more than thirty years.

Nor is it accurate to say that the judge left to the jury a question of law on the conduct of the moderator. He left to the jury the question whether Dr. Elliott's conduct was governed by an intention on his part to carry out the resolutions of 1837; and this was a question of fact. He charged the jury that if that were his motive, then his acts were unlawful, and that was a question of law.

I need not vindicate the observations of the judge on the comparative strength of affirmative and negative testimony, for they require no vindication. Indeed the defendants admitted them to be correct in the general, but supposed that there was some peculiarity in the present case, which rendered them inapplicable to it. The subject of inquiry being whether Mr. Cleaveland's motion was audibly made and put, and the question reversed on it, we produced many witnesses who actually heard all this, and who occupied positions in all the most remote quarters of the church. Most of the defendants' witnesses themselves heard quite enough to give them a clear apprehension of the character of the proceeding which was going forward.

The defendants, however, produced some witnesses who did not hear the motion or question. Under ordinary circumstances it would have been difficult to account for the fact that so many gentlemen of more than common intelligence should have failed to hear the announcement of a question in a body of which they were members. The peculiarity of the case lay here, that we were able fully to account for and explain this fact, by showing that they and their friends were filling their ears at the time with the music of stampings, hammer-rappings, and noisy exclamations. Instead of laying down, as he did, the ordinary rule of comparison between affirmative and negative testimony, the judge would have been justified in telling the jury that, under such circumstances, the superiority of affirmative testimony was very greatly enhanced.

In relation to the points on which the respondents' counsel requested his honour to charge the jury, I do not know that I have any occasion to remark, further than I have already done in the course of my observations.

The suggestion that we have recognized the acts of the Assembly

of '37 subsequent to the excision, and are thereby barred from questioning the legality of the excinding resolutions, and the remaining objections to the charge and the admission and rejection of evidence, as well as the exceptions to the form of the verdict, I shall say nothing upon, leaving them with entire confidence to the determination of the Court without argument. The charge of the learned judge will survive all the assaults which may be made upon it, and will be looked up to in future time, as a lucid and masterly exposition of the important principles involved in this case.

One misunderstanding I beg to correct. It is stated that the judge refused to permit the defendants to prove that the excinded presbyteries had not contributed to the funds of the church. As part of our evidence of actual, recognized membership, we had proved the acceptance, through a series of years, of our contributions, by the General Assembly. The defendants offered to prove, not, as is supposed in the exceptions, that we had not contributed, but that our contributions were small in amount. This offer it was that the judge rejected, and properly, for the question was of our having been admitted to contribute to the funds of the church as members, and not of our poverty or wealth. The legal effect of our contributions does not depend at all upon their amount, and we have the highest authority for believing that there may be as much merit in every sense in the gift of a mite as of a talent. If the defendants had offered to prove that we had not contributed at all, that would have been certainly admissible, and we should not have objected to it.

The offer made by the defendants to prove that there were, in the excinded presbyteries, churches which were in part Congregational, was very extraordinary, and was rightly rejected. A person or body who is connected with the Presbyterian Church becoming Congregational in doctrine and order, is guilty of an ecclesiastical offence, for which he can be tried and punished by the judicatories of the church alone. Their judgment on such a question is final and conclusive, provided only that the alleged offenders have had notice of the charge, and an opportunity of being heard on a fair trial. But civil tribunals have no jurisdiction in cases of heresy; and melancholy will be the prospects of religious freedom, when such questions shall be allowed, directly or indirectly, to be brought before our courts. Legally considered, these are in the light of corporate offences: they are triable in the corporate courts alone, and on the principles of corporate law. The public tribunals of the country can inquire no further than into the fact whether notice and a hearing were accorded to the party before those courts. If they were not, then the judgment is a nullity; if they were, it is conclusive: but in neither case can you meddle with the question of the truth of the charge.

In the remarks which it has been my duty to submit to the court on this occasion, I have endeavoured to avoid unkindness and irritating comments. Entertaining as I do (although a member of another church) a high respect for the adherents of both the parties which divide the Presbyterian Church, I still cannot avoid

speaking of the course pursued by the Old School, as one of unparalleled harshness, violence and injustice, evincing the blind domination of passion and party feeling, and an entire disregard of the rights of their brethren, and almost of the common charities of life.

We look to the benign influence of the laws to compose these differences. Our doors remain open to the party which has shut theirs against us; and when your decision shall be pronounced, it is to be hoped that it will be such as may tend to restore the unity of the Presbyterian Church, and promote in future the Christian graces of peace and good will, which are so desirable for improvement and example.

However much, as a man, I regret the unhappy dissensions and heats which have finally rendered this proceeding unavoidable, I must rejoice, as a lawyer, that out of much evil, some good has flowed, and that we have, in the charge of the learned judge who tried the cause, so clear and rational an exposition of the rights of the parties, and of the principles of law by which they are to be ascertained and secured, as to justify the hope that, when sanctioned by the decision of the Court, all parties hereafter will have the ability and the inclination to avoid trespassing on the privileges of their brethren, and bringing discredit on the church, by rendering necessary an appeal by the injured parties to the civil tribunals, for protection against the aggressions of those who have knelt at the same altar as themselves.

Instead of selecting a text for the opening of the Assembly (as the moderator of 1837 did at the opening in '38) which, under the circumstances, appeared like the language of exultation and triumph over the sixty thousand excinded members of the church, I would hope that the reverend gentleman to whose lot it may fall to perform that service in 1839, may take some such passage as this: "Whatsoever things are true, whatsoever things are honest, whatsoever things are just, whatsoever things are pure, whatsoever things are lovely, whatsoever things are of good report; if there be any virtue, and if there be any praise, think on these things."

Mr. Meredith closed his argument at one o'clock on Tuesday.

A BRIEF SKETCH OF THE ARGUMENT OF JOSIAH RANDALL, ESQ.

Occupying a part of Tuesday, the 23d, and the morning of Wednesday, the 24th of April.

Mr. Randall stated that the motion for a new trial involved two questions:

1. The validity of the excinding resolutions.
2. The organization of the General Assembly in 1838.

The first was an important question, involving the civil and religious rights of a large portion of the community, and property to an amount that could not even be ascertained.

The second question was anxillary to the first, subordinate in its character, and limited in its consequences and results.

The excinding resolutions had been variously described by the defendants' counsel. The learned counsel, (Mr. Hubbell,) who opened the case to the jury, had termed them "*detruding*," a term most appropriate, designating the thrusting out by force. During the present argument, the defendants' counsel had adopted the term "*disowning*," equally graphic and potential in its signification. All these terms spread the same idea, an abrupt and forcible deprivation of religious rights and privileges.

It was necessary to define the constituent character of a presbytery. It had no direct connexion with churches. A reference to the Assembly's Digest containing the resolutions forming presbyteries, will show that the ministers within certain bounds were constituted a presbytery. Three ministers, without a single church, may keep a presbytery alive, but a presbytery with one hundred churches, without three ministers, would become extinct. A reference to the Presbytery of Newburyport will show that it continues to exist with but two churches, and is regularly represented on the floor of the General Assembly. The ratio of representation of presbyteries in the General Assembly is according to the number of ministers, who are represented without regard to the fact whether they are pastors of a church or not.

These excinding resolutions had never been adopted by a majority of the Presbyterian Church. On the passage of the resolution excluding the Synod of the Western Reserve there were 65 members absent, and had they all been present and voted, as the commissioners from these presbyteries had done theretofore, the resolution would have been negatived. It was still more striking, that a greater number of commissioners were absent from the excinded synods than the majority for the passage of the resolution.

Mr. Randall then exhibited to the Court the returns of the presbyteries of New York, before the constitution of the General Assembly, showing, that of the twenty-one churches in that state, in 1789, eleven, with their members, elders and communicants, are now cut off.

That these churches were the source from which the great Presbyterian family had sprung, and had been in good standing before any gentleman who had voted for the excinding resolutions, was a member of the church.

That the Plan of Union between the General Association of Connecticut, and the General Assembly of the Presbyterian Church in the United States of America, was constitutional. It had existed previous to the revolution, had been suspended during the war, and again, at the invitation of the General Assembly, proposed immediately on the passage of the law incorporating that body. Similar arrangements had been proposed, or entered into by the General Assembly, with the Associations of Vermont, Massachusetts, New Hampshire, the Dutch Reformed Church and the Associate Reformed Church.

That the objection that the Plan of Union should be sent down to the presbyteries for approval, was of no avail. The provision in the constitution, which requires amendments to be sent down to the presbyteries, relates to general regulations, and not to the admission

of an individual, or a body of individuals into the church. That the practice of the General Assembly had been uniform on this subject, in all instances. Resolutions, admitting delegates from corresponding bodies to sit and vote, had been adopted and repealed, without sending them down to the presbyteries. The regulations, admitting ordained ministers and elders from other Protestant churches, without reordination, had been adopted in the same manner, although the General Assembly had, for a series of years theretofore, refused such admission. That a considerable portion of the present church, now held their seats by the same tenure under the union, with the Associate Reformed Church, including the moderator of 1836, (Dr. Phillips,) and the gentleman who officiated as chairman of the committees appointed on this subject, by the General Assembly of 1837, (Dr. Junkin.) That Dr. Green had declared that the legality of the union with the Associate Reformed Church, had never been denied. That, at all events, an acquiescence of thirty-six years, removed all such objections; that the amended constitution of 1821, had incorporated all these materials as a part of the church; that every presbytery in the church, had recognized the Plan of Union, and that subsequent ratification amounted to previous assent.

That the character of this plan had been totally misunderstood. It related to the "frontier settlements," generally, and not the western part of New York, and the Western Reserve of Ohio. That so far from its authorizing the admission of any Presbyterian minister into the church, it could not operate upon, nor affect him, till he had become previously, by ordination, a regular Presbyterian minister in good standing. That it had been proved, and was not denied, that the whole five hundred and seventeen ministers were regularly ordained ministers, exclusive from, and independent of the Plan of Union. It has been said that these synods have been the product of the Plan of Union; that they had their root in it. This was one of those vague, indefinite assertions, that it was difficult to understand. The Plan of Union did not authorize the introduction or ordination of any minister or elder. It did not operate upon a minister, until he had been regularly ordained as a Presbyterian minister. If it were intended by this argument to say, that of the five hundred and seventeen Presbyterian ministers excluded, any one of them became such, by the Plan of Union, it was contradicted by the instrument itself, by its character, and by the testimony of every witness who had been examined on the subject. This argument is one of those general assertions, in their nature intangible, and which, when accurately examined, means nothing; or, what is worse than nothing, is loosely calculated to convey an idea negatived by the whole mass of testimony, oral and documentary. That if the plan had been found inconvenient, or was believed to be unconstitutional, the proper mode was to repeal it; and then, if any Presbyterian minister should violate the rules of the General Assembly, by continuing pastor of a Congregational or mixed church, he would become obnoxious to censure and excommunication from the church, according to its forms of judicature.

That as it now stood, the General Assembly had, in 1801, "enjoined and recommended" Presbyterian ministers to preach to Congregational and mixed churches; and in 1837, without notice, had excluded ministers for obeying the injunctions and recommendations of the General Assembly.

That the excinding resolutions were contrary to all law, human and divine, and were utterly unconstitutional and void. It excluded five hundred and seventeen ministers, the elders of five hundred and ninety-nine churches, and sixty thousand communicants, without accusation, notice or trial. It was founded on no principle; the present Synod of Albany had been left untouched, while its offspring, the three Synods of Geneva, Genessee, and Utica, had been cut off. The Synod of the Western Reserve had been first created out of the Pittsburgh synod, and the Synod of Michigan has been subsequently created out of the Synod of the Western Reserve, and while the intermediate Synod of the Western Reserve had been cut off, the Synods of Pittsburgh and Michigan have remained untouched. It was a local desecration of the ground; expulsion from the church depended on the domicil of the member, in 1837, and had Dr. Green at that time lived in the western part of the state of New York, or in the Western Reserve of Ohio, he would have been excluded among the rest. It excluded all indiscriminately, whether they have been connected with the Plan of Union or not.

That the General Assembly of 1837, have admitted that whole presbyteries and churches, within the prescribed and infected districts, were regular and in good standing; and provided also a mode for their re-admission into the church. That the alleged exclusion for a day, a month, a year, or for life, were equally a violation of the right of the excinded individuals or bodies. That this mode of re-ingress into the church was illusory, as the excinded individuals could obtain re-admission only by examination in the same manner as if they had never been connected with the church. That the opening counsel had not denied the right of the court to inquire into the form of proceedings of the General Assembly, and that the case cited by the concluding counsel of Mr. Hindman was conclusive in favour of the power of the court; as the Supreme Court of Delaware there refused the mandamus, because the relator had confined his application for restitution to the presbytery as an ecclesiastical body, and not to the presbytery as an incorporated body, and the court there said that they would have entertained jurisdiction, if the application had been for restoration to the incorporated presbytery.

That the case referred to in Mr. Hindman's case of *The Commonwealth of Pennsylvania* vs. *Richards and others*, decided in 1790, by the Supreme Court of Pennsylvania, on a mandamus to restore Mr. Marshall as minister of the Scots' Presbyterian Church in Spruce street, was conclusive and unanswerable in favour of the right. That if this power were not conceded, there would be no remedy or relief from ecclesiastical tyranny and injustice, no matter how unjust or irregular it might be.

That the act of the clerks in excluding the commissioners from

the roll, and refusing to report them to the assembly, and the subsequent conduct of the moderator in refusing to put the motions made to rectify the misbehaviour of the clerks, were overt acts of a conspiracy to carry out the unconstitutional acts of 1837; and that the refusal of the moderator to put the appeal of Dr. Mason to the Assembly, was a breach of privilege which authorized any member of the Assembly to move for his dismission from office.

That Mr. Cleaveland's motion was substantially a proceeding to remove Dr. Elliott from office for this breach of privilege. That questions of privilege override all the ordinary rules of order.

That Mr. Cleaveland's motion was perfectly intelligible, and sufficiently loud to be heard by all. That every member had, therefore, an opportunity to vote, and if, under such circumstances, they were silent, they must be presumed to have acquiesced.

That, according to parliamentary rules, when the commissions of the commissioners of the General Assembly of 1838, were committed to the Committee of Commissions, they could only be restored to the Assembly for the Assembly's action, by the report of that committee. That, therefore, the conduct of the clerks composing the committee of commissions, in refusing to report the commissions from the four synods on either of their lists, was a gross violation of duty.

That the remedy to which the relators had resorted, viz.: this proceeding of *quo warranto*, was both legal and proper.

That the moderator could not, without absurdity, put the question for his own removal; nor did that duty, under such circumstances, devolve upon the clerks. They were *participes criminis*, and would not have put the motion if they had been required. That the precedents of motions put by clerks were, where they were specially authorized by the house to put the questions.

That every deliberative body which elects its own chairman, has the right to depose him for misconduct. That the moderator of the preceding Assembly, presiding over the organization of the succeeding Assembly, is by no means exempt from this power. He is designated to the office for the sake of convenience, but those for whose convenience he holds the office, are his masters and he their servant.

ARGUMENT OF JOHN SERGEANT, ESQ.

Occupying part of Wednesday, April 24th, and the whole of Thursday and Friday.

Mr. Randall having concluded, at 1 o'clock *Mr. Sergeant* addressed the court. He said:—It seems to be the opinion of one of the learned counsel on the other side that these parties might very readily make peace and come together again. That attempt had been made, but failed. The exhibition which has been presented in the trial, and the argument before this court, ought to make us very cautious in acting, with a view to bring the parties together again. I understand (and that will be the main ground of my argument)

that the object and end of this great judicatory of the Presbyterian Church, as well as all the subordinate ones, is purely spiritual and moral. We have no right to interfere with that in which a man's own conscience is concerned. No human tribunal has any right to interfere with it. It is a manifest violation of that right to talk of forcing people into spiritual connexion. I hold the attempt itself to be unconstitutional, inconsistent with spiritual liberty, and as striking at the foundation of one of the great principles of liberty among this people, and that is, that a man's spiritual and moral concerns are not to be interfered with by any temporal tribunal whatever. These parties never came together except by consent. They never could come together in this world but by consent. As to the idea of forcing one community of men to sit down to the same spiritual table with another whom they think unworthy, you must first be prepared to search the hearts and consciences of both, before you could tell what the consequence was to be. I take it, therefore, that the prediction which has just been made cannot be correct. I go for freedom, and am opposed to force, no matter from whence it comes. It may be seen, after all, whether we have suffered in our name, reputation, and character; whether we are not the real champions of spiritual liberty. I believe that we are. I believe, at the same time, that the effort here made, by the minority of that General Assembly, is, through the instrumentality of civil coercion, to deprive the party which I represent of their liberty, and to force them to associate with those whom they do not choose to associate with. The idea, it will be seen, is repulsive, and no doubt it would be, in its application, a most dangerous power. I will undertake to say that it would be a most dangerous power for a civil tribunal to take upon itself, to say who was wrong and who right in a matter of conscience. The courts have already enough to do, without being called upon to enter upon new sources of inquiry, touching matters of conscience, and with which civil tribunals have heretofore had nothing to do. We have been warned not to hold out threats. We have held out no threats. We have given no intimation of that sort; but that litigation will follow the decision; that every church, every single congregation, every presbytery, every synod will be called upon to decide for itself, is as certain, plain and palpable as any thing can be: nay, every individual. The minority of the General Assembly of 1838 have done a great deal, if they really have been able to accomplish what his honour, Judge Rodgers, at the time he delivered his charge, seemed to think they had done. If it were not too serious a matter to make a joke of, although it would be a much more innocent joke than they have made at our expense, I would say, that the occurrence in Ranstead court, by which a minority manœuvred a majority out of doors, was the greatest practical hoax that I ever heard of. A great deal has been done calculated to produce disturbance, discord and confusion throughout the church, by failing to observe that excellent admonition, which ought never to be lost sight of, to let spiritual bodies settle spiritual ques-

tions. I will endeavour to show the court, before I conclude, that the attempt here making is, to strip the General Assembly of this power, to take it into the hands of the ministers of the civil law; to take it into their hands in a manner which leads to the disgrace and disparagement of the law itself, as far as disgrace and disparagement can be brought upon it by such efforts. Where is the man who had been spared on this occasion? The spirit manifested on this trial is the same, which, by the first act of the Assembly on Washington square, cut off the venerable Dr. Green, the patriarch of his church. Neither age, nor services, nor character, nor ought else, could shield the true members of the Presbyterian Church from the asperity and violent denunciations of those on the other side. Look at the intimation by one of the counsel for the relators, that Dr. Elliott had been furnished with the text from which he preached on opening the General Assembly of 1838, by the promptings of a spirit of partisanship. The learned counsel had gone so far as to look into the conscience and heart of that moderator, and to charge him with having, in the performance of a solemn service, and in the presence of his Maker, used the text he did as the shout of victory.

My clients do not need, from me, a vindication of their conduct and temper; the very opposite, as they are, of the feeling and temper displayed on the other side, in the progress of this cause. I maintain, that we are the champions of civil liberty and the rights of conscience. And, however we may suffer in that cause, finally, if it is the right cause, as I believe it to be, it must and will prevail; and if this case is rightly decided, we shall come back to the plain principles of the constitution and the law of this commonwealth, which leaves these things to be adjusted, not by a civil tribunal, but a spiritual, even by Him to whom we are all accountable. But now, the question presented to this Court is, whether the defendants are not entitled to have a new trial? The cause is one involving questions of great magnitude and importance; none greater can ever arise, than they are. It is my intention to say nothing personally disparaging of any man connected with the New School party, nor to say one word which should be calculated needlessly to wound his feelings. I entertain great respect, too, for the learned judge who presided at the trial in the court below, and am sure that he found not less arduous than novel and intricate, the duties which he had then to perform. In a case so complex and abstruse as this, great allowance must be made for a judge who should fall into error. And, if the learned judge who tried this case had seen, on reflection since, that he had committed any error, he will, doubtless, be glad of the opportunity afforded him now, of correcting it. But if he sees no reason to alter his mind, why, then, he will adhere to his former opinion, but not simply because it was his opinion. I must be allowed to say, that when this case went to the jury, and even before it did, it went with a most manifest prejudice against these defendants. As to how that was effected I shall have an opportunity to speak hereafter. I maintain this great principle, that

the whole investigation in the manner in which it has been conducted, the whole decision, as far as it has gone, is a manifest violation of our constitution. I mean the constitution of the church; and a violation of spiritual liberty, and the rights of conscience. I now ask whether this court is a fit court to entertain an appeal from the General Assembly of the Presbyterian Church? I speak of the embarrassment, the difficulty, and the almost impossibility of coming to any conclusion on an appeal like this. Take, for example, the resolutions of 1837. Now, if this court is to be appealed to, from that General Assembly, then it is to take the place, for a moment, of the General Assembly, and is to decide whether, under the same circumstances, it would, or would not, have pursued the same course as that body did. And, in order to show your honours that you would not have pursued the same course, what has been said, what has been attempted, on the other side? Why, the very first blow was made at the intentions and motives of the respondents, and they were charged with having been actuated by a proud lust of power, and being desirous to engross to themselves all the funds of the church. Indeed, every thing that is bad and disgraceful has been attributed to them. The most foul and scandalous abuse has been heaped upon them. There was gross injustice in the outset of this cause; and with regard to that, I mean to be perfectly explicit. His honour, judge Rodgers, had fallen into an error, which probably arose from the press and hurry on the occasion of the trial, circumstances which will have their influence upon a judge as well as on others. The learned judge would find that a certain act of their body was an act they had a right to do, although he went on to characterize it as unjust. No doubt that in the course of the discussion injustice had been attributed to it, and perhaps most unjustly. His honour was led not to look at the lawfulness of the act that was done merely, but at the question whether it was just or unjust. I mean to contend, without hesitation or reserve, that where their acts are not unlawful, *no one* has a right to inquire into the motives that actuated them, or into the justice or injustice of the act they had done. They were there to do justice according to their own views, and not according to the views of any one else. They were placed there to do justice without accountability to any tribunal, so far as they were lawfully entrusted with power. The very principle of the organization of the church being to deal only with spiritual matters, it was not to be effected by any man's thoughts, words, or actions. I appeal to your honours to say whether it was fair that the New School party should inquire into the motives of Dr. Elliott and the clerks. It was right only to judge them by their acts. An act, which otherwise would be rightful, was made to depend upon the motives with which it was done. Now that was an unfair way of proceeding. The relators are alone to blame for having introduced the subject of this controversy to a civil tribunal. Whatever inflammation may hereafter be produced, whatever scandal may be brought on religion, if it were in the power of man to scandalize it, it certainly is not imputable to the

respondents. The relators only are responsible for it. And, if they have had a short victory once, it is possible that they may yet see, as they advance in life, as their shadows lengthen and the distance before them is contracted, occasion to mourn that they ever separated themselves from the good men with whom they were associated, by any course of events in this world. The example which has been set by these men will, peradventure, be followed hereafter, by those who are the younger and more active spirits, to cut off their leaders, as has been attempted to be done on this occasion. This case will furnish them with a precedent for their conduct. Nor is this all. The church indeed is "on a rock," but, this spirit once introduced into the church, who can exorcise it? I have already said that I am not afraid of any man being able to accomplish the destruction of the church, for I believe it to be founded on a rock. But what man can allay this spirit when once it has been brought in? No man: there it will remain and riot in the destruction of peace and goodness. If the youth now by injustice cut off the fathers and props of the church, it will not be strange, if before they are as old as Dr. Green, others visit the same award to them.

But now our business is to show that this verdict ought not to stand. Indeed it seems hardly necessary after the admirable opening of my colleague, (to which indeed the closing counsel on the other side has paid a well-merited compliment,) to occupy time farther on this subject.

But it may be due to the opposite counsel to notice some of their arguments, and perhaps I may be able to throw out some suggestions in addition to those of my worthy and able colleague.

In reply to the arguments in support of this verdict, I will examine the ground on which it must stand, if it stand at all. In the charge of his honour, judge Rodgers, the excinding acts of 1837 are regarded as unconstitutional and void.

Well, if they were so, it was of no consequence. The case ought then to be considered only with reference to the proceedings of 1838. But his honour, like the counsel, had made those acts of 1837 to characterize the conduct of the moderator and clerks, as being a violation of duty, authorizing the proceeding of Cleaveland and others. The excinding acts of 1837, were, therefore, the basis of the whole of the proceedings. Now, I contend that the General Assembly of 1838 would not have been justified, even if so disposed, in removing the moderator and clerks, for, they being appointed by the General Assembly of 1837 to perform certain duties, to organize the body of 1838, they consequently were not *their* chosen officers, and not subject to their control. There was no power vested in the preparatory meeting to remove officers not of their own appointment. There can be no doubt that in the whole of these proceedings, the great principle that the majority must govern was disregarded by the minority, and hence the former were driven out of doors. While Dr. Elliott was in the chair, there could be no other moderator. And, the first question which your

honours have to decide is, whether that gentleman was the presiding officer. Now, if Dr. Elliott was the moderator, am I to be considered as voting on the question of electing another moderator, when I did not vote at all, and when, too, I sat with my back to the man proposed to be elected? That proceeding was inconsistent with every rule of order, was calculated to mislead, to blind, to take away the hearing, to prevent every man in that Assembly from knowing what he was to do. I contend that members were not bound to notice, or to vote upon any question, unless it were put by the legally constituted and authorized presiding officer of the General Assembly. No one could tell whether that "Aye," that triumphant "Aye" which was given amidst so much disorder, proceeded from those *only who had a right to vote.* Judge Rodgers had said that none but those who were enrolled had a right to vote. Now, if the question had been put by the moderator, he would have suffered none to vote but those who were enrolled. The question, however, was put by another. And, whether they were members or not who voted, did not matter much, as the act was entirely wrong. Besides, there was a large assemblage of persons present as spectators, many of whom might, and perhaps did, join in the "thundering loud Aye," as it had been called.

In my opinion, the principle point in the whole case hinges upon the question of order. It is of considerable importance, then, that it should be first ascertained whether the moderator strictly performed his duty. Before proceeding to an examination of the acts of 1837, I wish to make a single remark further in connexion with this topic, which may, from its importance, be more particularly noticed hereafter. The General Assembly of the Presbyterian Church, at the time the disturbance took place, was in actual session, *de facto* and *de jure.* It was stated by his honour, judge Rodgers, in his charge, and it was admitted in argument on the other side, that the resolutions of 1837, whether right or wrong, did not dissolve the Assembly. Now, at the period when the disturbance took place, the body was partially constituted, and the moderator competent to conduct the organization to completion. I trust then that your honours will certainly see, that it lies with the opposite side to show, how the Old School party, or rather the moderator and clerks, ceased to be *in possession*, either *de jure* or *de facto.* I declare that I think no man could doubt, that the body who remained in Ranstead court, was the rightful and legal body. I contend that the rule of order in every deliberative Assembly, however informal it may be, is, that every eye and ear should be directed to the chair. No member has a right to turn his back upon the presiding officer, nor can any man be regarded as voting who does so. With regard to the acts of the General Assembly of 1837, it is a question hereafter to be decided, whether they can be at all connected with what took place in 1838. But I shall contend that they could not be connected, whether right or wrong. I assume, and have a right to assume it, that the Assembly of 1837, in passing the resolutions which they did, were really sincere, honest, and

that they meant them in good faith as they declared them to be, for the good of the church. And, I do most solemnly protest against the right of any body on earth, I care not who it is, to interfere with their acts so adopted. I will presently read to your honours, that part of the constitution of Pennsylvania, which I conceive to have a bearing on this case. It is of infinite importance. We have lost this case before the jury, and if we are to lose it finally, we are to lose it, in a great measure, in consequence of the implication to us of insincerity, want of truth, and bad motives, in the introduction and adopton of the resolutions of 1837. Every license has been taken with the evidence, assumptions contrary to the truth have been drawn from it, as to the character of the General Assembly. I will submit it to your honours, as a clear position, that every judicatory of this church, from a session up to the General Assembly, is entitled to be believed as to its motives, in whatever it does in reference to its spiritual and moral discipline. If it can not be believed to be prompted by pure motives, then it is not a church in any sense in which those belonging to it are supposed to constitute it: they are a set of hypocrites and sinners of the very worst description. But even if this were so, so long as they do not violate the laws of the country, you can not interfere with them. But, before proceeding farther, I wish to have this question settled. To whom does it belong to say that these acts are, or are not, for the good of the church? Supposing a certain end to be desirable, to whom does it belong to decide as to how that end can be reached? Now, presuming the first question to be decided, who, I ask, is to solve the second. The civil tribunal says, it is to be reached by *process*. The church says, No; we have no charge to make against our brethren with whom we have been in unity. We do not mean to dismiss our brethren from the church with any mark of condemnation upon them. We do not mean to try them, or impeach their motives or conduct. All that we mean to say is, that they do not live, as we think, according to the proper forms of the church, and that disorders have arisen from it. We wish to separate from them, and the act involves nothing but separation. Now, I would ask again, not whether this was the wisest, or the best mode of proceeding, but who was to judge whether it was or not? Did it belong to the church, or to a civil tribunal, to insist upon it that, contrary to their judgments, contrary to their own views of what is best to advance religion in general and the protection of their own church, they must do so and so? If, in fact, any body could interfere with the church, they had better dissolve themselves as a church at once. If they could not exercise their *whole* judgment, it was in vain to endeavour to exercise any judgment at all. I insist that they had a right to manage their church according to the dictates of their conscience, and no man or tribunal, was justified in interfering with them. I will endeavour to maintain that no civil tribunal could rightly take cognizance of this question. I do not mean to anticipate the question whether this court could take cognizance of the election of trustees. I will come to that question by and by. But I will say of the question growing out of the acts of

1837, that no civil tribunal could take cognizance of them; that they belong exclusively to the judicatories of the church. I know that in taking this position I have to encounter the harsh denunciations which have been lavished by the other side. I have to encounter the inquiries, "Why did you not take process? Why did you not give them a hearing?" I know too that I have to encounter something more formidable in the opinion of judge Rodgers on this point. To that I am bound to give the more special attention. I have examined it very carefully, and with all the respect, and that is certainly not a little, which is due to its distinguished author. I do not know that I had ever bestowed so much deliberation on any single question, as I have done on this, with a view to see its bearings in every particular, and to avoid every false track. I will now proceed to place before your honours, the grounds upon which I rest, and the conclusion to which I have come. The charge says that the excinding resolutions are unconstitutional and void, but adds, that that did not dissolve the Assembly.

In regard to the abrogation of the Plan of Union, the charge is in our favour; for the judge says that the Assembly had a right to abrogate it. We have therefore, his honour's opinion in favour of abrogating the act of union of 1801. I am glad to have it. Well, here was the hinge, on which the whole matter turned; for, it having been supposed that the abrogation was wrong, the argument had been drawn that, consequently, all the acts which followed in 1837, and all that took place in 1838, consequent upon them, must be wrong. It is necessary to consider the nature of the thing done, viz: whether it was purely ecclesiastical and moral, or whether it was civil in its character and consequences. The views entertained by the Assembly on this subject appear to be both unexceptionable and incontrovertible. Let us look at their language in the series of resolutions on this very subject.

Now, we contend that the relation between the Congregational and Presbyterian Churches was voluntary. It was voluntary throughout, from beginning to end, up to the time when the excinding acts were passed. Such is the tenor of the resolutions to which I refer.

"In regard to the relation existing between the Presbyterian and Congregational Churches, the committee recommend the adoption of the following resolutions:

1. "That between these two branches of the American Church, there ought, in the judgment of this Assembly, to be maintained sentiments of mutual respect and esteem, and for that purpose no reasonable efforts should be omitted to preserve a perfectly good understanding between these branches of the Church of Christ.

2. "That it is expedient to continue the plan of friendly intercourse, between this Church and the Congregational Churches of New England, as it now exists."

It must be understood, and we have no right to suppose otherways, that every word of this is honestly said, from the heart, and certainly there is nothing harsh or disparaging to Congregational-

ists. All we say on that subject is, that Congregationalism is incompatible with Presbyterianism, that the two cannot live together, and that it is calculated to produce disorder, when introduced among us, as in the famous case of Mr. Bissell from Rochester, who found his way into the General Assembly, although neither a committee-man, nor an elder. In view of such circumstances, among others, we adopted the following, the third in the series of resolutions.

3. "But as the 'Plan of Union' adopted for the new settlements in 1801, was originally an unconstitutional act on the part of that Assembly—these important standing rules having never been submitted to the presbyteries—and as they were totally destitute of authority as proceeding from the General Association of Connecticut, which is invested with no power to legislate in such cases, and especially to enact laws to regulate churches not within her limits; and as much confusion and irregularity have arisen from this unnatural and unconstitutional system of union, therefore, it is resolved, that the Act of the Assembly of 1801, entitled a 'Plan of Union,' be, and the same is hereby abrogated."

Now, they do not say, as seems to be taken for granted, that there was a designed violation of the constitution in adopting the plan at first, but they say that the making of these standing rules was wrong, that they ought not to have been adopted, that that act was destitute of authority, and led to confusion and disorder. Now, that these grounds for the abrogation existed, no man can doubt. And this being the fact, I must think that no man can doubt that the General Assembly had a right to abrogate the Plan of Union. What objection could there be. I contend that it could be done at any time by the wish of a majority, the association being purely of a religious character. It was also clearly expedient and right to abrogate it, in consequence of the disorders which it had introduced. They say it *had* introduced such disorders, and we are bound to believe them. Now, this being an adjudication to which they had a right, it being their proper province, what tribunal on earth has any right to sit in judgment over it, to pronounce it right or wrong, just or unjust?

But a question is raised here whether this Plan of Union, or agreement, were not in some sort of the constitution of a *compact;* as though, in bodies purely spiritual, there could be any thing in the nature of a consideration, which is essential to a contract. The idea is absurd. These bodies could form no contract.

Then a question is made whether these excinding acts, as they are called, are judicial or legislative; still it really seems to me, that all such questions are idle. I shall call these acts *administrative.* I think they are merely such, for they are designed to carry into effect the resolution abrogating the Plan of Union. I will here recite these excinding resolutions. [See pages 56 and 57 of this report, resolutions numbered 1, 2, 3, 4.] "*It being made clear to us,*" says the second resolution, "it being made clear to *us.*" To whom

should it be made clear that they had ground of action? To your honours?

Suppose that I were to tell you that they were Baptists, or Congregationalists, or Roman Catholics, or Jews: your honours would say that that was a question which you had no right to inquire into, that you had no right to condemn them for any alleged disorder in the church, that you were not the representatives of the Presbyterian Church, or any other tribunal, or sect. The constitution of Pennsylvania says, that "every man shall worship God in his own way, that no human authority can, in any case whatever, control or interfere with the rights of conscience." I assert that the second resolution must be taken to be true. It *had* been made clear to them, whose business it was to inquire into these spiritual matters, and their declaration of that fact is all that we need to know, in order to bar the action of any civil court in the premises; we cannot touch them for this. What judicial tribunal in this country, would dare thus to erect themselves into an ecclesiastical tribunal, and especially into the judicatory of a particular church?

But, if these acts might thus be investigated by the civil courts, what is their character? The third of these resolutions expressly declares, that they have "no intention to interfere with the duties or relations of private christians," &c. "but only to declare and determine according to the truth and necessity of the case, the relation of these synods," &c. Now this was clearly what they had a right to do by the constitution of the church. And then in regard to "saving the rights of ministers, &c." of which so much has been said, the 4th resolution makes ample provision for that, by directing "those who are strictly Presbyterian in doctrine and order," how they may enjoy their privileges and rights. In saying that the General Assembly "will take proper order thereon," they bind themselves, or declare that they will receive those who are strictly Presbyterian.

Now, as to the question whether they had a right to do this, we must consider the nature of the acts, and the nature of the body performing those acts. As to the nature of the body, it is "the highest judicature of the Presbyterian Church."

What is a church? That is, what is a Christian church, according to the definition of the Presbyterian Church itself, for that is our guide in this controversy. It is a community of professing christians associated for the express purpose of maintaining doctrine, discipline, and government, according to the apostolic standard. Every church professes to be framed after the pattern of the first Christian church. I know there is a cry by some against *doctrine*, that it is all bigotry, &c. But this church esteem it necessary. So in regard to *discipline*, there is an outcry against it, as tyranny: but discipline is, at any rate, essential to a Presbyterian Church, according to their book. And this discipline is, by their constitution, to be administered by ordained men. I do not say that this is the best system in the world. I think it is good, and at any rate it is Presbyterian. I need not vindicate the General Assembly for having excluded the four synods. They had a right to do so,

and they have done it in order to preserve sound doctrine in the church. Discipline and government are absolutely necessary to the church, although I know that there are some men who do not regard them in that light, who think nothing of discipline and government.

According to their constitution, (see Form of Government, Chapter 2, Section 4,) a church is a body "voluntarialy associated together, for divine worship and godly living, agreeably to the holy scriptures; and *submitting to a certain form of government:*" that is, so organized to conduct their moral discipline, wholly untouched by the civil power. Now, our state constitution expressly provides for this; (I refer particularly to the "Bill of Rights,") where it says that there shall be no interference "with the rights of conscience." I can see nothing, then, in which the Presbyterian Church brings itself into any relation to the civil power, except in its beautiful assimilation to it in the republican features of its government.

In relation to these acts of 1837, it is sufficient then for our purpose, abundantly sufficient, to preclude any right or power of interference, revision, or rejudgment by this, or any other court in this land, that *they were done by a majority*, and done *according to conscience*. That it was *so* done, the record that it was *done* is sufficient evidence for us, till it is disproved; and being so done, it can not be touched by any earthly power.

It was, then, the exercise of their judgment, expressed by a majority of voices. They had a right. Who will attempt to interfere with their right to regulate their own affairs, whether in regard to discipline or doctrine?

Now look at the preliminary principles, which lie at the foundation of the whole structure of this Presbyterian Church, as they are spread out on pages 343–345, being Chapter 1., of the Form of Government:—

"They are unanimously of opinion:

"1. That 'God alone is Lord of the conscience; and hath left it free from the doctrine and commandments of men, which are in any thing contrary to his word, or beside it in matters of faith or worship:' therefore they consider the rights of private judgment, in all matters that respect religion, as universal and unalienable: they do not even wish to see any religious constitution aided by the civil power, further than may be necessary for protection and security, and, at the same time, be equal and common to all others.

"2. That, in perfect consistency with the above principle of common right, every Christian church, or union, or association of particular churches, is entitled to declare the terms of admission into its *communion*, and the qualifications of its ministers and members, as well as the whole system of its internal government which Christ hath appointed: that, in the exercise of this right, they may, notwithstanding, err, in making the terms of communion either too lax or too narrow; yet, even in this case, they do not infringe upon the liberty, or the rights of others, but only make an improper use of their own.

"3. That our blessed Saviour, for the edification of the visible Church, which is his body, hath appointed officers, not only to preach the Gospel *and administer the sacraments;* but also to exercise discipline, for the preservation both of truth and duty; and, that it is incumbent upon these *officers*, and upon the whole church, in whose name they act, to censure or cast out the erroneous and scandalous; observing, in *all* cases, the rules contained in the word of God.

"4. That truth is in order to goodness; and the great touchstone of truth, its tendency to promote holiness; according to our Saviour's rule, 'by their fruits ye shall know them.' And that no opinion can be either more pernicious or more absurd, than that which brings truth and falsehood upon a level, and represents it as of no consequence what a man's opinions are. On the contrary, they are persuaded that there is an inseparable connexion between faith and practice, truth and duty. Otherwise it would be of no consequence either to discover truth, or to embrace it.

"5. That while under the conviction of the above principle, they think it necessary to make effectual provision, that all who are admitted as teachers be sound in the faith; they also believe that there are truths and forms with respect to which men of good characters and principles may differ. And in all these they think it the duty, both of private Christians and societies, to exercise mutual forbearance towards each other.

"6. That though the character, qualifications, and authority of church officers, are laid down in the Holy Scriptures, as well as the proper method of their investiture and institution; yet the election of the persons to the exercise of this authority, in any particular society, is in that society.

"7. That all church power, whether exercised by the body in general, or in the way of representation by delegated authority, is only ministerial and declarative; *That is to say*, that the Holy Scriptures are the only rule of faith and manners; that no church judicatory ought to pretend to make laws, to bind the conscience in virtue of their own authority; and that all their decisions should be founded upon the revealed will of God. Now though it will easily be admitted, that all synods and councils may err through the frailty inseparable from humanity; yet there is much greater danger from the usurped claim of making laws, than from the right of judging upon laws already made, and common to all who profess the Gospel; although this right, as necessity requires in the present state, be lodged with fallible men.

"8. *Lastly.* That, if the preceding scriptural and rational principles be steadfastly adhered to, the vigour and strictness of its discipline will contribute to the glory and happiness of any church. Since ecclesiastical discipline must be purely moral or spiritual in its object, and not attended with any civil effects, it can derive no force whatever, but from its own justice, the approbation of an impartial public, and the countenance and blessing of the great Head of the church universal."

Your honours will observe this, "*Lastly*, that ecclesiastical discipline must be purely moral or spiritual in its object, and not attended with any civil effects," &c. Showing that the constitution of the Presbyterian Church holds, explicitly, that the civil power has no right to interfere with its acts. This is a part of their faith, which they hold as of divine origin.

Now, how is this government administered. First, the congregations are governed by sessions. Second in order is the presbytery, then the synod, with the construction of which bodies you are acquainted. Then, over all, and above all, the last object in sight, the supreme, the "*highest judicatory*," is the General Assembly; just as supreme as this court is in relation to the courts of Pennsylvania. What earthly tribunal, again I ask, has the shadow of a pretence of any right to interfere with their decisions? Suppose the session of a congregation exclude a man from their communion, and he appeals to presbytery, to synod, to the General Assembly, and all through his original condemnation is confirmed. He then comes to your honours. You will tell him, (and can tell him nothing else,) "your church must decide that matter, there is no appeal beyond its highest judicature." But here, it is said, are 500 ministers, 50,000 communicants, &c.: well, what is the difference? The principle is the same with one as with thousands.

It might really be supposed, from the argument that was addressed to this Court yesterday, that the relators, and those whom they represent, were turned out to starve—to starve for want of food for the nourishment of the spirit. They were, however, turned out from the Presbyterian Church, because they did not agree with it in discipline and doctrine. But, the wide world was before them. If they chose to form a Congregational church, let them do it. If they chose to connect themselves with a Congregational church, let them do it. But the question was, shall they be allowed to come into the judicatories of the Presbyterian Church, and thus create disorder and confusion, to the danger of sound doctrine? Now, how, I would ask, was that question to be settled? The decision which was made, excluding the four synods, was, as we have seen, in consonance with the principles of the constitution of the church, that the majority shall rule, and was a most righteous and conscientious decision.

Let me now refer you to Chapter 8th of the Form of Government, page 253 and 254, which I rather wonder has not been more particularly adverted to. [For this chapter see page 156 of this report.]

Now, from this it is evident that if the General Assembly had done wrong, there is no body to which an appeal could be made. There is no other quarter whence to look for redress. There has been an outcry raised that 500 pastors and 60,000 communicants were now suffering persecution at the hands of the respondents! Now, instead of that being an argument to enlist the feelings of men, it was to be turned the other way, for they were strong enough to take care of themselves. A band, a phalanx of sixty-thousand, complaining of oppression in this country! Oppression by whom?

And, that they were going to be deprived of their property, and that there was a want of charity! Now this was not the fact, they were merely desired to go in peace. They were not going to lose their property. It was perfectly ridiculous to talk of oppression and persecution in such a case as this. Talk of violating the constitution! What greater violation of the constitution of the Presbyterian Church could have been committed than to drag the respondents here into a tribunal foreign to our institutions? Where is the constitution for this? But I ask, after all that has been done and said, and testified, what do your honours know about the four synods which were excinded, whether they were regularly constituted or not? I maintain that the General Assembly, in doing as they had done, were perfectly justified by the constitution of the Church, and that, if they had not been, it was a subject which cannot be entertained by this Court.

I have submitted pretty much what I had to say on this point; but within a few days, I have received the manuscript notes of Chief Justice Johns, of Delaware, of the argument, and a draft of his charge, in the case of the Rev. Mr. Hindman, excluded from the New Castle Presbytery in 1808, which, as it is exactly to my purpose, I will read.

[*Mr. Sergeant* stated that this presbytery was incorporated by the Legislature of Delaware, and he cited the case as authority, fully sustaining the position which he had taken against the idea that the civil courts had jurisdiction in this country over the acts of ecclesiastical bodies. *Mr. Randall* interposed, when this document was offered, remarking, that the whole argument presented by Mr. Sergeant against the jurisdiction of the court was entirely unexpected by himself and his colleague, Mr. Meredith, as that question had been distinctly decided by the court, in relation to this very case, at the July term, when it was specially argued; that since that time, during the whole course of the trial before Judge Rodgers and the jury, and by the opening counsel on the motion for a new trial, it had not been touched; it could not therefore have been anticipated that so extraordinary a course was to be taken at this time, and especially that after the closing counsel against the motion had concluded, judicial decisions of this character and in this form too, the manuscript notes of a judge were to be read and submitted to the Court. If these papers were to be presented, his colleague and himself ought surely to have been apprised, before the latter concluded the argument on the other side, that this ground was to be taken. In that case, they would have submitted the most ample authorities in the form of decisions in the courts of this state, New Jersey, New York, Maryland, and others, showing conclusively that the settled law of this country, according to the opinion of the ablest jurists, is directly contrary to that contended for by Mr. Sergeant.

The objection was waived, on the Court saying that Mr. Randall could reply to any new matter introduced by Mr. Sergeant.

Mr. Sergeant then read portions of the argument and charge.

by which it appeared that the Court in that case decided that it had no jurisdiction.]

With regard to the clerical office, the court had no power. Now, the principle of that decision applies here. It was a subject the court could not deal with. They could not interfere in the matter, because it was a spiritual question, and the civil authority has no right to touch the question of moral discipline, including the expulsion of ministers. I am, then, fully fortified by that decision as to the principle I have been contending for.

Now, if there can be any doubt, as I trust there will not be, as to this principle going the whole length of my positions, still it ought not to be denied that respect is due to the decisions of the judicatory of the church; that they ought to be deemed to be good until the contrary appears, and that the burden of proof that they are not, must lay with the opposite side. The whole matter, however, has been reversed in this case, for the burden of proof has been thrown upon the respondents. It will be recollected that his honour, Judge Rodgers, told the jury that Dr. Elliott was right in his decision as to the appeal of Dr. Patton, for the reason that the roll had not yet been reported, and that the body was not so constituted as to be able to entertain the appeal. But, then, his honour left it to the jury in this way: "The decision of the moderator was correct, if it was the true reason."

The moderator decided right, and the jury were called upon to decide whether the reason he gave for it was the reason upon which he acted. I do not speak of this as being an error in the charge, or a distinct and substantive ground of objection to the verdict, but as an uncalled for insinuation. Dr. Elliott, a reverend character, had been examined under oath, and an opportunity was afforded the other side of obtaining the information they desired, and yet the jury were called upon to *look into his heart*, and to say whether he was governed by the reason which he assigned! If the principle is to be admitted that such investigations are to be held in civil courts, and extended to every denomination, who, I ask, will consent to be moderator, if his clerical character only is not sufficient to protect him against those suspicions, from which every other presiding officer is, by rule, protected? That rule is, that his motives are not to be questioned. I protest against conduct of this sort, as being calculated to lead to persecution of the most cruel kind—persecution, in comparison with which that which had been experienced by the 500 ministers and 50,000 communicants was light as the dust of the balance. For what greater torture could any man endure than by the process of such an investigation as that to which they subjected Dr. Elliott before the jury? Especially when that was followed up by one of the counsel on the other side, in this Court, publicly suggesting to that reverend gentleman a text, inculcating truth and honesty, on which to preach, thereby plainly intimating that he ought to *obey* those precepts, or in other words, declaring that he had violated them! The same spirit has characterized the New School party throughout these proceedings. Indeed, what must be the character of the case, when counsel, so correct

as both those gentlemen are, could use such rancorous and bitter language as they had in this case, in relation to venerable clergymen!

[The opposite counsel here both interposed. *Mr. Meredith* said that he was not aware that there was any just foundation for the course of remark which the learned counsel was pursuing; that he was a little apprehensive that the gentleman was applying his rebuke on the wrong side; and that so far as the suggestion of a text was concerned, it was not made for Dr. Elliott, but for his successor, (who he might be he knew not,) and certainly the suggestion had no such personal application as the gentleman had laboured to give it, but was in view of the general aspects of the case, an expression of his own desire, that hereafter things "lovely, peaceful, and of good report," might prevail in the Old School portion of the church. Indeed, the remarks of his, to which the counsel alluded, were all thrown out in a playful mood, as the only reply which he thought it desirable to make, in a case of this character, to the rancorous and bitter denunciations which had been so freely uttered on the other side. He would cheerfully submit it to the cool reflection of the gentlemen themselves, which was the better course.

Mr. Randall said, that the imputations of Mr. Sergeant were certainly groundless. For himself he could appeal to every member of the court and of the bar, that he had been guilty of no such indecorum as was charged upon him; and in a case, which had been managed as this had been on the other side, he thought it peculiarly unfortunate that such an assault should come from that quarter, and especially that the counsel should not only thus have assailed the relators, and their friends and counsel, but that he should also have allowed himself thus to impugn his honour, who presided at Nisi Prius, than whom, he knew, that no judge enjoyed more entirely the confidence of this whole Court. Indeed, who has been spared, in this painful trial; who that happens to differ from the party of the respondents has been exempted from vituperation. Neither the responsibilities of the counsel for the relators, nor the outraged feelings of their clients—neither the sacred station of the jury nor the ermine of the judge, have been a shield against the imputations which have been lavished here at the forum; nor the calumnies, which, since the trial below, have been poured forth from the press, and, I am sorry to say it, even from the pulpit of the opposite party, with an indiscretion, however, which I am happy in being assured is exceedingly regretted by the more wise and venerable men of that party.

His honour, *Judge Rodgers*, remarked, that he did not know that the interruption of the counsel here was more called for than in several other instances; but most true it was, that no one had been spared, who had sustained any relation to this case, and who had been so unfortunate as to coincide in judgment with the court and the jury in the result of the trial below. It was certainly, in this particular, the most singular case he had ever known.

Mr. Sergeant said, that he did not seriously intend such imputa-

tions on others as seemed to be attributed to him, and perhaps in the warmth of his zeal in a good cause, he had used some expressions which would bear an interpretation which he did not design. But certain it is that a spirit has mingled in this controversy calculated to destroy any church, and which, if unrestrained, would destroy all the churches in the land.]

Mr. S. then proceeded in his argument—

Now, in relation to the position that the General Assembly is *quasi* corporate, that is, an imperfect corporation, I hold that it is not corporate at all; but that the trustees are fully and only, the corporation. Read the act of incorporation. [See page 28 of this report.] It specifies certain persons in New York, New Jersey, and Pennsylvania, whom it incorporates as Trustees of the General Assembly. It is said that the Assembly are the delectors of the corporation, and, therefore, *quasi* corporate; but this is not so. The act of the Legislature, under which the Assembly make the appointment, speaks of the General Assembly as an existing body, and of all its qualities, attributes and rights, before the church was either a corporation or a *quasi* corporation, and I contend that it intended to leave it in this respect as it found it. What was incorporated? Was it the General Assembly as it *then was?* Then the Plan of Union was clearly inadmissible. But, not to insist on this; the act certainly intended to leave the Assembly as it then was. Suppose the Assembly, before the act of incorporation, had dissolved or excinded synods and presbyteries. Would the civil court interfere? By no means. Well, then, was the Assembly abridged in its powers by the incorporation? No. The legislature left it as it was, with its bill of rights maintaining a separation from the civil power, an exemption from the interference or revision of the civil courts. It left it separate from the corporation.

Now, with regard to the trustees that were elected in 1837, after the excinding resolutions were passed, and after the four synods had ceased to be members of the General Assembly. Did ever any body question the validity of the election of trustees of 1837? Has any body ever pretended that that election was illegal? Has any one ever attempted to have those trustees removed? Yet if the principle were true which is contended for here, we should have a right to look into the validity of their election; for it happened at a time when the delegates from these synods were excluded from voting. No body, ever so much embittered in their feelings against that Assembly, ever thought of calling on this Court and telling it that that resolution was unconstitutional, in order to invalidate the election of 1837, on the ground that some of the electors had been excluded from the election. But that was not the inquiry. The inquiry was—where was the General Assembly? Did the General Assembly choose those trustees? The existence of the body known as the General Assembly attested that these are the gentlemen appointed as trustees.

Well, trustees, whether incorporated or unincorporated, could be compelled, by a court of equity, to fulfil the duties of their trust. So that, on the subject of the funds of the General Assembly, there

is no need of this process of *quo warranto*. If those funds were contributed for specific purposes, a court of equity could compel their being so appropriated: if for general charities, under the direction of the Assembly, the Assembly of 1837 was as competent as any other, to dispose of them.

I need not, however, dwell on this, as it has been, I think, fully shown, that it is not competent to this Court to inquire into the constitutionality or justice even, of the acts of 1837, those acts having been adopted by a majority, and the body adopting them being one of spiritual, and not of civil jurisdiction.

On this subject, your honours will recollect that objection was made on the trial, to the admission of the proceedings of 1837, and so I suppose that objection is available to us here.

[*Judge Rodgers* said no such objection was made on the trial, on the ground which is now taken, nor was this point ever made in the progress of the trial, that the court had no jurisdiction.]

Well, then, I was going to say, that in a case before Judge Washington, a point not presented below, was argued in the upper court, and so entirely to the satisfaction of that judge, that he fully concurred in the opinion of the court, reversing that which he had himself given below.

But not to rely on this, I will examine the acts of 1837, if examinable by this Court, or, as *if* they were so examinable.

Well, how shall it be done? I say that those acts are good and valid, and so to be received, till the reverse is proved. But how shall it be either proved, or disproved? I am not competent to examine these spiritual acts, and this tribunal is not a spiritual tribunal. This difficulty meets us at every turn. But we must go to the constitution of the church. That constitution declares that it is a church on principles not admitting the control of the civil power, and all its members have voluntarily adopted it with that principle on its face. The articles of the constitution, and the acts of the Assembly which have been read, also show you that that body had power to excind, expel or dissolve, &c. It had all the power of the church, and of all the judicatories of the church, not only as to the thing to be done, but also as to the manner of doing it. There is no limitation of its powers. And the court will therefore see a difficulty in pronouncing its acts unconstitutional.

Well now the act which they have done is to *lay down* four synods. This act is objected to. Well suppose the objection to prevail. Who will tell them *when* they may lay down a synod or do any other act to remove disorders from among them? Judge Rodgers' decision in regard to receiving evidence of irregularities, &c., in these synods was correct, on the ground that the Court could not inquire into them. But is not the same ground good against our inquiring into the character of the excinding acts? At any rate, I contend that if we are to examine here the constitutionality of the excinding acts, we must give them the benefit of the rules of law in such cases, viz: that those who complain of the unconstitutionality of any acts, must show the specific provision in the constitution which is violated. Have the other side done this?

No. But we have shown the clause in the constitution giving the power, and we have shown the practice in conformity to that clause, and the uniform acquiescence of the church in such practice.

Well, if we must go into it, feeble as my powers are for such purposes, yet if this investigation is admissible, I will go in to it.

First, I will show that the separation contemplated by the abrogation of the "Plan of Union" was necessary for the good of the church, in consequence of the disorders and contentions introduced by that plan. My evidence is not parole merely, but more authentic documents.

And first, the adoption of the resolution introduced by Mr. Breckinridge for a committee of separation proves it. How else could such a resolution have been adopted! But secondly, the proceedings of that committee show the same thing most clearly. Both the report of the majority committee, and that of the minority, show that there were "important differences of doctrine," differences of vital importance, differences to be deprecated, &c. It is not for us, certainly not for me, to institute a comparison of the tenets held by the different parties. It is enough that there were such differences, and these introduced feuds, heats, contentions, strifes, &c., till at length, in 1838, they produced the secession of the party now claiming with the relators in this Court. On every question, the two parties were as distinct and marked as the waters of the Allegheny and Monongahela rivers at Pittsburgh.

The root of all this difficulty was, that aliens were brought into the church by the Plan of Union of 1801. This we could have proved on the trial, had we been allowed, and are therefore now entitled to the benefit of it, *as if proved.* His honour charged the jury, that "if the standing committee of Congregational churches have claimed and exercised the same rights as ruling elders in presbyteries, and in the General Assembly itself, it is an abuse which may be corrected by the proper tribunals; but surely that is no argument, or one of but little weight, to show that the Plan of Union is unconstitutional and void." Hence, he concludes that the *plan* did not introduce these committees to the exercise of these rights. But I beg again to invite his attention to this subject. The construction depends upon the last of these articles. And if carefully examined, "provided" here, does not mean a "proviso" connected with the case of a church from which an appeal goes up to the presbytery, but it is in reality an independent article, and "provided," has simply the force of "if"—if such a standing committee depute one of their number, (that is on any occasion,) he shall have the same rights, &c. This conclusion is the more evident, because, that on the other construction, the very case in which it provides for a seat in presbytery *as an elder*, is the very one in which, by the constitution and by all the principles of this church, and of all other bodies, an elder from any particular church could not act in presbytery, that is, when there is an appeal from his own decision.

Here then the whole superstructure falls, for the construction which I have disproved is the whole basis of the argument on the other side. We see then that it was the "plan," which introduced

all these evils into the church. And especially let me here say in regard to the argument from acquiescence, that when these evils were discovered, they surely might rightly be put aside. Could the Assembly hold one of these synods or presbyteries against their will? Not one of them. Surely then, had not the *Old Stock* a right to separate these heterogeneous materials from themselves? And ought they not to do so?

Have I not, then, made out the case for the General Assembly, that they have kept their eye, in effecting this separation, on the great point of promoting the interests of the church? For the safety of the vine, the unnatural branches must be pruned off. They could neither separate voluntarily, nor live together in peace. The majority, therefore, made the separation, and the minority consulted counsel. The result of the advice which they obtained, has brought us where we are. The majority did right, and have no reason to regret what they did. All the occasion for regret is, that those on the opposite side, when it was plain and obvious to every man that a peaceful separation was particularly advisable, and indispensably necessary, did not agree to it; for, had they done that, which I conceive would have been the most commendable course for the benefit of the church, neither party would now have been before this Court. The utmost that can be hoped by the success of the relators is, to bring both parties together again. But what prospect there is of that, your honours can judge, from what has passed. I will refer to one or two little matters, upon which I do not intend to lay any very great stress, merely as collateral evidence of the necessity of a separation. In the New School pastoral letter, we find that so high had grown the feeling between these parties, that they compare the acts of the Old School, to the exercise of "papal power."

Another evidence of the spirit existing between these parties, is the fact that the very first act of the New School, when they were separated, was the ousting of Dr. Green, the patriarch of the church, from being a trustee.

Now, in relation to the acts of excision. According to the argument of the other side, we have two questions to consider—the substance and form of the proceedings in 1837. The form, in part, we have considered, and I will now finish that topic. The argument seems to admit, that if the form had been right, the substance would be right. This admits the jurisdiction. If so, then that body was the judge of the form, and the civil court has no right to interfere. But now, sir, if this is so, that the form of proceeding was wrong, on what foundation does the allegation rest, that we should have proceeded by citation? not on an express rule. What do the rules of discipline prescribe, in relation to the General Assembly? Why, the manner in which they shall proceed in cases of appeal, &c. But, suppose there is no appeal? Then, according to the decision in Delaware, the courts cannot touch it. But, according to the doctrine here advanced, if there is an appeal to the highest tribunal of the church, the courts can set aside their decision! If this were so, then we admit that it is essential, that when the General Assembly originate process, (if they have a right to do so,) they should

pursue the regular steps, and the civil courts can inquire whether they have done so.

Well, now, the first question to be examined is, was it the intention of the framers of the constitution to apply those rules of discipline to a case like this? I contend that it was not; but to cases where charges were brought. These are not such cases. We did not charge any individual with crime, but impute the evil to the Plan of Union, to the whole Assembly, to the whole church, if you please. This we have noticed in the proceedings adopted by the General Assembly, in repealing the Plan of Union.

I will now read the resolutions, called the excinding resolutions. [See pages 56 and 57 of this report.] Now, these resolutions assumed that these persons, or many of them, were innocent, and invited them to come and prove what? Why, simply that they were Presbyterians. Nay, more, to come, not to the General Assembly, but to the nearest presbytery. Here is no penalty, but we dissolve the connexion with the Assembly; not for crime, but for the good of the church. Congregationalism may be a ground of separation, but not of criminal charges.

The course proposed by Mr. Jessup, therefore, which it is said ought to have been adopted, that of charges and citation, was not applicable to the case. But it is said they were charged with gross disorder and irregularities; well, the first is the ground of this proceeding, and the second a ground of criminal proceeding, which they might, but did not choose to adopt.

Previous to the final action, your honours will remember that a mode of proceeding was proposed for an amicable separation; and when that failed, the resolutions were adopted which have been read; and I must say, that as far as I am competent to judge, (and the matter is submitted to the better judgment of your honours,) that I cannot yet see, after all that I have heard on the subject, (and I have listened attentively to every thing that has been said, and to the charge delivered by his honour, Judge Rodgers,) any thing to persuade any one that the course of the General Assembly was not the most tender, the most careful, the most in conformity with the spirit of other institutions, and the least liable to reproach from any body, of any that could be adopted. I cannot doubt that the happiness and peace of both parties did require that they should be put asunder, at least for a time. And I must say, that the other side have introduced a system of tactics to avoid that separation, at which I marvel. But. again, this proceeding related to bodies, not individuals; and I must say, again, that creation involves, in all cases, the right to dissolve.

Now, all these synods were the creation of the General Assembly, and no one has questioned their right to establish them. My colleague, (Mr. Hubbell,) has truly remarked that the power of removal necessarily and surely followed the power of appointment. I do not understand the argument on the other side, to deny the power of the General Assembly.

[Here *Mr. Randall* explained. He said, whether the General Assembly could dissolve a presbytery, was a vexed question. But

one thing was clear, that they had no right to dissolve a presbytery or a synod, without annexing them to some other presbytery. One reason, perhaps, was, because their rights had become vested, and the consequence of a naked dissolution, was the suspension of ecclesiastical privileges. And the suspension of those privileges, for one instant, was unconstitutional and void. It had been done in the case of the Third Presbytery, but that was one of the series of measures adopted by this party, of which we complain.]

I take the gentleman's position to be, that the right to lay down a presbytery is doubtful, because it has never been done. But I beg to say that it has been done, in the case of the Third Presbytery of Philadelphia. A synod is a link in the chain of connexion, according to the order of the church; and whatever is done by means of the establishment of a synod, is undone by the dissolution of a synod, and nothing more. Then, if any ecclesiastical privileges flow from the establishment of a synod, where is the authority to prove that the General Assembly cannot lay down that synod on that account? The argument of the learned counsel was, that when once you have created a synod, you cannot lay it down without trial, sentence and condemnation. Now there is no law of the state requiring a regulation of that sort, nor can there be. Under the constitution of the land, no such law can be passed, requiring an ecclesiastical body to pursue a certain course in disposing of any class of members who may be obnoxious to them.

Again, we are told of vested rights. The only vested rights involved, then, are spiritual rights, and the answer is that given in Delaware, "we do not know any thing of these rights in our courts of law." Then, again, no one is put out but those who, in the opinion of those who put them out, *ought* to go.

Now, sir, we offered to prove the existence of Congregational churches in those synods. How far we could have done so, I do not say. It has been said, that in the Western Reserve, there were great irregularities, and that we might have followed up the inquiries, and shown the degenerating character of members of judicatories, till we come down to Mr. Bissell, a mere layman, "not an elder, not even a committee-man," who obtained a seat on the floor of the General Assembly. True, a protest was entered against his admission, and that protest was signed by Mr. Gilbert, and others, now forward in sustaining the New School, but who then joined in the protest against this thing. This shows the progress of the evil.

There were several evils to be corrected, growing out of the Plan of Union. Now it is the province of the church to decide whether they will have Congregationalists in their body, or not. Suppose they decide they will not have *two*. Will the civil courts deny their right to judgment in the premises? The documents which have been read, and the cross-examination of Mr. Squier, show the existence of Congregationalism in the church. Now I claim that the dissolution of those synods was a legitimate consequence of the abrogation of the Plan of Union. That plan was not a part of the constitution. Those who came in under it, (admitting the Assembly's power to make it,) do not stand on the constitution, but on the Plan of Union. That abrogated, they go out, of course.

Judge Rodgers has said, that the dissolution of the Plan of Union, was within the powers of the General Assembly. It follows, then, that it was not a part of the constitution of the church. Those who came in under the Plan of Union, cannot have constitutional rights, for it formed no part of the constitution. We contend, that it was unconstitutional. These four synods do not derive any of their rights from the constitution, but from an ordinary act of the Assembly. The creation of these religious associations was a voluntary act, and those who made them could dissolve them.

But I leave these points with the Court, and proceed to examine the organization of the General Assembly of 1838. Here we are met by a resort to parliamentary law, to show how a minority may turn out a majority. It is, it seems to me, a perfect game of "push-bean." But I will examine the details, and begin at the beginning.

There can be no doubt whatever of the right of the antecedent Assembly to provide for the organization of the next General Assembly up to a certain point, and this is in accordance with the practice of the senate and house of representatives of the United States, and of the British house of commons. And here the old officers were to officiate till a certain point should be reached in the organization. All parliamentary law was in accordance with the principle, that while a presiding officer was in the chair, no other person *can put* any question. When he is absent the clerks may do it. But again, in these preliminary proceedings, whatever was done, the house had done no wrong. If any was done, it was by the clerks. But the clerks did right. The resolutions of 1837 bound them.

But there is complaint that they did not at least report these commissions on the rejected list. I put this on the same ground with the other. Three classes came; one with irregular commissions, one with *none*, and one without any constituency. Would you require them, then, to report those, who, in fact, according to resolutions of 1837, had no commissions? Besides, the moderator and clerks *could not do it*, for they were placed there, not as servants of the body to be organized, but of that of 1837, to officiate till a new Assembly is *organized*, and they were bound to do as they did, to obey that of 1837. By the constitution the moderator was to preside "till a new moderator be chosen," of which, the obvious meaning is, till he *can* be chosen, and when that could be done is shown by the standing rules. First, "those reported are to take their seats and proceed to business."

These rules are as strong as the constitution. The moderator and clerks were put there to do these certan things. The moderator was not to perform the ordinary acts of *speaker*, but to see that nothing be done till a committee of elections be appointed. He *should* tell all that proposed any thing else, "you are out of order," as he told Patton, Mason, Squier, &c.

With regard to the appeal made by Dr. Patton, none could be entertained, for there was nothing on which an appeal could be founded, unless the rules were violated, as the body was not then organized. Every deliberative body acts on this principle, to do nothing else, till organized, and permit me to say that rules are important. No voice ought to be heard in the Assembly, but that of

the moderator, or of the individual addressing him. If it were once allowed that any man should be allowed to rise and distract the attention of the moderator and of the member, who was in order in addressing him, then there was an end of all order, and it would then be a question as to what was going on. You may depend upon it, that form here is substance: and without it there can be no order, no fair play, but all sorts of tricks will be practised. As long as any one is in the chair, members cannot notice a question put from any other quarter. The officer and the chair are both essential, and they must be together. Dr. Elliott was not put in the chair to entertain motions and appeals, but to keep order, and do certain business, until the committee of elections was appointed. If the chair were vacant, the next officer, the clerk, must perform these duties. The moderator then was acting in strict obedience to the laws by which he was bound, and could have done no otherways than he did.

If a further vindication of the Assembly and of Dr. Elliott will be conducive to the decision of this case, it may be found by inquiring as to the condition of the house, and to the persons there. It was a mixed assembly, to hear the sermon. There was, then, peculiar reason for Dr. Elliott to adhere *strictly* to the rules. But Dr. Patton undertook to judge what was proper to be done, and so did Dr. Mason, when he chose to put aside the committee of elections.

According to the testimony of the most prominent actors on the occasion in question, the moderator acted fairly, impartially, and with the most rigid regard to the rules of the body. It has been said, that disorder was committed by those who supported the moderator, as well as by that gentleman himself. Now, I do not believe that Dr. Elliott acted in a disorderly manner; and I think that of those who committed disorder, there were, at least, three to one on the other side.

Now, suppose that Dr. Elliott was disorderly, Patton's and Mason's disorder would balance Elliott's; but if Dr. Elliott was right, then all the disorder was on the other side.

Now, till this time, all addressed the moderator. When did he cease to be so regarded? Never. But the fact is, a part came to do a certain thing, to effect a new organization, and must take therefore that "time and place." What next? Why, Mr. Cleaveland made a written speech, and which had been since unfortunately lost, and we were obliged to take what was called the substance of it. This important pivot to the whole case was lost! Mr. Cleaveland's speech was written before he came in, before Dr. Elliott had done wrong, if he did wrong at all, and he made a motion, which, according to the positions here taken, obliged the members to look both ways at once, under penalty of being construed to acquiesce in what *any* body might propose.

Now, see what they give us, separating the introduction of the minute from the speech of Mr. Cleaveland. The remarks about the moderator's refusing to do his duty, &c., do not appear to be any part of Mr. Cleaveland's speech, but this is that speech, as *they* have presented it: "That as the commissioners to the General As-

sembly for 1838, from a large number of presbyteries, had been refused their seats; and as we had been advised by counsel learned in the law, that a constitutional organization of the Assembly must be secured at this time and in this place, he trusted it would not be considered as an act of discourtesy, but merely as a matter of necessity, if we now proceed to organize the General Assembly for 1838, in the fewest words, the shortest time, and with the least interruption practicable." In the paper read by Mr. Cleaveland then, no intimation was thrown out, of a wish to change the moderator, or to impeach him. What he meant to have done was to leave Dr. Elliott in the chair, and to have another moderator in the aisle, upon whom the members were to look as their head. This was all arranged at a meeting of the party held previously. Every motion made must be addressed to the chair, and repeated by it; and until that was done no one was bound to know any thing about it. If that course was not adopted, the motion was not a lawful one. That the party did not come there to remove Dr. Elliott, is evident to me, but they wanted to have an organization of their own, and then to bring up the question afterwards, as to which was the true Assembly. They were most unquestionably prepared beforehand.

This is shown by the testimony of Dr. Hill, who speaks of the "incipient steps," &c. Dr. Patton's "motion was made to the house," &c., and Mr. Gilbert says, "he did not address the moderator," and he thought it "no matter in *what part of the house*," &c. At this time they had no idea that those who remained silent and did not vote on the motion of Mr. Cleaveland, would be *regarded as giving their assent.* They knew that the members who did not vote, were not bound to do so, nor to recognize any other authority than that of Dr. Elliott, the moderator. This is further evident from the very course which they pursued, electing Dr. Beman. (I suppose, because he had been moderator before.)

Now, this whole proceeding was outrageously disorderly from beginning to end. 1st. It was out of season. 2d. It was not addressed to the chair. The rules require the chair to be addressed. Another rule requires the motion to be seconded, and *repeated* by the moderator. Here observe, the rules are of infinite consequence to prevent a "snap judgment," in this case.

Now, because we did not vote on this very disorderly motion, we are to be construed as concurring in it! But I go further, and I intend to disprove this intendment of law *as* an intendment of law, as well as, as a matter of fact. It was put by *no officer* of the body, and then they went out of the seats which they occupied as members of the house. No one, then, was bound to notice it. But the fact was, that the minority came and asked us to let them organize *behind us*, (in order to have a body of their own, ready for a lawsuit,) and we gave them consent. "Oh, yes," we said, "you may have Dr. Beman for your moderator, if you wish, and we will keep our own."

But again, look at the circumstances in which the question was put; a perfect scene of disorder. But the disorder is imputed to the Old School. Their cries of "order" are called disor-

derly! I say they had a right (if Mr. Cleaveland was disorderly) to make as much noise as they pleased to suppress the disorder. Now what could they do to maintain order, other than they did?

Again, the question was not even put from the neighbourhood of the chair. Who could tell who had a right to vote or who did vote? Look at the situation of the parties. The question was not put to the great body entitled to vote, but to their backs. Then, it was not *intelligently put.* Sixteen of the witnesses tell you that they did not know who was elected moderator till some time afterward, or till the next day. The precedents read by the opposite counsel were correct, but not applicable, because these were *disorderly* movements.

Again, parliamentary rules require a pause to give opportunity for debate. But in this proceeding, where was the opportunity to debate? Crack, crack, crack, went their votes, and then they proclaimed at the doors, that they had gone "to old buttonwood." Now here is the clue to the whole matter. They intended that two bodies should be organized. Well, one is organized, and the other comes in and wants to organize in their own way. Well, but if they want to involve *us*, they must use *our language*, and must address *our* moderator. The fair way would have been to have told us just what they wanted, and then we should have known what to do.

But, again: suppose the disorder was "by the Old School." Well, the Old School is not an individual nor a corporation. How, then, could the whole be made answerable for the disorders of a part? How is it that every right is made to yield to a wrong construction of a rule? Why, by making it a question of privilege! It was not so intended at the time; but if so, that body never agreed to receive it, which is the *first* step in such a question. Again, it was not put by OUR moderator, which would also be essential if it were a question of privilege, or by the clerk, if the moderator was disqualified.

The case of Hollis, cited to the contrary, is no precedent. The authority of Hatzell is conclusive that the clerk should put the question in such cases. Such also was the practice of the General Assembly in 1835. In this case Mr. Meredith sees Dr. Ely, as a member and not as clerk, but the antecedent of "him," in that minute is "stated clerk," so that I think there can be no question on that subject.

I have now endeavoured to discharge my duties in this case. With great personal respect for members of the New School party, which made me extremely reluctant to engage, even professionally, in a contest between them and their brethren of the other party, I must yet, as a lawyer, be permitted to say, that I do most firmly believe them in the wrong, in this case.

Mr. Sergeant concluded late on Friday, P. M., and the Court immediately adjourned.

Saturday, April 26.

At the opening of the Court, Chief Justice Gibson remarked to Mr. Randall, that he would now be heard, and would confine himself to the new matter introduced by Mr. Sergeant, the closing counsel on the other side, as the case had already occupied too much time. *Mr. Randall* then said: In relation to time, your honours will remember that full two-thirds of the whole time of the Court devoted to this cause has been occupied by the opposite party, and that in the hearing on the present motion, my colleague and myself have consumed considerably less than half as much as the counsel on the other side. In regard to confining myself to the new matter introduced by Mr. Sergeant, I would be willing to be restricted to much narrower limits than that; I will not reply to all the new matter introduced by that gentleman, for that would be to reply to nearly the whole of his argument. I would like, however, to set Mr. Sergeant right in relation to two matters of fact. One is, in relation to the proceedings in the Assembly of 1835, removing the temporary incumbent of the chair, and placing Dr. Wm. A. M'Dowell in his stead. Mr. Sergeant has alleged that the question, in that case, was put by Dr. Ely *as stated clerk*, showing that the Assembly recognised the validity, in its transactions, of the parliamentary rule which requires the clerk of the house to put any question, which, the moderator or speaker may not or can not put. The fact is, that Dr. Ely could not have put that question as clerk of the house, for the stated clerk of the General Assembly is not properly *an officer of the house* during its sessions; the duties of the clerkships of the house being performed by the permanent and temporary clerks. The business of the stated clerk is to record the transactions of the Assembly as they are delivered to him by the permanent clerk *after the close of the session* of the body, to prepare the statistical tables, procure the publication of the minutes, and perform other duties after the dissolution of the Assembly. The minutes of the Assembly, in that case, which were in evidence on the trial by jury, moreover, say, not that the stated clerk, but that Dr. Ely put the motion to the house, Dr. Ely being a member.

The other matter on which I wish to set Mr. Sergeant right, has relation to the map of New York, which I submitted, and on which Mr. Sergeant remarked that the location of the excinded churches &c. was not distinctly delineated. On this subject I have to say, that the map of New York which I submitted to the Court, exhibits the territory formerly embraced by the single Presbytery of Albany. On this territory, by the regular and constitutional divisions of that presbytery and sub-divisions of the several presbyteries *erected out of it*, a large number of presbyteries now exist, which, by the several regular and constitutional divisions and sub-divisions of the *Synod of Albany*, have been, by the General Assembly itself, erected into the Synods of Utica, Geneva, and Genessee, whose boundaries are defined on the map, embracing a part of the original territory of the presbytery of Albany, and *of that territory only*. And further, on this map are shown the name and locality of a number of the churches of those synods, which churches were originally attached

to the Presbytery of Albany, and some of them indeed to the *Presbytery of New York*, when it embraced the whole State, *before the erection of the Presbytery of Albany, and before the organization of the General Assembly.* And the history of those Presbyterian Churches is traced in the documents submitted to the court, in their being reported annually to the highest judicatory of the church, from the year 1790, to the present time. These are among the churches excinded by the acts of 1837, and declared to be "*no part of the Presbyterian Church.*"

In relation to authority, in the way of judicial decisions respecting the power of the courts to take cognizance of ecclesiastical wrongs in this country, when the bodies committing them are incorporated, I have several cases to my purpose before me, and will read one from this volume of decisions of this Court. It is the case of the Commonwealth of Pennsylvania *vs.* Richards and others, decided in 1790, and is referred to in Mr. Hindman's case. [The Chief Justice here said, that if Mr. Randall read a new case, it would, perhaps, elicit a reply from Mr. Sergeant, and it would be impossible to foresee when this cause would be terminated. He had better, therefore, content himself, without reading. *Mr. Randall* said he would do so, and briefly stated the points in the case, and the decision of the court.] This, your honours will see, is all that we could wish as authority, opposed to the position of Mr. Sergeant; and, as for the case from Delaware, may it please your honours, Mr. Sergeant has read from these notes *a part* of a decision, showing, indeed, very satisfactorily to him, no doubt, that the court declined jurisdiction in that case over the acts of an ecclesiastical tribunal, the presbytery of New Castle. It will be sufficient for my purpose, to read to your honours the *part which he omitted.* [This *Mr. Randall* proceeded to do.] From this, then, it appears that the jurisdiction was denied, expressly on the ground that it did not appear to the court that it was the *incorporated* presbytery of New Castle, which had performed the acts complained of, and the court said that they would, otherwise, have entertained jurisdiction.

Here the parties rested, and the Court adjourned.

Wednesday, May 8th, 1839.

Chief Justice Gibson and Judges Rodgers and Kennedy were on the bench.

Chief Justice Gibson delivered the opinion of the Court in this case. It is given below, with a notice in brackets of variations on one subject, between the opinion as delivered and as subsequently officially published. This notice is supposed to be due to the parties concerned.

OPINION OF THE COURT.

To extricate the question from the multifarious mass of irrelevant matter in which it is enclosed, we must, in the first place, ascertain the specific character of the General Assembly, and the

relation it bears to the corporation which is the immediate subject of our cognizance. This Assembly has been called a *quasi* corporation; of which it has no feature. A *quasi* corporation has capacity to sue and be sued as an artificial person; which the Assembly has not. It is also established by law; which the Assembly is not. Neither is the Assembly a particular order or rank in the corporation, though the latter was created for its convenience; such, for instance, as the share-holders of a bank or joint-stock company, who are an integrant part of the body. It is a segregated association, which, though it is the reproductive organ of corporate succession, is not itself a member of the body; and in that respect it is anomalous. Having no corporate quality in itself, it is not a subject of our corrective jurisdiction, or of our scrutiny, farther than to ascertain how far its organic structure may bear on the question of its personal identity or individuality. By the charter of the corporation, of which it is the handmaid and nurse, it has a limited capacity to create vacancies in it, and an unlimited power over the form and manner of choice in filling them. It would be sufficient for the civil tribunals, therefore, that the assembled commissioners had constituted an actual body; and that it had made its appointment in its own way, without regard to its fairness in respect to its members: with this limitation, however, that it had the assent of the constitutional majority, of which the official act of authentication would be at least, *prima facie* evidence. It would be immaterial to the legality of the choice that the majority had expelled the minority, provided a majority of the whole body concurred in the choice. This may be safely predicated of an undivided Assembly, and it would be an unerring test in the case of a division could a quorum not be constituted of less than such a majority; but unfortunately, a quorum of the General Assembly may be constituted of a very small minority, so that two, or even more, distinct parts may have all the external organs of legitimate existence. Hence, where, as in this instance, the members have formed themselves into separate bodies, numerically sufficient for corporate capacity and organic action, it becomes necessary to ascertain how far either of them was formed in obedience to the conventional law of the association, which, for that purpose only, is to be treated as a rule of civil obligation.

The division which, for purposes of designation, it is convenient to call the Old School party, was certainly organized in obedience to the established order; and, to legitimate the separate organization of its rival, in contravention, as it certainly was of every thing like precedent, would require the presentation of a very urgent emergency. At the stated time and place for the opening of the session, the parties assembled, without any ostensible division; and, when the organization of the whole had proceeded to a certain point, by the instrumentality of the moderator of the preceding session, who, for that purpose, was the constitutional organ, a provisional moderator was suddenly chosen [on the motion of an individual who had not been reported or enrolled as a member, and by a mi-

nority of those who actually voted, including several who were in the same predicament with the mover*] by a minority of those who could be entitled to vote, including the excinded commissioners. The question on the motion to elect, was put, not by the chair, but by the mover himself; after which, the seceding party elected a permanent moderator, and immediately withdrew, leaving the other party to finish its process of organization, by the choice of its moderator for the session.

In justification of this apparent irregularity, it is urged that the constitutional moderator had refused an appeal to the commissioners in attendance, from his decision, which had excluded from the roll, the names of certain commissioners who had been unconstitutionally severed, as it is alleged, from the Presbyterian connexion by a vote of the preceding session. It is conceded by the argument, that if the synods with the dependent presbyteries by which those commissioners were sent, had been constitutionally dissolved, the motion [made by an excinded member†] was one which the moderator was not bound to put, or the commissioners to notice; and that whatever implication of assent to the decision which ensued, might otherwise be deduced from the silence of those who refused to speak out, about which it will be necessary to say something in the sequel, there was no room for any such implication in the particular instance. It would follow also, that there was no pretence for the deposal of the moderator, if indeed such a thing could be legitimated by any circumstances, for refusing an appeal from his exclusion of those who had not colour of title, and, consequently, that what else might be reform, would be revolution. And this leads to an inquiry into the constitutionality of the act of excision.

The sentence of excision, as it has been called, was nothing else than an ordinance of dissolution. It bore that the synods in question, having been formed and attached to the body of the Presbyterian Church under, and in execution of, the Plan of Union, "be, and are hereby declared to be, out of the ecclesiastical connexion of the Presbyterian Church in the United States of America; and that they are not in form or in fact, an integral portion of said church." Now it will not be said that if the dissolved synods had no other basis than the Plan of Union, they did not necessarily fall along with it, and it is not pretended that the Assembly was incompetent to repeal the union prospectively, but it is contended that the repeal could not impair rights of membership which had grown up under it. On the other hand, it is contended that the Plan of Union was unconstitutional and void from the beginning, because it was not submitted to the presbyteries for their sanction; and that no right of membership could spring from it. But viewed, not as a constitutional regulation, which implies permanency of duration, but as a temporary expedient, it acquired the force of a law without the ra-

* What follows, of this sentence, substituted in the *published* opinion, for the portion in brackets.

† Omitted in the published opinion.

tification of those bodies. It was evidently not intended to be permanent, and it consequently was constitutionally enacted and constitutionally repealed by an ordinary act of legislation; and those synods which had their root in it, could not be expected to survive it. There never was a design to attempt an amalgamation of ecclesiastical principles which are as immiscible as water and oil; much less to effect a commixture of them only at particular geographical points. Such an attempt would have compromised a principle at the very root of Presbyterian government, which requires that the officers of the church be set apart by special ordination for the work. Now the character of the plan is palpable, not only in its title and provisions, but in the minute of its introduction into the Assembly. We find in the proceedings of 1801, page 256, that a committee was raised "to consider and digest a plan of government for the churches in the *new settlements* agreeably to the proposal of the General Association of Connecticut;" and that the plan adopted in conformity to its report, is called "a Plan of Union for the new settlements." The avowed object of it was to prevent alienation; in other words, the affiliation of Presbyterians in other churches, by suffering those who were yet too few and too poor for the maintenance of a minister, temporarily to call to their assistance the members of a sect who differed from them in principles, not of faith, but of ecclesiastical government. To that end, Presbyterian ministers were suffered to preach to Congregational Churches, while Presbyterian Churches were suffered to settle Congregational ministers; and mixed congregations were allowed to settle a Presbyterian or a Congregational minister at their election, but under a plan of government and discipline adapted to the circumstances. Surely this was not intended to outlast the inability of the respective sects to provide separately for themselves, or to perpetuate the innovations on Presbyterial government which it was calculated to produce. It was obviously a missionary arrangement from the first; and they who built up presbyteries and synods on the basis of it, had no reason to expect that their structures would survive it, or that Congregationalists might, by force of it, gain a foothold in the Presbyterian Church, despite of Presbyterial discipline. They embraced it with all its defeasible properties plainly put before them; and the power which constituted it, might fairly repeal it, and dissolve the bodies that had grown out of it, whenever the good of the church should seem to require it.

Could the synods, however, be dissolved by a legislative act? I know not how they could have been legitimately dissolved, by any other. The Assembly is a homogeneous body, uniting in itself, without separation of parts, the legislative, executive and judicial functions of the government; and its acts are referable to the one or the other of them, according to the capacity in which it sat when they were performed. Now, had the excinded synods been cut off by a judicial sentence, without hearing or notice, the act would have been contrary to the cardinal principles of natural justice, and consequently void. But, though it was at first resolved to proceed

judicially, the measure was abandoned; probably because it came to be perceived that the synods had committed no offence.

A glance at the Plan of Union, is enough to convince us that the disorder had come in with the sanction of the Assembly itself. The first article directed *missionaries*, (the word is significant,) to the new settlements, to promote a good understanding betwixt the kindred sects. The second and third permitted a Presbyterian congregation to settle a Congregational minister, or a Presbyterian minister to be settled by a Congregational church! but these provided for no recognition of the people in charge as a part of the Presbyterian body; at least they gave them no representation in its government. But the fourth allowed a mixed congregation to settle a minister of either denomination; and it committed the government of it to a standing committee, but with a right to appeal to the body of male communicants, if the appellant were a Congregationalist, or to the presbytery, if he were a Presbyterian. Now it is evident the Assembly designed that every such congregation should belong to a presbytery, as an integrant part of it; for if its minister were a Congregationalist, in no way connected with the Presbyterian Church, it would be impossible to refer the appellate jurisdiction to any presbytery in particular. This alone would show, that it was designed to place such a congregation in ecclesiastical connexion with the presbytery of the district; but this is not all. It was expressly provided, in conclusion, that if the "said standing committee of any church, shall depute one of themselves to attend the presbytery, he may have the same right to sit and act in the presbytery as a ruling elder of the Presbyterian Church." For what purpose, if the congregation were not in Presbyterial fellowship?

It is said that this *jus representationis* was predicated of the appeal precedently mentioned; and that the exercise of it was to be restrained to the trial of it. The words, however, were predicated without restriction; and an implied limitation of their meaning, would impute to the Assembly the injustice of allowing a party to sit in his own cause, by introducing into the composition of the appellate court, a part of the subordinate one. That such an implication would be inconsistent with the temper displayed by the Assembly on other occasions, is proved by the order which it took as early as 1791, in the case of an appeal from the sentence of the Synod of Philadelphia, whose members it prevented from voting on the question, (Assembly's Digest, p. 332,) as well as by its general provision, that "members of a judicatory may not vote in the superior judicatory on a question of approving or disapproving their records." (Id. page 333.)

The principle has since become a rule of the constitution, as appears by the Book of Discipline, Chap. vii. sect. 3, paragraph 12. As the representatives of those anomalous congregations, therefore, could not sit in judgment on their own controversies, it is pretty clear that it was intended they should be represented generally, else they would not be represented at all in the councils of the church, by those who might not be Presbyterians: and that to effect it, the

principle of Presbyterial ordination was to be relaxed, as regards both the ministry and eldership; and it is equally clear, that had the synods been cited to answer for the consequent relaxation as an offence, they might have triumphantly appeared at the bar of the Assembly with the Plan of Union in their hand. That body, however, resorted to the only constitutional remedy in its power; it fell back, so to speak, on its legislative jurisdiction, in the exercise of which, the synods were competently represented, and heard by their commissioners.

Now the apparent injustice of the measure arises from the contemplation of it as a judicial sentence pronounced against parties who were neither cited nor heard; which it evidently was not. Even as a legislative act, it may have been a hard one, though certainly constitutional, and strictly just. It was impossible to eradicate the disorder by any thing less than a dissolution of those bodies with whose existence its roots were so intertwined as to be inseparable from it, leaving their elements to form new and less heterogeneous combinations. Though deprived of presbyterial organization, the Presbyterian parts were not excluded from the church, provision being made for them, by allowing them to attach themselves to the nearest presbytery.

It is said there is not sufficient evidence to establish the fact that the excinded synods had actually been constituted on the Plan of Union, in order to have given the Assembly even legislative jurisdiction. The testimony of the Rev. Mr. Squier, however, shows that in some of the three which were within the state of New York, congregations were sometimes constituted without elders; and the Synod of the Western Reserve, when charged with delinquency on that head, instead of denying the fact, promptly pointed to the Plan of Union for its justification. But what matters it whether the fact were actually what the Assembly supposed it to be? If that body proceeded in good faith, the validity of its enactment cannot depend on the justness of its conclusion. We have, as already remarked, no authority to rejudge its judgments on their merits; and this principle was asserted with conclusive force by the presiding judge who tried the cause. Upon an objection made to an inquiry into the composition of the Presbytery of Medina, it was ruled that "with the reasons for the proceedings of 1837, (the act of excision,) we have nothing to do. We are to determine only what was done: the reasons of those who did it are immaterial. If the acts complained of were within the jurisdiction of the Assembly, their decision must be final, though they decided wrong." This was predicated of judicial jurisdiction, but the principle is necessarily as applicable to jurisdiction for purposes of legislation. I cite the passage, however, to show that after a successful resistance to the introduction of evidence of the fact, it lies not with the relators to allege the want of it.

If then the synods in question were constitutionally dissolved, the presbyteries of which they had been composed, were, at least, for purposes of representation, dissolved along with them; for no presbytery can be in connexion with the General Assembly, unless it

be at the same time subordinate to a synod also in connexion with it, because an appeal from its judgment can reach the tribunal of the last resort only through that channel. It is immaterial that the presbyteries are the electors; a synod is a part of the machinery which is indispensable to the existence of every branch of the church. It appears, therefore, that the commissioners from the excinded synods, were not entitled to seats in the Assembly, and that their names were properly excluded from the roll.

The inquiry might be rested here; for if there were no colour of right in them, there was no colour of right in the adversary proceedings which were founded on their exclusion. But even if their title were clear, the refusal of an appeal from the decision of the moderator, would be no ground for the degradation of the officer at the call of a minority; nor could it impose on the majority an obligation to vote on a question put unofficially, and out of the usual course. To all questions put by the established organ, it is the duty of every member to respond, or be counted with the greater number, because he is supposed to have assented beforehand to the result of the process pre-established to ascertain the general will; but the rule of implied assent is certainly inapplicable to a measure which, when justifiable even by extreme necessity, is essentially revolutionary, and based on no pre-established process of ascertainment whatever.

To apply it to an extreme case of inorganic action, as was done here, might work the degradation of any presiding officer in our legislative halls, by the motion and actual vote of a single member, sustained by the constructive votes of all the rest; and though such an enterprise may never be attempted, it shows the danger of resorting to a conventional rule, when the body is to be resolved into its original elements, and its rules and conventions to be superseded, by the very motion. For this reason, the choice of a moderator to supplant the officer in the chair, even if he were removeable at the pleasure of the commissioners, would seem to have been unconstitutional.

But he was not removeable by them, because he had not derived his office from them; nor was he answerable to them for the use of his power. He was not *their* moderator. He was the mechanical instrument of their organization; and till that was accomplished, they were subject to his rule—not he to theirs. They were chosen by the authority of his mandate, and with the power of self-organization, only in the event of his absence at the opening of the session. Corporally present but refusing to perform his function, he might be deemed constructively absent, for constitutional purposes, insomuch that the commissioners might proceed to the choice of a substitute without him; but not if he had entered on the performance of his task; and the reason is that the decision of such questions as were prematurely pressed here, is proper for the decision of the body when prepared for organic action, which it cannot be before it is fully constituted and under the presidency of its own moderator, the moderator of the preceding session being *functus officio*. There can be no occasion for its action sooner; for though the commissioners

are necessarily called upon to vote for their moderator, their action is not organic, but individual. Doctor Mason's motion and appeal, though the clerks had reported the roll, were premature; for though it is declared in the twelfth chapter of the Form of Government, that no commissioner shall deliberate or vote before his name shall have been enrolled, it follows not that the capacity, consummated by enrolment was expected to be exercised during any part of the process of organization, but the choice of a moderator; and moreover, the provision may have been intended for the case of a commissioner appearing for the first time, when the house was constituted.

Many instances may doubtless be found among the minutes, of motions entertained previously, for our public bodies, whether legislative or judicial, secular or ecclesiastical, are too prone to forget the golden precept—"Let all things be done decently and in order." But these are merely instances of irregularity which have passed, *sub silentio*, and which cannot change a rule of positive enactment. It seems then that an appeal from the decision of the moderator did not lie; and that he incurred no penalty by the disallowance of it. The title of the excinded commissioners could be determined only by the action of the house, which could not be had before its organization was complete; and in the mean time he was bound, as the executive instrument of the preceding Assembly, to put its ordinance into execution: for to the actual Assembly, and not to the moderator of the preceding one, it belonged to repeal it.

It would be decisive, however, that the motion, as it was proposed, purported not to be in fact a question of degradation for the disallowance of an appeal, but one of new and independent organization. It was, ostensibly as well as actually, a measure of transcendental power, whose purpose was to treat the ordinance of the preceding Assembly as a nullity, and its moderator as a nonentity. It had been prepared for the event avowedly before the meeting. The witnesses concur that it was propounded as a measure of original organization transcending the customary order: and not as a recourse to the *ultima ratio* for a specific violation of it. The ground of the motion, as it was opened by the mover, was not the disallowance of an appeal, which alone could afford a pretext of forfeiture, but the fact of exclusion. To affect silent members with an implication of assent, however, the ground of the motion and nature of the question must be so explicitly put before them as to prevent misconception or mistake; and the remarks that heralded the question in this instance, pointed at, not a removal of the presiding incumbent, but a separate organization to be accomplished with the least practicable interruption of the business in hand; and if they indicated any thing else, they were deceptive. The measure was proposed not as that of the body, but as the measure of a party; and the cause assigned for not having proposed it elsewhere, was that individuals of the party had been instructed by counsel that the purpose of it could not be legally accomplished in any other place. No witness speaks of a motion to degrade: and the rapidity of the process by which the choice of a substitute, not a

successor, was affected, left no space for reflection or debate. Now before the passive commissioners could be affected by acquiescence implied from their silence, it ought to have appeared that they were apprised of what was going on; but it appears that even an attentive ear-witness was unable to understand what was done. The whole scene was one of unprecedented haste, insomuch that it is still a matter of doubt how the questions were put. Now, though these facts were fairly put to the jury, it is impossible not to see, that the verdict is, in this respect, manifestly against the current of the evidence.

Other corroborative views have been suggested; but it is difficult to compress a decision of the leading points in this case into the old fashioned limits of a judicial opinion. The preceding observations, however, are deemed enough to show the grounds on which we hold that the Assembly which met in the First Presbyterian Church was not the legitimate successor of the Assembly of 1837; and that the defendants are not guilty of the usurpation with which they are charged.

The rule for a new trial must be made absolute.

Judge Rogers then said—"After the patient and impartial investigation, by me, of this cause, at Nisi Prius, and in bank, I have nothing at this time to add, except that my opinion remains unchanged on all the points ruled at the trial. This explanation is deemed requisite in justice to myself, and because it has become necessary (in a case, in some respects, without precedent, and presenting some extraordinary features) to prevent misapprehension, and misrepresentation.

THE END.