REPORT

OF THE

PRESBYTERIAN CHURCH CASE:

THE COMMONWEALTH OF PENNSYLVANIA,

At the suggestion of JAMES TODD AND OTHERS,

vs.

ASHBEL GREEN AND OTHERS.

BY SAMUEL MILLER, JR.

A MEMBER OF THE PHILADELPHIA BAR.

PHILADELPHIA:

WILLIAM S. MARTIEN.

SOUTH-EAST CORNER SEVENTH AND GEORGE STREETS.

1839.

PREFACE.

A FEW words will suffice to explain the general character of the following work. The reporter was requested to undertake the preparation of it, and hopes that he has done some service to the cause of truth, and justice, and religion, in perpetuating a full record of the case. A strict impartiality, the highest recommendation to such a work, he has carefully endeavoured to maintain; and he thinks that a candid examination will satisfy every reader, that the idea of its being a party publication, an idea to which the supposed bias of his private opinions and feelings may give rise, is entirely erroneous.

A verbatim report of the whole argument, both that upon the trial at Nisi Prius, and that on the motion for a new trial, before the Court in bank, would have swelled the book to an ungainly size: it could not conveniently have been compressed into the compass of a single volume. Selection and condensation were therefore absolutely necessary, but the principles which here governed the reporter in this part of his labour should be fully explained, that all responsibility may rest where it properly belongs. First, however, he would say a few words in regard to the other parts of the volume. Judge Rogers' charge to the jury, with the exception of the introductory paragraph, which was not written, and the final opinion of the Court, have been taken from the original manuscripts, and great care has been exercised to insure their accuracy. The parol testimony is given without curtailment, in the precise language of the witnesses and the counsel, so far as that could be preserved. It is reported, for the most part, in the usual method—not by way of dialogue, as much of it was given in, which would unnecessarily have swelled the work, but by connecting together the questions and answers, as if the witnesses had spoken continuously. In some cases, where the nature of the dialogue seemed to require, it has been given at length.* The documentary evidence has been copied in full, excepting where mere references, for reasons elsewhere explained, have been thought sufficient. The

* This matter may be more fully explained by an example. See, at the bottom of page 109, *post*, the first two questions and answers of the dialogue between Mr. Sergeant and Mr. Adair. That part of the testimony, if reported as a great deal of the rest is, would appear thus:—

"*Mr. Adair.* I think an appeal may, under some circumstances, be out of order. I have no experience as to whose business it is to declare it out of order."

Much of the evidence, however, given on the examinations in chief, was given in a narrative form, without questions being put. The reader can generally distinguish between the two cases.

testimony, the charge, and the opinion of the Court, were the parts which it seemed most important to preserve entire.

In preparing the different arguments, which are given at length, the reporter has received much aid from several of the learned counsel; and he would take this opportunity of tendering to them his grateful acknowledgments for the kindness with which they have afforded him every assistance in their power. This part of the work will be found to contain a full and correct exhibition of the argument, somewhat condensed. The phraseology of each speaker has been in a great measure preserved: the recollection of a mere listener would probably detect few verbal departures from the original. Still it is proper to say, what has already been intimated—that a verbatim report was not intended; and that the precise language of the counsel is not always given. The report is, in each case, from two-thirds to three-fourths in length, of the argument as actually delivered.

It was originally proposed to give merely a synopsis of the arguments on the motion for a new trial. To have reported them also at length would have carried the work far beyond all reasonable limits; and, besides, each one of the counsel who spoke on both occasions, necessarily went over nearly the same ground in each case. It also seemed advisable to furnish the reader with a synopsis of the argument, after the same had been exhibited at length. Various reasons, however, induced a change of plan so far as regarded Mr. Sergeant's speech. A report of this was taken for the purpose of separate publication; but after it was taken, several considerations appeared to justify its being incorporated with the present work. Mr. Sergeant had not addressed the jury at all, and some of the positions which he took were entirely new. Accordingly his argument in full has been inserted. One speech, therefore, of each of the counsel, with the exception of Messrs. Randall and Hubbell, whose openings, only, are so given, is reported at length; and of the other speeches a mere synopsis is exhibited.

The length of each opening and argument was about as follows:

TRIAL.

Mr. Randall's opening	1½ hours.
Mr. Hubbell's "	4½ "
Mr. Meredith's argument	8 "
Mr. Preston's "	10½ "
Mr. Ingersoll's "	9 "
Mr. Wood's "	9 "

MOTION FOR A NEW TRIAL.

Mr. Hubbell's argument	14 "
Mr. Meredith's }	12½ "
Mr. Randall's }	
Mr. Sergeant's	10½ "

Thus much in explanation of the character of the work. We propose now to give a brief account of the proceedings in the case preliminary to the trial at Nisi Prius.

Immediately after the events of the 7th of May, 1838, which resulted in the organization of two distinct Assemblies, the Rev. Mr. Squier, Judge Brown, and the Rev. Mr. Hay commenced the suits, which were given in evidence from the docket, on the trial. *Post*, *p.* 201. They were prosecuted no farther than the service of the summonses, and the entry of appearances for the defendants. On the 31st of May, while the Supreme Court for the Middle District of Pennsylvania, was sitting at Harrisburg, Chief Justice Gibson, with the concurrence of the whole court, allowed on special cause shown, the writ of *quo warranto*, which commenced proceedings in the case here reported, and the writ was issued on the 2d of June. On the 30th (the last Monday) of July, the case was brought before Judge Kennedy on a motion for a rule to show cause why the writ should not be set aside. The following report of the argument and decision then made is copied from the United States Gazette.

" Mr. Kane (with whom were Chauncey and Bradford) moved the Court for a rule to show cause, why the writ in this case, should not be set aside, as having been obtained improvidently, inasmuch, 1st. As it is made returnable in vacation: 2d. As the suggestion filed is insufficient. And for an order that the rules entered by the relators (rules to plead) be in the mean time suspended.

" Mr. Kane proceeded to examine the different Acts of Assembly, and the authorities on his first ground; and argued that the suggestion did not state that the relators were elected in the place of the defendants.

" Mr. Meredith, on the part of the Relators, replied to Mr. Kane, showing that the writ in this case had been granted by Chief Justice Gibson, while sitting at Harrisburgh, with the approbation of the whole court—that a writ of Quo Warranto had issued in the same form in the case of the Ninth Presbyterian Church—that the law and the practice under it sanctioned this mode of proceeding—that even if it had been irregular, objection was waved by the appearance of the defendants, and could not now avail them. On the second ground Mr. Meredith replied, that the suggestion was in the usual form—that the title of the relators was stated only to show their interest in the subject-matter, and that though the fact were otherwise, it might be assumed for the purposes of this argument, that the relators were not elected in the place of the defendants.

" Mr. Randall (on the same side) commenced by stating that they had no right to inquire into the motives of those who made this motion, but its practical effect was delay: if successful it would only postpone the issuing of the writ till next December. He had indulged the hope that both parties would unite in a prompt and speedy termination of the unhappy controversy. All such expectation he now abandoned.

" Mr. Randall was then proceeding to cite authorities, when he was stopped by the court, who directed the other side to proceed.

" Mr. Bradford then addressed the court on all the grounds, and to the suggestion of delay, replied, that the defendants were ready to meet the case, but would insist on its being conducted in a legal manner; if the proceedings were irregular, they ought not to wave any advantage it might afford them; that there was great justice in the science of special pleading, and if they could, they would in this case invoke its aid.

" The case was continued until a late hour in the day, when the court refused the motion on all the grounds taken by the defendants.

"Mr. Kane then stated that the rule to plead would expire on the next day, (the 31st July) and successively asked the court to enlarge the rule till the *2d Monday in December*, and the *1st Monday in September next*, both of which motions were also refused by the court, in the order in which they were made."

The counsel for the defendants then filed pleas; and issue was joined between the parties on the 7th of November. The case was now put by the counsel for the relators, at the head of the trial list, for the second period of the July term of Nisi Prius for 1838, as a commonwealth cause, and therefore entitled to priority. But Judge Sergeant, who sat during that period, which commenced on Monday, November 26th, decided that it was not such a cause as could claim precedence, reading in support of his opinion Rule thirty-ninth of the Supreme Court. "If the Commonwealth is not interested in the event of a suit, such cause shall not be entitled to a priority in the trial to other actions, although the name of the Commonwealth may be used as a party thereto."

On Saturday, December 29th, 1838, on motion of Josiah Randall, Esquire, the Court fixed the first day of the second period of the ensuing Nisi Prius, for the trial of the case by a special jury. Monday, March 4th, 1839, was the day so appointed.

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PRESBYTERIAN CHURCH CASE.

INTRODUCTION.

We propose to give as a preliminary to our report, a short account of the peculiar kind of action instituted by the plaintiffs in this case. Questions are frequently asked in regard to it; and nothing conduces so much to the satisfactory understanding of a subject, as a clear explanation of all prelusive difficulties. In fact, some such introduction as we here offer, is necessary to a clear comprehension of terms to be afterwards employed.

The writ of *Quo Warranto* is by no means a common one in the practice either of Pennsylvania, or the other states of the Union; and, therefore, in respect to it, mere general readers are not usually possessed of even that scanty knowledge, which they frequently have acquired in respect to legal subjects of more ordinary exemplification. This writ, in its original, as a remedy provided by the common-law of England, was the commencement of a criminal proceeding. It was issued on behalf of the king, to determine the right of an individual, or body corporate, to an office, franchise, or liberty, granted, or supposed to have been granted by the crown; in other words, to inquire, *quo warranto, by what authority*, such privilege was exercised, and to punish its abuse or usurpation. This proceeding, being found on several accounts inconvenient, fell into disuse, and the method of prosecuting by *information*, in nature of a *quo warranto*, filed by the attorney-general, took its place, as a speedier and more advantageous process.

Originally, no private person could institute, in his own behalf, the proceeding either by *quo warranto*, or by *information;* but the statute 9 Ann, c. 20., authorized the court to grant the latter form of action, as a civil remedy, in certain cases, the name of the king, however, being still employed, and the real plaintiffs appearing on the record only as informers, or, in technical language, *relators*.

The Constitution of Pennsylvania provides, that "No person shall, for any indictable offence, be proceeded against criminally by information, except in cases arising in the land or naval forces, &c.," which clause has been construed to take away the remedy of *information*, or, as it is usually called, the original name being given to the substituted form, of *quo warranto*, as a criminal proceeding in ordinary cases. The Supreme Court, however, supporting a practice of which there had been several precedents, since the adoption of the constitution of 1799, from which the clause just quoted from that of 1838, was copied, had established its right, to issue a *quo warranto*, as a civil remedy, before an Act of Assembly, which passed so lately as June, 1836, and is still in force, expressly granted the power to that court, and, in certain cases, to the several Courts of Common Pleas. The act referred to, however, while in

its effect, but declaratory as to the right in general, enlarges that right, and prescribes, at some length, the manner of proceeding.

The writ of *quo warranto*, as a private remedy, issues by leave of the court, or of a judge thereof, on information or suggestion verified by affidavit. It is in every respect a mere civil process, though the name of the Commonwealth has, in our practice, taken the formal place of that of the king. The wrongs which it may be employed to redress, are diversified. Some of these are enumerated in the act just referred to; but for our present purpose it suffices to say, that it is a proper and convenient method of proceeding, to determine the right of a body corporate to exercise its franchise, or of any person or persons to hold their seats as members of such a body.

As already intimated, though on the record in this species of action, the Commonwealth appears as a nominal party, prosecuting *ex relatione—at the suggestion* of certain persons, yet the relators are, in every respect, the only true plaintiffs. They apply for the issuing of the writ, they conduct the proceeding, and the judgment is usually for their benefit. Any number of persons, either as relators or defendants, may be joined in a single writ, if it appears to the court or judge granting the same, that their several rights may be thus properly determined.

A *quo warranto* is in the form of a summons, commanding the parties therein named, to appear and show by what authority such party exercises the liberty and franchise described in the writ. The previous suggestion must set forth the facts of the case circumstantially. The defendant thus summoned, appears and pleads or demurs to this suggestion filed, and by the regular course of pleading, an issue either of law or of fact is joined. If the former, the cause is set down for argument before the court; if the latter, it goes to a jury; and in either case, the matter is determined in the usual way. As the Supreme Court sits at *Nisi Prius*, that is, for the decision of questions of fact by a jury, for the City and County of Philadelphia only, when, in the course of proceedings on a *quo warranto* in that Court, a fact arises proper to be tried in another county, an issue is directed to the Common Pleas of such county, to be there determined.

Where, as in the present case, the issue joined by the parties is an issue of fact, the jury having found a verdict, judgment may be entered for the successful party after four days, unless within that time a motion is made either in *arrest of judgment*, for some error which vitiates the proceedings, appearing on the face of the record, or for a *new trial*, where from circumstances not appearing on the record, it seems that justice has not been done. These motions are argued before the court *in bank*—that is, before all the judges sitting in a body to determine questions of law; and, in the present case, are the only remedies for the unsuccessful party, since the Supreme Court of Pennsylvania is the highest tribunal in the State—the last resort. Where judgment is given in a Court of Common Pleas, it may be reviewed upon a *writ of error*, issuing out of the Supreme Court, in the exercise of its appellate jurisdiction. The judgment thus entered, if in favour of the plaintiff, is that the defendant be ousted and excluded; and the successful litigant in every case recovers his costs of suit. It is manifest that such a judgment does not, in form, determine the right of any other party than the defendant, though it may do so in fact.

If the due election of certain new members of a body corporate, in the place of as many old members, determine the office of the latter, and, the parties taking issue on the fact of such new election, the verdict is for the plaintiff, the judgment must, in effect, give a right of entry on the one hand, while it pronounces an ouster on the other. Until judgment is finally rendered, the last resort having been tried, the defendant continues in the exercise of the disputed right, unless the court to which a writ of error is brought, sees fit, on sufficient cause shown, to award execution, notwithstanding such writ.

In the above concise view, we have confined ourselves chiefly to those aspects of the subject, which have seemed important to a clear understanding of the case here reported, to which, without further introduction, we now proceed.

SUPREME COURT

FOR THE EASTERN DISTRICT OF PENNSYLVANIA.

DECEMBER TERM—*Nisi Prius*—SECOND PERIOD.

Before Hon. Molton C. Rogers, and a Special Jury.

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.
} *Quo Warranto, &c.*

MONDAY MORNING, MARCH 4, 1839—10 o'clock.

Counsel for the Relators, *George Wood, Esq.*, of New York city, and *William M. Meredith*, and *Josiah Randall, Esq'rs.* of Philadelphia.

Counsel for the Defendants, *William C. Preston, Esq.* of South Carolina, and *John Sergeant, Joseph R. Ingersoll,* and *F. W. Hubbell, Esq'rs.*, of Philadelphia.

Of the forty-eight jurors summoned, the lists being struck, several individuals excused, and several challenged, but eleven men were impanelled. One more being requisite to complete the jury, after some delay, the sheriff was ordered to summon, and return the next morning twelve additional men, from whom a juror might be selected.

Court adjourned.

TUESDAY MORNING, MARCH 5—10 o'clock.

MR. RANDALL'S OPENING.

The sheriff having, as ordered, made return of twelve men, to supply the deficiency in the former panel, one was selected from the number, by the parties alternately striking from the list, until but that one was left. The jury being now complete, each juror was either sworn or affirmed. The following were the names of the jurymen impanelled.

Charles Wagner,	Isaac Jeanes,	John Burk,
James Simpson,	W. S. Greiner,	C. Barrington,
L. Quandale,	Miller N. Everly,	S. Baker,
George Mecke,	R. C. Dickinson,	E. R. Myers.

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

May it please your Honour—Gentlemen of the Jury:—Though this action is brought in the name of the Commonwealth of Pennsylvania, it is not to be considered in the light of a criminal proceeding. Nor does

it 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, for determining the private rights of individuals. The object of the writ of *Quo Warranto* in this case is, to try whether certain persons, viz. Dr. Ashbel Green, Rev. William Latta, Thomas Bradford, Esq., Solomon Allen, Esq. and Dr. Cornelius C. Cuyler were on the 24th day of May, 1838, trustees, in 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 part 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 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 or 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 higher 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, with as many elders as may be present, being necessary to constitute the body. The next superior judicatory is the Synod, which includes a number of Presbyteries, at least three, and like the latter 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 ministers belonging to it, each being entitled to send at least two delegates, one a minister and the other an elder, and beyond this number, one minister and one elder for every twenty-four constituent

ministers. You will observe, then, that 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, always recognised 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, and poured 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 to them respectively; 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 years these two parties continued nearly equal. In 1831, '32, '33 and '34, 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 at this meeting all the preliminary arrangements were made 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 these terms, the purpose of cutting off from the church a sufficient portion of their opponents to place themselves in a decided majority, was held out as a punishment to be inflicted on the New-school, should they not consent to the proposed separation. The latter were willing to entertain the proposition, and to enter into a negotiation on the subject; and the terms which they offered

were, 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 partizans 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—that thereafter they would be left in a minority. 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 more than five hundred ministers, five hundred and ninety-nine churches, and about sixty thousand 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 many of the chief actors had been but a few years in the Church. Dark as are the pages of ecclesiastical history, it has in it no parallel to these proceedings.

The practical operation of these exscinding 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 reverend 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.

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. We shall here give merely an abstract of their most important parts. 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 certainty 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 is permitted to question them; and prescribes 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; and how different were the proceedings in the case before us? Here there was no accuser, no accusation. Notice was not given to the parties thus disciplined. In fact, the first news carried to the great mass of Presbyterians who inhabit the proscribed districts—the first information on the subject which reached their ears 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 exscinding 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 exscinded Synods to have been formed. But we shall show you that this was only a plan of fellowship, of the same kind as those formed with the General Associations of New Hampshire, Vermont, and Massachusetts, the Associated Reformed and Dutch Reformed Churches, both before and after the plan of union of 1801, and that not a single elder, minister, church, or Presbytery has been, or could be admitted under its operation.

The Plan of Union authorized a Presbyterian minister 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 effect 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 exscinded 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 proceed to exscind 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 exscinding acts. The Synods have local bounds. Under the practical operation, therefore, of 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 had 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, after the excision, lost the right of fellowship. And 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 fell swoop 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 exscinded, if the Old-school party had wished to be consistent and impartial. The Synods of Pittsburg and New Jersey equally deserved the same fate. And the parent Synod of Albany was suffered to escape, when 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 Pittsburg Synod, and, in the first instance, 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 Pittsburg 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 was 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 exscinded 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 exscinded 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 organiza-

tion, 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 exscinded 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 been then 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. McDowell 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 with great respect, 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. Cleaveland, a commissioner from the Presbytery of Detroit, rose, and stating 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 the commissioners present. The motion was almost unanimously carried, there being, however, a few votes in the negative. The Assembly was then constituted, and Dr. Fisher being chosen Moderator, and Dr. E. Mason and the Rev. E. W. Gilbert, clerks, 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 and unlawful, and without precedent; 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 unconstitutional authority.

The General Assembly was organized as I have described, and held its session in the First Presbyterian Church, and in the course of its proceed-

ings, did, on the twenty-fourth of May, 1838, according to the provisions of the section of their charter of incorporation, elect six trustees, viz: James Todd, Frederick A. Raybold, George 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, every individual within the bounds of the four exscinded Synods. We come into court reluctantly, and our effort is, not to take away the rights of others, but to preserve our own inviolate.

TESTIMONY FOR THE RELATORS.

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, Esquire*, 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 the process, and takes no part in the pleadings.

Before proceeding to the evidence, it should be mentioned, that a written agreement between the parties had provided, that the printed copies of all original documents, which were competent testimony, might be given in evidence, without producing such originals. The documents from which, under this agreement, the most copious extracts were read, were the published Minutes of the General Assembly, "The Assembly's Digest," and "The Constitution of the Presbyterian Church," containing "The Confession of Faith, the Catechisms, and the Directory for the Worship of God : together with the Plan of Government and Discipline, as amended and ratified by the General Assembly, at their session in May 1821;" references to all which will be understood after this explanation.

Mr. Randall first offered in evidence the Charter of Incorporation, granted to the Presbyterian Church, by the legislature of Pennsylvania. *(Assem. Digest, p.* 192. *)*

"*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 of 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 monies 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 Com-

monwealth 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 Irvin, 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, all and all manner of lands, tenements, rents, annuities, franchises, and other hereditaments, which at any time or times heretofore have been granted, bargained, sold, enfeoffed, released, devised, or otherwise conveyed, to the said ministers and elders of the General Assembly of the Presbyterian Church of the United States, or any other person or persons, to their use, or in trust for them; and the same lands, tenements, rents, annuities, liberties, franchises, and other hereditaments, are hereby vested and established in the said corporation, and their successors for ever, according to the original use and intent for which such devises, gifts and grants were respectively made; and the said corporation and their successors, are hereby declared to be seized and possessed of such estate and estates therein, as in and by the respective grants, bargains, sales, enfeoffments, releases, devises, and other conveyances thereof, is, or are declared limited and expressed; also, that the said corporation and their successors, at all times hereafter, shall be capable and able to purchase, have, receive, take, hold, and enjoy, in fee simple, or of lesser estate or estates, any lands, tenements, rents, annuities, franchises and other hereditaments, by the gift, grant, bargain, sale, alienation, enfeoffment, release, confirmation or devise, of any person or persons, bodies politic and corporate, capable and able to make the same: And further, that the said ministers and elders, under the corporate name aforesaid, and their successors, may take and receive any sum or sums of money, and any portion of goods and chattles, that have been given to the said ministers and elders, or that hereafter shall be given, sold, leased, or bequeathed, to the said corporation, by any person or persons, bodies politic or corporate, that is able or capable to make a gift, sale, bequest, or other disposal of the same; such money, goods, or chattles, to be laid out and disposed of, for the use and benefit of the aforesaid corporation, agreeably to the intention of the donors, and according to the objects, articles, and condition of this act.

"Sect. 2. And be it further enacted by the authority aforesaid, That no misnomer of the said corporation and their successors, shall defeat or annul, any gift, grant, devise or bequest, to or from the said corporation, provided the intent of the party or parties shall sufficiently appear upon the face of the gift, will, grant, or other writing, whereby any estate or interest, was intended to pass to or from the said corporation.

"Sect. 3. And be it further enacted by the authority aforesaid, That the said corporation and their successors, shall have full power and authority, to make, have, and use, one common seal, with such devise and inscription as they shall think fit and proper; and the same to break, alter, and renew, at their pleasure.

"Sect. 4. And be it further enacted by the authority aforesaid, That the said corporation and their successors, by the name, style, and title aforesaid, shall be able and capable in law, to sue and be sued, plead and be impleaded, in any court, or before any judge or justice, in all and all manner of suits, complaints, pleas, matters, and demands, of whatsoever nature, kind, and form they may be; and 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, may or can do.

"Sect. 5. And be it further enacted by the authority aforesaid, That the said corporation and their successors, shall be, and hereby are authorised and empowered, to make, ordain, and establish, bye laws and ordinances, and do every thing incident and needful for the support and due government of the said corporation, and managing the funds and revenues thereof; *Provided*, the said bye laws be not repugnant to the constitution and laws of the United States, to the constitution and laws of this commonwealth, or to this act.

"Sect. 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 monies, 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.

"Sect. 7. And be it further enacted by the authority aforesaid, That six members of this corporation, whereof the president, or in his absence the vice-president, to be one, shall be a sufficient number to transact the business thereof, and to make bye-laws, rules, and regulations; *Provided*, that previous to any meeting of the board or corporation, for such purposes, not appointed by adjournment, ten days notice shall be previously given thereof, in at least one of the newspapers printed in the city of Philadelphia: And the said corporation shall and may, as often as they shall see proper, and according to the rules by them to be prescribed, choose out of their number, a president and vice-president, and shall have authority to appoint a treasurer, and such other officers and servants, as shall by them, the said corporation, be deemed necessary; to which officers the said corporation may assign such a compensation for their services, and such duties to be performed by them, to continue in office for such a time, and to be succeeded by others, in such way and manner as the said corporation shall direct.

"Sect. 8. And be it further enacted by the authority aforesaid, That all questions before the said corporation, shall be decided by a plurality of votes, whereof each member present shall have one, except the president, or vice-president, when acting as president, who shall have only the casting voice and vote, in case of an equality in the votes of the other members.

"Sect. 9. And be it further enacted by the authority aforesaid, That the said corporation shall keep regular and fair entries of their proceedings, and a just account of their receipts and disbursements, in a book or books to be provided for that purpose; and their treasurer shall, once in a year, exhibit to the General Assembly of the Presbyterian Church in the United States of America, an exact state of the accounts of the corporation.

"Sect. 10. And be it further enacted by the authority aforesaid, That the said corporation may take, receive, purchase, possess, and enjoy, messuages, houses, lands, tenements, rents, annuities and other hereditaments, real and personal estate of any amount, not exceeding ten thousand dollars a year in value, but the said limitations not to be considered as including the annual collections, and voluntary contributions, made in the churches under the care of the said General Assembly. CADWALADER EVANS, JR.
Speaker of the House of Representatives.

ROBERT HARE, *Speaker of the Senate.*
THOMAS MIFFLIN, *Governor of the Commonwealth of Pennsylvania.*
APPROVED, March 28, 1799."

Next was offered the Act of the General Assembly itself (*Ass. Dig. p.* 198.) prescribing the mode of making choice of Trustees.

"*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 for a person 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 next evidence offered was "The Constitution of the Presbyterian Church in the United States of America; containing the Confession of Faith, the Catechisms, and the Directory for the Worship of God; together with the Plan of Government and Discipline, as amended and ratified by the General Assembly, at their session in May, 1821."

Minutes 1821, *p.* 5. "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 to this 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."

Before the time when this constitution was thus approved by the Presbyteries, the Synod of Geneva had been formed; and, at that period, comprised the Presbyteries of Geneva, Onondaga, Cayuga, Bath, Ontario, Niagara, Genessee, and Rochester. The Presbyteries of Oneida, St. Lawrence, and Otsego, now belonging to the Synod of Utica, were then parts of the Synod of Albany; and the Presbyteries of Grand River and Portage, now parts of the Synod of Western Reserve, at that time belonged to the Synod of Pittsburgh. Therefore of the *twenty-eight* Presbyteries at present contained in the exscinded Synods, there were *fourteen* in existence at the period when this amended constitution was adopted, to all which, that constitution was of course sent down for their approval. *(See Minutes.)*

The following sections of the form of Government were next offered:

"*Chap. X.* (*Of the Presbytery.*) *Sect.* 2. A Presbytery consists of all the ministers and one ruling elder from each congregation within a certain district.

"*Sect.* 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.

"*Chap. XI.* (*Of the Synod.*) *Sect.* 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.

"*Sect.* 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.

"*Chap. XII.* (*Of the General Assembly.*) *Sect.* 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.

"*Sect.* 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 nine ministers, shall send one minister and one elder; each Presbytery consisting of more than nine ministers, and not more than eighteen, shall send two ministers and two elders; and in the like proportion for every nine ministers in any Presbytery. And these delegates so appointed shall be styled, *Commissioners of the General Assembly.*"

Min. 1833, *p.* 486. This last section altered, with the approval of a majority of the Presbyteries, in the year 1833, so as to read thus:—

"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 twenty-four ministers, shall send one minister and one elder; and each Presbytery consisting of more than twenty-four ministers, shall send two ministers and two elders, and in like proportion for every twenty-four ministers in every Presbytery; and these delegates so appointed shall be styled, "*Commissioners to the General Assembly.*'

"*Sect.* 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."

Mr. Randall next read extracts from the minutes of the Assembly, showing the time and manner of the creation of the four Synods of Geneva, Genessee, Western Reserve, and Utica.

Min. 1803, *p.* 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."

Min. 1812, *p.* 23. "The Synod of Albany having made application, that the said Synod should be divided in the following manner:" viz. (The Presbyteries of Londonderry, Columbia, Albany and Oneida, forming the Eastern Division, under the name of the Synod of Albany.) "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*;" the Assembly

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

Min. 1821, *p.* 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*, &c."

Min. 1825, *p.* 263. On application made to erect a new Synod, &c. the Assembly

"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 be designated by the name of *Synod of the Western Reserve.*"

Min. 1829, *p.* 373. On application of the Synod of Albany, the Assembly

"Resolved, That agreeably to the request of the Synod, the Presbyteries of Ogdensburgh, Watertown, Oswego, Oneida, and Otsego, are hereby constituted a New Synod, to be called the *Synod of Utica.*"

The testimony next offered, consisted of extracts from the minutes, showing the frequent recognition of these Synods, and of the Presbyteries composing them, by the General Assembly; their having contributed to the church funds, &c. As the fact of *recognition* was not contested by the defendants, and as most of the passages cited to prove it, and the

other points here connected with it, were of the same general nature, in many cases, mere references are given.

Min. 1801, *pp.* 4, 5.—"The delegates appointed by the last Assembly to attend the General Association of the State of Connecticut, made their report, which was read as follows, viz.

"The delegates from the General Assembly to the General Association of Connecticut, report, that they have attended according to appointment through the whole course of the sessions of the General Association. That besides the business peculiar to the churches of Connecticut, the General Association appointed a committee to confer with a committee that may be appointed by the General Assembly, on measures which may promote union among the inhabitants of the new settlements and the missionaries to those settlements, as appears by the inclosed paper. The General Association also voted that instructions be given by the trustees of the Missionary Society, to their missionaries, to avoid every thing that may interrupt peace in the new settlements, among those that are attached to the Presbyterian and Congregational forms of government.

* * * * * * * * * *

"Your delegates further report, that they were received and treated with exceeding great cordiality and Christian friendship, and that the Association expressed high satisfaction with the connexion subsisting between themselves and the General Assembly of the Presbyterian Church, and believed that it would have a happy tendency to promote the interest of the Redeemer's kingdom.

(Signed,) JONATHAN EDWARDS,
ASA HILLYER,
JONATHAN FREMAN."

Id. p. 18.—"The Rev. Peter Fish, of the Presbytery of Albany, was appointed a missionary for six months, in the county of Oneida and its vicinity."

Min. 1803, *p.* 16.—"The Assembly called on the Presbyteries, which are required to make annual collections for missionary purposes, to report how far they have complied with the orders of the General Assembly on this subject. It appeared in consequence, that the Presbyteries of *Oneida*, Albany, Columbia, &c., have substantially done their duty, in reference to this collection."

Min. 1804, *p.* 69.—"List of churches belonging to the Synod of Albany, &c., which have contributed to the contingent fund of the General Assembly, from June 1st, 1803, to May 21st, 1804. (The fund expended in the course of the year, for missionary, and other purposes; so called to distinguish it from the *permanent fund*, the principle of which is kept entire.)

"Presbytery of *Oneida*,	$28 77½
" Columbia,	12 01½
" Albany,	16 25 &c."

Min. 1805, *p.* 96.—"The committee to whom were referred the reports of the Presbyteries on the Amendments of the Constitution, reported, that the Presbytery of *Oneida* has approved all the proposed amendments."

Id. pp. 107, 8.—"Payments into the Contingent Fund.

"Presbytery of Oneida,	31 33 &c."

Min. 1807, *p.* 173.—*Oneida* contributes to contingent and missionary funds $24.

Min. 1808, *pp.* 188, 9, 197. *Min.* 1809, *p.* 220.

Id. p. 227.—View of churches under the care of the Assembly.

Presbytery of *Oneida*,	7 Ministers,	13 Congregations.
" *Geneva*,	14 "	12 "

Id. pp. 230, 252. *Min.* 1810, *pp.* 278, 288.—Contributions to Education, Missionary, &c. funds.

Min. 1811, *p.* 353.—Statement of Contributions.

"Presbytery of *Oneida*,	$96 50
" *Geneva*,	28 81
" *Onondaga*,	35 00
" *Cayuga*,	22 57."

Min. 1812, *p.* 30. *Min.* 1813, *pp.* 30, 85.

Id. p. 101.—Acknowledgment of monies received from the Synod of *Geneva* for the Theological Seminary at Princeton.

Min. 1814, *pp.* 108, 9, 141, 154, 5.

Id. p. 221.—Contributions to Theological Seminary.

"Received of Rev. Jabez Chadwick, the donation of Col. John Lincklaen of Cazenovia, - - - - - - $100.

"Received of Rev. Alexander Monteith, - - - 70."

Min. 1815, *p.* 250.—Contributions.

Presbytery of *Cayuga*, - - - - - $30 00

" *Utica*, - - - - - - 819 90."

Id. p. 267. *Min.* 1816, *pp.* 318, 367. *Min.* 1817, *p.* 59.

Id. p. 9.—"The committee appointed to prepare a minute, stating the attention which the Presbyteries appear to have paid to the resolutions of the Assembly, in relation to the selection of young men for the gospel ministry, and providing funds for their education, reported; and their report being read, was adopted, and is as follows, viz.

"That from the votes of the Assembly, it appeared the Presbyteries of *Onondaga*, *Geneva*, *Oneida*, *Cayuga*, Columbia, * * *, *Grand River*, * * *, had fully attended to the recommendations of the Assembly on the subject."

Min. 1818, *p.* 27.—"The following persons were appointed a Board of Missions, for the ensuing year, viz.

* * * * * * * *

"Of the Synod of *Geneva*, Rev. D. Higgins.

" Albany, Rev. Jas. Coe, D. D. &c."

Id. pp. 59, 61, 2, 3.

Id. p. 84.—"Theological Seminary—Contingent fund.

"28, Of Rev. W. Hanford, per Rev. Jos. Treat, collected in *Grand River* Presbytery, - - - - - - $71 38.

Min. 1819, *p.* 158.—"The Presbyteries were called upon to report on the subject of the overture sent down by the last General Assembly, proposing an alteration in the Constitution, in the following words:

"1. Resolved, That it be recommended to the Presbyteries to alter the ratio of representation, by substituting *Chapter XI.* Section 2, the word *nine* for the word *six*, and the word *eighteen* in place of the word *twelve*.

"2. That the Presbyteries be required to send up to the next General Assembly their respective decisions on the question submitted to their consideration in the above resolution.

"Reports on this subject from the following Presbyteries were received in writing, declaring their concurrence in the proposed amendments, viz. Niagara, Ontario, Onondaga, Cayuga, Geneva, Bath, &c., * * Portage, Grand River, &c. Whereupon the General Assembly did, and hereby do declare, that the above mentioned amendment of the Constitution has been duly and constitutionally made."

Min. 1820, *pp.* 306, 345, 6, 7, 8, 358, 9.

Min. 1821, *p.* 11.—A committee of three appointed in each Synod, to superintend the printing of the Confession of Faith, and Constitution of the Church.

"*Of the Synod of Genesee.*	"*Of the Synod of Geneva.*
Rev. Ebenezer Fitch, D. D.,	Rev. Henry Axtell,
Rev. Comfort Williams,	Rev. Henry Dwight,
Rev. Calvin Colton."	Rev. Derick C. Lansing."

Id. p. 16.—"It being the order of the day, the Assembly proceeded to consider the appeal of Mr. Jabez Spicer, from the decision of the Synod of *Geneva*, by which Mr. Spicer had been deposed from the Gospel ministry. The documents on the subject were read and the parties were heard. After a considerable discussion, the following resolution was adopted, viz.

"Resolved, That the appeal of Mr. Spicer be sustained, on the ground that the sentence pronounced upon him was disproportioned to his crime; it not appearing substantiated that he was guilty of more than a single act of prevarication: while, therefore, the Assembly express their entire disapprobation of the conduct of Mr. Spicer, as unbecoming a Christian, and Christian minister, they reverse the sentence of deposition passed upon him by the Presbytery, and direct that after suitable admonitions and acknowledgments, he be restored to the ministerial office."

Id pp. 31, 2, 39, 41.—Contributions of Presbyteries within the exscinded Synods to the Education funds, Theological Seminary, &c.

Min. 1822, *pp.* 12, 45, 50, 56, 59.

Min. 1823, *pp.* 124, 135, 139, 145, 170, 1, 2.

Min. 1823, *p.* 159.—"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. *Genesee*, which has one young man under its care, and has expended last year 19 dollars.

"2. *Rochester*, which supports *three* beneficaries.

"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 24 dollars, 34 cents, and expended 25 dollars.

"5. *Oneida*, which has *nine* beneficiaries.

"6. *Onondaga*, which aids *five* young men in board and clothing, &c."

Min. 1824, *p.* 202.—"The committee appointed to examine the records of the Synod of Genesee, reported, and the book was approved to page 47."

Id. p. 203.—The boundary line between the Synod of Albany and the Synod of Geneva altered.

Id. pp. 235, 242.

Min. 1826, *p.* 262.—"The committee to whom was referred the overture from the Presbytery of Genesee, made a report, which being read and amended, was adopted, and is as follows, viz.

"Resolved, That the Presbytery is the competent court to try these two elders, and that it is their duty to cite the offending persons before them, and proceed to issue the case."

Id. pp. 274, 301, 335—360 *Min.* 1826, *pp.* 11, 15, 21, 59, 63, 4, 5, 6, 7, 88, 9, 90. *Min.* 1827, *pp.* 120, 1, 177, 8, 9, 180, 1, 2, 3.

Id. p. 147.—Rev. Henry Axtell, and Mr. Horace Hill, of Auburn, belonging to one of the exscinded Synods, elected members of the Board of Education.

Min. 1828, *pp.* 236, 7, 280, 1, 2, &c. *Min.* 1829, *pp.* 371, 2, 381, 2, 3. *Min.* 1830, *pp.* 30, 65, 6, 103, 4, 5. *Min.* 1831, *p.* 175.

Id. p. 184.—"The committees appointed to examine the records of the Synods of Albany, * * *, *Geneva*, *Western Reserve*, *Genesee*, * * *, reported respectively, and the records were approved."

Id. pp. 219, 220, 1, 2, 3, 261, 2, 3.—Funds contributed for missionary purposes, &c., by the Presbyteries within the four Synods.

Min. 1832, *pp.* 324, 367—418. *Min.* 1833, *pp.* 469, 470, 1, 485.

Id. p. 489, 90.—"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 of 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. 8th, 1832, the following resolution was adopted, viz.

"Resolved, That in reference to the point named by the Assembly, as having been charged by common rumor 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 1838, 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 receiv-

ing 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 there 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, WILLIAM 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 recognised in our Form of Government, Chap. II. Sect. 4. Chap. III. Sect. 5. Chap. V. Chap. IX. Sects. 1, 2."

Min. 1833, *pp.* 517—568. *Min.* 1834, *pp.* 1—6, 13, 17.

Id. p. 22. "The Assembly took up Overture No. 11, viz. A petition from the Synod of the Western Reserve to erect the Presbyteries of Detroit, Monroe, and St. Joseph, in the said Synod, into a new Synod, to be called the Synod of Michigan."

Id. pp. 28, 30, 38, 40, 1, 82—139. *Min.* 1835, *pp.* 17, 18, 19, 30, 32. *Min.* 1836, *pp.* 263, 276.

Min. 1837, *pp.* 527—544, 572—576. Monies contributed by the Presbyteries of the four Synods.

The next testimony, *Chapter IV. of Form of Discipline.*

"OF ACTUAL PROCESS.

"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 meetings, 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 allotted 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 manage 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, Mat. 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."

Chapter 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 becomes 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 malignity 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."

Next, *Form of Government, Chapter XII.*

"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 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.

"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."

Min. 1822, *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 principle; 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 superior 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."

Court adjourned.

WEDNESDAY MORNING, March 6th—10 o'clock.

Mr. Randall offered in evidence portions of a statistical table, (*Min.* 1837, *p.* 521,) to prove that in Presbyteries still in connexion with the General Assembly, there were numerous ministers who were pastors of Congregational Churches. He showed that in the Presbyteries of Londonderry and Newburyport, belonging to the Synod of Albany, out of forty-one ministers reported as composing those Presbyteries, there were sixteen pastors of Congregational, and only fourteen of Presbyterian Churches, (*pp.* 522—3.) He then offered other parts of the table to show that there were no such cases reported in any of the Presbyteries of the exscinded Synods. Next he referred to the table, beginning with the Presbytery of St. Lawrence, (*p.* 527,) to show the amount of contributions to the Church funds, collected within those Synods, in the year ending with the date of the reports of 1837. Some of the extracts were as follows:

"Presbytery of	St. Lawrence,	$953 33
"	Watertown,	976 32
"	Oswego,	662 07
"	Otsego,	1525 01
"	Geneva,	7729 95
"	Cayuga,	3251 00
"	Rochester,	15,750 50."

Mr. Randall next offered to read from the same minutes, (1837, *p.* 520,) to show what ecclesiastical bodies were recognised as in connexion with the Church, at the opening of the Assembly of 1837.

Mr. Hubbell. We object to the evidence proposed, *may it please your Honor.* The admission of this testimony would involve us in other questions than those raised by the pleadings. The proceedings of the Assembly of 1837 have no bearing upon this case: why does the other party wish to introduce them here? What is their purpose? Is it to prove that that Assembly dismembered and destroyed itself? If any thing less than this, what effect can the proceedings of 1837 have upon those of 1838? The pleadings, however, preclude the admission of evidence for such a purpose. The Assembly of 1838 derived its existence from the adjournment in 1837. The very appointment of these trustees, the relators in this suit, is an acknowledgment of the fact, that the Assembly of 1837 did not perform any act of dismemberment. It was said, in the opening of the opposite party, that the officers of the Assembly of 1838 had rejected from the roll of that body certain individuals claiming seats, and that this was the true ground of the controversy.

That a certain gentleman rose, and proposed the deposition of those officers, for their misconduct; and that, by an almost unanimous vote, they were deposed. Their object, then, is to prove, that the officers of the Assembly of 1838 committed some error; that they defeated the constitutional organization of the Assembly, by their refusal to admit the claimants referred to. If so, if such a rejection can be proved, and it can also be shown that this rejection defeated the organization of the Assembly, the plaintiffs have made out that part of their case. But why should they go into our case? We deny that the Assembly ever made any such rejection; that they ever committed themselves on the subject. But even if they did, why should our opponents go into the proceedings of the Assembly of 1837 to find a reason, either good or bad, for such rejection? If there are any such reasons, it is our business to exhibit them. They have no right to meddle with them—to come into our camp. Let us justify ourselves.

The Assembly of 1838, as regards the qualification of its members, was entirely independent of that of 1837. It may have been composed of members entirely different, though coming from the same constituent bodies. The two Assemblies had not even the same Moderator; for the old Moderator continues in office merely to constitute the new body. Here are certain individuals, then, who present themselves to the Permanent and Stated Clerks of the Assembly of 1838, whose business it is to judge of the validity of commissions, and they are rejected. An attempt is made to introduce the matter to the consideration of the house. The Moderator declares the motion for that purpose out of order, and an appeal being taken from his decision, he declares the appeal also out of order. Now they may contend, that by this act, the house either was dismembered, or, on appeal to it, unanimously removed its officers for their misconduct. Well, if there was a unanimous removal, why should the plaintiffs go back to the proceedings of 1837: why should they anticipate our defence? Perhaps we may say that our opponents have violated some rule of the Assembly. If this be our defence they certainly have no right to anticipate us in the development of it. Suppose it true, that the Assembly of 1837 did commit injustice: what effect can this have upon the proceedings of 1838, when, as they contend, the error has been cleared away? "Ah! but you won't admit this," say they; "therefore we will go into evidence to show the injustice of the acts of 1837." Well, suppose they abandon this ground, and contend that no regular process was commenced under the Assembly of 1838; that, from the rejection of certain commissioners by the clerks, every thing done was void and of no effect: still, is it for them to say, that the Assembly of 1837 committed an error? If we attempt to show a justification for our Moderator and clerks, must we do it in the way which they point out? We, indeed, intend to prove our Moderator and clerks in the right; and that they, taking offence at the primary and inferior tribunal, never presented their case regularly for rejection.

The plaintiffs have taken the ground, that an error of the clerks made them the true General Assembly, and dismembered and destroyed our body. But they want to go farther than this, and show a bad motive, which, they say, must have actuated our party.

Judge Rogers. This evidence seems to me to be exactly of the same kind with that already admitted.

Mr. Hubbell. For the purpose for which the other testimony was received, we have no objection that this should be admitted. We conceived it to be the right and duty of our opponents to build up an Assembly. But how is this to be done? By showing that these bodies have been admitted as parts of the Presbyterian Church? This is conceded. Whether admitted constitutionally, or not, is another thing. But they cannot be allowed to show that the proceedings of 1837 are a poor reason for those of 1838; that our defence is a poor defence. Let us be masters of our own defence.

Mr. Ingersoll. I should like to know for what purpose Mr. Randall offers the evidence. It may be that he has two objects. If offered to prove the admission of these Synods, it is proper, or, at least, only irrelevant. If to prove their rejection, it is inadmissible.

Judge Rogers. What is the object of the testimony, Mr. Randall?

Mr. Randall. May it please your Honor, our object is to show the state of the General Assembly in 1837; that these Synods were then in good standing, and incorporated as a part of the Presbyterian Church, under the Constitution of 1821. Then to follow this up, by showing an act of dismemberment, begun by the clerks of the Assembly, and carried out by the Moderator, which defeated the organization, and made it void and nugatory, whereby we became the true General Assembly But we cannot prove more than one link at a time. The links are independent of each other, except as to order.

Judge Rogers. Mr. Hubbell, you may go on.

Mr. Hubbell. May it please your Honor, we do not pretend that the act of the clerks was a mistake. Our opponents cannot, then, bring evidence to prove that it was not a mistake—that it was the result of deliberate design. If they prove that certain commissions were presented to the clerks, and by them refused; that then a resolution in regard to them was offered, and, this resolution being declared out of order, an appeal was taken from the Moderator's decision, but that the Moderator refused to put the appeal—if all this be shown, they have laid the basis of their superstructure. They must not anticipate our defence to the allegation. If the acts of 1837 dismembered the General Assembly, then our trustees, appointed before that time, are entitled to their places. This supposition would defeat the issue chosen by the other party. They admit, therefore, that those elected trustees in 1837, even after the acts complained of, were lawfully elected. If, on the other hand, no dismemberment is alleged, what can be the effect of the testimony offered? The Assembly of 1838 was an entirely independent body, having full power to judge of the qualifications of its own members. The rejection complained of was not influenced by the proceedings of 1837, except as they furnish us a reason—an excuse, if we choose to avail ourselves of it, for the purpose of defence. The other party themselves contend, that the proceedings of the Assembly of 1838 should not have been influenced by those of 1837. They say, that the latter were void, except as merely advisory or recommendatory, and that therefore the rejection of commissioners in 1838 was bad. We will, ourselves, show the reason

of this rejection, and will not allow our case to be mangled and distorted.

Judge Rogers. I do not like to decide, at this stage of the proceedings, whether the testimony offered involves the merits of the case or not. It may be admitted now, and the point be decided hereafter.

Mr. Ingersoll. I should like to say half a dozen words in explanation, even if the testimony be admitted. If it go to prove the same points as that offered yesterday it is merely irrelevant. If the other point, which I have mentioned, it will produce serious evil, by raising a false, a prejudicial, and a dangerous issue. There were two courses for the New-school party to take. They might have issued a *mandamus*, and thus have established their rights, if unjustly deprived of them. They did not choose, however, to try that remedy, but met in Ranstead Court, determined on a bolder measure. Here they did not proceed regularly, but, having reached a particular point, seceded. The question now before us is, did they secede properly? Under this *quo warranto*, the remedy selected, they must show their title. Again, they say that we did things irregularly in the Assembly of 1837, and therefore ask the assistance of the Court to oust us. But the Assembly of 1837 was entirely dissolved. Look at the provision on this subject, in the Form of Government, Chap. 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 Assembly then of 1837 was dissolved and extinguished. It was not an adjournment, nor yet a *curia advisare vult*, as in the practice of the Supreme Court. Therefore, as to that Assembly, there was an end of every thing. Now, if any members had been unjustly excluded from the Assembly of 1837, they should have applied for re-admission in 1838. But, instead of this, they chose to secede; and here, they must prove, not that the proceedings of 1837 were void, but that their secession was proper. We say, that they were not excluded from the General Assembly of 1838: they never sought admission. That Assembly never had an opportunity to decide on their case.

Judge Rogers. It is one link in the testimony. We must have the proceedings of 1837, to explain those of 1838.

Mr. Randall, then read the testimony offered.

Min. 1837, *p.* 520.

"SYNODS AND PRESBYTERIES.

"The following summary account of Synods and Prebyteries 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 *Genesee*, [see Minutes, page 444,] and the Third Presbytery of Philadelphia was dissolved, [see Minutes, page 472.] The Assembly directed the Stated Clerk, hav-

ing 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 GENESEE, containing the *six* Presbyteries of Genesee, 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."

As explanatory of the table from which the above was extracted, *Mr. Randall* read the following:

Min. 1837, *p.* 494. "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 next evidence offered was a list of the Presbyteries within the exscinded Synods, with the dates of their formation, from which it appeared, that there were in those Synods *twenty eight* Presbyteries, with *five hundred and nine* ministers, *five hundred and ninety-nine* churches, and *fifty thousand, four hundred and eighty-nine* communicants.

Mr. Randall remarked—There is another case which may properly be mentioned here, somewhat isolated in character, but nevertheless forming a link in the chain of testimony, heretofore kept out of view. I allude to the case of the Third Presbytery of Philadelphia, containing *thirty-three* ministers, *thirty-two* churches, and *four thousand eight hundred and fifty* communicants, which, at the same meeting of the Assembly—that of 1837—was dissolved, but without the usual provision attaching the ministers and churches, of which it was composed, to other Presbyteries, they being left to apply for admission to other bodies, and run the risk of being told, on such appplication, "We don't know you." And this excision, as in the other cases, was wholly without trial, proof, or even accusation.

The *Rev. Mr. Eliakim Phelps* being called to prove the correctness of this statistical list, the proof was waved by the counsel for the defendants, who agreed to admit the list without proof, subject, however, to correction, if found erroneous in any particular.

Mr. Randall. We will now recur to the proceedings of the Assembly of 1837, beginning with its organization.

Min. 1837, *p.* 411. "The General Asembly 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 Commissions reported that the following persons present have been duly appointed Commissioners to this General Assembly, viz."

Then follows a list of members, from which it appears, that every one

of the Presbyteries in the four Synods of Utica, Geneva, Genesee 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.

On *page* 419, is the minute of the first of that series of acts which resulted in the excision of these Synods.

"*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.

"*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.

"Adjourned till 9 o'clock to-morrow morning.

"*Tuesday morning*, *May* 23*d*, *&c.*—The orders 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.

"Adjourned till this afternoon at half-past 3 o'clock.

"*Afternoon*, *&c.*—The Assembly resumed the unfinished business of this 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?'"

Then follow the *yeas*, 129; and the *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 the Assembly of 1801, entitled a 'Plan of Union,' be, and the same is hereby, abrogated.'" See Digest, pp. 297–299.

Then follow the *yeas*, 143; and the *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 re-committed, and the committee was instructed to make a full report on the memorial as soon as convenient.

"The Assembly proceeded to the orders 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 nine 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 resolutions 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. Sect. 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 the *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. Cleaveland, 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 Jesup, 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. Jesup, on the part of the minority. The report was adopted; and the committee was directed to meet in the 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, and are as follows, viz:

'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 1 to 5 of the majority, and 1 to 4 of the minority. 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 appeared 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 Jesup."

"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 the neighboring 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 appears 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 view 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 is hereby 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 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 wrttten 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 principle 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, 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 of America, 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 dissolution 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, 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 favor 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, viz. yeas 138, nays 137."

Mr. Randall. Thus the proceedings instituted to effect an amicable separation, were at a stand. The attempt at pacification had proved abortive.

"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* 1*st.*—The Assembly postponed the orders of the day, and resumed the unfinished business of yesterday, viz., 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, viz.

"Shall the main question be now put?"

Then follow the *yeas*, 130, and the *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, viz.

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 follows the *yeas*, 132, and the *nays*, 105.

"*Thursday afternoon.*—"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, viz. 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 Genesee, 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, Genesee, 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 Assemhly; 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 Genesee, 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 Genesee, 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 Genesee; 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 Genesee, 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."

Then follow *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 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.

"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."

Then follow *yeas* 113, *nays* 60.

"Some disturbance having been made among the Spectators, Mr. Breckinridge moved that the Assembly will hereafter sit with closed doors. The motion was laid on the table.

"*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 newly 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 recognised 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 reunite 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.

Then follow *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 Genesee, 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 on 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 thenceforward, *de facto*, out of the communion of the Presbyterian Church in the United States of America, and no longer an intregal 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 the 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 no-

tice 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 4th resolution, and the whole of the 5th 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:"

Then follow *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."

Here follow *yeas*, 75; *nays*, 60.

[During and after these proceedings, the minutes of 1837, exhibit various protests against the measures of *excision*, as they are termed, each followed by an answer, prepared by a committee appointed for the purpose. These papers were offered as testimony, and part of them having been read, it was agreed that, to avoid unnecessary delay, the whole of the Minutes of 1837 should be considered as in evidence, without further reading, and open to each party for purposes of argument. They are too voluminous to be given here, but the parts of them particularly relied or commented on by the counsel for either party, will appear in the argument.]

Next was offered the "Plan of Union." (*Ass. Dig. p.* 297. *Min.* 1801, *p.* 6.)

"*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 Ame-

rica, 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.

"3d. 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.

"4th. 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 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. 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."—Vol. II. p. 192.

Mr. Randall next offered in evidence, "The Plan of Union and Correspondence with the Convention of Vermont, proposed by the Assembly, in 1803, and ratified by the convention." (*Ass. Dig. p.* 300.)

A proposal from the General Association of New Hampshire, for a plan of union between it and the General Assembly, accepted in 1810. (*Ass. Dig. p.* 303.)

A Proposal of the same kind from the General Association of Massachusetts, accepted in 1811. (*Ass. Dig. p.* 305.)

"The Plan of Correspondence with the Presbytery of Albany, and the Northern Associate Presbytery, approved by the Assembly in 1802." (*Ass. Dig. p.* 309.)

And the Plans of Correspondence between the Reformed Dutch Church and the Associate Reformed Church, and the General Assembly, proposed in 1798, and 1819. (*Ass. Dig. p.* 311.)

[These various plans we do not here insert. It will be sufficient to say merely that the leading feature of those entered into with the Congregational Associations of Vermont, New Hampshire, and Massachusetts, is the mutual appointment of delegates, to sit in the respective bodies, with power to take a part in the proceedings thereof. The other plans propose the communion of particular churches; the friendly interchange of ministerial services; and a correspondence between Church judicatories, by mutual delegation.]

Mr. Randall. I shall now proceed to examine the Rev. Dr. William Patton, of New York. This is going out of the regular order of testimony; but Dr. Patton is obliged to leave the city, and therefore requests to be examined now.

[Before proceeding to the evidence of Dr. Patton, it will be well to give the reader some idea of the localities to which that evidence will introduce him. The Seventh Presbyterian Church in the city of Philadelphia—the Tabernacle, as it is usually called—is situated in the interior of a closely built square, and is approached by an alley named Ranstead Court, which, running west from Fourth Street, terminates at a gate in the south-east corner of the church yard. The house stands north and south; and at these two ends is directly abutted by adjoining structures, so that there is no communication between a narrow strip of pavement, which skirts the eastern side of the building, forming a right angle with Ranstead Court, and a larger piece of ground on the western side, which is used as a grave-yard, but through the building itself, at each end of which is a small vestibule, separated by partition from the body of the house, being little more than a passage from this grave-yard to the eastern pavement. From the northern vestibule three large doors open into the church, upon as many aisles running north and south, and extending its whole length. There are two double blocks of pews between the middle and side aisles, and east and west of the latter, are ranges of single pews along the wall. From the southern vestibule, or session-room, two small doors open into the church, one on each side of the pulpit, between which and the front of the pews, is an open space, or area, in which, during the meetings of the Assembly, many of the members usually sit. There are also two doors into the church, one on the east, and the other on the west side, so situated that a straight line drawn between them would fall about fifteen feet in front of the pulpit, and the short passages from these doors open into the side aisles before mentioned. The galleries of the church, to which one stair-case opening on the outside, near the east door of the northern vestibule, and another from the vestibule itself, ascend, and which may also be entered at the other end of the church, by the pulpit stairs, extend round the whole building; but the portions of them adjoining the pulpit, being separated from the rest by partition, are usually unoccupied during the session of the Assembly. In the north end of the gallery is an organ.]

Dr. William Patton, sworn. I was a commissioner from the Third Presbytery of New York, to the General Assembly of 1838. I attended in the church in Ranstead Court, on the third Thursday of May, at the hour designated for the opening of the Assembly. Immediately after the introductory exercises and sermon, by the previous Moderator, Dr. Elliott, he gave notice that after the prayer which he would offer, the Gen-

eral Assembly would be constituted. Immediately on the closing of that prayer, I rose and addressed the Moderator, calling him by his official title, and stated to him that I wished to offer certain resolutions, a copy of which resolutions I hold in my hand. The copy in the printed minutes is a correct one. I rose asking permission to read them. The Moderator declared them out of order, as the first business was the formation of the roll. I stated to the Moderator that the resolutions had reference to that very business, that I was desirous to present them, and would do so without comment or remark. The Moderator declaring me out of order, I took an appeal from his decision. The Moderator declared that appeal to be out of order. I then took my seat.

Mr. Randall. Please to read the resolutions contained in the paper which you hold in your hand.

Mr. Hubbell. I object to the reading of them. May it please your Honour, this paper was not read to the Assembly, and therefore, though the fact of its having been offered is a part of the *res gestae*, the contents of it are not. We did not know, at that time, what were the contents of the paper, and *non constat*, but that if we had known we should have acted differently. If at any subsequent stage of the proceedings, it was read to us, then when we come to the witness's testimony in regard to that fact, perhaps there will be no objection to the contents being made known to the court and jury.

Judge Rogers overruled the objection, and allowed the paper to be read, which was accordingly done by Dr. Patton, 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 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,

"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, Genesee, 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."

After the reading of the paper had commenced *Mr. Hubbell* objected that it was not an original.

Dr. Patton testified that the original had been given to *Dr. Erskine Mason*, and the opposite counsel offering to call *Dr. Mason* to account for it, the objection was waved.

Dr. Patton. These are the resolutions which I offered at the time. My appeal was seconded. The Moderator declared the appeal out of

order, and directed the clerks to proceed with the reporting of the roll. Thereupon Mr. Krebs, the Permanent Clerk, rose and proceeded, omitting the names of Commissioners from the exscinded Synods. At the close of that report the Moderator announced that if there were any commissioners whose names had not been reported, then was the time for them to present their commissions. Immediately the Rev. Dr. Mason, a commissioner also from the Third Presbytery of New York, rose, and first stating the fact, that the names of the commissioners from within the bounds of the exscinded Synods had not been entered on the roll, then moved, that their names should be added to it, at the same time holding forth as a tender the commissions, saying here they were, and stating that they had been rejected by the clerks. The Moderator declared that motion to be out of order. Dr. Mason then said, that, with great respect for the chair, he must appeal from his decision. This appeal was seconded. The Moderator refused to put the appeal, declaring it to be out of order. Dr. Mason then took his seat. There was an inquiry made by the Moderator, from what Presbytery these commissions came. Dr. Mason replied that they came from the Synods named in his resolution—Utica, Geneva, Genesee, and Western Reserve. After Dr. Mason had answered where they came from, the Moderator declared they were out of order. I do not remember that any thing more was said at that time.

Immediately after Dr. Mason took his seat, the Rev. Miles P. Squier, from the Presbytery of Geneva, rose, and said that he had presented his commission to the clerks, and they had refused to receive it, and that he now rose to claim his seat upon that floor, or words to that effect. The Moderator asked him from what Presbytery he came. He said from the Presbytery of Geneva. The Moderator then asked him if that Presbytery was within the bounds of the Synod of Geneva. Mr. Squier answered that it was. The Moderator then said, "We do not know you," whereupon Mr. Squier took his seat. Immediately after that, the Rev. John P. Cleaveland, a commissioner from the Presbytery of Detroit, rose, and, after a few introductory remarks, moved that the Rev. Dr. N. S. S. Beman, of the Presbytery of Troy, be Moderator. That motion was seconded and put by Mr. Cleveland, and was carried by a large majority, very few voting in the negative. Dr. Beman then called the attention of the house to business, and Dr. Mason and Mr. E. W. Gilbert, were nominated as Clerks, and were elected. No other nomination for clerks was made. Dr. Beman stated that the next business would be the election of the Moderator, and the Rev. Samuel Fisher, D. D. of the Presbytery of Newark was nominated, and no other person was put in nomination but Dr. Fisher. The vote was then taken and Dr. Fisher was declared to be duly elected. My own recollection is that the vote was unanimous; there were no negatives. It was taken *viva voce*. Dr. Beman then addressed Dr. Fisher, stating to him that he was duly elected Moderator of the General Assembly, and that he should govern himself by the rules that should be adopted by the house. It is usual for the General Assembly to adopt rules for its own government. Dr. Fisher then took the place occupied by Dr. Beman, and called for business, when Dr. Mason and Mr. Gilbert were chosen clerks. No others were nominated. They were nominated together, and voted for together. A motion was then made to adjourn to meet in the lecture-room of the First Presbyterian Church. It was put and car-

ried unanimously; that is, there were no votes in the negative. It was put *viva voce*, as all the motions were put. Dr. Fisher then announced, that the Assembly had adjourned to meet forthwith in the lecture-room of the First Presbyterian Church, and that if any commissioners had not handed in their commissions to the clerks, they should do so immediately at that place. We went to the First Presbyterian Church, and attended to the business of the Assembly in a very affectionate and brotherly manner. Immediately on our assembling at the First Church, I renewed my offer of the resolutions before offered, and they were unanimously adopted by the Assembly, as containing their views. A Committee of Commissions was then appointed, to whom informal commissions were referred, and several commissions were presented and received, after the adjourment to the First Church.

Court adjourned.

THURSDAY MORNING, March 7th—10 o'clock.

Dr. Patton, (in continuation.) The motions for the Moderator were made and put in an audible voice, to be heard throughout the house. Dr. Elliott occupied a chair immediately in front of the pulpit, and Dr. Beman, when he officiated as temporary Moderator, took his place in the middle aisle, about one third or one half of the way down the aisle, north of the pulpit. There were some voices in the negative, on some of the motions. These negatives, as nearly as I could judge from the sound, came from the south-west portion of the church. That was the part of the house where the Old-school sat: they occupied that portion, and also a portion on the left and front of the pulpit—that is the south-east part of the house. During the time that I occupied the floor, in endeavouring to get the reading of the resolutions I wished to offer, there were frequent cries of "Order! Order!" proceeding from gentlemen in the general neighborhood of the Moderator. When Dr. Mason was on the floor, similar cries of "Order!" were repeated, from the same quarter of the house, and were more continued than when I was on the floor. Shortly after Mr. Cleaveland rose, the calls to order were much more vociferous, and were accompanied with frequent coughing, scraping of the feet on the floor, and some very emphatic hisses, also proceeding from the same quarter of the house, with the obvious intention, as appeared to me, of preventing the progress of business. After the notice of adjournment was given by Dr. Fisher, there was considerable noise in the galleries of the church. This noise consisted of clapping, expressive of approbation, intermingled with some hisses, making the light and shadow of the picture. These are the material points, in regard to which my memory serves me. Spectators only, I presume were in the gallery. There were no members there to my knowledge. It is not usual for members to sit in the galleries. A mixed company of ladies and gentlemen was there. I think ample opportunity was given to every commissioner to vote upon the motions put by the Moderator. After our adjournment from the church in Ranstead Court, the body in the First Presbyterian Church, was in session about two weeks. Every day the full roll of all who had reported commissions, at any stage of the organization, was called. The roll embraced all the commissioners, as well those whose seats had, as those whose seats had not been disputed. That body went into the election of new trustees.

On suggestion of *Mr. Hubbell*, the election of such trustees being a recorded proceeding, the examination on this subject was waved.

Cross-examined by Mr. Hubbell. I cannot say with absolute certainty who seconded Dr. Mason's motion. My own impression is that it was Dr. Dickinson, Professor in Lane Seminary. I gather this from general familiarity with the tones of his voice, and from his sitting in that part of the house. I myself seconded Dr. Mason's appeal. Our roll was called very soon after we retired to the First Presbyterian Church. We called it 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 rising one hundred; or say in the general neighborhood of a hundred and seventeen, or from that to a hundred and twenty. This number included those whose right was disputed. The exscinded I understand by the disputed. This was the first time of the calling of 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 remarks preliminary to his motion, and in the same direction when he made the motion. When he put the question, his face was turned the same way. He did not, at any time during his remarks or his motion, turn either his back or side toward the Moderator. I have no recollection that there was any gathering or crowding of persons round him, during either his remarks, or the making of his motion. He did not call the Moderator by name, but looking toward 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 something of this kind, 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 in a contiguous one. 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 toward the pulpit. I should think it probable there were other persons, 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 remained in the chair where he had been before, now shorn of his office.

Mr. Hubbell. Did Dr. Elliott admit that he had been shorn of his office.

Dr. Patton. I presume not. I believe he continued to sit where he had before, until we had adjourned to the First Presbyterian 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. In some 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, nor did he 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 Dr. Beman's election. That part of the Assembly, called the Old-school party, I am not able to say, took any part in the proceedings after Dr. Beman took the chair, except by their silence. The cries of order, and the coughing and hissing ceased after Mr. Cleaveland had got through with his preliminary remarks.

Mr. Hubbell. What part of the house was occupied by the New-school members?

Dr. Patton. The house had been occupied nearly to the hour of religious service, by a convention of what are termed Old-school men, sitting with closed doors, and admitting no body to their counsels, but those who would sustain their proceedings.

Mr. Hubbell interrupted the witness, and objected to his speaking of matters of which he could not possibly have any direct knowledge.

Mr. Randall. The witness is at liberty to say whether this fact came within his own knowledge or not.

Mr. Hubbell repeated his question.

Dr. Patton. The New-school party were located on such seats as they found vacant when they entered, which were at a considerable distance from the pulpit. A portion of them were around and behind Mr. Cleaveland, in the north part of the church, and in that general neighbourhood. I did know, at the time accurately, how many persons the entire roll called after the adjournment contained. I cannot state now exactly. There were not, that I know of, two persons' names on that roll, who did not arrive in the city until after our adjournment. Neither Dr. Beman nor Dr. Fisher demanded possession of the chair, or of the hammer, from Dr. Elliott. I have seen the depositions of Dr. Beman and Mr. Cleaveland, since this visit to the city. I have read them—this I mean by saying I have seen them. Our proceedings were the result of a concerted plan, and not the suggestion of the moment. There was previous consultation as to the manner in which an *ex parte* organization of the Assembly might be prevented, and a constitutional one 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 would be. It was to maintain the Constitution inviolate. We had no knowledge whether we should be in the minority or majority, and could have had none until all the commissions were received. I think there was a small majority on what was called the Old-school side; but this we knew as matter of history, and not of prophecy. I think I have already answered whether it might have been matter of anticipation. The meeting of consultation, to arrange this proceeding, was held in the lecture room of the First Presbyterian Church. It commenced its session on the Monday evening preceding the meeting of the Assembly, on an invitation to all the commissioners to attend a meeting for consultation. I do not

know how many attended. The clerks of the meeting are present and can say how many. The invitation was given through the public newspapers. I have a copy of it here, as it was published.

Dr. Patton produced a printed paper, in the form of a circular, from which he read the following.

"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. Aikin, 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."

[We give the notice as inserted in the Philadelphia Observer, and as afterwards read to the jury. Dr. Patton's copy was without the names, and contained only the body of the notice.]

This copy has no date, but it took the date of the newspapers in which it was published. It was signed by some twenty clergymen, from different parts of the country, and was published in all the religious newspapers we could get it into. It was published in newspapers in this State, in New York State, and I think in Maryland; and had as wide a circulation as could be given to it. Some who remained in the body organized under Dr. Plumer, attended that meeting. Of these, I recollect the Rev. Dr. Church, and the Rev. Wm. Bradford. I do not remember any others. I believe there were some others, but I cannot identify them at this moment. The circular was signed by a number of gentlemen—about twenty I think. Dr. Dana, and Dr. Bemam signed it. The newspapers will show who the rest were. I think Dr. Fisher signed it. Dr. Skinner's name was there, and also the name of Rev. Luther Halsey, formerly professor in the Western or Alleghany Town Seminary. He was not professor at that time. He was then located at Auburn in the State of New York. I do not recollect that Messrs. Church and Bradford signed it. I do not recollect that any of those who signed this paper sat in the Assembly under Dr. Plumer. There were some diversity of opinion in the debates, as to the best mode of securing the object; but no diversity as to the importance of forming a constitutional Assembly. There was a resolution offered—the minutes will show precisely what it is—and there was opposition to it, and considerable debate, which opposition, however, nearly disappeared before the end of the debate. There were various classical figures used, and among others it was said, by an eloquent gentleman present, that this measure was passing the Rubicon.

Re-examined by Mr. Randall. Dr. Beman, I presume, is now in England. He left this country in the month of January; I had the happiness of seeing him safe on board the vessel in which he sailed. Mr. Cleaveland lives, I think, in Marshall, in Michigan. Their depositions were handed to me to be read by yourself—(Mr. Randall.) No such thing as a stick or hammer is recognised in our Constitution. The Constitution is in itself strong enough. I and my friends, when we went into the house in Ranstead Court occupied the nearest vacant seats. We found those nearest the pulpit occupied by the Old-school party. I do not know from personal observation that there had been a private meeting of that party in the morning, or that they sat with closed doors; but I have no moral doubt that they were so sitting. I have been a minister of the Presbyterian Church about sixteen or seventeen years, and was forty years old last August. It was the Rev. Jared Waterbury who spoke of our measures being the passage of the Rubicon. 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 an opportunity to take seats there.

Yesterday I said I had handed my resolutions to the Stated Clerk. This was a mistake: I handed them to the Permanent Clerk.

Judge William Jesup—sworn. I was a commissioner to the General Assembly of 1837, attended that body, and took an active part in its proceedings. I came from the Presbytery of Montrose, belonging to the Synod of New Jersey. So far as I know, this Presbytery has always been in that Synod. I was one of the members of the committee appointed, on motion of Mr. Breckinridge, to devise measures for the separation of the Church. Mr. Breckinridge was also a member of that committee. It met several times; the two portions of which it was composed meeting sometimes separately, and sometimes together.

Mr. Randall. Do you recollect whether any thing was said by any member of that committee, at the time when it was about to separate, in regard to the consequence of the refusal of the New-school members to accede to the terms proposed?

Mr. Hubbell. May it please your Honor, we object to the question. The proceedings of that committee were reduced to writing: the record has been produced, and speaks for itself. The various and conflicting propositions made by the opposite parties are all in writing, as well as the action of the house thereupon. The conversations of the different members of the committee converged in these records, and were ended by them, and, besides, are entirely foreign to this controversy. Indeed, the whole subject is a foreign one. The proceedings of the Assembly of 1837 were admitted, so far merely as they related to the acts of excision; but the other party saw fit to read the account of these efforts at compromise, and to this we did not object. It was matter of record, and, at most, immaterial and irrelevant. This is an attempt to go out of the record, and substitute for it the loose and idle conversations of individuals, of which we know nothing. They were *ex-parte* conversations, and no result followed them. The parties to this suit had nothing to do with them. Certain individuals, claiming to be trustees of the General Assembly, and asserting the right to oust those who now hold the office, seek to effect their purpose by giving in evidence conversations, not with the

trustees themselves, but between Judge Jesup and Mr. Breckinridge. These can have no more bearing on the case than any street conversations.

Mr. Randall. We think this an important link in the chain of proof, and that a decision adverse to the admission of the evidence would be unfavorable to the cause of justice. Your Honor must connect the whole testimony—

Judge Rogers. You had better present the question in writing, as it is an important one.

Mr. Randall. I will put it in writing, and, to prevent delay, now offer in evidence "The Philadelphia Observer" of March 29th, 1838, in which the notice of the consultation meeting, before mentioned by Dr. Patton, is to be found.

[This notice—the same as given above—was then read.]

Dr. Patton. Some of the persons whose names are appended to this notice are of the Old-school party—for example, the Rev. T. S. Spencer.

Mr. Hubbell asked for the piece of paper, which had been torn off from the top of that copy of the notice from which Dr. Patton had first read.

Mr Randall produced it, and proposed to read it in evidence. It was, he said, a circular intended to accompany the notice. After looking at it, *Mr. Hubbell* waved his demand, and the paper was rejected.

Mr. Randall then presented, in writing, the question which he proposed putting to Judge Jesup. His object was to prove, that, in the course of the negociations of the joint committee appointed by the General Assembly, as a part of the *res gestæ*, 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 exscind a sufficient number of Synods from the General Assembly to secure, thereafter, in that body, the predominance of the Old-school; and that the other four ministers of this part of the joint committee assented to his declaration. Copies of the question having been given to the Court, and the opposite counsel.

Mr. Randall, in defence of it remarked, Your Honour perceives from a perusal of that paper, that it relates to a declaration made in the meeting of the committee referred to. It is objected, that what we seek to prove is the mere act of an individual. But we want to show that there was a total discrepancy between the course pursued by the Old-school party, and the real object which they had in view. The *ex-parte* declaration of Mr. Waterbury was admitted, and was gone into at some length; and he was a gentleman not present during the proceedings of the Assembly of 1837, and no party to them. Now, we seek to show the acts and declarations of a gentleman who moved for the appointment of this committee—who was the mouth piece, and—I say it without disrespect—the master-spirit of the Old-school. We wish to show a concerted plan, a conspiracy, to exclude certain Synods from all future participation in the rights and privileges of the Presbyterian Church. This is the leading feature of the case. These Synods were cut off without trial, or even notice. The great principle that none shall be condemned without a hearing was violated. I do not wish to state what are the contents of that paper, in the hearing of the jury, but my allusions to it will be un-

derstood by those who have it before them. This is not only a part of the *res gestæ*, but the very pivot—the corner stone of the whole investigation. On this declaration depends, for its character, the exclusion of the four Synods. A motion was made to appoint a committee to agree upon terms of amicable division. That committee met, as the agents of the General Assembly. They reported, and their report was received. Then came the act of exclusion, or, as one of the counsel has said, not inappropriately, of *detrusion*. We now propose to show that after this abortive attempt at pacification, after the members of that committee had returned to the body, a menace was distinctly offered, and that the deed threatened was afterwards consummated. This witness, holding in his hand the book, appealed to it, and asked for an accusation, and for trial. His appeal was met by a call for the previous question. The words of Omniscience to Adam were, "Where art thou? What hast thou done?" Even he would not pass sentence upon poor, fallible man, without a hearing. But these reverend fathers of the Church, born and bred in its communion, have been detruded, unheard. This is the very *gravamen* of the charge. No lawyer, at least, can misunderstand me, when I say, that the exclusion of these trustees, whom we claim to have superseded by our appointments, was not intended to fix any stain upon their christian character. Their motion was with a view merely to try the rights of the respective parties. The high character of the man whose name has been put at the head of the newly appointed trustees, is a sufficient guarantee of the purity of our intentions. We wish only to try whether sixty thousand communicants, five hundred and ninety-nine churches, and five hundred ministers, can be detruded, without trial, or even the knowledge of any accusation. This is the ground of the present offer. I consider it the most interesting, and vital part of our inquiry. With these views I submit the question, hoping that your Honour will allow all the facts of the case to be developed.

Mr. Wood. The question is, whether the evidence offered is material to the issue; but a court will not nicely scan the nature of such evidence, and decide upon it, at this stage of the proceedings, but will rather admit it, and leave it to the jury. I will show how this testimony applies to the case. We proceeded to organize the General Assembly of 1838, and must prove that that Assembly appointed new trustees. In the course of the organization, some unusual proceedings occurred. A Moderator and two clerks were removed, and others elected in their places. All this was done in the Assembly, and to prove that we were right in doing it is essential to our cause. We now want to show why we did it. Our reason was this: that there were several commissioners sent to the Assembly of 1838, from certain Presbyteries belonging to the Presbyterian Church, which prior to this time, year after year, had been recognised as branches of that church—the rights of which had never been disputed. That these commissioners presented their commissions to the proper officers, the clerks, but were rejected; not on account of any real or pretended informality in the documents, not in a case of contested election, but in obedience to an illegal mandate of the Assembly of 1837. That we demanded that the names of the commissioners thus rejected should be inserted upon the roll; that motion after motion was made for the purpose, which the Moderator refused to put to the house, and pronounced out of order; and that,

on one occasion, he said to a person who tendered to him a commission, which had been rejected by the clerks, "We do not know you." Further, that the Moderator refused to put to the house an appeal from his decision. After these repeated acts of rejection and refusal, it was that the members appointed a new Moderator, and new clerks. Their *right* to do so, is not to be decided at this stage of the investigation. The act was certainly within the power of the Assembly at that time; and we assign as the cause of our proceeding, a deliberate, preconcerted plan, on the part of a portion of the Assemblies of 1837 and 1838, to exclude the commissioners from the exscinded Synods. In 1837, resolutions were passed, cutting off these Synods from the Church. What then is our object? To show a determined purpose, a conspiracy of the Old-school, carried out by their clerks and Moderator, to support the measures of excision, by excluding certain individuals. How can we prove this? It is idle to say that these commissioners would have been admitted if they had applied at another time. Can any one believe that it was not the fixed intention of the Old-School to exclude them for ever? The pledge exacted from the clerks demonstrates this: that clinches the nail. Well, to prove a preconcerted plan, we offer to show that, in a committee of the General Assembly, a threat was proclaimed, which was afterwards acted upon in that body; that it was declared by a member of the Old-school portion of the committee, that unless the other portion consented to divide the church at once, without consultation, the Old-school party in the Assembly, would secure their future preponderance, by cutting off a portion of their opponents. Is not this evidence material? It goes to show the reason of the subsequent acts of excision—a deliberate design, a preconcerted plan. These we offer to prove by declarations made at the time—the declarations not of a mere cypher, a dough-faced man, but of the head, the prime mover, the Coryphæus of the party. We offer to prove that he held out a distinct menace, that unless the terms which he proposed were accepted, the next act of the Assembly would be the total exclusion of certain members. Now, if it is proper to prove this at all, in what way are we to prove it, but by evidence, like that offered, of remarks made at the time, in the course of action, in the committee room, and in the house? There is no other way.

It is said that all the conversations in that committee merged in the different resolutions and proposals made by the two portions of it. This is not so. These documents do not show at all the design of those who passed the exscinding acts. Our object is to prove a fraudulent design. I say this without intending any disrespect to these gentlemen: they no doubt thought that they were doing what was perfectly right. But if their measures were illegal and unjust, in the eye of the law they were fraudulent. How, I say, are we to prove all this, but by contemporaneous declarations? There is no other method. The exscinding resolutions present only the naked fact of the excision. But it is said, that the General Assembly of 1837 had nothing to do with that of 1838; that if the clerks made out a defective roll, the Assembly would have completed it. No, never! and this is the very thing we wish to demonstrate—to demonstrate, by showing a design, a pre-determined plan. Such a design and plan, I repeat it, can be proved, in this case, only by the declarations of those who were most active in counselling and carrying out the measure.

Mr. Breckinridge, a leading man among the Old-school, makes certain declarations in a committee of the house; these declarations are acquiesced in by his party, who verify them by subsequent acts, passed with the design of securing a majority. Is your Honour prepared to say, that evidence of such a design is not material, to show that we were right in removing the Moderator and clerks, who in pursuance of the measures of excision, had refused seats to commissioners regularly appointed? Are the exscinding resolutions valid? No member of the bar will say so. Even the counsel for our opponents will not say so; and they strive to keep them in the dark. But these acts must be dragged forth into the light of day. The design with which they were passed has an important bearing on the case; and it can be proved only by such declarations. If so, the Court will admit the testimony.

Mr. Preston. If I understand the proposition, it is to give in evidence, certain declarations made by Mr. Breckinridge, a member of the committee alluded to, as showing the design with which certain acts of the General Assembly were performed. We object to the admission of such testimony, on the ground that an individual declaration is entirely incompetent to the proof of the feelings and designs which actuated such an Assembly as that the proceedings of which are under consideration. It is offered as explanatory of the acts of a recognised public body. The declarations of a single man, declarations, too, made, not in the course of debate, not upon the floor of the house, but in a subsidiary meeting of certain members of that house—these are brought forward to explain public and recorded acts of a judicial Assembly. If the design of those acts does not appear upon their face, the testimony offered must either contradict the record, or be consistent with it. Here then is the dilemma. If consistent, why attempt to confirm that which is already certain, to bolster up what is now fully supported? If contradictory, shall the mere declaration of an individual overthrow the testimony which the solemn record bears of the transaction? Shall secondary evidence destroy that which is primary? Who ever heard of the proceedings of a great public body being expounded or explained by private declarations? To state a case exactly in point: if your Honour were sitting in judgment upon an act of the Legislature of Pennsylvania, you would not allow your decision, as to the validity of that act, or the power of the body that had passed it, to be influenced by declarations made even upon the floor of the legislative hall, much less by declarations uttered in a committee-room. So far from acknowledging the declaration of a single man as conclusive, the concurrence of all the individual members of the body, in views not appearing on the face of the record, would not govern your decision. I venture to assert—using here a word drawn from a theological source, as proper in a theological controversy—I venture to assert that the *exegetical* history of a public body has never been introduced to explain the acts of that body. If so we should call on every individual member, in order to determine whether the motives and designs which actuated the whole were fair or fraudulent.

But we have another serious objection to the testimony offered, depending on more important considerations. Let us look into the circumstances of the case, and we shall find more general grounds for its rejec-

tion. Here I may say, that in your Honour's decision of yesterday, respecting the admission of the Minutes of the General Assembly of 1837, as evidence, I acquiesce. So far as that record is connected with the exclusion of the Synods, it is competent evidence; but no farther. To the proof of other acts, or to show a fraudulent design in those engaged in the proceedings referred to, it is clearly incompetent. No issue is presented admitting of such testimony. In the pleadings a single fact is asserted and denied—the fact that certain men, the relators in this suit, were duly elected Trustees of the General Assembly of the Presbyterian Church in the United States. This fact we deny, and here is the sole issue in the case. It is incumbent, therefore, on the relators to prove the regular organization, the Constitutional authority, the paramount power of the Assembly to which they owe their election. That power, that authority, we contest: here is the naked issue. If they prove theirs the only true General Assembly, there is an end of our cause. It is an entire mistake—the fact taken for granted by our opponents—that we are endeavouring to set up an opposition General Assembly. We tender no such issue. We do not assert that the Old-School Assembly of 1838 was the Constitutional Assembly: our cause rests on broader grounds. We are content with a mere general negation of the facts alleged on the other side. No matter how irregular, or unconstitutional, how false or fraudulent, have been all the proceedings not merely of the Assembly of 1837, and of the incipient organization of 1838, but of every General Assembly from the year 1800 to the present time: this does not advance their proof in the smallest degree. We are anxious to keep ever in view the real, the naked issue. We are not setting up one Assembly and our opponents another. We are not contending for the affirmative of one issue, of which they have the negative; and for the negative of another of which they have the affirmative. When we come into Court, we come as defendants, with all the privileges of defendants. Should they prove our proceedings foul, false, and fraudulent, how would this establish their claim to hold office under a righteous power? They propose, under the authority of their Assembly, to detrude—I employ a word before introduced—to detrude from the Board of Trustees of the Presbyterian Church, a reverend and venerable gentleman, who sits near me—Dr. Green, who holds his office by virtue of the original appointment of the Legislature, independently of the Assembly of 1837, or of 1838, or any other General Assembly. There is no imputation of irregularity in his appointment. He is above all such imputation—untouched by it. We then are not called upon to do any thing—to prove any thing. It is for our opponents to strike down this venerable gentleman by a paramount power. Why then should we go into an investigation of the proceedings of the Assembly of 1837? Not one of those whom they attempt to eject from their office holds under that impugned Assembly. All of them can refer to an antecedent date as the time of their appointment, though he to whom I have just alluded is, I believe, the only relic of the original company. They all claim under General Assemblies on which no shadow of imputation rests. The proceedings of the Assembly of 1837 therefore cannot affect either of the issues which the case presents.

What are the facts of this case—those which are conceded on all sides?

Each General Assembly at the close of its session, closes its existence, is dissolved, vanishes in thin air.

> The earth hath bubbles as the ocean hath,
> And these are of them.

But is there nothing at all left? No prolific root from which another Assembly may spring? No germ of a future existence? No nucleus from and around which a succeeding body may grow up? Yes, there is such a prolific root, such a germ, a nucleus still preserved for a new organization. This nucleus is the surviving power of the Moderator, who presides at the opening of the new Assembly, and of the clerks who assist in its formation. In the year 1837 such an Assembly was dissolved. In 1838 another was organized; but who met for this purpose? The elements of which that Assembly was to be composed. And why did they meet? In pursuance of an act of the preceding General Assembly, under the auspices of the Moderator, whose authority still survived, and in the presence of the clerks. In other words, there were materials around which a new organization was to be effected.

Thus far all of us are agreed. The validity of the proceedings which I have detailed, even our opponents, "by the advice of counsel learned in the law," admit. All that was done, up to this stage of the proceedings, was done regularly. Now came the accepted time—now the period when a new state of things was to rise into existence. Still Dr. Mason turned towards the Moderator, still addressed the Moderator—the Moderator not yet "shorn of his office." But the acts of refusing to put the motion offered, and to put the appeal, were derogatory from his power, and by them was he thus shorn. The elements of the incipient organization were thrown upon the amplitude of their original powers. Up to the date of this occurrence, of the act by which it is said that that Moderator and those clerks forfeited their office, we are all agreed—all upon the same road. How then does the testimony offered apply? Suppose the Moderator, in organizing the new Assembly, failed in his duty; committed a fundamental error, and that it became necessary to remove him; suppose, too, that his intention was evil, corrupt, fraudulent. If the act done was illegal, the most conclusive evidence of right motives cannot protect it from condemnation: if legal, the proof of wrong motives, of the most fraudulent design, cannot invalidate it, or render the proceedings of the other party any the less violent, disorderly, and revolutionary. Then, no matter what motives actuated us—what was our concerted plan or purpose.

I therefore do not here offer to vindicate any declaration or any menace. However violent or improper our opponents may consider that which they have offered to prove, we might, with safety, as regards the issue of this cause, admit the charge. But I make no such admission. We could exhibit a complete vindication, though we object to its being introduced here. Not only could I vindicate the declarations uttered by Mr. Breckinridge—I could vindicate them in a Christian and Presbyterian spirit. What I object to is the waste which the introduction of such testimony would produce—the waste of words, the waste of time, and,

worst of all, the waste of temper, in the investigation of collateral issues; not that we shrink from the attempt to vindicate our words.

Allow me, before closing, to illustrate a position that we take in this controversy. Our friends on the other side may as well be advised of it, and I throw it out now. We contend, that no regularly organized General Assembly has been convened since the year 1800. In 1799, the act incorporating the Trustees of the General Assembly of the Presbyterian Church was passed. And whom did it incorporate? The very title of the instrument tells us whom. It is called "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." Now, are not these words—"the General Assembly of the Presbyterian Church in the United States," potential? Was not the act designed to incorporate their trustees, and only theirs? Well, in the year 1801, the Assembly entered into articles of agreement with certain Congregational Churches, by which, Congregationalists were allowed to be represented in that body. Was not this an avoidance of the trust created by the charter? Was that charter granted to a mixed body of Presbyterians and Congregationalists? Suppose Baptists, Episcopalians, Methodists, and Catholics, had been introduced, would they have formed the Assembly contemplated by the act of incorporation? Or put a still stronger case. Suppose the persons thus admitted to our fellowship and communion, by their numbers, their dexterity, and "the advice of counsel learned in the law," had ousted us entirely, proclaimed themselves the true General Assembly, and appointed counsel to come into this court, and support their rights: would your Honor say that these composed the body to whom that charter was given? It seems to me, that the introduction of improper members into this body corporate, or rather *quasi* corporate, may have vitiated every Assembly. The act contemplated none but Presbyterians—thorough-paced, true-blue Presbyterians.

Our opponents, may it please your Honour, must show a paramount authority. Therefore, if the acts of all previous Assemblies were proved null and void, their object would be defeated. Besides, we object to an exegetical exposition of the proceedings of 1837: it must prove fallacious.

Judge Rogers. 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 affect those proceedings. I must therefore exclude the testimony.

Mr. Randall. Judge Jesup, will you be good enough to state all that you know in regard to the pledge exacted, by the Assembly of 1837, from its officers, that they would carry out the exscinding resolutions, in organizing the Assembly of 1838.

Mr. Hubbell objected to the question. The best evidence of the proceedings of the Assembly was its own minutes. On such a subject, parol evidence was inadmissible. His objection was not to the facts themselves, but to the mode in which it was proposed to prove them.

Mr. Randall. In many cases the minutes are the best evidence of the proceedings of the Assembly; but are we bound to prove by the minutes, what cannot appear on them? I propose to show, that after the ex-

scinding resolutions of 1837, the Moderator and clerks of the Assembly were called upon to give a pledge, that they would act in accordance with those resolutions, in organizing the Assembly of 1838. That a motion was made to that effect, but that while it was pending, the officers gave the pledge required, and then the motion was withdrawn. That afterwards, these proceedings were put upon the minutes by the clerk, but, by some gentlemen sympathising with the Old-school party, were withheld from publication. We are not bound by the minutes. What is a minute? The mere narrative of the clerk—an officer not under oath. If a minute be inaccurate or defective, are we bound by it? Is a minute infallible?

Judge Rogers. Perhaps these proceedings are recorded. Is the record here?

Mr. Randall. We have summoned Dr. McDowell, the Stated Clerk, by a *subpœna duces tecum*, directing him to produce the original minutes.

[Dr. McDowell being called for, it was found that he was not in court.]

Mr. Randall. I hand to your Honour, the Old-school minutes of 1838. There, on page 15, is a record which will explain what I desire to prove by the testimony of the witness.

[The following is the part thus referred to by Mr. Randall. We copy it for the reader, though it was not laid before the jury.]

"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."

Mr. Randall, in continuation. That is the point in regard to which we desire to give testimony. Suppose that a resolution was offered and subsequently withdrawn: cannot we prove the contents of that resolution in any way but by the minutes—minutes prepared by officers not acting under the sanction of an oath. Minutes are not evidence at all, but for the sake of convenience. If I can prove by a witness, who gives his testimony under oath, what were the contents of Mr. Ewing's resolution, shall I not be permitted to do so? The printed minutes have, by agree-

ment, been given in evidence instead of the originals, in order to save Dr. McDowell the trouble of testifying; but they certainly are not conclusive. If the minutes stated that a resolution was withdrawn, would I not be at liberty to prove that it was not withdrawn, or that it was put to the house at another period, and carried? A memorandum of the proceedings of the Assembly, made by any body else, might just as well be relied on, as the memorandum of the clerk.

Judge Rogers. First give in evidence the record, which you suppose incorrect, as it stands, and afterwards you may correct it.

Mr. Randall said, that Dr. McDowell should be present the next morning, with the original minutes.

Court adjourned.

FRIDAY MORNING, March 8th.—10 o'clock.

Mr. Randall. I now propose to call Dr. John McDowell, Stated Clerk of the General Assembly, who has been summoned, by a *subpoena duces tecum*, to produce that part of the original minutes of the Assembly of 1837, referred to yesterday, which relates to the pledges given by the clerks, that they would carry out the decisions of that Assembly, in regard to the exscinded Synods.

Dr. McDowell being called, produced certain papers as the original minutes required. On the face of the papers appeared many obliterations, and interlineations, and several parts were crossed or cancelled with the pen.

Mr. Randall. I offer to read the whole of these papers in evidence.

Mr. Ingersoll. We have no objection to their being read, but to their being read as the minutes of the Assembly, when in fact they are not so. These are only the rough minutes prepared by the clerk, to be presented to the house, for approval, or correction.

Mr. Randall. The witness was served with a *subpoena duces tecum*, and he produces these papers. Papers thus presented may always be read without inquiry, and without the attestation of the person producing them. We have offered to prove the facts in question by parol testimony. This offer was refused: it was said that the minutes, as the best evidence in the case, must be produced. Here they are: I offer them in evidence, and propose to read the whole, as well the parts erased, and crossed by the pen, as the rest.

Mr. Randall, then read an extract from the papers, noting various erasures of words and sentences, as he proceeded.

"*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 3½ o'clock.

"Concluded with Prayer."

"*Tuesday afternoon, 3½ 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. The marks on these papers are of two kinds, erasures and crosses. They are the rough minutes made up by the clerk. The original of Mr. Ewing's motion is not here; what I have read is but a copy. I will ask Dr. McDowell what has become of that original.

Mr. Ingersoll. We object to the witness being called upon.

Mr. Randall. We have a perfect right to examine a witness producing papers, in obedience to a *subpœna duces tecum*, in regard to the character of such papers.

Judge Rogers. The witness may be examined.

Dr. McDowell. I have never had in my possession the original resolution offered by Mr. Ewing.

Rev. John M. Krebs, the Permanent Clerk of the Assembly, in answer to an inquiry respecting the paper which he had read, stating his views of duty as a clerk, in relation to the exscinding 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. The original is necessary.

Mr. Ingersoll. We have made no objection to any paper.

Mr. Randall then produced "The Philadelphia Observer," of December 14th, 1837, containing a copy of a paper purporting to be that read by Mr. Krebs.

Mr. Krebs. I have no doubt that it is perfectly correct. I sent the orignal copy to "The Presbyterian."

Mr. Randall then read the paper, 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 recognises 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 Com missions, 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, recognised 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. Randall. I suppose there will be no objection to this paper's being cut out, that it may go to the jury.

Mr. Ingersoll. Excision is a very dangerous type. We now propose to call the clerks, to show what the papers, which have been read as minutes, really are.

Mr. Randall objected, that this was not the proper time for such testimony, but afterwards waved the objection, and asked Dr. McDowell to explain the matter.

Dr. McDowell. The paper was not drawn up by me; it is in the hand-writing of Mr. Krebs.

Rev. John M. Krebs—sworn, with the uplifted hand. I will read the minute as I prepared it, and offered it to the meeting of the Assembly, in the afternoon, to be passed upon by that body. [Here Mr. Krebs read what is above given.] The words which I have read are the words read to the Assembly to be approved. The custom of the clerk is, to turn his face toward the members of the house, and read the minute which he has prepared. This was approved as a correct minute, without a word of dissent. These minutes are made up during the debate, and, when I am not satisfied with any expression, I make erasures and interlineations, so as to have a fair record to read at the opening of the next session of the Assembly. This is my process of making up the record, and erasures of the character mentioned are very frequent. Sometimes erasures are made by order of the Assembly.

Mr. Hubbell. There are, on these papers, marks of two kinds—erasures and marks of cancellation.

Mr. Krebs. I do not know by whom the cancellation was made, except from rumor. It was not done by me, or by the General Assembly, or by their order.

The witness being about to give evidence of what was done in regard

to this cancelled minute, by the Assembly of 1838; *Mr. Randall* objected to his going into that matter.

Mr. Krebs. The paper that I read was never directed to be put upon the minutes. [Here *Mr. Randall* waving his objection, the witness recurred to the former subject.] The General Assembly of 1838 ordered that the parts cancellated should be recorded on the transcript of the minutes.

Mr. Randall objected to the witness proceeding farther, saying that he had never meant to cast any imputation upon the clerks.

Mr. Hubbell. We want to prove this cancellation an unauthorized act. And that it was on account of it that the original minute did not go into the printed copies, or appear on the formal transcript. In 1838, by order of the Assembly, it was restored.

Judge Rogers. We will take it as a part of the minutes of 1837.

Mr. Krebs, examined by Mr. Ingersoll. The paper that I read was a simple statement of my views. I asked leave to insert it in the minutes, but no motion was made to that effect, and I did not feel at liberty to insert it without. I afterwards published it myself. It did not belong to the Assembly.

Examined by Mr. Randall. I do not know where the original paper is. I gave it to Mr. Engles, editor of the Presbyterian, with a request that he should publish it. I read this paper by permission, before Mr. Ewing had withdrawn his resolution. First I made a statement of about ten minutes, and then read the paper. I cannot tell where the original copy of Mr. Ewing's resolution is. The copy on the minutes is a correct one. Such papers are always destroyed, as soon as a copy has been taken.

Dr. McDowell sworn—examined by Mr. Hubbell. That you may understand the marks of cancellation which appear on these papers, I would refer you to page 498 of the Minutes of 1837, where mention is made of the appointment of a committee to revise the minutes.

"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 General Assembly, were put into my hands, either as Stated Clerk, or as Chairman of the Committee. The committee met in my study for several 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 is customary for the whole minutes to be read over to the Assembly, at the close of its sessions; but occasionally they are in haste, and have several times appointed a committee to make the corrections. It was under such powers that we acted in 1837. We thought, that as Mr. Ewing's motion had been withdrawn, it ought not to be made a matter of record. Mr. Grant, one of the members of the committee, differed from us in opinion, in regard to this point. The pledge given by Mr. Krebs, I never have had; it never came to me in any form. The Minutes of 1837 were printed, I think, about the first of August: as soon as the revision was completed, they were sent to press.

Examined by Mr. Wood. The statements made by the Clerks formed no part of the minutes. We left out every thing, as if the trans-

action 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.

Examined by Mr. Hubbell. The statement which I made was never put on the minutes. The statement of neither of the Clerks was filed. Mine was not in writing. I can give the substance of it, if proper.

Judge Jesup—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. McDowell and Mr. Krebs made their statements. Dr. McDowell made a statement of his views of his duty as a clerk, of which, though I cannot repeat the whole, a part is impressed upon my memory. After Mr. Ewing's resolution had been discussed for some time, the Assembly adjourned to the afternoon. In the afternoon Dr. McDowell asked leave to make 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 so to do, as long as he retained the office, whatever might be his opinion as a private individual. It is impressed upon my mind that he added, that if he found himself so situated that he could not consistently with his principles carry out the views of the General Assembly; he would resign; but I am not clear 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 person, that the explanations were satisfactory; and leave being asked to withdraw the motion, it was granted by a vote taken.

No *cross-examination.*

Rev. Miles P. Squier—sworn. I was a commissioner to the General Assembly of 1838, from the Presbytery of Geneva, which is within the bounds of the Synod of Geneva. The commissions of the commissioners from the exscinded Synods to the Assembly of 1838, were handed to myself and Judge Brown, of Ohio, on Thursday morning, and were by us tendered to the clerks, Dr. McDowell, and Mr. Krebs. Dr. McDowell in the name of the committee replied, "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 do very differently, but I am bound by the instructions of the Assembly."

Mr. Randall, handing a bundle of papers to the witness. Are these the commissions which you and Judge Brown presented to the clerks?

Mr. Squier. I have no doubt these are they. There were about fifty of them. (After looking over them) There can be no manner of doubt that these are the commissions. They were stated to be commissions from Presbyteries within the four exscinded 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 interview took place 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 by Mr. Hubbell. I had no objection to say to Dr. Elliott, that the Presbytery of Geneva was under the jurisdiction of the

Synod of Geneva, but because 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. I had been preaching the winter of that year in the congregation of Junius, within the bounds of that Presbytery, as a stated supply, as it is termed on the minutes. I was a minister belonging to the Presbyterian Church. The churches in that Presbytery, without exception, or, at least, as I think, not more than one, were governed by ruling elders. That one exception, if there were any, must have been the congregation of Middlesex.

By Mr. Ingersoll. With regard to my own Presbytery, it is as I have stated. About the other Presbyteries in the Synod I cannot speak with certainty. I know of none that are strictly Congregational churches; I do not know that all have sessions. If there be any churches 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 do not know that all have elders chosen for life; but all that I know have. I know of none which have committee-men. I presume there are some 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 Genesee. They were the fewer in number, and the smaller churches, I should say. Churches, when first formed in a new country, are very small, and have few male members; hardly enough for the formation of an eldership; and 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 changes, subsequent to the time of which I speak, in the Presbytery of Buffalo. It was frequently the case that these churches afterwards chose ruling elders. I now reside one hundred miles from them, and therefore do not know much about them.

Mr. Ingersoll. Here is page 534 of the Minutes of 1837, containing the reports of the Presbyteries of Onondaga and Cayuga. Please to say what churches there designated have, and which have not, ruling elders regularly ordained.

Mr. Squier. I do not know whether all these have elders; all of them that I know have. I know of none which have not. I am not as much acquainted with the churches of Onondaga, as with those of Cayuga. I do not know the number of churches in Onondaga, but it is rather large. I am acquainted in Auburn, and both churches there have ruling elders. By a rather large number of churches I mean about twenty. 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, did not embrace that Presbytery; they did embrace all west of it. 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. During my agency, the following Presbyteries were formed: Out of Geneva, in 1817, were formed Ontario, Niagara and Bath; and in 1819, the Presbyteries of Rochester and Genesee were created. All of these were formed by the Synod of Geneva. The geographical limits of the Presbyteries were at first large, but were afterwards cut shorter for convenience. At a later period the Presbytery of Tioga was created, and by the same Synod of Geneva. This was in a subsequent year. Also the Presbytery of Angelica, by the same Synod. At a later period, in 1821, the Synod of Genesee was formed by the General Assembly, containing, I think, the Presbyteries of Ontario, Rochester, Niagara, and Genesee. At a subsequent time, the Presbytery of Niagara was divided by the Synod of Genesee: the part north of Tonnewanta Creek, took the name of Niagara, the other that of Buffalo, and the latter retained the papers. The Presbytery of Chemung was subsequently formed by the Synod of Geneva. I cannot now think of any more. 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, one way or the other. I do 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 sessions. To the best of my recollection, there were but a small number of such churches, and these from among the smaller and newer ones. Each church belonging to a Presbytery, has one representative. I judge there were churches in these Presbyteries, which, in the feature of not having sessions, were Congregational. I know 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.

By Mr. Hubbell. I know of no church formed wholly, or partly, on the accomodation plan. 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 state 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 initiated, fifteen years ago, have now become consummate. 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 am not sufficiently acquainted with all the churches in Rochester to know about them. I do not know that all in Genesee have ruling elders; but I know of 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. I know of none such in Rochester.

Re-examined by Mr. Randall. The representation from the Presbytery of Watertown. (*Minutes* 1837, *p.* 528, *referred to,*) is always ac-

cording to the number of ministers, and, so far as I know, always has been so. A minister without a 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 exscinded 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 those churches not strictly Presbyterian, there would have remained a sufficient number, regularly organized, to send commissioners to the General Assembly, of 1837.

Mr. Randall. We will here interrupt the witness, to offer these commissions of the delegates from the exscinded Synods to the General Assembly of 1838.

The commissions were then given in evidence.

Mr. Squier, in continuation—examined by Mr. Randall. I was present at the organization of the Assembly of 1838. After tendering the commissions to the clerks, I presented them for keeping to a gentleman named Mr. Nixon. I introduced him to Dr. Mason, and then went into the house. I found the house previously occupied, very densely, 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 prayer he would proceed to constitute the Assembly. This prayer being finished, he took his place below, in front of the pulpit, and made a prayer, at the close of which Dr. Patton rose, saying that he held in his hand certain resolutions which he wished to offer. Dr. Elliott said, that was not the time to hear them; that the next business was the formation of the roll, or something to that effect. Dr. Patton replied that his resolutions had regard to that very subject. Dr. Elliott stated, that they could not be received, as the roll was the next thing in the order of business; and I think mentioned, that the clerks were ready to make their report. Dr. Patton informed him, that he had the floor before the clerks. The Moderator told him he was out of order. Dr. Patton appealed from his decision, and his 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. As soon as they had reported, the Moderator said, if there were any more commissions, then was the time to have them presented. Dr. Erskine Mason then arose, 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, Genesee, 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 these four Synods. He answered they were. The Moderator replied that they could not be received, or in words to that effect. Dr. Mason then ap-

pealed from the decision of the Moderator to the house, and his 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 among the members. 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 answered that it was within the bounds of the Synod of Geneva. He replied, "We do not know you," Mr. Cleaveland of Detroit then rose, and said in substance, that we had been advised, that a constitutional Assembly must be organized at that time and place, by the admission of all 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 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 put by Dr. Beman, that Dr. Erskine Mason and Mr. Gilbert be clerks, and Dr. Beman then called for nominations for a Moderator of the Assembly. Whereupon Dr. Fisher was nominated, and the nomination being seconded, and none other made, the question was put *viva voce*, by calling the ayes and nays. Dr. Beman then announced to Dr. Fisher, that he was regularly constituted Moderator of the General Assembly, and should be governed by the rules of that body thereafter to be made. The Rev. Dr. Mason was then nominated as Stated Clerk, and Mr. Gilbert as Permanent Clerk, and the question was put by Dr. Fisher and carried. Some paper was then read or referred to, the purport of which I did not understand, and on the back of this, a motion was made to adjourn to the First Presbyterian Church. The paper was on the subject of the occupation of the house. 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 lecture-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.

The motions in the Seventh Church, were I think, all made in an audible voice, and all seconded; and the question on each was put by the chair. An opportunity was given to vote in the negative, it being, to the best of my recollection, in each instance put, and a competent time being allowed to vote. So far as I could perceive, the business had the attention of the whole house. The house was very still, especially at the time when I was on the floor. Every member had an opportunity of voting on these resolutions. There was a call to order, by the Moderator, of Dr. Patton, who, when last called to order, took his seat. There were, if I recollect, some cries of order when he and Dr. Mason were on the floor. There was no interruption when I had the floor, but more when Mr. Cleaveland was on it, from Dr. Elliott and those sitting in that portion of the house. The noise and interruption came 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 did not enter the house till eleven o'clock; then it was occupied by a dense mass, 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 commissioner since the year 1817, about every four years. I have never before seen such a collection of persons at that hour. I entered the house previously to the commencement of the preparatory exercises. 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 one 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—whether it is done before, or after the choice of a Moderator.

No cross-examination.

Dr. William Hill—sworn. 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 repeatedly been a commissioner to the General Assembly; once soon after the Assembly was organized, and since, I cannot recollect how often, but more frequently than any other person from the state of 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 one after another, as fast as possible, and their names put on the roll. All the doubtful commissions were laid aside, to be acted upon at a subsequent period. Where nothing doubtful appeared, the names were put upon the roll immediately. If I recollect aright, the doubtful commissions were at first 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 acting on these doubtful commissions, until after the Moderator was chosen. Those members about whom there was no dispute 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 names merely of each commissioner, and of the Presbytery from which he came, were announced. If any commission was doubtful, or was called in question, it was always laid aside for subsequent consideration. This continued the practice, until thirteen years ago, when the custom arose of referring all the commissions to the 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. Then this plan was

found to operate unfavourably, 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 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. After the sermon, there was an objection to Dr. Miller's taking the chair, and Dr. Beman presided a considerable time; but an objection being again made, the office devolved on Dr. William A. McDowell, I believe by a vote of the house, but I am not certain whether by a vote, or by consent. Dr. Beman occupied the chair some time before his right was called in question. I think I recollect repeated instances, in former years, under the previous order, of disputed rights to seats being determined before the choice of a new Moderator.

Cross-examined by Mr. Hubbell. On the occasion mentioned, Dr. Beman's right was disputed because he was not the last Moderator present. Dr. McDowell, the last one present, was in very feeble health, and it was to accommodate his feelings that Dr. Beman was put into the chair. The universal rule is, that the last Moderator present is entitled to the chair. I do not know whether Dr. Beman put the question on the subject of his removal: I think he did, but am not certain. If I recollect Dr. Beman took no part in the discussions of the house. He left the chair, in obedience to its order, as soon as the decision had been made.

Re-examined by Mr. Randall. I think the objection on which the moot point arose was, that Dr. McDowell was not a commissioner to that Assembly.

By Mr. Ingersoll. It is not necessary to be a commissioner to preach the sermon. On this occasion Dr. Miller preached it.

Mr. Randall next offered various extracts from the minutes.

Min. 1823, pp. 111, 112, 113. "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, May 15th, 1823, at 11 o'clock, A. M., and was opened by thy Rev. Obadiah Jennings, the Moderator of the last Assembly, with a sermon, &c. * * * * * * *

"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."

[Here follows the roll of the Assembly.]

"The Rev. 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 Clerk; and the Rev. John Chester, D. D. was chosen Moderator, and the Rev. Robert Cathcart, D. D. was chosen Temporary Clerk.

Min. 1824, *pp.* 193—5. *Min.* 1825, *pp.* 249—251. *Min.* 1829, *pp.* 363—6.

Min. 1831, *pp.* 155-8. "The General Assembly of the Presbyterian Church in the United States of America, met, &c.

"The Standing Committee of Commissions reported, that the following persons present have been duly appointed commissioners to this General Assembly, viz:"

[Then follows the roll, as before.]

"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 McCrea, 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 persons denominated 'Standing Committee,' in the commission; and, after considerable discussion, it was resolved that the member be received, and enrolled among the list of members.

"The Assembly proceeded to the election of a Moderator, when the Rev. Nathan S. S. Beman, D. D., was elected."

Min. 1833, *pp.* 469–73.

[The passages here simply referred to are of the same nature with those quoted, going to show that it is customary, in the Assembly, to try doubtful or disputed rights of membership, before the choice of a new Moderator.]

Court adjourned.

SATURDAY MORNING, MARCH 9TH—10 O'CLOCK.

Mr. Randall. I have examined Dr. Patton and Mr. Squier out of the regular order of the testimony, but shall endeavor to be more methodical hereafter. The last evidence offered yesterday was in regard to the practice of deciding the right to disputed seats before the election of the new Moderator. I now give some farther extracts from the minutes, relating to the same point.

Min. 1826, *p.* 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. Bissell 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 nine 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. Bissell be admitted as a member of the Assembly.

"The Rev. Thomas McAuley, D. D., was chosen Moderator; and the Rev. John Chester, D. D., and the Rev. Samuel T. Mills, were chosen temporary clerks."

Mr. Randall. There seems to have been complete unanimity in regard to Mr. Bissell's case. It was not considered as involving any important constitutional question, and even the yeas and nays were not called for.

Mr. Hubbell. The counsel, I think, is mistaken in regard to the

unanimity of the house. There was a formal protest in Mr. Bissell's case.

Mr. Randall. Yes, here is a protest, signed by forty-two members. It had escaped my notice, from having been made at a subsequent time. I will read it.

Min. 1826, *p.* 23. "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."

Mr. Randall. The ground of the protest, as you see, was not the time when the decision, as to the disputed seat, took place—its being decided before the choice of the new Moderator. All seem to have agreed, that that was the legitimate and only proper time.

Min. 1834, *pp.* 3–7.

Min. 1835, *pp.* 3–7. "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. McDowell, 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 follows the report of the clerks upon the roll, and their report of irregular commissions.]

"The Assembly had a recess until three o'clock this afternoon.

"*Thursday afternoon, three o'clock.*—The Assembly met. A motion was made to re-consider 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. McDowell, 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. McDowell 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:

"'All who are in favor 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. McDowell, D. D., being the last Moderator present, be requested to take the chair. This motion prevailed, and Dr. McDowell took the chair accordingly."

[Then followed the appointment of a Committee of Elections, and their report, which was accepted; and after this the Assembly proceeded to the choice of a Moderator and Temporary Clerk.]

Min. 1836, *pp.* 235–9. *Min.* 1837, *pp.* 411–15.

[The minutes referred to, go to establish the same point as those quoted—the practice of deciding in regard to disputed seats before the choice of a Moderator.]

Dr. Robert Cathcart—sworn. I have been a minister of the Presbyterian Church in the United States near forty-seven years. I cannot tell, exactly, the number of years I have attended the meetings of the

General Assembly, but may safely say that, as spectator or member, I have attended forty years. From thirty to forty times I have been a commissioner. I occupied the place of clerk of the Assembly, from fifteen to twenty years. At that time there were no such officers as Permanent and Stated Clerks. Our constitution recognises no such officers. All that it recognises is, a clerk of the Assembly, and his duties are very simple. At an early period, either the clerk of the last Assembly, or one nominated for the occasion, sat down, and served until the Assembly was constituted. All the commissions were brought forward and put upon the table, and the clerk read them at full length. After some years, when the number of commissioners had increased, this method was found inconvenient, and then it became customary to read only the most essential parts of each commission, as, the name of the commissioner, and of his Presbytery, and the signature of the Moderator. At this time there were so few disputed or defective commissions, that such matters were usually settled at the clerk's table. Afterwards, when the number 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 the hands of that committee went all the doubtful cases. Then a recess was usually allowed for dinner, and, after the interval, the committee returned 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 proceeded to choose 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 disconnected from any officers; if the Moderator and clerks should all die, the body would still exist.

Cross-examined 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. Then they have reported upon them according to circumstances. They are called a Committee of Commissions, or Elections, I forget which. 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—sworn. I belong to the Presbytery of Wilmington, in the State of Delaware. I was a commissioner to the General Assembly of 1837, and also to that of 1838. I went to the church in Ranstead Court, on the day of the organization of the latter Assembly, about half past ten o'clock, and found the seats around, and in front of the Moderator's chair occupied 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. As I was passing, I heard Dr. McDowell say, "Where is the sexton? These doors ought to be locked." As I had been present at many Assemblies, and had never known them locked, I was surprised at hearing this. Soon after the doors were locked. Then I went round and took my seat in the house on the east aisle, as near to the front as I could get. After the sermon was over, and the introductory prayer concluded, Dr. Patton rose, and said, "I hold in my hand, certain resolutions, which I desire to present to the house." The Moderator declared him out of order, saying that the first business was the report of the clerks upon the roll. Dr. Patton replied, that his resolutions bore upon the formation of the roll, and that he desired they might be presented, and acted upon without debate. The Moderator replied again, that they were out of order; that the clerk had the floor. Dr. Patton said, that he had had the floor before the clerks. Again, the Moderator pronounced him out of order. Dr. Patton appealed from his decision to the house, and his appeal was seconded by at least a dozen voices. I seconded it, and so did all who sat around me. The Moderator declared that the appeal was out of order, refused to put it to the house, and ordered the clerks to proceed with the roll. 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 exscinded Synods, and the Third Presbytery of Philadelphia. After the roll was concluded, the Moderator said, according to the usual form, that if there were any other commissions, from any part of the Presbyterian Church, they should then be presented. Dr. Mason, of New York, then rose, with a bundle of papers in his hand, and said, "Mr. Moderator, I hold in my hand the commissions of a large number of commissioners, which have been rejected by the clerks: I now tender them to the house, and move that their names be added to the roll." This motion was seconded by many voices. The Moderator asked whether these commissions 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, Genesee, and the Western Reserve. The Moderator replied, "We cannot receive them." Dr. Mason then 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. His appeal was seconded by many voices. The Moderator declared him out of order, and refused to put the appeal. The Rev. Miles P. Squier, then rose in his place, and said, that he had been regularly commissioned from the Presbytery of Geneva, that he had handed his commission to the clerks, and that they had 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, that 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 motion 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 not one loud distinct "No!" I understood the object of the motion to be to remove Dr. Elliott, and substitute Dr. Beman in his place. Those around me voted with the same understanding. Mr. Cleaveland declared that the motion was carried, and requested Dr. Beman to take the chair. Dr. Beman stepped out into the aisle and took the chair. Then 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, on the eastern aisle, and passed round near where Mr. Krebs and Dr. McDowell sat, and walked down the broad aisle, to 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 from Cincinnati, nominated Dr. Fisher, and the nomination was seconded. Dr. Beman asked, if there were any other nominations, but 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 decide the question *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 adopted by the Assembly. It is usual for each Assembly to adopt rules for itself, which are commonly those to be found 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 then put the motion, that we should be clerks, and it was carried almost unanimously. I think there were some nays, but if so, they were not as distinct as before. These negatives came from the south-western part of the house, or from towards the west door. 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. The noes came from 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 was but one nomination for each officer appointed. The question upon the first motion, that of Mr. Cleaveland, I know was reversed; and I believe that it was reversed on all the subsequent motions. I know it was reversed on two or three. By this time there was considerable confusion in the house, and there was a motion made, that the Assembly should adjourn to meet forthwith in the lecture-room of the First Presbyterian Church. This motion was put and carried. The question was reversed, but I think there were 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 should attend and present it at that time and place. I do not remember the reading of a paper, as to the reason of adjournment. Some reason was assigned, as the confusion, or the difficulty of occupying that house. We left the Seventh Church, and moved off to the lecture-room of the church on Washington Square. As soon as we were convened there, or a few minutes after, the roll was called, and we proceeded to business. Dr. Patton then offered 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 given to every member present to vote. The only thing that made it difficult to hear, was the noise at times made in the house. The noise 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, mingled with coughing, scraping, hissing, and hushing, yet not so loud but that Mr. Cleaveland could be heard. Some efforts were made to keep down the noise. Several 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, and there was more hissing there than in any other part. 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. 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 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 counsel for the respondents objecting to the witness being exa-

mined, in regard to the election of the relators as trustees, *Mr. Randall* offered in evidence the Minutes (New-school) of 1838, to prove the election.

P. 650. "*Monday Morning, May 21st.* * * * *

"*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, 199, of the Digest."

P. 654—5. "*Thursday, May 24th.* * * * *

"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 given were 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. McClelland 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. McClelland, 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 by Mr. Hubbell. The vacant space, of which I spoke, is in front of the pulpit, and 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 other but 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 congregation usually pass into the church were open. It is not customary, I believe, in general, for people to pass through the doors from the lobby. The Assembly has met in that church, I think, at least seven or eight times. The persons in the galleries were females. A mixed congregation of males and females, such as is usually found in a church, were seated in the back pews, on the floor of the house. There were clamorous expressions of applause from the galleries, and other parts of the house during our proceedings, especially after Mr. Cleaveland's last motion. 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. McDowell, came into the house after I had entered.

By Mr. Preston. I am not positive whether the Moderator was seated,

when Dr. Patton made his motion, or not. The clerks were in advance of Dr. Elliott, and both he and they continued to occupy the same places, so long as I saw them. The gentlemen who were seated near the pulpit, to the best of my recollection, also remained in their places as long as I saw them. The gentlemen of the Old-school were the majority. I do not know that our proceedings were entirely without the body of the Old-school, but they took place on its circumference. The body 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 Old-school party. The seats of the Moderator and clerks are invariably 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 at the gate of a church in this city. It is not usual for there to be 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 at the gate of the church in Spruce street, and another in the Central Church; but these 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.

Mr. Preston. Did you understand, that the Old-school were taking a part in the proceedings which you have detailed, or that they had entirely segregated themselves, and took no part?

Mr. Randall objected to the witness giving his *understanding* of the matter.

Mr. Hubbell. Such a question though not proper for an examination in chief, is proper for a cross-examination, the object of which is, not to obtain new testimony, but to qualify that already given.

Judge Rogers. The only difference between questions proper for examination in chief, and those proper for cross-examination, is in their form.

Mr. Preston. I wave the question.

Cross-examination continued. The meeting before mentioned, 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. We object to going into the proceedings of this informal meeting.

Mr. Preston. The consultations of that meeting, and the concerted plan of operations formed by the party who held it, have already been given in evidence. I do not wish to establish what is before proved, but to deduce from the testimony a fact, of which we all know very well the existence—that there were in the church in Ranstead Court two separate and distinct bodies, acting independently of each other. But I wave the question, and will try to come at what I want in another way.

Cross-examination continued. 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. I believe they were still in their seats when we left the house. We did not regard them as having any Moderator or clerks.

Mr. Preston. You have said that the votes on the several motions were unanimous, or nearly so: do you mean by this, that all, or nearly all the members present agreed to the resolution, and considered themselves as taking a part in the proceedings, or are you speaking merely of a legal fiction?

Mr. Randall. We object to the question.

Mr. Preston. The word *unanimous* has been used by the witness: now it is well known that there was no unanimity on the occasion of which he speaks. I want to understand what he means by the term he uses.

Mr. Randall. The question calls for not merely the opinion of the witness, but goes one step further, and asks for his opinion as to what were the opinions of others.

The question being waved, the

Cross-examination was continued. 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.

Mr. Randall. We object to all testimony as to that meeting. No part of the evidence given in regard to the informal meetings of either party was brought out in our examination in chief. We have only made inquiry into the fact of the doors being locked, and have not trespassed upon what happened in those meetings.

Mr. Preston. I trust your Honour perceives the object we have in view. A part of the proceedings concerted at the meeting spoken of, were afterwards carried out in the Assembly. Now the witnesses speak of a unanimous vote. They have sworn that the votes on certain proceedings were nearly unanimous. But every gentleman present knows that these proceedings were schismatic, revolutionary, and violent. Then words are not here used in their common signification. The witness misrepresents, and satisfies his conscience by a mere legal fiction. We wish to discover the meaning which the gentleman affixes to his terms. The New-school party was a minority, and the Old-school, during the proceedings alluded to were segregated from them, and did not consider themselves as acting with them. The testimony is not offered for itself; merely to elucidate the meaning of words.

Mr. Wood. The thing may be gotten at appropriately, and by a simple inquiry into facts. It may be shown how many voted and how many did not vote; that when the witness speaks of a majority, he means a majority of those who voted; that some voted in the negative, and that some did not choose to vote. Then it may be shown that these last were the Old-school party. The legal question however will still remain. When a motion is put what is a sufficient majority to decide it? A majority of all who vote? Or must there be a majority of all present? This is a question of law. Who did or did not vote is a question of fact. As to asking for opinions, designs, purposes—it has already been decided that this is improper. The proof of previous concert has nothing to do,

that I can see, with the meaning of the witnesses. The question of design will be discussed hereafter.

Judge Rogers. Such testimony as to previous plans and purposes cannot be admitted; but the witness may be required to explain the meaning of the terms he uses.

Cross-examination continued. I considered the votes on the motions put by Drs. Beman and Fisher, in the Seventh Church, as nearly unanimous.

Mr. Preston. Do you mean by *unanimity*, a mental acquiescence of the members of the Old-school party in your proceedings?

Mr. Randall. I object to the witness being questioned in regard to the minds of the other party, which he could not possibly inspect.

Mr. Preston. I want an explanation of the term *unanimous*—which means, *of one mind.*

Mr. Ingersoll. I would say one word, which I think appropriate here. The witness is asked for the meaning of a term he uses in regard to certain proceedings. My notion of those proceedings is, that, such was the spirit of confusion which prevailed, those who did not vote were taken by storm; found a sudden tempest raised about them; saw and heard something that took place, on their skirts, or border, they knew not exactly what. Now if the term unanimous is left unexplained a very erroneous impression may be produced.

Judge Rogers. I have said that I admit the explanation.

Mr. Randall. Will the counsel please to put the question in writing?

Mr. Preston, (having written his question.) The witness having said that the vote on Dr. Fisher's nomination was unanimous, I ask, "By the use of the word "unanimous" do you mean an intentional acquiescence or approbation of the appointment of Dr. Fisher, as Moderator of the General Assembly of the Presbyterian Church?"

Mr. Randall. I thought there was something about *mental reservation* in the question before.

Mr. Preston. O no! the mental reservations are not on our side.

Mr. Meredith. It seems to me that there is no difference between the question now offered and that first put. It is not proper for either an examination in chief, or a cross-examination. We are here attempting to prove by parol evidence, the proceedings of a certain body; but the question now proposed, leaving what actually took place, goes to the intentions of the members of that body. Is this legal testimony? If instead of parol proof, a minute of the proceedings were offered, could such a cross-examination as this follow? Could we go behind that minute and ask for the opinion of a witness, as to the intentions and opinions of those who acted? What have we to do with their intentions or opinions? How are we to guess what they were? Here, not merely the opinion of the witness is asked for, but his opinion of what were the opinions of others. He has no means of knowing any thing about the matter. It is true that *unanimous*, in a strict sense, means that there is a concert of minds, but as commonly used, it expresses the state of an actual vote only—what is said, and not what is thought. Will you attempt to prove the intention with which a person voted aye, or no? We have been told, and very properly told, by one of the learned counsel, that the exegetical

history of the Assembly is not to be brought into this court. The intention of its members is to be discovered only by their votes, not by an inquiry as to motives and designs. And how much less can it be ascertained from the opinion of the witness? There cannot be any thing more than a mere guess on such a subject. The witness is asked, "Do you believe that the members of the Assembly intended to do what they did?"

Mr. Ingersoll. I beg your pardon! He was asked to explain his use of the word unanimous.

Judge Rogers. The counsel desire only an explanation of the meaning of the witness. I do not see how we can get along without it.

Mr. Meredith. I now perceive a slight difference between this and the question first offered. I have hitherto considered it as an inquiry whether certain persons intended to vote. We make no objection to the witness explaining his use of the word *unanimous.* The question presents two aspects—the meaning of the words used by the witness, and whether the fact was so or so. We do not object to the mere explanation, but the witness must take care that he does not give also his opinion.

Judge Rogers. The witness' opinion is not evidence, but his meaning certainly is.

Mr. Gilbert—the question having been repeated. I use the word 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 did not use the word in reference to the vote on Dr. Fisher, but to that on Dr. Beman. 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 very numerous. I will not venture to say that a majority did vote. I do not know that but 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?

The question was objected to.

Mr. Preston. The witness has already said that there was a previous understanding and concert among the members of the New-school. As they knew at this time that the Old-school had a majority, I wish to know what they had determined to do if voted down. I submit the question to your Honour.

Judge Rogers. I do not think this a proper question.

Re-examined by Mr. Randall. The seats where members usually sit were entirely occupied, when I entered the house. 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.

Re-examination continued. I have never before known a Moderator to refuse to put an appeal from his decision. Our rules are express on this subject. Formerly the old rules of the Assembly were in force, until new ones were adopted. This was so until Mr. Breckinridge came into the Assembly, five years ago. Mr. Breckinridge was the author of the

regulation to re-adopt the rules at every session. The old rules, as I understand it, are in operation till new ones are adopted.

Rev. Dr. Erskine Mason—sworn. I was a commissioner to the General Assembly of 1838, from the Third Presbytery of New York, which is not within the bounds of the exscinded Synods. On the day appointed for the meeting of that Assembly, 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 of the house nearly 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 immediately in front of the pulpit occupied, and could not get nearer than the eighth or ninth pew. I took my seat, and the preliminary religious exercises commenced. At the conclusion of these exercises, Dr. Elliott, the Moderator of the Assembly of 1837, gave notice, that after a benediction had been pronounced, he would come down and proceed to constitute the Assembly. Accordingly he came down and took a seat in front of, and below the pulpit. Then he made 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, saying 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, as the first business was the clerk's report of the roll of the Assembly. 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 the conclusion of their report, the Moderator stated, that if there were any 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, and that the commissioners to whom they belonged were present; that these commissions had been presented to the clerks of the last General Assembly and rejected by them; 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, Genesee, and Western Reserve. At that time the Moderator asked me, 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, Genesee, Geneva, and 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 appeal was declared out of order, 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, therefore he moved, that Dr. N. S. S. Beman take the chair.

This motion was seconded, and 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 dont 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 one else. 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 place and time to which the Assembly had adjourned. Then the Assembly came to order in the lecture-room of the church on Washington Square, and Dr. Patton offered the resolutions which he had 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 exscinded 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 arose 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 on the floor, but these ceased before he had concluded. There was very little noise when Mr. Squier was on the floor. 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 audable 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 ample 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. I will examine Dr. Mason hereafter, in regard to some other points, not immediately connected with the organization of the Assembly of 1838.

Cross-examined by Mr. Preston. 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, and had no pen or ink, but I had paper and a pencil. I had in my hand the commissions which I had tendered to the Moderator, and another paper containing the roll of the members of the General Assembly, including the names of those commissioners 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 of the members from the Western Synods. I, in connection with Mr. Gilbert, had made out this roll on the floor of the house, 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. I had the names on paper, and I considered that putting them on the roll was my first act. I had really so far put them on the roll, that if it had been necessary to call it, I should have called all the names. That consideration was my first official act.

Mr. Preston. Were any other of the acts which you have detailed mere considerations?

Dr. Mason. 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 exscinded 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 1838. 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—a 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. So then, if but two voted in the affirmative, and only one in the negative, a motion would be carried. I have no means of 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 till 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, voted in the affirmative. This is one reason of my conclusion in regard to the majority.

Court adjourned.

MONDAY MORNING, March 11th—10 o'clock.

Dr. Mason—cross-examination by Mr. Preston continued. I cannot say, certainly, whether the roll made up in the church in Ranstead Court was written by myself. I had made out one, as far I could, before the house met; and one was furnished by another person. I had 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 more than two. It was well known, beforehand, who would be the commissioners: 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 all the commissions which we had, at first. 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 person 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.

Mr. Preston. Did you make your appeal to the Assembly, or to the gentlemen present in the house?

Dr. Mason. I made it to all the persons present who had commissions; them I considered members of the Assembly of 1838.

Mr. Preston. Did you make it to an organized Assembly, or to disorderly individuals?

Dr. Mason. That question asks for my opinion merely.

Mr. Preston. I do not wish to enter into a colloquy with the witness; I will explain the question to the Court. One great difficulty under which we labor, is the use of technical terms, which may be understood in one sense by the witness, and in another by the jury. He has spoken of an appeal—an appeal from the decision of the Moderator. We want to get at his intendment—to find out the tribunal to which he appealed.

Dr. Mason. I intended to appeal from the Moderator to all the persons who had commissions, whom I considered members of the Assembly.

Mr. Preston. Do you consider it the legitimate practice, to appeal from a constitutional Moderator to an unconstitutional Assembly?

This question was objected to.

Mr. Preston. I will modify it so as to bring it within the rule. Has it been the practice to appeal from a constitutional Moderator to an unconstitutional Assembly?

Dr. Mason. 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.

Mr. Preston. Over what body was the Moderator presiding?

Dr. Mason. Our constitution will tell you, that he 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.

Mr. Preston. When the temporary Moderator had been chosen, what was the form of his induction into office?

Dr. Mason. Dr. Beman, when called upon, stepped out of the pew in which he had been sitting, and took his place in the middle aisle.

Mr. Preston. Well, what was the form of Dr. Beman's abdication, and of his induction of Dr. Fisher into office?

Mr. Mason. Dr. Beman declared Dr. Fisher elected. I cannot recollect whether Dr. Fisher was standing on the seat. The distance between them was not very 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. All these things were transacted as rapidly as they conveniently could be. I cannot say what Dr. Elliott was doing during this time. After Mr. Cleaveland's resolution, I did not pay particular attention to him. I don't know whether he retained his seat or not; or whether he used the hammer, or called us to order. I cannot say whether 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 Moderator or clerks. I do not know that any proceedings were, during this time, conducted by the Moderator or clerks. I didn't hear any thing going on in that quarter. I 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 several persons who did not appear till some days afterwards; but they were all on the roll reported by the clerks of 1837. Such was the case I recollect in regard to Mr. Boynton, an elder from the Synod of Albany. I do not recollect whether Mr. Martin and Mr. Fabrigue, from Salem Presbytery, appeared at the opening of the Assembly. I don't remember at what time Mr. Glover, or Mr. Stewart, from Charleston Union Presbytery, appeared. I recollect only the case I have mentioned; but I 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 immediately 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 all those. My opinion is that a majority of all on the full roll did not take seats with us.

By Mr. Hubbell. I used to belong to the Synod of Albany, and therefore Mr. Boynton's name was impressed upon my memory.

By Mr. Preston. I don't recollect whether Dr. Green's name was on our roll. He did not sit with us, nor did Mr. Robert J. Breckinridge. The case which I have 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 had retired from that place. I went once afterwards to the house, but the Assembly had adjourned. The gentleman who had been Moderator next before Dr. Elliott was, I think, Dr. Phillips. I do not know whether he was present. To the best of my recollection, the one next before him was Dr. Wm. A. McDowell, 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 in either 1835, or 1836. Each of those whom I have mentioned has held that office since Dr. Beman.

By Mr. Hubbell. Mr. Boynton's name was read by the clerks of 1837, and in this way I know that we had it enrolled. I saw afterwards their printed roll: Mr. Boynton's name was not there. I do not recollect whether the names of Mr. S. Glover and Mr. R. L. Stewart, elders from Charleston Union Presbytery, were on our roll. (The Minutes (New-school) of 1838 being put in his hand—p. 645.) They *are* on the list. They did not attend our Assembly. I don't know how I got their names, unless as I got the others—from the publications of the day. I do not recollect from which Presbytery Mr. Boyton came—I think it was either Londonderry or Newburyport. Messrs. Glover and Stewart never answered to their names, and did not present any commissions. I had nothing to do with taking names off of the roll after the Assembly was organized. I *had* something to do with the preparation of the minutes for publication. I did not know that there were any such names on the roll. 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. Wm. W. Martin, and Mr. Henry L. Fabrigue, from Salem Presbytery, Synod of Indiana, were on our roll; I don't know whether their names were on Mr Krebs'. I don't remember examining the commissions of either. Originally their names had been published in the paper. We had no authority to put down any but those on Mr. Krebs' roll. I can't say whether I took them from that; but, if not, I 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 commmission of the Rev. Samuel W. Brace. He was from the Presbytery of Cayuga: I recollect that 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 being allowed to give evidence of his appointment, he was admitted. Mr. Jotham Goodell I do not remember. To the best of my recollection, we had the commission of Dr. John H. Haynes; he was an elder from the Presbytery of Troy. I cannot say whether Dr. Witherspoon was present in the church in Ranstead Court: I don't know him. I do not recollect that inquiry was made, whether any person that had been Moderator subsequently to Dr. Beman was present. I do not recollect whether we called the names of Dr. Witherspoon and Dr. Phillips on our roll. They both were on it. They did not present their commissions to us, I don't remember whether I took their names from Mr. Krebs' roll.

By Mr. Ingersoll. I recollect that the sexton of the First Presbyterian Church was at the other house, and that when we adjourned, he ran off before us. I saw him going before us.

Mr. Wood. What complaints were made, in the Assembly of 1837, in regard to irregularities in the Synods of New Jersey and Albany?

Mr. Hubbell. We object to the question.

Mr. Wood. I will change it. Were there any Congregational churches in those Synods?

Mr. Hubbell. We still object.

Mr. Randall. Please to state your objection to the court.

Mr. Hubbell. The testimony offered is entirely foreign to the matter in hand, and it is peculiarly improper that it should be brought out in the re-examination of the witness.

Mr. Wood. I offer in evidence the minutes of 1837, page 496.

"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."

Now I want this matter explained.

Judge Rogers. What is the pertinency of this evidence, Mr. Wood?

Mr. Wood. The Assembly of 1837 abrogated the "Plan of Union," and cut off four Synods; and they based these acts on the idea of there being a necessity for them, because of the irregular admission of Congregationalists into the Church. We insist, that they might have cut off Congregational, without cutting off any Presbyterian churches, and that they did this very thing in the Synods of New Jersey and Albany.

Mr. Hubbell. This inquiry is entirely foreign to the case: it has no bearing upon the organization of the Assembly of 1838. It is not offensive, but improper. We shall have enough to do in disposing of all the matters that legitimately belong to the case, without going into those foreign to it. We object to the testimony as irrelevant.

Mr. Wood. I presume that the court and jury by this time see clearly the true point at issue, and that it is totally impossible to understand the proceedings of 1838, unless we go back to those of 1837. I am not surprised that the counsel for the defendants wish to shut their eyes upon this subject. They may talk of a little matter of irregularity, or of a little noise and confusion; of this seat, or that seat; of this hammer, or that cane; but all these are trifles light as air. The great point in this case is the exscinding resolutions of 1837, the operation of which the Old-school party attempted to infuse into the Assembly of 1838, by means of the pledges exacted from the clerks. This is the true point; but it presents a question in regard to resolutions of which the opposite party are now ashamed. Had they a right to carry out the void acts of the Assembly of 1837, in the organization of the Assembly of 1838? Here was the ground on which we displaced the Moderator and clerks. They were acting out the illegal proceedings of 1837: they were attempting to organize an unlawful Assembly. There is a principle of law, respecting all collective bodies whether they are corporations themselves, or like the General Assembly, supply or feed corporate bodies, and are therefore *quasi* corporate—a principle which is well settled. It is this: No Assembly can be lawfully constituted without the admission of all entitled to seats, or without giving to all an opportunity to come in. On this occasion, the Old-school party, under the Moderator and clerks of 1837, were about to organize the General Assembly, without admitting the representatives of near fifty thousand Presbyterians. Here is the great

point, and to this we want to bring our opponents. We mean to show that this was the ground of our displacing that Moderator and those clerks, appointing new ones, and proceeding to organize the body in a lawful manner, by bringing within its pale every member, both New and Old-school. It is all important to inquire into the character of the exscinding resolutions: they are like the baseless fabric of a vision. It is alleged that the mixture of Congregationalism, which it is said was found in the four Western Synods, was the reason of their being cut off. But why not take the same order in regard to these, which they did in regard to the Synods of Albany and New Jersey? We now desire to show that they knew full well they could do this. They did not, however, attempt it, but at one fell swoop, pounced on older Presbyteries, merely because they were alleged to contain a few Congregational churches. There were churches of the same kind, I say, in the Synods of Albany and New Jersey, but for some reason, those Synods did not share the fate of the others. We therefore wish to show that the Assembly did take order in regard to the former, for the very same cause for which they cut off the latter. If we show this we leave the Old-school party without the colour of a pretence for cutting off these Synods without trial or accusation.

Mr. Randall. Your Honour will recollect the course of examination pursued by the counsel on the other side, in the case of Mr. Squier. Out of the regular order of proceedings, they inquired into the fact, whether there were any Congregational churches in the four Synods. We, then, have a right to consider this as matter of defence—that these persons were cut off without hearing, because they lived in an infected district.

Judge Rogers. The reasons given for the act on the minutes, are different from those that the counsel assign. I don't know which ground the defendants will take.

Mr. Randall. This inquiry has been entered into before. We want to show that the mother Synod of Albany was as obnoxious to the charges on which the exscinding acts were founded, as its offspring; and that if the Assembly had been at all consistent, it would have excluded the Synod of Albany, the mother of the Synod of the Western Reserve, and the Synod of Michigan, the child of the latter. Nay, the friends of Mr. Preston, in Charleston, ought to have been included, for there too there are Independent churches, which are as obnoxious as Congregational ones, mingled with the Presbyterian churches. Now the ground taken by the Old-school is untenable, unless their acts be carried out to their legitimate extent. As they have not been thus carried out, they must be considered as an arbitrary and capricious discrimination, made with an ulterior, a covert design. If the Assembly stated the true cause, it ought to have been consistent in its acts. This point is directly germane to the evidence already given. It might, perhaps, more legitimately, have been reserved for the defence; but as the opposite counsel have introduced it, as they have extracted evidence on this subject from Mr. Squier, we certainly may pursue the course thus opened. It is undoubtedly very strange, that a Presbyterian minister should be excluded, because he happens to live within the bounds of a Synod containing a few Congregational churches. Not because any one of all these five hundred and ninty-nine clergymen is not a Presbyterian: such an allegation has been avoided. Not because any one of them is a heretic; but, living within bounds in

which there are Congregational churches, they are *ipso facto* disrobed. Though born in the Presbyterian Church; though many of them fathers of that church, you send them all off into the world; you tell them, "We do not know you, you are not within the fold." Can any testimony be more german to the issue? The Old-school have chosen to adopt this ground: we propose to try who has a right to maintain it. The reasons alleged for the acts of excision are a mere pretext—I say it with respect—or they would have followed up those acts consistently. With a high hand they have made arbitrary stretches of power, but whenever the rays of truth shine upon their acts, must appear their flagrant enormity.

Mr. Sergeant. It is the most natural thing in the world, that each party should look at their own side with affectionate interest, and conceive all sorts of strange notions in regard to their adversaries. It is natural that each party should endeavour to pry into the designs and impugn the motives of the other; to give their opponents a bad name. This course, however, we have not adopted. So far as my observation has gone, not a single hard word has been said by any one of my colleagues, but I am sorry to say, that there has not been the same abstinence exercised towards us. By the opposite counsel, hard words have been used, and unwarrantable motives imputed, not only to-day, but in every stage of the proceeding. To all this we answer, we are before a court and jury, with a fit case to be decided by them; that as to our own conduct, it is for ourselves to decide, and that we are not to be instructed on this point by others. The counsel may consider a question very trifling which is really of great pith and importance, and they may do so sincerely. Or they may attempt to ridicule and belittle questions which are greatly embarassing them, in order that they may escape into others of more easy management. They impute to us a design to keep out the light. Let me tell both these gentlemen, that we stand here upon our rights, and that no imputation whatever, from any quarter, shall drive us from this ground. If we consider any point material we will endeavour to make it appear so; and what is not deemed material we shall try to exclude. We will not allow all the questions in the world to be drawn into this case: we have enough to do without them. There are some questions which are here called little, and some called great. Why, may it please your Honour, in this scuffling world, any question may be little or may be great, according to circumstances; and one may be just as great as another. Certainly any ground on which a right stands, is strong enough to support that right. The other party have had full license to bring up this case for the consideration of the court, as they have thought best. We have not interfered in their plans, and if now they find themselves straightened in the issue which they have chosen, it is not our fault. If they please, they may even yet stop and begin again. What is the issue which has been selected by the learned counsel on the other side? My colleague has already correctly stated it, and whether the question presented be a little or a great one, it is certainly their own question. They say that the body which met in the First Presbyterian Church, in 1838, was the true General Assembly; that, as such, that body was authorized to elect a certain number of new trustees, which they are said to have done, thereby vacating the seats of the same number of the former trustees; and they now call upon the court to expel the latter from their places. Is

not here the issue? They say that they are the true General Assembly. This we deny. Now they want to go back and inquire, why we exscinded certain portions of the Church, and not content with even this, to inquire why we did not exscind certain other portions. In what part of the argument have the counsel shown the bearing of this testimony upon the issue? How does it make them the General Assembly, and give them the power of electing new trustees, and vacating the seats of the old ones? It has not the least bearing or effect. It is only leading your Honour and this jury into an investigation, the limits of which it would be hard to define, but which would make it necessary for you to assume the powers of the General Assembly itself. How will such evidence contribute to establish the legality of their organization? It is foreign to the subject, unless it can show that their Assembly sprung forth, though a child of confusion, still a full-grown and healthy child, able to destroy its own parent. I shall not undertake to express any opinion as to the proceedings of our opponents. I will not ascribe to them fraudulent designs: still less say that they are ashamed, which they have perhaps no more reason to be than we have: still less that the counsel now desire to form a new issue. The true question here, and that which must be broken off and separated from every other is, which body was the true Assembly. This is the sole issue. There may be a great deal even in the little hammer: perhaps it is not without real weight. The place of organization may be of considerable import. There may be a great many different things going to show that the body which met in the First Presbyterian Church was not the General Assembly. We not only object to the testimony offered, but think it very extraordinary. There was no objection made in the Assembly of 1838, to receiving the commissioners from these Synods. There was to be sure an admonition given by the Assembly of 1837, that the Synods of Albany and New Jersey should guard against any infusion of Congregationalism; or that they should get rid of such an infusion. That was all. On any and all these grounds, we contend that this testimony has no relation to the issue; and we say that if admitted, it will lead into an interminable investigation.

Judge Rogers. I think this inquiry is foreign to the subject. We must determine the legality of the Assembly's proceedings as to the exscinded Synods, not whether they were impartial.

Dr. Mason—re-examined by Mr. Wood. By the direction of the Assembly of 1838, I went to Dr. McDowell, and demanded from him the books and papers of the Assembly, and the commissions that were in his possession. He declined altogether to give me any paper. Mr. Cleaveland, as a 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.

By Mr. Randall. This commission (a paper having been handed to him,) is the one that Mr. Squier presented. Mr. Boynton I never saw on the ground during the meeting of the Assembly. Mr. Krebs' roll might have contained the name, though it did not appear on the printed roll.

Mr. Hubbell. Could a name have been properly put on Mr. Krebs' roll, without the commissioner being present?

Dr. Mason. Sometimes the names of all the delegates from a Presbytery are in 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-examined by Mr. Ingersoll. There was no written communication made to Dr. McDowell, 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. We will now call on Mr. Krebs, for the original roll of the Assembly of 1838.

Mr. Krebs. It is in the hands of Dr. McDowell.

(The roll was sent for.)

Mr. Randall. While we are waiting for the roll, I will read in evidence a portion of the minutes of 1837, page 411.

Mr. Preston. I should like to know whether the whole of those minutes are not in evidence. Unless they are, I object to the reading of extracts.

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.

Mr. Randall then read as follows:

"The General Assembly of the Presbyterian Church, in theUnited 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 division 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 4 o'clock.

"At 4 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."

(Here follows the roll.)

Form of Government, Chap. XII. Sect. 7.—"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.

Appendix to Constitution—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."

Mr. Gilbert recalled by Mr. Randall. The appearance of the names of Messrs. Martin and Fabrigue, on the printed roll, was an error of the printing committee. These names were not on the previous record; but the committee took a wrong roll.

Cross-examined by Mr. Preston. The roll which I used was originally taken from that of Mr. Krebs, and was amended, by the addition of the names, from commissions afterwards handed in. I took down the roll as he read it, 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 had 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. I made the corrections as well as I could. I had not the commissions of all the members; but probably about a third part 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 exscinded Presbyteries, and a great 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 at the time: I was clerk of the consultative meeting.

Mr. Preston. Was it as clerk of the meeting for consultation, that you saw those commissions?

Mr. Randall. We object to the witness going into that meeting for consultation.

Judge Rogers. I do not think it a proper question.

Mr. Preston. The witness uses terms in a double sense, and I wish him to explain his meaning. He says that these commissions were presented to him, and that he was acting at the time in an official capacity. We wish to show, that they were not submitted to him as clerk of the General Assembly.

Mr. Gilbert. 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.

Mr. Wood objected to the witness speaking farther of this matter.

Cross-examination continued. 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 session-room of the First Presbyterian Church, in the hands of the members. This view of them was 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—speaking here of the Old-school as 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 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 it, interspersing it with remarks, by way of apology 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 which Mr. Cleaveland held, and from which he read.

By Mr. Hubbell. 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-sheet, and cannot say from what they printed. I furnished them with a 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 then discovered and corrected. I do not know, that there is any necessity for inserting the roll on the minutes, but 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 probably 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, and had not heard them answer. 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' 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 at the time 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. Please to look at the remarks of Mr. Cleaveland, as they are recorded in the minutes, and read them aloud.

Mr. Gilbert, reading—

"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 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 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."

Mr. Cleaveland did not address the Moderator when he made these remarks: 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 understood him to read the whole of the paper. This is the paper, in substance. It contains every main idea of his speech, so far as I recollect.

Cross-examined by Mr. Hubbell. It is usual, in difficult cases, to appoint a committee to prepare a minute. This was done in the present instance; the committee reported the minute, and it was adopted.

Rev. Dr. Samuel Fisher—sworn. I was a member of the Assembly of 1838, from the Presbytery of Newark, Synod of New Jersey. I attended the meeting, on the third Thursday in May, in the Seventh Presbyterian Church. I went about half past ten o'clock, (I am not quite positive as to the time,) handed in my commission to Dr. McDowell, 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, 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 concluded his discourse and then 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 he was very desirous to present them at that time. The Moderator told him, he was out of order, and, the second time, 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; and, I think, told the clerk to go on, or said that the next business was the report upon the roll, or something to that effect. Dr. Patton said that his resolutions had reference to that very object. Dr. Elliott told him, that he was out of order; that the clerks had the floor. Dr. Patton said, that he had had the floor before the clerks. The Moderator told him, he was out of order, and he then sat down.

The clerk having finished the roll, and stated that there had been some informal commissions presented, a Committee of Elections (I think it was at this time,) was appointed. Dr. Mason then rose, and presented a resolution to the effect, that the names of the commissioners from the four Synods of Utica, Geneva, Genesee, and Western Reserve, should be added to the roll, saying 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 of 1837. Dr. Mason replied, that they were within the bounds of the four Synods mentioned, naming them 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, the Rev. Miles P. Squier rose, on the opposite side of the aisle, and held up a commission, which he said he had received from the Presbytery of Geneva. He said, that it had been presented to the clerks, but that they had refused him his seat. 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 Mo-

derator 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 from the paper. I sat in the next pew to him, and had seen the paper before. He prefaced his remarks 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 it must be organized at that time, and in that place, therefore he moved that Dr. Beman should be Moderator 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, to about the distance of twenty-five or thirty feet 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 estimated a large majority. I rose up—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 that the Assembly shold adopt. After this, I took the station which he had left, saying, 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 favor will say, aye;" then, "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 house, and heard all that passed. I have detailed the facts as correctly as possible. I mean by a majority, what is usually called so, in our ecclesiastical judicatories. There, when a question is put, and 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, then 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 same quarter. The resolutions were offered in an audible voice, and 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 partly 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-examined by Mr. Preston. I had never previously been Moderator. I don't recollect that, at the time, I saw Dr. Witherspoon present. I did see Dr. Philips. Dr. Beman had been Moderator—I cannot state in what year—probably about 1831. Dr. Witherspoon afterwards appeared 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 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.) His face was towards me when he announced my election. When he called for nominations, he addressed the preliminary meeting, to which he stood in a quartering way. The mass of the New-school brethren were north of me, on both sides of the aisle. Dr. Beman sat near the front of them, and not in their centre. The largest portion 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 had been 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 the Moderator, 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. First he 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. I did not take mine there, because a paper was put into my hands, signed by the President of the Board of Trustees of the Church, giving permission for the house to be occupied by the Assembly organized under the Moderator and clerks of 1837, but by no other. No disturbance was wished, and I feared that an attempt to take the Moderator's chair might create an improper disturbance. I did not know but that the trustees had placed men there, to prevent my taking the seat. It is usual to take that seat in organizing the Assembly, but I don't know, whether it would not have been a greater violation of order to attempt to take 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 Moderator's chair. 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 the chair. I took the station that I did, in order that there might be no interruption in organizing the Assembly. We could thus do it more speedily, and with less disturbance. My reasons were prudential ones. I thought that Dr. Elliott would not resign the chair, although he is a very polite man.

Something was going on in the other part of the church, during these proceedings, and there 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, there was a very great noise. Some one said to the Moderator, "Why don't you put him down?" and there was a great stamping and scraping. After the motion appointing Dr. Beman Moderator was put, there was apparently a calm. The brethren of the Old-school looked on in a kind of silent astonishment. There was no further outbreaking of noise, until notice of the adjournment was given, 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. 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 of all classes that were present, before we left Philadelphia, whose names were upon our roll, was about two hundred and eighty. I did not say the New-school roll, but the roll of the Assembly. Most of these were present at the first meeting, but we received some afterwards. I should think more than one hundred 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 than this 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 up 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 attainment of our purpose. 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 to the First Presbyterian Church. Some time afterwards we had about one hundred and thirty—perhaps a few more or less: I am not positive.

Mr. Preston. Was your election entirely unexpected?

Mr. Meredith. Every ecclesiastical preferment is entirely unexpected and undesired.

Mr. Preston. I should be glad if the witness instead of the counsel would tell me so.

The question was overruled.

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?"

This question was objected to, but admitted by the court.

Dr. Fisher. 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 out 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 country, 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. There was, at all times a constitutional quorum present in our Assembly. Nineteen, I believe, is the number required to form a quorum. (Some one mentioning that the number required was fourteen,) I thought that it had been changed to nineteen.

Court adjourned till four o'clock.

MONDAY AFTERNOON—4 o'clock.

Dr. Fisher.—Cross-examination continued by Mr. Preston. 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. 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 proceed to 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 of those who had been on the floor being present. 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, 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.

Re-examined by Mr. Randall. 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 came 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 then was a member of it. 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—sworn. I am a minister of the Presbyterian Church, and pastor of a church in Fourth street, between Arch and Market, where we are worshiping temporarily in the Academy. I attended the Assembly of 1838. I went to the place where it was to meet, the Seventh Presbyterian church, or the Tabernacle—I can't say precisely at what time, but not very long before the meeting. The house was then well filled, 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 usual services, the Moderator announced, that immediately after the benediction, he would constitute the Assembly, and accordingly he came down and constituted it with prayer. After he had thus constituted it, 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, only 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. He appealed, but 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 that 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. Then Mr. Cleaveland rose, and after some remarks, the purport of which I don't know, made an 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 motion 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, there was a motion 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 there, 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 presumption at the time 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.

Mr. Randall read from the Minutes of 1835—first from page 22, the record of a motion carried by a vote of *yeas* 130, and *nays* 78; and then from page 32, the record of a motion carried, by *yeas* 76, and *nays* 15, to show that resolutions were sometimes adopted, without a majority of the members of the Assembly being present and voting.

Mr. Adair—examination 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 from him. 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 at the time was, that the negatives 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-examined by Mr. Ingersoll. I came out of the church with the body of my friends. They left the pews which they had occupied, 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 any 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.

Mr. Ingersoll. What could have manifested Dr. Mason's acquiescence in the Moderator's decision, more clearly than 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 that the Moderator should take a drink of water; and he had decided the motion out of order, and also an appeal from that decision out of order, what would have happened 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. In our movement from the house, there was a confusion and uproar in the galleries, but nothing 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 before-hand, when I entered the First Presbyterian Church.

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. 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 sound was much smaller than the other. I was the distance of 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 commissioners 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 a 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 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. May not an appeal, under some circumstances, be out of order?

Mr. Adair. I think it may.

Mr. S. Whose business then is it to declare it out of order?

Mr. A. I have no experience in reference to that matter.

Mr. S. Suppose an appeal out of order, does it not belong to the Moderator to declare it so?

Mr. A. 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?

Mr. A. The house will decide: they will say the appeal is out of order; but I have gone 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?

Mr. A. No, Sir: the house must decide.

Mr. S. Do you mean to say that the General Assembly is different from all other deliberative bodies?

Mr. A. We have certain rules, but 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—how then?

Mr. A. 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?

Mr. A. Our books make an appeal always in order.

Mr. S. Is there nothing said as to the proper time and place?

Mr. A. I do not know.

Mr. Preston. If a Moderator decides an appeal out of order, who is to determine the propriety of his decision?

Mr. A. 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?

Mr. A. 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?

Mr. A. 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?

Mr. A. 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. Here is No. 29 of the "General Rules for Judicatories." Please to read it.

Mr. A.—reading—

"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."

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 usage giving a clerk a right to put a question; I only supposed such a case.

Cross-examined 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 an instance to the contrary, until 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 a 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.

Mr. Randall offered the minutes of 1837, p. 498.

"Resolved, That calling the roll previously to dissolving the Assembly be dispensed with."

Mr. Archibald McElroy—affirmed. I am connected with the press, as reporter for the United States Gazette. I did not attend at the Church in Ranstead Court very early, on the morning of the organization of the Assembly of 1838. When I went in, the Moderator had nearly finished his discourse. I took a seat, and waited until he was done. He announced that he would descend and constitute the Assembly, which he did, by prayer. After the prayer, Dr. Patton rose, and requested permission to offer a paper which he held in his hand. The Moderator told him that he was out of order; that the first business was the report of the clerks upon the roll. He appealed, and the Moderator declared the appeal out of order. Dr. Patton then took his seat. The clerk reported the roll, which, as I afterwards ascertained, had upon it upwards of two hundred names. The Moderator then said, that if there were any commissions which had not been presented to the clerks, then was the time to present them. Dr. Mason rose, holding in his hand certain commissions, which he attempted to offer. The Moderator asked the question, where they were from. He answered, from the Synods of Utica, Geneva, Genesee, and the Western Reserve. The Moderator decided that he was out of order, and also that an appeal which he took, was out of order. Dr. Mason, in the meantime, had made some remarks which I don't recollect. Mr. Squier then rose and said that his commission had been presented to the clerks and rejected, 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. The conversation I did not understand. Mr. Cleaveland rose, with a paper in his hand, that related to the organization of the Assembly. What I heard was the same that has been given in evidence by others. He moved that a Moderator should be chosen, and that Dr. Beman should take the chair. Dr. Beman

accordingly took the chair. He then stated that the next business was the nomination of clerks. This was gone through with in the regular way, and Dr. Mason and Mr. Gilbert were chosen clerks. Afterwards he said, that the next business was the election of a Moderator, but I did not hear him call for nominations. This was gone through with, also, in the regular way, and Dr. Fisher was elected Moderator. After that election, Stated and Permanent Clerks were chosen, and after this, Dr. Fisher announced that the Assembly had adjourned to the First Presbyterian Church. During the time that these motions were made, there was considerable noise and confusion. I was in the east aisle, about half way up; I went in at the north door. I don't know what was Dr. Beman's position before he rose, or until he had taken his place in the aisle; I was to the north of him. I moved across the aisle, and took my stand on the seat of one of the pews. I did not see Dr. Beman; his friends were between him and me. I came into the house after the sermon had commenced.

I heard some of the questions reversed: I cannot say which. I thought there were noes on some of them. I don't recollect whether they were all reversed, but I have a distinct impression that they were, and that I heard nays. I cannot say from what part of the house these negatives came. I could hear the question put very distinctly. Dr. Patton was about half way up the church, and I six or eight pews lower down. I was to the east of him. I first stood in the east aisle; then on the seat of a pew west of this aisle. Dr. Patton was south-west of me, in a diagonal direction. My position in regard to the others was about the same; Mr. Cleaveland, however, was a little farther off. The noise never prevented me from knowing what was going on. The noise consisted of the Moderator's calling to order, and rapping with his hammer; and a request was made by some gentleman, who rose, that he would let them go on. After Mr. Cleaveland had finished his paper, or his remarks, and Dr. Beman had been chosen Moderator, some gentleman rose and said, "Oh, let them proceed." The Moderator then sat down. This gentleman was in the south-west quarter of the house. I did not see him, but I knew his voice. It was Mr. Breckinridge of Baltimore. This stopped the hammer. After his interposition, the Moderator was quiet, and the hammer too.

Cross-examined by Mr. Hubbell. I am a member of the Franklin-street Church—Mr. Adair's. Franklin-street is west of Franklin Square. We are now worshipping in the Academy. I arrived at the Seventh Church near the conclusion of the sermon—probably about twelve o'clock. I remained about ten minutes at that church, after the others had gone, and did not, at that time, go to the First Presbyterian Church. I attended to take notes of the proceedings. I attended the two bodies, at each church, every day, to take notes. I did not hear a mingling of ayes and noes, upon any of the questions. Some of those who were immediately around me, when I was listening to Mr. Cleaveland, were members, and some were spectators. On my left they were principally members, and on my right, spectators; the most of them ladies. None of the spectators, that I heard, joined in the voting. I did not join my voice to those of the members. I think I may safely say, that none whom I knew to be spectators voted. I do not know that all who voted were members.

I saw among the spectators a number of persons, with whom I was acquainted, but I cannot mention any of them now. All were seated when I went into the church, with a very few exceptions. After the proceedings commenced, some rose in my neighborhood. I was not seated at all. I stood up on the seat of one of the pews, that I might see. When I took my place on the seat, I think either Dr. Patton or Dr. Mason was reading. There were three or four other persons standing on the seat of the pew in which I was. This was after I had altered my position. I altered it that I might see and hear better. Dr. Beman when he took the chair, in the aisle, was, it may be, ten or fifteen feet from me. I did not take particular notice of the distance. Mr. Cleaveland moved that Dr. Beman should take the chair. When he made that motion, I did not see him; there were persons standing between him and me. He was farther off from me than any of the others. He, I think, was not standing on the seat, when he made his motion. I think all the persons between Mr. Cleaveland and myself, were on their feet. There may have been fifty or a hundred between us. Some were standing on the seats and some were not. I do not recollect that I took any pains to look at Mr. Cleaveland. I frequently write, listen, and talk at the same time, but I was not writing or talking, at the time of the transaction of which I speak. I got upon the seat to see and hear, but took no special pains to see. I should have been obliged to have gone very near Mr. Cleaveland, or to have asked some of those who were standing between us to sit down, in order to have seen him. I can't say whether those standing on the seats were spectators or members, or whether they had their hats on or off. Those immediately engaged in the organization, Dr. Beman, Dr. Fisher, and the clerks, were all standing on the floor.

Rev. Amasa Converse—sworn. I am a minister of the Presbyterian Church from Virginia. I was present at the organization of the Assembly of 1838. I went to the church in Ranstead Court, on the third Thursday of May, between the hours of nine and ten o'clock, and found there a body, which, at that time, appeared to have a recess. I then left the house, in company with Mr. Dickinson. I returned to it before the sermon was preached, and found that part of the house around the Moderator's chair, densely occupied. I then went up into the gallery, but on reaching it, found that also densely occupied, by ladies and gentlemen. I therefore went back, and found a seat under the gallery north of the door. After the sermon was closed, Dr. Elliott announced that he would proceed to organize the Assembly, and he came down to the front of the pulpit, and made a prayer. The prayer being over, Dr. Patton 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 told him he was out of order, and Dr. Patton then 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 person 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 he moved that the roll should be amended, by the addition of the names from them. The Moderator pronounced him out of order, and there were cries of order from six or

twelve voices round the Moderator. Dr. Mason said, "With great respect, I appeal," but Dr. Elliott told him the appeal was out of order, and he took his seat. Then the Rev. Mr. Squier, from the Presbytery of Geneva, rising, demanded his seat in the house. The Moderater 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. The Rev. Mr. Cleaveland next rose, and stated in substance, that it was impossible to proceed, but that an assembly must be constitutionally organized at that time and place. He held a paper in his hand, but made some remarks without reading. He then moved that Dr. Beman should be Moderator, until a new one was elected, in order to proceed with the organization. This motion was put, and carried by a large majority. 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 a 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 seconded, 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. The Assembly adjourned, and I think about one half of those, who had occupied the seats where the delegates sat, left the house. I next saw those who retired, at the church on Washington Square. I did not go there immediately with them.

Cross-examined by Mr. Hubbell.—I went to the church in Ranstead Court, to hear the sermon, and see my friends. I went, at 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 stayed perhaps for ten or fifteen minutes, after the adjournment of the New-school party 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. I heard some remark, but what it was, or from whom it came, I cannot say. I am a Presbyterian clergyman. 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; I rose when other spectators were rising around me. 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 my neighbourhood. I think I could see Dr. Beman after he took his seat in the imaginary chair, but don't remember distinctly. 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 recognised as commissioners, but I do not undertake to say that I recognised every commissioner in the house. I don't know whether the spectators generally went away with the retiring body. A good 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 exscinding measures, but not on the Old-school party. I have both written and spoken my opinion, in regard to the proceedings which are now the subject of litigation.

Court adjourned.

TUESDAY MORNING, March 12th.—10 o'clock.

Mr. Charles H. Dingee—affirmed. I attended the General Assembly of 1838, in Ranstead Court, at its opening, as a spectator. I went to the church near twelve o'clock. I stood all the time, in the north gallery of the church, in front of the organ, in the centre of the house, as regards east and west. After the religious services, the Assembly was constituted with prayer as usual. First after this preliminary, Dr. Patton arose, and wished to offer a preamble and resolutions. The Moderator told him he was out of order. I heard this distinctly. He refused to put them, or allow them to be read. Dr. Patton remarked, that the paper in his hand, or the resolutions which he wished to offer, related to the formation of the roll. The Moderator declared they were out of order, as the next business was the report of the clerks on the roll. Dr. Patton appealed from the decision of the Moderator; that appeal was seconded, but the Moderator declared it out of order, and refused to put it; he said that the clerks had the floor. Dr. Patton reminded the Moderator that he had the floor previously to the clerks. The roll was then read by one of the clerks—I think by Mr. Krebs. After the reading of the roll, the Rev. Dr. Mason of New York, moved, that the names of the commissioners from within the bounds of the Synods of Utica, Geneva, Genesee, and the Western Reserve, should be admitted to the roll, and at the same time, he tendered their commissions. This motion was also declared to be out of order. Dr. Mason appealed from the decision of the Moderator, and his appeal was seconded. The Moderator then announced, that if there were any of the commissioners present, who had not yet presented their commissions, then was the proper time to present them. The Rev. Mr. Squier rose, and informed the Moderator, that he had tendered his commission to the clerks, and they had refused it, and he demanded that his name should be put on the roll. Mr. Squier was asked whether he belonged, I think, to the Presbytery of Geneva, and also whether that Presbytery was within the bounds of the Synod of Ge-

neva. He answered in the affirmative. The Moderator informed him, "We do not know you." Then Mr. Cleaveland of Detroit rose, and said, that, as the Moderator and clerks had refused to do their duty, it became necessary that then and there the Assembly should be organized; and that this advice had been given by counsel learned in the law. He informed the Moderator, that without intending any discourtesy to him, with the fewest words, and in the shortest time possible, he would then and there organize the General Assembly. Mr. Cleaveland then moved, that the Rev. Dr. Beman should be Moderator, until another should be chosen, and that Messrs. Mason and Gilbert should be the clerks. Mr. Cleaveland held a paper in his hand, and he occasionally looked at it, but certainly did not read from it. I had an opportunity to observe him distinctly. He did not, at any time, appear to be reading from this paper. His resolution was seconded, and the question was taken in both the affirmative and the negative, and was decided in the affirmative. After this, Dr. Beman rose, and came out into the aisle. I then came down out of the gallery into the middle aisle of the church, and just as I got down, the motion was made to adjourn to the First Presbyterian Church, and was carried. I do not know whether there were any negative voices on the election of Dr. Beman. I heard a very peculiar sound like an aye. I know the question was reversed. This motion was made in an audible voice, very distinctly. I should suppose that any individual in the house could have heard it. I was as near to the speaker as the Moderator was. Mr. Cleaveland was standing in a pew on the east side of the centre aisle. When he first rose, he faced the Moderator; afterward, he faced the south-west corner of the church. He had papers in his hand, and I could see the use he made of these papers, and when he referred to them.

Cross-examined by Mr. Hubbell. Very soon after he addressed the Moderator, Mr. Cleaveland turned his face towards the south-west corner of the church. When he arose he addressed the Moderator, and the house through the Moderator. I am not positive whether he had got through his preamble before he turned his face. I left the gallery soon after Dr. Beman took his place in the aisle—very soon after the clerks had been appointed. There had been no other business transacted. I went immediately, as soon as I could get down, into the body of the house. There was an obstruction on the stairs—two or three ladies were going down at the same time. I was perhaps about two or three minutes in the transit. When I got down they were engaged in the question of adjournment—this question passed while I was there. Dr. Beman, when he took his place in the aisle, faced, I rather think, the south directly; but I am not positive. Dr. Beman was presiding when I came down, and put the question of adjournment, which was then under consideration. I have seen Dr. Beman very repeatedly, and have heard him preach often. Dr. Beman put the question of adjournment. I am not positive whether he reversed it, but my impression is that he did. At that time I was anxious to get out of the house. His tone was loud enough to be heard all over the church. I should say, that I stood not more than twenty-five feet off from him. I had a distinct view of him, when he put the question of adjournment. I think that during the greater part of his remarks, Mr. Cleaveland faced the Moderator, but afterwards his face was turned obliquely. He stated that the Moderator and clerks, having re-

fused to do their duty in the organization of the Assembly, it became necessary, in the shortest time, and with the least disturbance possible, then and there to organize the General Assembly. I know Mr. Cleaveland very well when I see him. I had known him by sight before. He is not very large, but stout—I suppose about five feet eight inches in height; he has light hair, and is about thirty-five years of age, or a little over. I am not positive in regard to the language which he used, when he reversed the question. I think he said, "those of a contrary opinion." This was pronounced in a loud voice; Mr. Cleaveland don't speak low generally. I heard but one response, and I think that was "Aye!" Mr. Cleaveland seemed somewhat agitated when he commenced. I did not observe the paper shake very much in his hand; or if I did, I do not recollect that fact. His voice, when he commenced, had something peculiar in it, and was like that of a man agitated.

By Mr. Ingersoll. I made no note, at the time, of these proceedings. I am connected with the Third Presbyterian Church in this city—Mr. Brainerd's, and, formerly, Dr. Ely's. I was anxious to get out of the house in Ranstead Court, to get a seat at the other church. Before the vote was taken, there were a good many standing about where I was, immediately in front of the gallery. When I came out of the church, I was a little ahead of the main body, and walked very fast, and I got a seat. The sexton had unlocked the door, while I was in the Square. I think I saw him going before us. I am not positive, but I think I had spoken to him that morning—whether at the church in Ranstead Court or not, I can't say. I did not hear Mr. Cleaveland say, in the First Presbyterian, Church, that he had been agitated.

Mr. Randall. The witness has fallen into a slight inaccuracy. The first motion you say was made by Dr. Patton, the second by Dr. Mason—

Mr. Ingersoll. I object to this method of examination: it is a direct violation of the rule that forbids leading questions.

Judge Rogers. Mr. Randall only stated what the witness had said.

Mr. Randall. You stated that Dr. Beman put a question, after Dr. Fisher had been appointed Moderator. Now recollect—was it Dr. Beman or Dr. Fisher that put that question?

This method of examination was objected to, but the objection was overruled.

Mr. Dingee. I recollect distinctly that it was Dr. Fisher.

Cross-examined by Mr. Hubbell. On my way down, I heard the name of Dr. Fisher. I was on the stair-case, behind the ladies, when I heard it. I heard simply the name: in what connexion, or from where it came, I cannot say. The stair-case comes down into the lobby. The termination of the stairs in the gallery is the only part of them that is in the house. I know Dr. Fisher. There he is, (pointing him out in the court-room.) When I went into the lower part of the church, Dr. Fisher was standing near where Dr. Beman had been standing, when I had left the gallery, and Dr. Beman was near him. I do not recollect distinctly about their position, but I think it was just as I have stated. The first I knew of Dr. Fisher's being Moderator was his putting that vote. I then supposed he was Moderator, from the fact of his putting it. I did not inquire, but was afterwards satisfied that it was so, when I went to the church, and found him in the Moderator's seat—I mean the First Church. I did

not state in my first examination that Dr. Fisher was appointed Moderator. It is so long since these occurrences happened, that I have forgotten a good deal, not expecting to be called upon to testify in the case.

Dr. Fisher—re-called. From the acquaintance which I have had with the order of the Presbyterian Church, for the last thirty years, in all our judicatories, I should say that when a motion is made, the Moderator is judge in the first instance. If he decides that it is out of order, and the person making the motion acquiesces, there is an end of it. But a party who feels himself aggrieved, has a right to appeal from the Moderator's decision to the house. It is then the imperious duty of the Moderator to put the appeal: he can never finally decide upon his own decision. If he persists in refusing to put an appeal, he virtually abandons his office.

Mr. Preston. This is clearly mere matter of argument.

Judge Rogers. The witness must confine himself to facts.

Examination continued. I have known of thousands of appeals, but never of an appeal upon an appeal. Such a thing would be a perfect absurdity.

Mr. Sergeant. This is merely the witness's opinion.

Cross-examination continued. I know of no case, where two questions of equal grade can come before a legislative body at the same moment.

Mr. Sergeant. Are you aware that some of the counsel have intimated a different opinion?

Dr. Fisher. I did not know that they had.

Mr. S. Were you present at the examination of Mr. Adair?

Dr. F. I was present, and some of the questions I heard, but some I didn't hear.

The next evidence offered was,

Append. to Const.—Gen. Rules. R. 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."

Jeff. Manual, Sect. IX—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."

Id. Sect. XVII—Title "Order in Debate." "In parliament, all decisions of the speaker may be controlled by the house. 3 *Grey*, 319."

Mr. Eliakim Phelps—re-called. I am a minister of the Presbyterian Church, and have been so for about ten years. I have taken an active interest in the concerns of that Church. I was a member of the Assemblies of '31, '34, and '35, and was present at that of '36, a part of that of '37, and most of the Assembly of '38. I have taken some pains to collect information, on the subject of the materials of the Assembly of 1838. I am generally acquainted with the localities of the various churches that compose the General Assembly.

Mr. Randall. Have the Old-school portions of the Church any geographical advantages?

This question was objected to, but the objection was waved.

Mr. Phelps. I can state in general terms, that the Presbyteries of Pennsylvania are what are generally denominated Old-school, and those Presbyteries, which have generally sent representatives of the New-school to the Assembly, are situated in the northern and western parts of the

Church, and some of them in the south-western and southern portions. The Old-school have the advantage of contiguity over the New.

Judge Rogers. What do you mean by that?

Mr. Phelps. I mean that they live nearer to Philadelphia—the place where the Assembly usually meets. I have been at some pains to ascertain the position of the churches in the city and liberties of Philadelphia, in regard to these two parties. The churches of the Third Presbytery are sixteen in number, and those of both the other Presbyteries do not together exceed ten or twelve. I ought to explain that the Third Presbytery is New-School. There was a church, in the southern part of the city, belonging to one of the two latter Presbyteries; but it is said that the house has been sold to the Catholics. I don't know how this is. If the commissioners to the Assembly of 1838, from the four exscinded Synods, and from the Third Presbytery of Philadelphia had voted, I think there would have been a majority with those who opposed the excluding acts. I have estimated that there would have been about one hundred and forty in favour of Dr. Patton's and Dr. Mason's resolutions, and only a hundred and thirty-six against them, had they been put. 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 some others. I cannot say, without reference to data, how many Presbyteries were not represented in the Assembly of 1838. I can tell something near the number of commissioners absent, who were generally reckoned on one side or the other.

The testimony in regard to this point was objected to.

Mr. Randall. If every Presbytery in the United States had been fully represented in the Assembly of 1838, or were fully represented this day, which would have a majority, the New or the Old-school?

Mr. Preston. Can the witness state this from his own knowledge?

Mr. Randall. I ask only for his judgment or opinion, not supposing him acquainted with the sentiments of every minister in the United States. I will confine the question to the Assembly of 1838.

Mr. Preston. May it please your Honour, there are, in our judgment, two objections to this question: first, that it is irrelevant, and secondly, that the mere opinion or conjecture of the witness is asked for. We will however permit it to be put, if the same permission is hereafter to be accorded on the other side. We object unless this be the understanding. If allowed to go fully into the matter, we shall be glad of the issue thus offered.

Mr Randall. I offer the testimony because we have been taunted with being a minority. We must however submit to your Honour's decision.

Judge Rogers. We must confine our inquiry to the majority or minority of those who actually assembled in 1838. Some other tribunal must decide the question submitted.

Mr. Phelps—cross-examined by Mr. Preston. I did not state that commissioners from the Old-school Presbyteries had superior facilities for getting to Philadelphia, but that they had the advantage in point of contiguity. I did not say they had advantages, as to the means of getting here. I cannot say they have superior facilities in this respect. 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 a travelling agent of the Board of the Philadelphia Education Society, which is a branch of the American Education Society. This has branches all over the United States. The senior Board is in Boston; there is another in New York, and one in Cincinnati. I am commissioned by the Philadelphia Board. 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 exscinded Synods. I have been within the bounds of those Synods since they were exscinded. In prosecuting the duties of the Board of Education, I am led as far as Pittsburg and Erie; and once a year have been as far south as Richmond.

Mr. Preston. I want you to tell me what are the facilities of the churches of New York State, compared with the facilities of those in the Synod of Pittsburgh, as to intercourse with Philadelphia, expressed in time.

Mr. Phelps. The mails come in about four days, or a shorter time, from Geneva to Philadelphia. Railroads have been constructed in that country since I left there. 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. I know, at least, one New-school Presbytery among them—that of the District of Columbia, which I understand is partly in that State. I have understood, that in the whole Synod of Virginia, the Old-school have a small majority.

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 south-western States.

Mr. Randall. We mean to follow up the testimony offered, by evidence, to prove that the Old-school majority in 1837 was merely accidental, and did not show the numerical strength of the parties.

Judge Rogers. That is the very thing I wish to reject.

Mr. Randall. I propose, also, to offer evidence as to the comparative means of intercourse.

Judge Rogers. It is no matter whether one part of the Church is more or less contiguous than another.

Mr. Randall next read, Form of Gov., Chap. X. Sec. 7. (*Vid. Ante. p.* 23.)

Min. of 1837, *p.* 523, "*Statistical Table.*" The Presbytery of Newburyport, reported as containing sixteen ministers, and but two Presbyterian churches.

Mr. Randall. If this evidence does not fall within your Honor's decision, and, if it does, the opposite counsel will object, I propose also to read the report of the Charleston Union Presbytery.

Id., p. 618—19. Charleston Union Presbytery, reported as containing twenty-eight ministers, and only eight Presbyterian churches.

Min. of 1835, *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. McElhenny, Mr. Stonestreet, and Mr. Banks.

Min. 1835, *p.* 26—"The consideration of the report on overture No. 16, was resumed. The 6th 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, impartiality and solemnity which the deep importance of the subject 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 respectively recommend to the Assembly the adoption of the following resolutions, viz.

* * * * * * * * * * * * *

"*Resolution* VI.—Resolved, that this Assembly deem it no longer desirable that churches should be formed in our Presbyterian connection 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 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 any wise interfere with the existence and lawful operations of churches which have been already formed on this plan.

"VII. Resolved, that this General Assembly see no cause either to terminate or modify the plan of correspondence with the Association 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."

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Rev. Oliver Wetmore—sworn. I am a minister of the Presbyterian Church, in which I have been for thirty years, or thereabouts. I belong to the Presbytery of Oneida, and have with me some of the records of that Presbytery.

Mr. Randall. By what Presbytery was the Rev. Dr. Carnahan, President of Princeton College, ordained?

Mr. Hubbell. We object to the question. Dr. Carnahan was not even a member of the General Assembly of 1838.

Mr. Randall. We propose to give Dr. Carnahan as an example of an individual ordained in one of the exscinded Synods, but who came out of it before the excision, and is now in good standing, while others, by moving within the bounds of those Synods, have been excluded. Dr. Carnahan we offer as an example of the former kind, and shall afterwards present the case of Dr. Richards, who was ordained by a Presbytery in New Jersey, but has since moved to Auburn, and is among those exscinded in 1837. We want to show the unjust practical operation of the exscinding acts.

Mr. Hubbell. We have heard enough of unjust excisions, of acts of which we are ashamed. We have done nothing of which we are ashamed—nothing unjust. The acts so frequently characterized as acts of excision, are not so by any means. They provide expressly for the continuance in the church of all Presbyterian ministers, and congregations, that will simply report their names to regular Presbyteries. If Dr. Richards has been excluded, he has only to report his name to the nearest or most convenient Presbytery, and he will be received. No injustice has been done this gentleman. Dr. Carnahan is President of Princeton College; and what have we to do with him? Will this testimony help us to decide which is the true General Assembly? Suppose that one of these gentlemen does suffer some inconvenience, does this establish the legitimacy of either body? Does it tend in the remotest, the most reflective manner to do so? Look at the qualifications of these acts, which are called acts of excision, though merely administrative acts. Our opponents say they are unconstitutional, and destructive of their rights; but the sole difficulty lies in their obstinacy, and their desire to give laws to us.

"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 connection 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 connection 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."

Is there any excision in that? Here were certain bodies, which, in their infancy, were admitted into our communion, that we might foster and protect them. Time rolls on; they have out-grown the necessity of protection, and are called upon either to go out from us, or adapt themselves to our system. They will do neither. They even wish to govern us. They inflict discipline upon us, and when we attempt to inflict it on them in return, they put up the shield of Congregationalism, and laugh us to scorn. It is therefore absolutely necessary that they should submit to our forms of government, and throw off their Congregationalism, or retire from among us. It became our imperative duty to perform the acts complained of, to prevent a dismemberment of the Church.

Our opponents have chosen a certain issue, and by it they must abide. Is that issue, whether Dr. Carnahan or Dr. Richards has suffered an incon-

venience? Indeed, if they complain of inconvenience, it is only because they don't read the resolution which I have just quoted. I know Dr. Carnahan by reputation. He has removed to Princeton, and may have been represented in the Assembly ; but the fact that he has been affected by the disowning acts, if indeed they have affected him at all, is collateral to this issue, and very remote from it. I hope your Honour will exclude all these collateral facts. When we have attempted to rebut those that have been admitted, the offer has been rejected by the court. In consequence of this, we must meet them at the first onset, by objecting to their introduction. We are not ashamed of any of our proceedings: to say that we are is a gratuitous assumption. After this long endurance we shall at last have an opportunity to make our defence, and show the justice of the disowning acts. Let us now come to the pith of the matter. What have we to do with the inconvenience suffered by Dr. Carnahan, or Dr. Richards? In fact if they have suffered inconvenience, it must have been from their own free choice.

Mr. Randall. This is a very interesting question, perhaps the most interesting that has been presented. Our proceedings in 1838 were predicated on the unlawful excision—the detrusion, of four Synods from the Church. We say that this detrusion was contrary, not merely to the Constitution of the Church, but also to the laws of the land, and to common sense. We now wish to follow out the acts of 1837 in their practical effects—not on any particular individual, locality or domicil; but their effects in general. We do not attach any importance to the fact that inconvenience is suffered in an individual instance ; but we want to show the universal operation of the acts referred to—that by the accidental circumstance of a person's residence he is either excluded, or left untouched. If the testimony now offered be allowed, we shall then go farther, and show that a clergyman ordained in New Jersey, by merely residing within the infected region is disfranchised and disrobed. Can any thing be more plainly relevant? We shall give the instance of a professor, who at the time of the excision was not touched, but by his entry into one of the four Synods has been excluded. All this goes to show the practical effects of the exscinding acts. It has been said that there was no injustice in those acts—that they excluded no one ; but you have just heard a resolution read, declaring, that the individuals on whom they were intended to operate, in order to be received back into the Church, must come and apply, as persons not belonging to it, show that they are Presbyterians, and undergo an examination. They are to be received, only, as members from an entirely foreign association may be.—Unless they come in this manner, they are told, "We do not know you. We are the arbitrary judges as to whom we will recognise. Yet no injustice is done you, for we have provided a method by which you may be restored to your old footing. We have done you no injustice for you may be pardoned." I say that these men are placed in the same situation as if they had never belonged to the Church. When a Presbytery is excluded, all the ministers and individuals within its jurisdiction are cut off. And while these individuals and judicatories are, as it is said, invited to apply for re-admission, no pledge or promise is given, that they will be re-admitted upon such application. The question is left open—as completely open as if they came from any other bodies.

One word as to the Plan of 1801. I say that that Plan never admitted Congregationalists into the Presbyterian Church; that it did not contemplate their admission; that none could be admitted under it. Those venerable men who formed it, were not guilty of the heresy of admitting Congregational ministers into their communion. It has been said, that those excluded by the acts of 1837, wish to rule their brethren, and will not submit themselves to the discipline of the Church. These are entirely gratuitous assertions; if they can be supported by evidence, the time for such evidence to be offered will come by-and-by. Where is there, as yet, any proof, that these gentlemen who have been *detruded*—a very graphic word—have ever refused to submit to Presbyterian government and discipline? No such thing has been, or ever can be proved. We want to show, that this was an indiscriminate and ruthlesss exercise of power—the driving out and dissolving large bodies of men, without any regard to their particular tenets. That the extent of the exclusion depended merely on geographical limits. The cases of the two individuals whom I have mentioned, are not singular. Their cases are the cases of all similarly situated. I have chosen to instance these two men, Dr. Carnahan and Dr. Richards—both heads of colleges, in order to place in bold relief the unjust and unwarrantable nature of the acts of excision. To show that the exclusion did not depend upon the individual, but upon the location of the Presbytery to which he belonged.

We desire that all the features of this case should be developed before the court, in order that its intrinsic character may be understood. The whole crime of the five hundred and nine ministers who have been cut off is, that they happened to be Presbyterian ministers in good repute, belonging to Synods, within the bounds of which were a few Congregational churches. This was the very head and front of their offending. They happened to live within an infected district—we shall hereafter exhibit a map of it—a district in which there was a Congregational church. This we are at liberty to prove.

Mr. Hubbell says that these gentlemen were not detruded; that no injustice has been done them. They have been told, "You may do just what any other strangers might—apply for admission; and then we will take such order in regard to your cases, as in the exercise of a sound judgment we may think proper." And a strict or lenient hand would be extended to them, according to the complexion of the body to which they might apply.

Mr. Ingersoll. It seems to me that your Honour's decision of yesterday, covers all this ground and a great deal more. The court then decided that the testimony offered in regard to the Synods of New Jersey, and Albany was foreign to the case. The fact that a Presbyterian minister in New Jersey, or any Presbyterian minister at all—and certainly there are none more respectable than the one who has been mentioned—has not been excluded, while some others have, is equally foreign and irrelevant. What is the question now proposed? Your Honour has admitted testimony of certain resolutions being passed in 1837, by the effect of which it is contended that certain commissioners were excluded from the Assembly of 1838. We say that nobody was excluded—nobody entitled to a seat in any view of the case. This is a question for the decision of the jury. An inquiry was proposed yesterday, designed to indicate, that, by the pas-

sage of certain resolutions, either a door was opened, through which we went too far; or a door being opened, we did not go far enough. This testimony was rejected, and on the ground, that the legality of what the Assembly had done in certain cases, was not to be determined by proof of what it had failed to do, or had not done, in certain other cases. The evidence now offered seems to me farther still from the merits of the case. If the partial operation of the acts of the Assembly, in the case of whole Synods, be irrelevant, what has the hardship or rigour of their operation on single individuals to do with the subject? Is the constitutionality of these acts to be determined by reference to their effect in some particular instances? It seems to me that such an inquiry is totally foreign to the subject. The question before the court respects the validity of the election of certain trustees. This is not an inquiry as to the vast mass of Presbyterians, throughout the whole country: we are now confined to the Assembly of 1838, and those who claim to have had a right to sit in it, and to elect trustees. These investigations go to show a hypothetical or actual state of things, not bearing at all upon the issue.

Judge Rogers. This is nothing more than showing the construction to be put upon those acts; but that may be shown in the argument, more properly than by evidence as to particular cases.

The counsel for the respondents proposed to cross-examine Mr. Wetmore.

Mr. Randall. You cannot cross-examine upon any points on which he has not been examined in chief.

Judge Rogers. You can, however, make him your own witness. But if it is proposed to go into new matter, you had better wait till by-and-by.

Mr. Randall. I offer the Minutes of 1837, page 442, from which it appears, that on Friday afternoon, June 2d, the Rev. Norris Bull was elected a member of the Board of Education, to serve for four years. On the Monday following, the act exscinding the Synods of Utica, Geneva, and Genesee 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 Genesee, which appears from the same Minutes, page 541.

Mr. Ambrose White—sworn. I was a member of the Board of Trustees of the Presbyterian Church, in the year 1838. In the month of June, 1838, shortly after the meeting of the Assembly, the relators in this case applied for admission to seats in the Board. All the relators applied, but John R. Neff did not while I was present. The members present refused to recognise them as trustees, and a resolution was passed to that effect, from which I dissented.

Cross-examined by Mr. Hubbell. I am placed in the New-school party: I believe there is no doubt about my belonging to it. I have been active in the management of this case, and of the measures preliminary to it.

The next evidence offered,

Form of Government Chapter III.—"*Of the Officers of the Church.*"

"*Sect.* 2. The ordinary and perpetual officers in the Church are, *Bishops* or *Pastors*; the representatives of the people, usually styled *Ruling Elders*, and *Deacons.*"

Id. Chapter VIII.—"*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."

Assembly's Digest, pp. 28, 29.—"*Sect.* 11. 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.—1791. Vol. I. page 42.

Assembly's 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.—Vol. I. p. 77. 1793."

It was agreed by the counsel that the whole of the book, entitled "The Constitution of the Presbyterian Church," &c. was to be considered as in evidence.

Min. 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 a 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 a union of the two churches is both desirable and practicable.

"The following articles were then proposed, and unanimously approved as the basis of such a union.

"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 Presbyteries 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 monies 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 monies 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 the Associate Reformed Church, and until such professorship shall be established, the said interest or product shall be used for the general purposes of the Seminary.

"4. The Theological Library and Funds belonging to the Associate Reformed Church, shall be transferred and belong to the Seminary at Princeton.

"These articles having been approved, were ordered to be transcribed and signed, and a copy of them transmitted to the General Assembly of the Presbyterian Church, and the General Synod of the Associate Reformed Church, respectively.

"The meeting was closed with prayer by the Rev. Ebenezer Dickey.

"All which is respectfully submitted.

"Ashbel Green, Samuel Blatchford, John McDowell, 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 the Synod of the Associate Reformed Church, and inform them of the adoption of the articles of union on the part of this General Assembly.

Min. 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 clerk, be immediately sent to the General Assembly of the Presbyterian Church, and that the 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 o'clock, P. M., that we may, unitedly, return thanks to Almighty God, for the consummation of this union."

Dr. Erskine Mason—re-called. I have never known a single instance of the re-ordination of ministers received from other denominations into the Presbyterian Church. My father was admitted into that Church under the union of 1821, but he was never re-ordained. There are instances in the Presbytery of New York, of clergymen who have come from the mother country, in regard to whom the same rule was observed.

Cross-examined by Mr. Hubbell. The Second Presbytery of New York never required the Confession of Faith to be subscribed. They

themselves don't use it. The book of the Associate Reformed Church is the one under which they act. The form of government of that Church differs from the Presbyterian form, in several important respects. The Confession of Faith of both Churches is the same: it is the Westminster Confession. I was formerly a member of the Second Presbytery of New York. The Associate Reformed Church is Presbyterian in its form of government: it has elders and church sessions. Foreign ministers applying for admission into the Third Presbytery of New York, are subjected to examination and a year's probation. I am speaking now of those who come from across the Atlantic. That is the Presbytery to which I now belong. We require, in the Third Presbytery, an acknowledgment of the Confession of Faith.

Re-examined by Mr. Randall. The Westminster Confession of Faith, in the part that relates to civil magistrates, was altered by both the Associate Reformed and the Presbyterian Churches.

Mr. Randall. In the course of the trial of the case of Duncan against the Ninth Presbyterian Church, one of the gentlemen who are the respondents here, Dr. Green, gave evidence in regard to some of the questions now agitated. When Mr. Ingersoll, who was one of the counsel engaged in that case, has his notes here, I shall take an opportunity of referring to them. With this exception, we here close our case.

TUESDAY AFTERNOON—4 o'clock.

MR. HUBBELL'S OPENING.

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 disconnection 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 exists 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 licensable 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 favourers 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, improvable 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 required 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 vestiga*, 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 should be 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. Sect. 5. "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, the orthodoxal canons. This decision of the General Assem-

bly, 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 mal-contents 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 resolution of the Assembly of that year, declaring the Synods of the Western Reserve, Utica, Geneva, and Genesee, 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 each 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 vitious 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 vitiously 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." *Assem. Dig. p.* 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, the 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. Chap. XII. Sect.* 6.

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 the Plan of Union, sent their unordained lay delegates to the Presbyteries, and they were admitted.

When controversy called attention to this 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 Genesee, 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 denied. 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, Genesee and Geneva.

Our adversaries have thought fit to represent these acts as tyrannical, because (as they assert) they disfranchised five hundred ministers, five hundred and ninety-nine churches, and sixty thousand 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 five hundred ministers, five hundred and ninety-nine churches, and sixty thousand 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 communicants, 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 Genesee, 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 intregal 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 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." 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 parricidal hand against his Church, that the General Assembly has remo ved 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 exscinded, 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 five hundred and ninety-nine churches, five hundred and nine ministers, and sixty thousand communicants without a trial, or an opportunity of defence. I have just demonstrated that it is only the Congregational portion of these five hundred and ninety-nine churches, and sixty thousand 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 vitious 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 approval 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 institu-

tion; 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 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. *Sect.* 8.

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 unimpared 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 recognised 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 recognises 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 declared that there were no vacancies in the Board. A declaration which would have been untrue, had the Assemby 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." *Assem. Dig.*, 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 declared 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 partizans, 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 Relators' 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 enrollment, 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.

"I. Immediately after each 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, and the person delivering each, shall state whether the principal or alternate is present.

"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. 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.

"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."

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. *Sect.* 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 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 was 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 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 them 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 authorised 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 afterthought. 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 connection 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, i. e. no one had a right to address that house but enrolled members, and that its officers could not recognise 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 applicant 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 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 recognised 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 those 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 consequence, based solely upon the act 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 partizans. They appointed clerks, and a permanent Moderator, in the same way, and adjourned to the First Church, were 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 a 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 out-generaling 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 arise only 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 extraor-

dinary 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 apppeal 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 his 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 this 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 state of the object of the vote; and the vote being taken, shall then declare how the question is decided." *Chap.* xix. *Sect.* 2. 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 adversary's 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. McDowell, 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. McDowell, 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 case 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 come into collision, and the one calls for the ayes and noes, and the other cries *order*, is it not 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 contend, 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 tumultuously around him. Their clerks did not demand the roll, nor take the clerks' seat, 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 savor 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 not this betray some bitterness of feeling? To the fluctuating faith of their party, does not his 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.

TESTIMONY FOR THE RESPONDENTS.

WEDNESDAY MORNING, March 13th.—10 o'clock.*

Mr. Hubbell, in his opening, referred to a number of passages in the Constitution, &c., which it was afterwards agreed, should be considered as in evidence, without further reading. We insert here such of them as have not been given at length before.

Form of Government, Chap. IX.—"*Of the Church Session.*"

"*Sec.* 1.—The Church Session consists of the Pastor or Pastors, and Ruling Elders of a particular congregation.

"*Sec.* 2.—Of this judicatory, two elders, if there be as many in the congregation, with the Pastor, shall be necessary to constitute a quorum.

"*Sec.* 3.—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 see meet, belonging to the same Presbytery, to preside in that case. The same expedient may be adopted in the case of sickness or absence of the Pastor."

Id. Chap. XIII.—"*Of Electing and ordaining Ruling Elders and Deacons.*"

"*Sec.* 2.—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.

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"*Sec.* 6.—The offices of the Ruling Elder and Deacon, are both perpetual, and can not 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."

Form of Government, Chap. XII.—"*Of the General Assembly.*"

"*Sec.* 7.—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.

"*Sec.* 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."

Min. 1826. *pp.* 37, 39, 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:

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* Mr Hubbell's opening occupied the whole of Tuesday afternoon, and about an hour of Wednesday morning.

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"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 adjourn 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.

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"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.

"I. Immediately after each 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; and the person delivering each commission shall state whether the principal or the alternate is present.

"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 thus 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."

Min. 1837, *p.* 132. "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.

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"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."

Min. 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."

Id. 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," he 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.

Form of Government, Chap. XIX.—"Of Moderators."

"1. 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.

"2. 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.

"3. 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."

Mr. Hubbell first offered,

Min. 1837, *p.* 456. Section 3d of a protest against the abrogation of the "Plan of Union."

"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 pecuniary 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 Preseyteries, 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."

Rev. John M. Krebs—before sworn and examined for the relators. I am pastor of a Presbyterian church in Rutgers street, New York. The Presbytery of which I am a member—the Presbytery of New York—is in connexion with the General Assembly. I was elected the Permanet Clerk of the Assembly in 1837, and hold that office still. The Committee of Commissions consists of Dr. McDowell, the Stated Clerk of the General Assembly, and myself. 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 all 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 each meeting of the Assembly, who is called the Temporary Clerk, and whose business it 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 General Assembly of 1838, Dr. McDowell and I had published 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 order to be ready for the great press of business which is usual at the opening of the Assembly, I had prepared, before leaving New York, a blank form of the usual opening minute, with a list of the Synods and Presbyteries, to which I might attach the names of persons who should present commissions. These were all our preliminary arrangements. We met on the afternoon of Wednesday, the 16th of May, in the session-room of the Seventh Presbyterian Church, and that afternoon, from one hundred to a hundred and twenty commissions were handed in to us. 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. After having thus received about one hundred, or a hundred and twenty commissions, on the afternoon of Wednesday, and, so far as we had opportunity, examined whether they were regular,

and put the names from those that were approved on the roll, we adjourned until nine o'clock on Thursday morning, when about one hundred more, or the balance, were presented. On the roll thus made out, I had inserted the names of two hundred and fourteen or fifteen commissioners. Four or five additional ones presented were not inserted, because of some defect, or some circumstance in regard to which we were not authorized to decide. These we kept separate from the others, though as it was afterwards determined, they were actually entitled to seats, in order to refer them to the Committee of Elections, the appointment of which is the first business in order after the report of the roll by the Committee of Commissions. The Committee of Elections is chosen from among the undisputed members of the Assembly, and it is their duty to examine and report on the defective commissions. It is a standing rule, that their appointment shall be the first business to which the attention of the Assembly is directed. On the afternoon of Wednesday, out of one hundred, or one hundred and twenty, who presented commissions, there were none that I recollect, and certainly not more than five, except those who are commonly denominated Old-school men. The balance received next morning included both Old and New-school. Their commissions were examined, and as many as were found correct were enrolled. During our session on Thursday morning, (I can't pretend to give the precise order of events,) the Rev. Mr. Barnes of the Third Presbytery of Philadelphia, and the Rev. Mr. Brainerd of the same Presbytery, presented their commissions. I don't recollect seeing the commission of any elder from that Presbytery. We informed them that we could not receive the commissions; that the Third Presbytery had been dissolved by the Assembly of 1837, and that therefore we could not recognize it; that the General Assembly must itself decide the matter, and not its officers. Mr. Barnes expostulated with Dr. McDowell, who told him that he could exercise no discretion on the subject. At that moment, Mr. Squier presented his commission, and we told him that it could not be received, because the Assembly of 1837 had declared the Synod of Geneva, to which his Presbytery belonged, no longer a part of the Presbyterian Church; that his remedy was in the Assembly, and not in its officers. Mr. Barnes and Mr. Squier were both present during this colloquy. Mr. Squier said to Mr. Barnes, "Yours is a very different case from mine: your Presbytery was dissolved by the General Assembly."

The counsel for the Relators objected to the witness's repeating what Mr. Squier had said.

In the course of our session, several other commissions of the same kind were presented. The Rev. Dr. Richards presented one, and to him we gave the same answer, as to the rest: That we had no right to receive his commission, no liberty to decide his case, unless further orders were given to us by the Assembly. We treated all alike—that is all the commissioners from the four exscinded Synods: We were very civil to them, and told them that their only remedy was in the General Assembly.

Next we were met by a deputation, very respectable in appearance, one of whom I think was Mr. Squier, who said they were authorized to offer the commissions from the four exscinded Synods, and to demand that they should be received. We replied, that they could not be received or enrolled, and gave an absolute refusal. One of the gentlemen asked

whether "we could not," meant "we would not." I replied, that we did not mean to be disrespectful, but that if he liked that better, we *would* not. The Rev. Mr. Aikin of Cleaveland, who was one of the persons rejected, then asked those standing by to take notice of the refusal. We observed that this was not necessary, that our testimony would be sufficient, and, 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 wanted them to do; that their remedy was in the Assembly, and it would meet the next hour. This is all I recollect in regard to the meeting of the Committee of Commissions. As to the locking of the door: The little room in which we sat is under the pulpit, and from it two doors, one on each side of the pulpit, give access to the body of the church. On each side of the church are two large doors, and by one of these, persons in the grave-yard may enter the house. On Wednesday and Thursday, we found that the disposition of persons, to press through the little doors by the sides of the pulpit, was a great annoyance. They interrupted us, while asking questions and receiving answers from the commissioners who presented themselves. I repeatedly locked the door that opened from the session-room into the grave-yard, and also that on the left side of the pulpit—the left side as you face the audience. My table was near the door locked. When any one came, wishing to enter, I, perhaps not being so kindly disposed as I should have been, refused to open it. The room may be eight or ten feet wide. The five large doors in the body of the church were all open, and one of the little doors from the session-room was constantly so. The door by which we sat was closed, in order to prevent the room from being made a passage-way. The applications for entrance were generally made by Old-school men, and being excluded they went round to one of the other doors.

Public worship commenced at eleven o'clock, at which hour, our room was cleared, and we were left making out the roll. This was necessary, in order to have the roll complete, by the time the Assembly was constituted. Dr. McDowell and I, entered the church through the door previously locked, (the west door,) bearing the roll in our hands, about five minutes previous to the close of the religious exercises. The sermon was done, and the singing, I think, had commenced, the prayer after the sermon being over, and the Moderator still in the pulpit. I took my stand by the clerks' table, which is under the pulpit, and just beneath the Moderator's chair, the latter being raised from the floor on a dais. The table is a large one, appropriate to the business of the clerks, and is from four to five feet long. The position which I ordinarily assume is, at the head of the broad aisle; where I sit, with my back to the audience, and my face toward the Moderator, for the convenience of writing. Before getting to my seat, I took my position 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 entirely full. I either sat or stood on the west side of the table, facing the audience, until Dr. Elliott entered the chair, and assumed the place of Moderator. I was present during the constituting prayer, immediately after which the Moderator called for our report. I was about to speak, when I saw Dr. Patton on the floor, and heard his voice saying, two or three times, "Moderator—Moderator." Some one told me to go on with the roll, but

I remained quiet. The Moderator directed me to report the roll. Dr. Patton said, that he wished to offer certain resolutions, and desired 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 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 answered, there could be no appeal, as there was no house in existence. During this colloquy, of which I pretend to give only the substance, not the precise terms, I was waiting until the floor should be cleared and silence obtained. Dr. Patton sat down, and I proceeded to report the roll. I read it as clearly and distinctly as I could; and also reported four or five informal commissions, which had been presented but not enrolled, in order that they might go to the Committee of Elections, which it was usual to appoint then. I did not report the commissions from the excluded Synods. We did not think we had any right to do so. There was, however, a difference of opinion, between my colleague and myself, in regard to this subject. I supposed it was our duty to receive and report, but not to enrol them. He thought, that we should not receive them, any more than commissions from other churches which were 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. McDowell would not consent to this; and I, accordingly, made such a report as he would consent to. After our report had been made, and the time was come for the next business—the appointment of a Committee of Elections, to whom all the doubtful commissions might be referred—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 in his hand a bundle of papers of the same size with that here exhibited, 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 rejecteg them; and now moved that the roll should be completed, by insertind 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 told him he was out of order at that 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. Then Mr. Squier rose, on the opposite side of the aisle from Dr. Mason, and stated, (I recollect only the facts now,) that he had a commission from the Presbytery of Geneva; that he had offered it to the clerks, and it had been refused by them; and that he now 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 Sy-

nods; I do not recollect precisely which. Mr. Squier answered, that it was. The Moderator replied, "We do not know you, sir." At this point it was 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 likewise. 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 me at the time.

Some farther questions being asked, in regard to what Mr. Cleaveland had said, *Mr. Meredith* objected to the witness' saying any thing more, as he had already stated that he recollected nothing more.

Judge Rogers. The witness may state what he recollects.

Mr. Krebs. I don't recollect any thing else distinctly: I don't know what Mr. Cleaveland said.

Mr. Ingersoll. Do you mean, that you heard, and do not now recollect; or that you did not know at the time?

Mr. Krebs. 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 and endeavouring to see and hear. My recollection is, that when Mr. Cleaveland commenced, his face was towards the Moderator, and that he gradually turned round, until he faced the western wall. While he read, there were calls to order from the Moderator, and those near him, intermingled with the waving of hands, and the voices of some saying "Hush! Hush!" This thing 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, after the report of the roll, 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, continued, 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 questions or motions. I think, at this time, the cries to order were not so loud as they had been. My attention was particularly directed to the place where Mr. Cleaveland stood, but, now, many persons were 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 in the body of men around Mr. Cleaveland, towards the east door of the church. I could see, as they were moving 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 who it was. It was not, to my knowledge, Dr. Fisher. I don't

know whether 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. Well, the persons engaged in this affair having moved off, the tumult subsided, and the Assembly was left to transact its business quietly. 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, two weeks, or longer—certainly for two weeks. The great mass of those who left the house, 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 a noise. During the time that the *tumult* continued—this word conveys the very idea that the scene impressed upon me at the time, which I say without intending any disparagement—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—one of the two certainly. The noise was very great. Some called to order, and others said, "Hush! let them go on." The Moderator said, that we would wait till the tumult had subsided, and the house had got quiet; that we could not now 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 their departure, 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 from when Dr. Patton rose. From Mr. Cleaveland's rising till the departure of his friends from the church, was perhaps six or seven minutes, or not so long. 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 before 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's rising. I think not before Dr. Mason rose, because the Moderator had just then called for other commissions, which, if regular, were to be enrolled, and, if not regular, referred to the Committee of Elections. The reason of this uncertainty is, that when motions are made, the clerks endeavour to ascertain that they *are* made, but are not very solicitous to discover *who* make them. 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. Mr. George Duffield of New York. He was not a commissioner, but having come merely with his friends, he interposed then. 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. This is it. (Producing a bundle of papers.) This is the original paper, the blank prepared by me, before I left New-York. In all, there were enrolled about two hundred and fifteen members. I reported 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 Green Brier—a new Presbytery. The house was not satisfied with the report in regard to these two, and their case was referred back. Again they reported, and both were admitted. Two hundred and twenty were therefore 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, and 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 of those who were recorded answered, and to mark the absentees. There answered one hundred and fifty-two of those whose names were on the roll—I speak to the best of my recollection, and 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. One hundred and fifty-two were recorded present, and sixty-eight were recorded absent. On the next morning, of these sixty-eight, three appeared, and requested that their presence might be noted. These were Dr. Green, a 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 was excused, because of the inclemency of the weather, and their weak and feeble health, at the time of calling the roll. Of the remaining absentees, two others subsequently appeared in the Assembly, and continued with to us the end. I saw them, and heard them vote and speak. I don't know whether they had gone 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 note 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. To the original roll of four hundred and twenty, were subsequently added four. Mr. John Green, an elder from Transylvania Presbytery, appeared, offered his commission, was approved and enrolled, on a day which is here marked. It was the ninth day of our meeting. There also appeared, under the same circumstances, Aaron W. Lyon of the Presbytery of Arkansas, on the twelfth day, and he was enrolled. On the eleventh day appeared the Rev. Wm. W. Martin, and Henry L. Fabrigue, of the Presbytery of Salem, in the Synod of Indiana. None of these had been on the original roll. The persons thus tardy appeared before the Committee of Commissions; but the latter had no right to inquire why they were so late: they must answer for this to their own Presbyteries. Messrs. Martin and Fabrigue were late, and they looked sick. I inquired of them what had happened. 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 his reason. He attended that day. 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 sebsequent day, but on what occasion I don't recollect, Mr. Eagleton rose, in the course of debate, 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 knew nothing further in regard to him—I mean of my own knowledge: I am not speaking of rumors, or subsequent information.

Cross-examined by Mr. Meredith. 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, and proposed to notice in a general way, that a disturbance had taken place. This minute was objected to, and not allowed to stand. It was said, that it was not usual to take any notice of transactions which led to nothing; that when a resolution had been debated, if it were 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. At the same time, I think, though my recollection is a little confused, a committee was appointed to prepare a minute, which should give a full account of the transaction. My account was very short and concise—merely stating, that Dr. Mason had made a motion, which had been declared by the Moderator out of order; that then a scene of confusion occurred, and that after the tumult had subsided, we had proceeded to business. A committee consisting of—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 their names were suggested to me. I think a minute was made of the appointment of this committee. I am sure that I made a note with my pencil, that that was the place in which it should be inserted. It is very customary for the Assembly, when not satisfied with a minute, to appoint a committee to prepare another, to take the place of the clerk's. In such case, all I have before made, is erased or cut out, and that was the way here. There is no record here of the appointment of the committee. This record is the prepared minute, and is inserted, as you see, written on different coloured paper from that which I brought from New York.

By Mr. Wood. I do not recollect who moved the appointment of a Committee of Elections. I presume the motion was seconded. I made a minute of it at the time it was made. I am in the habit of making full records at the time, if possible, and if not, notes to be filled up afterwards. I am not confident whether the motion was made while Mr. Cleaveland, or Dr. Mason was speaking. My strong impression is, that it was when 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 have no doubt the Moderator was in order, when he made proclama-

tion, that those who had not yet presented their commissions, should hand them in. This proclamation preceded the appointment of the Committee of Elections. This committee was not appointed 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 Moderator. The record, in regard to this matter, is wrong; it was not made in my presence. I will say, now, what I think was done. The record, in regard to Mr. Moore, was contained in the report of Dr. Elliott. My recollection is, that Mr. Moore did not come to me, until after the election of the Moderator. I informed Dr. Nott that at a certain stage, his commission had been presented; and he inserted my information in the wrong place. There was, in the Assembly of 1838, some action on the exscinding resolutions of 1837. They were not repealed. There was, so far as I recollect, no action either to repeal or to affirm them, except in what are commonly called "The Three Acts"—acts adopted on the report of the Committee for the Pacification of the Church. It is not my office to interpret these acts; they are here in court, and speak for themselves. I do not know whether they treat of the four Synods as exscinded Synods. I recollect merely, in a general way, that they provide for the incorporation of all the Presbyterians in those Synods with the Church.

By Mr. Meredith. Some days the roll was called, and some it was not. At the end of the sessions of the Assembly, it was called, and all who were absent without leave, were so recorded. Very few—perhaps from six to ten—had obtained leave of absence.

By Judge Rogers. 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 the ordinary business of the Assembly, and, at other times, was looking towards the interruption.

Re-examined by Mr. Preston. It is usual, shortly after the Assembly is organized, to appoint a Standing Committee on Leave of Absence, composed of four or five members. If any one wishes to go home, he applies to them, and, if 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 with certainty say how many, for I have nothing to guide my recollection.

Dr. William W. Phillips—sworn, with the uplifted hand. I am a clergyman in the Presbyterian Church, of the Presbytery of New York. I was a commissioner to the General Assembly of 1838. I was at the church in Ranstead Court at the opening of the Assembly, on the 17th of May, in that year. I occupied the pew next the wall, in the south-west corner of the house, at the bottom of the stairs which lead to the pulpit. After the religious exercises, the Moderator announced that the Assembly would meet; and came down from the pulpit, and opened its meeting with prayer.

The Moderator told Dr. Patton, "Your motion is out of order at this time." He presented himself to the Assembly, and addressed the Moderator, saying, that he held in his hand some resolutions, which he wished to offer for the consideration of the Assembly. The Moderator said, "Your motion is out of order at this time: the first business is the report

of the clerks upon the roll." Dr. Patton said, that his resolutions related, or had reference, to the roll. The Moderator still told him, he was out of order. He appealed, and the Moderator pronounced the appeal also out of order, saying, there was no house to appeal to. Then he took his seat; and the clerk proceeded to report the roll, as far as it had been completed. Dr. Mason said, that he held in his hand the commissions of certain commissioners, which he wished added to the roll. The Moderator asked him, if he had presented them to the clerks; and whether they came from Presbyteries in connexion with the Presbyterian Church at the close of the sessions of the Assembly of 1837. Dr. Mason replied, that they were from Presbyteries within the bounds of the Synods of Utica, Geneva, Genesee, and the Western Reserve. The Moderator told him, that, at that time, his motion was out of order. Dr. Mason said, that, with all respect, he must appeal from this decision. The Moderator told him, he was out of order. Mr. Squier then addressed the Moderator. He said, that his commission had been tendered to the clerks, and refused; and that he now presented it there, and claimed his seat, as a member of the Assembly. The Moderator inquired from what Presbytery he came. He answered, from the Presbytery of Geneva. The Moderator replied, "We do not know you, sir." Mr. Cleaveland then rose, and commenced reading a paper. The contents I could not hear, more than the words, "having taken advice of counsel learned in the law." I heard him say also, that it was necessary to organize the Assembly in the shortest time possible. I could not hear all. There were incessant calls to order, from the Moderator and others; and, although I had determined to be still, I found myself saying, in an under tone, "I hope we shall have order." Some of the brethren extended their hands, and said, "Hush! Hush!" I could see Mr. Cleaveland from where I stood; and I heard him say, "I move that Dr. Beman take the chair." I then heard a vote of, "Aye!" very loud, and one shrieking voice above the rest. 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 either of the questions, and no negative votes. I did not hear the motion for the appointment of Dr. Fisher as Moderator. I did not know, until the next day, that he had been appointed Moderator, but supposed that Dr. Beman was presiding. I think I did hear the motion to adjourn. I heard no prayer. I may be mistaken in regard to the motion for adjournment, for a proclamation of the adjournment was made at the different doors. I don't know who made this proclamation. The whole of these movements were very rapid. I cannot well judge how long a time they consumed, but should say, that it was not more than five minutes, from the time Mr. Cleaveland rose, until they were out of the house. It may have been longer, but every thing was done as rapidly as possible. There was much confusion in the house. From the time when the motion was made, that Dr. Beman should take the chair, there were a number of persons standing, and there was a rush into the aisle. Most of these remained standing. My impression was, that I heard some ayes 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. It was on this account, that I chose that situation, which I occupied during most of the time that the General

Assembly was in session. Those who retired from the house, went out in a crowded manner, very rapidly; and there was a great press, whether by members of the body, or other persons, I cannot say. There was a great dust round the doors while they were going out, and afterwards. There was a rising in the gallery, and great interest manifested. 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 occupied the seats around where I was. We had occupied the building 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 different individuals among them, as well as from the Moderator.

Cross-examined by Mr. Meredith.—I was ordained by the Associate Reformed Presbytery of New York, in April 1818. I came into connexion with the General Assembly by the Union of 1822, but still remained in that Presbytery, the organization of which was not changed. I was installed as Pastor of the First Presbyterian Church in the city of New York, in 1826. I was not re-ordained, on entering into connexion with the General Assembly. The Associate Reformed Church was a Presbyterian Church—We thought it as much so, as the General Assembly itself. It had the same Confession of Faith, and the same Catechisms, with the Presbyterian Church. One condition of the union, and of our Presbytery's coming into it, was, that we should retain our distinct organization as a Presbytery. The Forms of Government of the two Churches were the same in substance, though a little different in phraseology; but the Westminster Confession of Faith and Catechisms are the standards of both. 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. I have used the directory 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 Catechisms, because they are the same in both denominations.

Mr. Meredith, (handing to the witness the book of the Associate Reformed Church.) Look if you please, if that is the act of adoption of the Confession of Faith, by the Associate Reformed Church.

Dr. Phillips. There was subsequently, I think, an alteration in that part which relates to the civil magistrates. I think this is not the Confession now used; but the doctrines are 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.

Mr. Stacy G. Potts—sworn. I reside in Trenton, New Jersey. I happened to be in Philadelphia, on the day of the opening of the Assembly, in May, 1838. I attended at the church in Ranstead Court. Having arrived that morning, I went directly from the steamboat to the church, about half past ten o'clock. My seat was in one of the small

pews toward Fourth-street. I entered, I think, at the east door, went a little beyond the centre of the church, and sat down at some distance from the Moderator's chair. Until the close of the religious exercises, every thing was quiet; and then the Moderator took his place on the desk below the pulpit, and proceeded to organize the Assembly. At this time, a gentleman, whom I did not know, rose and made some statement; but I did not hear what he said, for, at that moment, the people around rose, and there was a little confusion and noise about me. This passed over, the gentleman sat down, and I saw the clerk, as I supposed, and heard him call over the roll of the Assembly. Immediately after he had called it, there was another interruption. Some one, whom I did not know, rose, and the noise commenced again. From that time, the confusion around me increased, persons went out into the aisle, and pressed near the place where these proceedings were going on. I was unable, sitting in the pew, to see any thing, and finding that the scene was one of interest, rose up, but just then the persons around began to get upon the seats of the pews, and still entirely intercepted my view. I made no further effort to see, but remained standing in my place. The first thing that I distinctly understood, was a vote of aye, very loud, and apparently coming from many parts of the house. Some about me said "Aye!" very loudly. I thought some voices from the galleries, which I supposed were female voices, mingled with the rest. My attention was drawn to the galleries, because I had noticed that ladies exclusively sat there. They were quiet when I looked up, but manifested a visible interest in the proceeding, and there was a slight movement of their hands. I did not know at the moment what this "Aye!" was for. It was impossible to hear, where I stood, a syllable spoken in ordinary language. I did not know one person in the vicinity of the place where I stood, and cannot say that any one who was not a member of the Assembly voted, aye. Two or three votes of this kind were all that I distinctly heard. There were two or three ayes at short intervals, but I heard no question proposed the whole time. I think that, on one occasion, I heard a few scattering noes—whether on the first, or one of the subsequent votes, I cannot tell. The scene took place, I think, in about the centre of the church. I was in one of the wall pews, a little further towards Market street. The ends of those pews are against the wall. The next scene which attracted my attention, was a general movement towards the doors, and in a very short time a mass of persons had gone out. Immediately, a person presented himself at one of the doors, and made proclamation, that the General Assembly had adjourned. He then proceeded to the second door, and there made the same proclamation. I think I saw the person at one of the doors. At the third door also the same proclamation was made, and the person who made it not doing it the first time to his satisfaction, being a little hoarse, cleared his throat and repeated it very loudly. I heard no motion made in regard to adjournment.

Cross-examined. I am a member of an Old-school church in Trenton.

Court adjourned.

WEDNESDAY AFTERNOON—4 o'clock.

Dr. William Harris—sworn. 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, and was immediately 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 the roll, 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 from a by-stander, 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 by-stander, 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, Genesee, 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 declared the appeal also out of order. A third person, who, I learned, was Mr. Squier, then rose. He said he had a commission to offer from the Presbytery of Geneva, which had been rejected by the clerks. The Moderator asked him, whether that Presbytery was in the Synod of Geneva. Mr. Squier answered that it was. The Moderator replied, "Sir, we do not know you." Afterwards a fourth gentleman arose, whom I knew to be Mr. Cleaveland: I had seen him the year before in the General Assembly. He was in a diagonal direction from me, and so far distant, that I could not hear 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 to read. 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 unusually 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 standing 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-examined by Mr. Randall. I am an elder in the Tenth Presbyterian Church, in this city—Mr. Boardman's church.

Rev. Dr. Samuel B. Wilson—sworn, with the uplifted hand. I attended the Assembly of 1838, as a commissioner. I was in the church of Ranstead Court, on the day, and at the time, of the organization of the Assembly. I sat on the front range of seats, on the west side of the middle aisle. Sitting, as I was, with my face towards the Moderator, Mr. Cleaveland was behind me, and I did not see him. I heard a gentleman, whom I afterwards understood to be Mr. Cleaveland, either speaking or reading. When he commenced, I could hear, pretty distinctly, some of his first words. Very soon the Moderator called him to order. He persevered; and the call to order was repeated, perhaps more than once. A member, who sat near me, rose, and also called him to order. That produced a confusion, and prevented me from hearing distinctly, and in continuity, all that was uttered by Mr. Cleaveland. It is, perhaps, proper that I should explain, now, another reason why I did not hear. At times, after the calls to order, Mr. Cleaveland having persevered, there was a considerable commotion in that part of the house where he stood. Some were standing on the floor, and some higher; altogether, they made a good deal of noise. I do not think I can state any distinct proposition made by Mr. Cleaveland. There was a kind of confused statement, but I am not able to say that any thing distinct and definite, so far as I heard, was brought before my mind. It appeared, however, from what followed, that something or other was proposed, for I heard a distinct vote—a number of unusually loud ayes, besides the one particularly alluded to by others. I heard no reversal of the question; and do not remember any voice saying, "No!" I cannot say, that I endeavoured to hear Mr. Cleaveland, though, if I had, I am confident I could not have heard.

Mr Hubbell. Why did you not vote?

Mr. Meredith. We object to the question. The witness's reasons for not voting are of no importance.

Mr. Hubbell. On what grounds do you object? I should like to argue the point.

Judge Rogers. Let us hear the grounds of your objection, Mr. Meredith.

Mr. Meredith. The question asks for the witness's motives in a particular case, which I suppose are not evidence.

Judge Rogers. If the object is to show the fact that the witness did not hear, the question is competent.

Mr. Hubbell. I asked the witness whether he had voted. He said "No." I now ask him why he did not vote. The point in dispute is, whether we voted or not. They say, that being silent, we must be considered as acquiescing, as voting in the affirmative. Now it is certainly competent for us to bring up every one of the Old-school party, to show that they did not intend to acquiesce; to exclude this conclusion of our opponents. We desire to prove that these individuals did not intend either to vote affirmatively, or to cast away their votes; that the reason of their silence was, that they considered the whole proceeding irregular and abnormal.

Mr. Ingersoll. There may have been a moral or physical inability to vote—some circumstances that prevented the witness's voting. This,

perhaps, is the true issue. If there was either a bodily or mental incapacity, or if he refrained from voting because the question was not heard, he cannot be supposed to have assented to the proceeding. Again, a member who does not vote is sometimes recorded as a *non liquet*. We wish to ascertain whether this witness is to be treated as a *non liquet*. We ask for the reason of his not voting. It may be that it was owing to some sort of incapacity.

Mr. Randall. If the witness be questioned merely as to his ability, or as to any obstruction of his hearing, we make no objection.

Judge Rogers. You may ask, whether the witness's not voting was because no opportunity was given, or because he did not wish to vote.

Mr. Preston. I should be happy to understand the full extent of your Honour's decision. The main point on which our opponents rely, is the intendment of law, that persons who are silent vote in a particular way. This intendment must prevail, unless we show the contrary, by demonstrating the exact state of the facts.

Judge Rogers. I do not think that that intendment of law can be rebutted. If a motion be put and there are ten ayes, and but one no, it is carried.

Mr. Preston. Perhaps the parties can show that the motion was not put either in fact or in law.

Judge Rogers. I do not think that is the question here.

Mr. Ingersoll. I will put the inquiry 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?

Mr. Meredith. We object to the question as presenting an entirely suppositious case.

Judge Rogers. You must confine the inquiry to what was actually done.

Examination continued. My back was towards Mr. Cleaveland, when I first heard him speak, but I naturally turned, while he was speaking, to get a view of him, and hear what was said. When I turned, I think he had a paper in his hand. I thought he did not hold it very firmly, and, 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: as to this, I was entirely in the dark. I didn't know that Dr. Fisher had been 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 mem-

ber of the Assembly of 1838. I am considered as one of the Old-school party.

Rev. Dr. Samuel Miller—sworn, with the uplifted hand.—I was present at the organization of the Assembly of 1838, but was not a commissioner. I sat 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, and held 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 a great deal of difficulty in proceeding. 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 a new body, and that they should proceed, in as few words, and as short a time, with as little discourtesy as possible, to do so; and he offered a resolution, inviting Dr. Beman to take the chair. That is the amount of what I heard. Then there was a great deal of tumult and disorder, and calls to order. What Mr. Cleaveland said appeared to be by no means distinctly uttered. With the exception of a few calls to order, all the tumult was in that part of the house, where Mr. Cleaveland was. I heard no vocal utterance in the other part, excepting the calls to order. The nays were not called for on either of Mr. Cleaveland's motions. After moving, without reversing the question, that Dr. Beman should take the chair, he made, I think, a similar motion, also without reversing it, that Dr. Mason and Mr. Gilbert should be clerks. After these resolutions had passed—that is, after the ayes, which came principally from that part of the house, had been called for, Dr. Beman immediately stepped out into the aisle, went down the aisle, and appeared to place himself in the situation of a presiding officer. The whole body of those engaged in these proceedings moved down the aisle, near the door opposite to the pulpit. I afterwards heared a confused murmur, but no distinct articulate sound: what words were spoken, or with what result, after Dr. Beman took the chair, I am wholly unable to testify, from my own knowledge. It is not easy to define, exactly, the limits of the space occupied by the Old-school party; but the great body of them, occupied the part where I stood, the corresponding part, on the right side of the Moderator, and the front pews. I think I was standing in the midst of that body. I heard no vote from this part of the house. So far as I could see and hear, not a single Old-school man, in the whole house, voted. I heard no negative votes on any of the motions. When the vote "Aye!" was given, there was a character about it, that convinced me, that a number in the gallery had voted. There were sharp, shrill cries, which I could not believe came from considerate, dignified, and serious men. I took for granted that they came from the gallery, and from the boys about. This however, was my own inference. There was certainly a character about the ayes, which I had been altogether unaccustomed to. It is difficult to make an estimate of the length of time between Mr. Cleaveland's rising, and the adjournment of those who left the house, the whole affair was so thrilling; but I suppose it was not more than five or six minutes. I did not know that Dr. Fisher was Moderator until the next day. I was not at all sensible of that part of the operation.

Examined by Mr. Preston. I cannot say with confidence, how often the Assembly has been held in that church; I should think ten or fifteen

times; 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. I have no pastoral charge, but am a professor in the Theological Seminary at Princeton. I remained the whole time in the same place. I 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.

Dr. Wilson—re-called. 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 very words.

Cross-examined by Mr. Randall. As soon as the Committee of Commissions had made their report, the Moderator stated, that if any commissioners had not had an opportunity of presenting their commissions, now was the time to present them. 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 which was called for.

By Mr. Meredith. The Moderator called for commissions that had not been presented. I will not be positive that he did not say, those that had not been enrolled. I believe, that by this, the same thing would have been understood. I cannot be sure, but I think his words were, those that had not been presented to the clerks, or to the Committee of Commissions. I was not a member of the committee to prepare a minute of these transactions. I presume that I approved of the minute, but I have no distinct recollection of its phraseology.

Rev. Isaac V. Brown—sworn, with the uplifted hand. I am a clergyman of the Presbyterian Church. I was not a commissioner to the General Assembly of 1838, but I attended at its organization. I was on the north-east side of the house, in the rear of Mr. Cleaveland, and within about five feet of that gentleman, as nearly as I could estimate. There was one pew between his and mine. Dr. Beecher was at the end of the pew between us, and Mr. Cleaveland sat next in front of him, about half-a-dozen pews from the Moderator. Mr. Cleaveland rose with a paper in his hand. At his first rising, his face was towards the Moderator, and his back to me. I did not hear him say, "Mr. Moderator." When he had commenced reading, he turned a little round from the chair, as if addressing the persons to his right, and thus gave me an opportunity to see the hand-writing of the paper, and to hear, distinctly, what he uttered. I can recollect, perfectly, the main topics of his discourse, and nearly in their order. He commenced by declaring, we are about to form a new body; he expressed an apology for the interruption, and wished not to be considered discourteous, as they would do it "in the fewest words, and the shortest time possible." These are his own words. He declared, that what they were about to do, was in pursuance of the advice of counsel

eminent, or learned, or both—one or the other form of expression he certainly used. He stated, that their choosing that time and place, was in order 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 instantly 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 vociferous response of "Aye!" in certain parts of the house. I think there were voices from the gallery, and voices that clearly manifested, that they did not belong to members of the General Assembly. They were shrill and squeaking, more like female voices, and came 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. In the rear, there was a very promiscuous assembly, of all sexes, and all ages. There were, however, a few gentlemen, occupying the seats immediately in my rear, whose faces I did not know. I heard no negative voices at all. After this a motion was made for the appointment of clerks. I heard the name of Mr. 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 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 particularly 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—a notice, that the body which had recently been 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 in regard 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.

Rev. Nathan G. White—sworn, with the uplifted hand. I was a delegate to the General Assembly of 1838. I am a clergyman settled in M'Connelsburgh, in Carlisle Presbytery, of which I am a member. I attended at the organization of the General Assembly, on the 17th of May. I was in the eastern part of the church, about four pews from the Moderator, on the eastern side of the middle aisle, and

was 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, read, or appeared to read, what was in the paper. I supposed him to have uttered about one sentence, before I heard what he was saying: about a moment of time had elapsed. He then stated, "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 at that moment there was considerable noise. I thought that 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 continuously uttered, so as to form a sentence. At this time, he was turning his face away towards the middle aisle, and therefore away from me. He then made a motion that Dr. Beman should take the chair, and just as he made it, a number of persons near and around him arose, and, immediately, I heard a very loud "Aye!" I did not hear the motion for Dr. Beman to take the chair reversed. I heard no negative votes on it. 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. When I say it was not, 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 this, those persons who were standing in the aisle, and on the seats of the pews, 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 had gone out, I heard a loud cry at the door, announcing, 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 the north-western 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, that he was out of order, because 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 to be taken without debate. The Moderator decided that he was out of order. Then 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 arose, saying that he held certain commissions. He had a bundle of papers in his hand, which he held out, and he 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 commissioners were from. Dr. Mason answered, that they were from the four Synods—naming them—of Utica, Geneva, Genesee, 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—sworn. I am a theological student in the Princeton Seminary. I belong to the Old-school party, if worthy of that honour. I attended at the organization of the Assembly of 1838, as a spectator. I had a companion with me—Mr. Twitchell. He is from the same place with myself. When I first went into the church, I passed through the recess into the grave-yard, and entering by the side door, took my seat on the side aisle, near the door. After a few moments, I thought that I could see better from the gallery, on the left hand of the pulpit: I went into that part of the gallery, and seated myself there. My companion and I went up the steps together, or, at any rate, we sat together. I remember the motion made by Mr. Cleaveland. After Dr. Mason had taken his seat, Mr. Cleaveland rose, holding in his hand a paper, and, with his face towards the Moderator, commenced reading, as I supposed, from the paper: he certainly looked at the paper. During the reading he changed his position, so that his side was towards the Moderator, and his face nearly towards me. At the conclusion of the paper he moved that Dr. Beman should take the chair. I did not hear the motion seconded, but took it for granted it was seconded, 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 that 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 as it was propounded 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 me informed me 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. The confusion at first arose from the 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 motion of those persons engaged in these proceedings, and of a number of the spectators, towards the north door. After the great mass of them had reached the door, and passed through it, 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—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. 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, he was out of order. He appealed to the house. The Moderator told him the appeal was out of order. Dr. Patton then sat down, and the clerk proceeded with his roll and finished it. The Moderator stated, that those whose names had been read by the clerks were to be considered as members of the Assembly; also, that if there were any other persons, who had not yet presented their commissions to the clerks, now was the time to present them. Upon that, a gentleman, whom 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 stated, 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 replied, that they were from Presbyteries within the bounds of the Synods of Geneva, Genesee, Utica, and the Western Reserve. The Moderator then 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 said, "I tender these commissions, and demand 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. At this time, the Moderator repeated his call for commissions; and, at that moment, Mr. Squier, as I was told it was, rose 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-examined by Mr. Meredith. This was a period of vacation at the seminary, and quite a number of the students were in the city. Some of the professors were here, but not a majority of them, I think.

Mr. Walter Lowrie—sworn, with the uplifted hand. I attended at the organization of the Assembly of 1838. I was in the seat immediately adjoining the door leading into the grave-yard, on the left of the pulpit, looking from it. I was in the south-west corner of the church, in a wall pew—a pew running along the wall. After the General Assembly had

been opened with prayer, it was announced by the Moderator, that the first business was the report of the Committee on Commissions; and he called for the report. Dr. Patton arose, saying, that he had a motion to submit: he did not state what the motion was, but he held a paper in his hand, which, I presume, contained the motion. The Moderator told him, he was out of order; that the first business was the report on the roll. Dr. Patton said that his resolution had relation to the roll. The Moderator replied, that the first business was the hearing of the roll; that he was out of order at that time. Dr. Patton said, he must, respectfully, appeal from that decision to the house. The Moderator said, 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, and the Moderator directed the clerks to proceed. Mr. Krebs then read a considerable time, until he ceased reading. After this, the Moderator announced, that if there were any commissioners present, who had not handed their commissions to the clerks, now they would have an opportunity of doing so. A gentleman, whom I afterwards understood to be Dr. Mason, rose, at, or about that time, and stated that he held a number of commissions from certain Presbyteries, perhaps naming them as Presbyteries in the four Synods of Utica, Geneva, Genesee, and the Western Reserve; that they had been pesented to the clerks, but not received; and that he now tendered them to the chair. The Moderator said that he was not in order 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. Whether he rose before, or after Dr. Mason, I cannot tell. He tendered the commission, and claimed a seat as a member of that house, from the Presbytery of Genesee. The Moderator asked him, if that Presbytery belonged to the Synod of Genesee. He said, that it did. The Moderator replied, "Sir, we do not know you." It was the Synod of Geneva, not Genesee. I confound the two words frequently, because I do not know the locality of the two Synods, except from indistinct recollection. 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 any appearance of disorder. Thus, I had a full view of Mr. Cleaveland. He had a paper in his hand, and, apparently, he 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 could hear nothing more, distinctly, partly on account of the noise, partly from his hurried enunciation—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 that neighbourhood and behind him, 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 reverse of that question; 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 have not heard it from my position. But the proceedings which immediately followed did not leave time for it to be put, even in a whisper. The want of time is sufficient proof; else I would not swear to a negative. 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 for eleven years I was Secretary of the latter 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; and 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—for others were put; but what they were, or who put them, I did not hear. I thought, that the one who put them had moved nearer the door, but persons rose between, and shut him out from my view. I heard no negative responses; and 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 arose, 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, with which I stayed, that Dr. Beman had been chosen Moderator. They said, the next day, that it was Dr. Fisher. I told them, that then any man might be mistaken, for I was looking on, and had seen nothing of 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, and took any seat I found vacant.

Cross-examined by Mr. Wood. I was not a member of the Assembly that year; 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.

By Mr. Preston. I was elected, before I resigned my place in the Senate, Corresponding Secretary of the Western Foreign Missionary Society. That was transferred to the General Assembly in 1837.

THURSDAY MORNING, March 14th—10 o'clock.

Dr. Phillips—re-called. I was Moderator of the Assembly in 1835. Dr. Witherspoon was a member of the Assembly of 1838, and was present, I believe. He had been Moderator in 1836.

Mr. Jerome Twitchell—sworn, with the uplifted hand. I am a theological student at Princeton. I went there from the Miami University, of Oxford, in Ohio. I am a member of the Second Presbyterian Church, in Cincinnati, under Dr. Beecher. I attended at the organization of the Assembly in 1838. I came into the building, and, in the first place, took a seat on the right hand side of the aisle, entering by the door from the grave-yard. I found several vacant seats. This was near eleven o'clock, and Dr. Elliott was then in the pulpit. I was there before the sermon had commenced. After I had taken this first seat, seeing several ladies standing, I moved farther back. Soon after, I saw a gentleman standing. I beckoned to him to take my seat, and walking forward, went up into the gallery. Mr. Samuel Wilson was with me. I saw the Moderator come down from the pulpit, and open the Assembly with prayer; after which he stated, that the next business was the reading of the roll by the clerks. Upon this Dr. Patton rose, to offer some resolutions which were in his hand. The Moderator decided that he was out of order. Dr. Patton said, that he wished to read them, and have them passed upon without remark. The Moderator told him, that the next business was the reading of the roll. Dr. Patton replied, that his resolution had reference to the roll. The Moderator pronounced him out of order. He appealed. The Moderator said, his appeal was out of order, as the house was not yet organized. Then Dr. Patton sat down. Afterwards an individual, whom, as I learned, was Dr. Mason, arose, with a bundle of papers in his hand. Before this, however, a declaration had been made by the Moderator, that if there were any more commissions, which had not been presented, now was the time for them to be handed in. Dr. Mason then rose, and said that the commissions, which he held, had been presented to the clerks, and that they had refused to enrol the names; and he moved, that the roll should be completed, by the addition of these names. The Moderator asked, whether these commissions were from Presbyteries in connexion with the General Assembly, at the close of its session in 1837. Dr. Mason answered, that they were from Presbyteries, within the bounds of the Synods of Utica, Geneva, Genesee, and the Western Reserve. The Moderator said, "We cannot receive them at this time." After this Dr. Mason took his seat. A gentleman then rose, on the opposite side of the aisle, whose name I have since learned. He said that he had presented his commission to the clerks, and that they had refused it; that he now demanded his seat in the General Assembly. He said that he was from the Presbytery of Geneva. The Moderator asked him, if that Presbytery was within the bounds of the Synod of Geneva. He answered, that it was. The Moderator said, "We do not know you, Sir;" upon that he took his seat. Mr. Cleaveland then rose,

holding a paper in his hand, from which he appeared to read. The first part I heard with tolerable distinctness: the last part, not at all. The first part was, "Whereas certain individuals have been excluded from their rights as Presbyterians, their commissions having been refused by the clerks, and we have been advised by counsel learned in the law, that, at this time, and this only, can a constitutional organization of the Assembly take place, I hope that——" Then the noise prevented me from hearing, but he used a word seeming like "discourteous." Next, I heard a name, something like B., and I supposed it was Dr. Beecher, who was sitting at the side of Mr. Cleaveland. Then, the next thing that I distinctly heard, was a very loud vote on the affirmative of some question, which I did not hear. The next thing I *saw*, for I could not hear—except that I heard several calls to order, and some one saying, "I hope we shall have order," with the Moderator's distinct response, that the confusion would soon be over—that he had called order, and tried to preserve order, and that he hoped the members would keep their seats—the next thing I saw, was several individuals going into the aisle, from the pews in which the three gentlemen had arisen, and the surrounding ones. In several parts of the house there were individuals standing up, and there was a rustling of dresses, and a noise occasioned by persons rising, in the gallery. Most of those in the gallery rose. These, whom I have mentioned, having gone into the aisle, I heard in close succession, after they had gone part of the way up the aisle, several affirmative responses, apparently to questions which I did not hear. Soon, a great part of the audience in the gallery, and on the floor below—ladies and others—I could not then distinguish the members on the floor—left the house. At 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 most had left the church, Mr. Edward Beecher came back to the door, and proclaimed, in an audible voice, that the General Assembly of the Presbyterian Church would meet forthwith, in the First Presbyterian Church. The same proclamation was repeated at the side-door of the house, by an individual whom I could not distinctly see, and did not recognise. I heard no negative votes, and I heard no question reversed. I cannot affirm that I heard any votes in the gallery, because they rose in a body, and I cannot say from what part of the house they came. I cannot say how long the whole of these proceedings occupied: it was a moment of deep excitement. The time was very short. I did not then know of Dr. Fisher being appointed Moderator of the body.

No cross-examination.

Rev. Varnum Noyes—sworn, with the uplifted hand. I am a clergyman of the Presbyterian Church. I was not a delegate to the Assembly of 1838. I reside on the Western Reserve, in the state of Ohio. I now belong to the Presbytery of Worcester. In 1837 I belonged to the Presbytery of Medina, and previously to the Presbytery of Cleveland. The Presbytery of Medina is within the bounds of the Synod of the Western Reserve. I am not very intimate with any other Presbytery, but have some acquaintance with that of Portage, which, as well as Cleveland, is also within the bounds of the Synod of the Western Reserve.

Mr. Hubbell. How is the Presbytery of Medina constituted as regards Congregationalists and Presbyterians?

Mr. Meredith. The witness will please to wait one moment. What is this testimony intended to prove?

Mr. Hubbell. We propose to show that in the three Presbyteries which Mr. Noyes has mentioned, a great majority of the churches are Congregational; and to follow up this by similar testimony, in regard to other Presbyteries within the bounds of the disowned Synods.

Mr. Meredith. We have no indisposition to go into this inquiry, if your Honour thinks it material; but we desire to ascertain the exact extent to which we shall be permitted to go. It appears to me that so far as regards the exscinding resolutions, we stand here upon a question as to our rights as Presbyterians. Suppose there was not a single true Presbyterian within the bounds of the four Synods; not a man among them, from the minister down to the humblest worshipper, without some flaw; what remedy was within the power of the General Assembly, other than the trial and expulsion of the delinquents? If a trial had been given, it would have been conclusive of this question. If, instead of exscinding this great body of people, claiming to be Presbyterians, without trial, they had been tried for some offence, convicted, aud expelled, such expulsion would have been final. They would not be at liberty now to prove that it was all a mistake; that they were as good Presbyterians as those who had condemned them. It would not be competent to them to show, that the evidence brought against them had been falsely coloured, in its passage, through the medium of party feeling. If, on the other hand, the General Assembly has thought fit to cut them off without trial, without any allegation of error in doctrine, or of irregularity in practice, but merely on the ground that they came into the Church in an unconstitutional manner, that they have never really belonged to it, that body must stand by its own act. It is not competent to them to prove now, that those whom they have attempted to exclude are Congregationalists; to try them for a corporate offence before this court, which is not the corporate tribunal. Proof of their delinquency cannot be admitted, after judgment has been already passed upon them. The only questions now before the court, in regard to these acts of excision is, whether by the "Plan of Union" of 1801, the Presbyterian Church did, or did not, admit Congregationalists into her fellowship; and, if she did, whether the General Assembly was or was not competent to exclude, on this account, a large body of undoubted Presbyterians. I do not expect to hear any argument advanced to show that the General Assembly had a right thus to act. It is not for the counsel on the opposite side to attempt now to bolster up an unconstitutional proceeding, by proof of the existence of these Congregational churches. The examination of witnesses has, we think, proceeded far enough; still we are quite ready to go into this investigation at any expense of time, though we have thought fit to ask the question, whether the testimony is relative to the point in issue.

Mr. Ingersoll. Your Honour will do us the justice to affirm the position, that this was the very course of proof which we attempted to eschew in an early stage of the trial; but that we were compelled to follow in the track marked out by the plaintiffs' counsel. They led the way into the inquiry respecting the acts of the Assembly of 1837, with a view to show the illegality of those acts. We thought such an inquiry foreign to the subject, but the point was decided against us. The relevancy of the pro-

ceedings of 1837 was affirmed by the court. We, however, acquiesced cheerfully in the decision. We presumed, indeed, that these proceedings were held up to view merely for effect, and this is evident from our learned friend's argument. He speaks of a condemnation without trial and without notice, the common rights of an accused party. On this point we take issue: it is the very thing that we deny: there was no such condemnation. We maintain that, according to the true construction of the charter granted by the legislature of Pennsylvania, and of the whole form and system of government of the Presbyterian Church, the "Plan of Union" of 1801 was unconstitutional, and either voidable or void—at all events a mere temporary expedient. The General Assembly may originally have spread its wings over a vast circle, extending widely its protection and patronage; but it did not contemplate the perpetuity of such a system. When it became unnecessary this protection was withdrawn. We say then, that the plan was not only unconstitutional, but also temporary, and that as a temporary plan it might be abrogated. But all this pertains to our defence, and we now propose to establish it. We wish to present evidence of facts, which we contend are a sufficient justification for our proceedings, which have been erroneously condemned as being in the nature of criminal process. We ask leave to show the propriety of our acts—to show that there existed in the body of the four disowned Synods, sets of individuals who were not Presbyterians. These individuals, however, were not to be condemned on this account. Perhaps they were even to be lauded. They were but pursuing their own path to salvation. The lamp for my feet is not the lamp for every man's feet. Perhaps, I say, these men were to be applauded. They were not in fact condemned, but merely disunited from us. I put a case: Suppose it were discovered that by the "Plan of Union" of 1801, worshippers at Mecca or Constantinople had been admitted into the Church: would it not be competent for us to show the fact of their admission, in order to prove the unconstitutionality of the "Plan?"

We offer this testimony then as a justification of our acts. We believe that the true merits of this case are resolvable into the proceedings not of 1837, but of 1838; and that the proof of their irregularity will be a bar to all polemical topics. Yet at this moment we cannot foresee, but that this testimony may prove important. Our opponents, too, have gone into the breach, and we must follow them. Our object is, first, to meet the assertion that our proceedings were in the nature of condemnatory process; and secondly, to give our reasons for them.

Judge Rogers. I admitted the proceedings of the Assembly of 1837, 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 defendant's 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 within the jurisdiction of the Assembly, their decision must be final; even though they decided wrongfully. I do not think any church ought to wish the civil power to interfere in such matters.

Rev. Francis McFarland—sworn, with the uplifted hand. 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 connection with the Home Missionary Society. Some years ago, they recommended that society to the patronage of their churches. The Assembly has no connection with what is styled, I think, the Central Education Society. I am Corresponding Secretary of the Board of Education, attached to the General Assembly. I have some of the books of that Board with me. Our register contains the names of the young men assisted by the Board, and our ledger, the sums paid to all these young men.

Judge Rogers. What has this to do with the case?

Mr. Hubbell. Mr. Randall, the other day, read from the reports of the Presbyteries, to the General Assembly, statements of their contributions to certain charities. We desire to show, that those reports 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 reports, the sums appropriated to the different objects, are not distinguished; and we are prepared to show, 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 the recognition of those Presbyteries by the General Assembly. In this view of the case, it is entirely immaterial, whether only one dollar, or ten thousand dollars were contributed.

Mr. Randall. They were offered to show a right vested in the exscinded bodies.

Mr. Hubbell. Then I was mistaken as to the intention of the counsel. I supposed the evidence was given to raise an equity in favour of the disowned Synods.

Mr. Randall. We have nothing to do with equity; or, rather, the law will be the equity of the case.

Mr. Hubbell. We can produce evidence that these bodies have never contributed anything to the Theological Seminary fund, or to the Foreign Missionary fund.

Mr. Randall. I have already proved by the record that they have.

Mr. Hubbell. Your Honor sees, that it is intended to insist on this point in argument, and yet we are excluded from rebutting the testimony given.

Mr. Wood. We do not intend to insist upon it, further than as it regards the recognition of the four Synods.

Mr. Thomas Evans—sworn, with the uplifted hand. I attended the Assembly of 1838, in the church in Ranstead Court, at its organization. I occupied a part of one of the front pews, in the west gallery, and the south-west part of that gallery. I saw Mr. Cleaveland rise, and he had in his hand a paper, which he proposed reading. I was told by a gentleman near me, that it was Mr. Cleaveland. I was a stranger in the city, having for twelve years past resided in one of the Southern States. The Moderator called him to order. With his face towards me he continued to read, but turned gradually until he faced a little north-west of where I sat. I did not understand the contents of the paper. I could not hear his reading distinctly. I heard his voice, but could not understand what

he said. I was in the front seat of the gallery, and nearer to the pulpit, than to the other end of the church. Mr. Cleaveland was almost opposite to me, perhaps a little to the north-east from where I sat. I am confident that I did not hear what he read. I mean to say, I did not understand what he read: I heard his voice. The noise and confusion at that time, prevented me from understanding. I heard him, after reading the paper, propose, that Dr. Beman should act as temporary Moderator of the Assembly. He wished all those who were in favour of the motion, to signify it by saying, aye. There was then a loud vote in the affirmative, and Dr. Beman stepped out into the aisle. The question was not reversed. I took particular notice of this at the time; for, from out-of-door reports, I had supposed, that the motion would be voted down. I remember stating to a gentleman, after the Assembly had adjourned, that the question had not been reversed. I feel entire confidence that it was not reversed. Dr. Beman then stepped out into the aisle: I think that he and Mr. Cleaveland had been sitting in the same pew. I think Dr. Beman sat by the door. They were certainly in the same immediate neighbourhood, if not in the same pew. Dr. Fisher was then nominated, by somebody, as Moderator of the Assembly, of 1838; this nomination was seconded by some person, I do not know by whom, the motion was put, and a loud vote in the affirmative given. Then a motion was made, that those in favour of these proceedings, should retire, or adjourn, to the rear of the house. Accordingly, a great many persons moved off towards the north end of the house, and formed in the middle aisle, about half way, I should suppose, from the pulpit. I am unable to state, what was done after this, until it was said, by a number of persons, that the General Assembly had adjourned to the First Presbyterian Church—Mr. Barnes's church. There was considerable confusion and noise, which prevented me from hearing. I heard a good deal of noise, and saw several persons applauding, and clapping their hands, in some of the pews on the middle aisle. I do not like to tell their names, for fear of giving offence. One of them was a gentleman of high respectability, who lives in Philadelphia. I had been only a few weeks in Philadelphia. When the vote in the affirmative was given, on the motion that Dr. Beman should take the chair, I heard some noes, simultaneously, with the ayes. A young gentleman, who was sitting close by me, voted, "No!" and there were other votes from the galleries. 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 remained silent. Those around me appeared to. While the body was retiring, there was, I recollect distinctly, great applause. 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 been a member before that time.

Cross-examined by Mr. Randall.—I think my papers had been handed in, and that I was admitted. 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 my sympathies with them. I have been influenced by nobody, in these sympathies.

Rev. Henry A. Boardman—sworn, with the uplifted hand. I am the pastor of the Tenth Presbyterian Church in this city. I was not a delegate to the General Assembly of 1838. I attended at the opening of the Assembly in that year: my position was in the south-west corner of the church, under the gallery, in front of the Moderator, in either the front pew, or the one lining the wall. Those seats are elevated one step above the floor of the church. Mr. Cleaveland rose with a paper in his hand, and with his face toward the Moderator. He had been sitting in the spot pointed out by each of the witnesses. He made some remark, the purport of which I do not remember. He was not called to order immediately by the Moderator, and began to read. Here and there I understood a clause, but can now remember only the words, "counsel learned in the law." As he read, his eyes were intently fixed upon the paper. He seemed very much agitated; his countenance was flushed, and his frame and voice trembled. As he read he turned gradually, till he faced the western wall of the church. The Moderator repeatedly called him to order, and rapped with his hammer. Other members around me, called to order, and used various expressions. Some said this was shameful disorder, and others, "Let him go on." As he proceeded, the people in his neighborhood, in the body of the house, began to rise. He then moved, that Dr. Beman should be Moderator. I think he used that expression, or one equivalent to it. He called for the ayes, saying that those in favour would say aye; and there was a very loud "Aye!" He did not reverse the question. Either Mr. Cleaveland, or some one else then made another motion, which I did not hear, and Mr. Cleaveland, as I recollect, put this also, calling for the ayes, but not reversing the question. I speak with some confidence of these questions not being reversed, for I spoke of it at the time, and then supposed that it arose from Mr. Cleaveland's embarrassment. There was great confusion, and many stood up, some on the seats, and even on the backs of the pews. There was a movement then, in the middle aisle, toward the northern door, and the subsequent proceedings were completely shut out from my view. I heard nothing but a hum or buzz, excepting now and then a loud, tumultuous "Aye!" One voice, in particular, sounded high above the rest. I did not hear one of the questions put, and was utterly at a loss to know what they were. I did not know of Dr. Fisher's being Moderator, until the close of that morning's session, or until the next morning, and I denied it, when I first heard it stated. After several of these responses of "Aye!" had been made, there was a movement of this mass in the body of the house, toward the north door, and I took it, that the actors in the scene had receded. There was, at length, another movement toward that and the east door, and somebody cried out, in a very high and shrill voice, that the General Assembly had adjourned to Mr. Barnes' church, which excited a smile. Presently this was proclaimed again near the east door; whether the same person had gone round, and repeated the proclamation, I don't know. The house was filled with spectators during this scene, and was very crowded. A number of these left the house, with the retiring body; but I think the greater part remained. None of the Old-school party, to my knowledge, voted on any of these questions. I think, on the first, there were a few noes simultaneously with the ayes, but it was not reversed. These noes did not come from the part of the house

where the Old-school party sat. They seemed to come from the same vicinity with the ayes, but perhaps may have come from the gallery.

No cross-examination.

Mr. Hugh Auchincloss—sworn, with the uplifted hand. I attended at the organization of the Assembly in 1838. I was a commissioner from the Presbytery of New York. I sat in the south-west corner of the church, under the gallery. I am not a clergyman, but a ruling elder. Dr. Mason had scarcely taken his seat, when Mr. Cleaveland rose. I did not hear him address the Moderator, but he commenced immediately reading a paper. What the paper contained, I did not distinctly hear. I then heard him put the question, upon the nomination of a certain gentleman for Moderator. Whether the gentleman was Dr. Beman, or Dr. Beecher, I did not know at the time. The question being put, there were a number of irregular votes in the affirmative. I did not hear any negatives, and am sure that the reverse of the question was not put. Another motion was made, that Dr. Mason and Mr. Gilbert should be clerks, and this was put in the affirmative, but not in the negative. There was considerable noise around the place were this scene was acting, and in the galleries. Distinct voices from the gallery responded "Aye!" and there was clapping of hands. After this, a number rushed to the door, and went out in a disorderly manner, and cried out, that they had adjourned to meet in the First Presbyterian Church—Mr. Barnes'. I should judge, that all these proceedings did not occupy more than five or six minutes, at most. The answer of the Moderator to Dr. Mason's motion, when he presented the commissions, was, that he was out of order at that time. I did not hear Dr. Fisher appointed Moderator, nor did I know until the following morning that he had been. I did not vote on any of these questions.

Cross-examined by Mr. Randall. I belong to the Duane-street Church, in New York. We don't rank under the banner of any party, but under the Presbyterian banner—the banner of the cross. We certainly are an Old-school church. This term was given by the New-school party, in the General Assembly of 1831. I was very proud to be ranked among the Old-school. I don't know the individual who first used the term. It came from the neighbourhood of my respected friend here, (pointing at Dr. Absalom Peters.)

Mr. Hubbell offered the Assem. Dig. p. 118.—An article from the Plan of Union between the original Synods of New York and Philadelphia:

"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."—Page 3.

Mr. William Wilson—sworn. I was a delegate to the General Assembly of 1838, from the Presbytery of New Brunswick. I attended at the opening of the Assembly. My situation was about the sixth or seventh pew, I think, from the front, on the west side of the middle aisle. I am a ruling elder. Mr. Cleaveland was close by where I sat. He had a paper in his hand, which he wished to read, and he stated that he meant no dis-

courtesy, but that "we,"—I did not understand who "we" were—"have been advised by learned counsel, that this is the true place in which we must organize." I sat at the door of the pew, next the aisle. While he was attempting to read, he was called to order by the Moderator; and several other persons, in different parts of the house, in the vicinity of the Moderator, called him to order. I heard also one or more voices distinctly urging him, in a low but exceedingly earnest tone, to go on. In the course of the proceeding, he moved, that Dr. Beman be appointed to take the chair; which motion, I believe, was seconded by somebody in the same quarter. When he put the question, I heard an indefinite number of ayes ring through the whole church, very loudly. Some of them seemed to come from the gallery, from the manner in which the sound filled the house. The calls to order, still, in some measure continued. The Moderator used his mallet, and expressed himself in some words that I did not exactly hear, and finally sat down. Dr. Beman, who was sitting at the door of the pew in which Mr. Cleaveland sat, came out of the pew. The question was not reversed. I did not hear it reversed, and was so close, that, if it had been, I should have heard it. Then there was a movement farther back into the house—back from the Moderator's chair, and several pews back of where I sat. I was then between this movement and the Moderator's seat. What took place, after they were out of my vicinity, I did not hear. I heard noises, confused sounds, and very loud ayes, but I kept my seat during the whole time. I heard no nays on any of the votes taken at that time. I did not vote. It appeared to me, from where I sat, that the sound got nearer the northern door, and finally, a great body of persons moved out. Then I heard it proclaimed, in or near the church, that the General Assembly would meet in the First Presbyterian Church, on Washington Square. I knew nothing of the appointment of Dr. Fisher as Moderator, till I heard it by common fame, or rumour. The whole operation occupied but a very few moments—I should say, not more than five minutes elapsed, from the time Mr. Cleaveland began to read. His manner was hurried, and the whole proceeding was conducted in a hurried way.

A gentlemen to my left, in the same pew with Mr. Cleaveland, whom I did not know till afterwards, made a motion. Mr. Cleaveland was in a pew immediately opposite to me, to the east, across the aisle. This gentleman arose, after the Moderator, according to his announcement, had opened the meeting with prayer and stated that the first business was for the clerks to report a roll, and attempted to present a paper which he held in his hand. The Moderator declared him to be out of order at that time. The gentleman appealed from the decision of the Moderator. The Moderator stated, that, for the same reasons that the motion was out of order, the appeal was out of order, or out of order at that time. I understood him to say that it was for the same reasons.

There was another gentleman, in the same pew, who, after the roll had been reported, offered, as I understood, some papers, which shared the same fate, as those offered by the first gentleman. These proceedings were not conducted in an orderly manner. The first two gentlemen's proceedings I considered all orderly. I am not a judge of order, but I mean to say they were quiet. The other proceedings were tumultuous and noisy—so much so, as to make it painful to some present, to hear and see

the transaction. There was considerable noise, and clapping of hands, and something like cheering, just as the body moved off to the north door, and were about leaving. At the same time, a number moved off towards the door from the gallery.

No cross examination.

Mr. Hubbell offered an extract from the "Pastoral Letter," *Appendix to Minutes, (New-school,)* 1838, *p.* 663, and the court decided, on the suggestion of the counsel for the relators, that if a part of the document was read, the whole must be considered in evidence.

"*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 re-union 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 opprobious 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 prosperity 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 in 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 recognise 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 recognised 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,' while 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 Genesee, out of the ecclesiastical connection 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 on 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 connection 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 connection 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 thereon,' 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 'recognised' 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.

Besides 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 honors, 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 the rights of conscience, and free inquiry, and charitable enterprise, to an organization never recognised 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 mean of 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.

SAMUEL FISHER, *Moderator*,
ERSKINE MASON, *Stated Clerk*.

Philadelphia, May 25th, 1838."

Mr. Hubbell commenced reading from the Minutes of 1837, p. 468.

Mr. Randall. For what purpose is this testimony offered?

Mr. Hubbell. To show that there did exist a dispute between the Old and New Schools in regard to doctrine and tenets. First I will read the report of a committee, which was adopted by the Assembly, and then a protest against the adoption of it.

Judge Rogers. What has all this to do with the case?

Mr. Hubbell. I thought that I had explained that in my opening.

Judge Rogers. It has nothing to do with the case.

Mr. Hubbell. Well, I merely thought proper to offer it. In my opening I referred to various rules of order: I suppose they will be considered in evidence without a second reading.

Mr. Meredith. The whole book of Church order is in evidence; but I do not consider Jefferson's Manual as testimony.

Mr. Hubbell. No, it is merely an authority.

Judge Rogers. I don't think we have any thing to do with differences of doctrine between these two parties. No doubt there are differences.

Next was offered *Assem. Dig. p.* 17.

"*Sect.* 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 to 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 in 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."

Id. p. 16. "*Sect.* 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.

"*Sect.* 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. p. 26.

"*Sect.* 3. The list of the commissioners present being completed, a new Moderator is chosen."

Mr. Hubbell. The date of this publication is 1820. This was the rule before the alteration to which the witnesses have testified.

Id. p. 24. "*Sect.* 9. GENERAL RULES for regulating the proceedings of the Assembly, which are read by the Moderator before he resigns his seat to his successor.

(Here follow the Rules, which need not be inserted. It is enough to say that they occupy three pages of the Assembly's Digest.

Rev. William S. Plumer—sworn. I was a delegate to the General Assembly of the Presbyterian Church in 1838, from the Presbytery of East Hanover in Virginia. This Presbytery includes the chief part of the tide-water district of Virginia. The part north of the Rappahannock, however, is not included, except two counties on the Eastern Shore. I reside in Richmond. I attended at the organization of the Assembly in 1838, and was at the house from an early hour in the morning, perhaps from nine o'clock. I know, that all the doors of the church, at which the congregation usually enter, were open from ten o'clock, and I think they were not closed that morning. I was seated in the open area in front of the pews. This drawing (a ground plan of the Seventh Presbyterian Church put into his hand) is not exact. Originally the two front pews had circular parts in front; now these circular parts have been taken away, and the pews are oblong. I was seated in the open area, with a table, to the left of the Moderator as he sat. Around me were seated, Dr. Witherspoon, not very far off; Dr. Phillips, perhaps ten or twelve feet in another direction, and others. When Dr. Miller, before the organization of the Assembly, came in, I gave him my chair, and reclined against my small table. Dr. William Harris was not far from me. Mr. Robert J. Breckinridge was not many feet off, but I do not now recollect his relative position. Mr. Krebs was not very far from me: he sat at the side of the clerk's table. Dr. Samuel B. Wilson was in the position that he described the other day, a little to my left. Rev. James C. Wilson was also not far from that place, in either the front or rear. When, in the usual manner, the Moderator had descended to organize the Assembly, he took the chair, and stated, that the first business was the report upon the roll made out by the Committee of Commissions. The clerk about that time, or before, was in a standing posture. He did not instantly commence reading, he had his papers however. Before he commenced, Dr. Patton rose, and said that he had certain resolutions, which he wished to offer at this stage of the proceedings. The Moderator said he was out of order, as the first business was the report of the clerks. Dr. Patton replied that his resolutions related to that very subject. The Moderator still said, that he was out of order, as the house was not organized, or something conveying that idea. Dr. Patton took an appeal, which the Moderator pronounced out of order, and he then resumed his seat. The Moderator called upon the clerk to proceed with the roll, which he did, and as I supposed, completed it. Shortly after the committee had made their report, Dr. Mason, who sat in a pew which was entered from the middle aisle, six or seven pews from the front, rose, and said that he moved, or wished to move—First, however, I should mention, that as soon as the report of the committee

had been read, the Moderator announced, that, if there were any commissioners present, who had not presented their commissions to the clerks, or to the Standing Committee of Commissions, and had them enrolled, should now present them. It was immediately after this, that Dr. Mason arose. He said, that he had certain commissions which had been refused by the clerks, and he moved, either that the names of the commissioners should be placed on the roll, or that their commissions should be examined, and they enrolled. The Moderator replied, that they could not now be received, or, you, or they, are out of order at the present time.

At this moment Dr. Mason seemed greatly embarrassed, which, however, he did not show, otherwise than by the tremulousness of his voice: what he uttered was not incoherent. Very politely, he said, that, with great respect for the Chair, he must appeal from the decision. The Moderator told him he was out of order. He then sat down, and made a remark to some one in the pew; but I am not certain I heard, and therefore shall not state it. I have since heard it reported, and do not know whether I have gathered it from what I then heard, or from the report since, and on that account shall not testify. Dr. Mason stated, when he first arose, that the commissions which he held had been presented to the clerks and refused. His idea was to get them upon the roll. As soon as he had sat down, Mr. Squier arose, and said that he had a commission from the Presbytery of Geneva, that it had been refused by the clerks, or the Committee of Commissions, and that he now demanded that his name should be put on the roll. The Moderator asked him, whether the Presbytery of Geneva belonged—belonged was his word—to the Synod of Geneva. Mr. Squier replied, that it was within the bounds of that Synod. The Moderator, waving his hand, said, "We do not know you." At this period, I was reclining against the table, with my head about five feet from the floor. I noticed a little consultation, and my attention being turned in that direction, heard a member opposite to me, move the appointment of a Committee of Elections. I do not know that this motion was seconded: my impression is that it was. I do not know who made it, but I did know at that time. Before the Chair had announced the motion, the interruption began. I saw a little stir, and observed Dr. Beecher, and Dr. Taylor, who was a delegate to the Assembly from the General Association of Connecticut, seated together, I believe in the pew behind Mr. Cleaveland. They were moving their hands, and making gestures with their heads, and I thought I heard the words, "Go on! go on!" I am certain that they were making gestures, but am not positive that I heard the words. The gestures could not be mistaken. Mr. Cleaveland arose, with his face towards the Moderator, but did not address him, or any other person or persons. He began with the word "Whereas," in his usually loud and distinct tone. As he read, he turned his face toward the opposite side of the main aisle, his tones became lower, and, toward the conclusion, I could not hear what he said. I could distinguish 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—he hoped it would not be considered discourteous; and I thought that, in connection with these words, I heard the words, "least interruption and shortest time

possible." All this was from Mr. Cleaveland's paper. At the conclusion of the paper, I heard his voice—as I supposed, for now it had lost its natural vigour and clearness, and had become tremulous and agitated—saying, "I nominate Dr. B."—I thought at the time it was Beman—or, "I move that Dr. Beman"—to what he nominated him I did not hear. I may state here, that I had a distinct idea lodged in my memory, that Dr. Beecher's name had been used, at some time after Dr. Beman's nomination, but to what I did not hear. Whether I mistook it for Fisher or Beman I cannot say. After the nomination of Dr. Beman, I heard nothing, until what would have been an affirmative vote, which, for loudness, I have never heard equalled on the hustings of a Virginia Court. I am certain that it might have been heard across Washington Square, at any quiet period of the twenty-four hours—that is, from one side of the Square to the other. I am not certain who this stentor was; but I thought it was a small gentleman mounted on the back of the 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.

Court adjourned.

THURSDAY AFTERNOON—4 o'clock.

Mr. Plumer—examination continued. This morning I closed my account of the circumstances that attended the first vote, after Mr. Cleaveland took the floor. So far, I have told all that I saw, but I do not suppose that I saw all; for there was a dense mass of people standing up—a good many of them on the seats of the pews. I heard no more nominations from this time, and even as to the nomination 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, away from the Moderator. The persons who had been acting in this scene removed to a considerable distance—possibly twenty feet. I heard nothing afterwards, 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 very loudly proclaimed, that the General Assembly had adjourned to meet forthwith in Mr. Barnes' church. There were two other annunciations of the same thing, by, I think, some person of a different voice—next, at the east door, at the north end of the house, and lastly, at the door nearest the pulpit, on the Moderator's right, and the east side of the house. There were clapping and hissing in the gallery. I do not know whether any persons in the gallery voted or not. No person in my vicinity voted, in either the affirmative or negative, on any question. I could not, if I had wished to do so, have voted intelligently. I did not hear any reversal of Mr. Cleaveland's motion; I firmly believe it was not reversed, and certainly it was not, so that I could hear; and the next "Aye?" came so soon, that it confirmed my impression, for no time was allowed for putting both the negative and another motion. Of course any answer, in regard to the time which these proceedings occupied, must be exceedingly vague. My impression that day, when some persons were 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, but of what was going on. I now know Mr. Joshua Moore. He sat in the General Assembly which held its meetings in the Seventh Presbyterian Church. After the Moderator had called for commissions, I saw Mr. Moore come to the clerks' seat, but what he said or did I don't know. I first learned that Dr. Fisher had been appointed Moderator, some time after the proclamation of adjournment had been made; whether that day or the next, I don't remember.

Cross-examined by Mr. Randall. I was elected Moderator of the Assembly in the church in Ranstead Court, that year. I became acquainted with Mr. Cleaveland, some years ago in Boston, Massachusetts. He is ordinarily a very prompt man. I think Mr. Cleaveland could put a question as quickly as any other man, with an equally stout voice, when not embarrassed. 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 soon 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," a paper established in August, 1837; and that I have taken an active part in the discussion of the Assembly's proceedings of that year. It was for this purpose, among others, that the journal was established.

Rev. Dr. David Elliott—sworn, with the uplifted hand. I was the Moderator of the Assembly of 1837, who presided at the opening of the Assembly in 1838. Immediately after the religious exercises had closed, on the morning that the body was convened, I announced from the pulpit, that, as soon as the benediction had been pronounced, I would take the chair below the pulpit, and proceed to organize the Assembly. Accordingly I did so, and having offered a prayer, immediately after taking the chair, I then called upon the clerks to report the roll, if they had formed one. Before that call was complied with by the clerks, Dr. Patton, arose, and remarked, in substance—I do not pretend to repeat his very words—that he wished, now, to offer certain resolutions that he held in his hand, and that they should be passed upon by the house. I replied, that he was out of order, as the first business was the report of the clerks upon the roll. Dr. Patton replied, that his resolutions related to the formation of the roll, and would take but little time, or something to that effect. I reminded him, that he was out of order, that the first business was the report upon the roll, and that the clerk was on the floor. By this time Mr. Krebs had arisen, or, if up before, was standing on the left of the table, and I directed him to proceed. Dr. Patton took his seat. Mr. Krebs then proceeded to read the roll, and at the close, stated that there were also in his hands some informal commissions, which he now presented to the Moderator; and he laid them on the desk, immediately in front of where I sat. Then I announced, that the persons whose names had been thus reported, were to be considered members of the house, and added, continuously, that if any other commissioners were present, from Presbyteries in connexion with the Presbyterian Church, who were not enrolled, and had not had an opportunity of presenting their commis-

sions, they would now have an opportunity of doing so, and of being enrolled.

At this time, I believe it was, that a gentleman arose, whom I did not then know, but, afterwards, learned to be the Rev. Dr. Mason. He stated, that he held in his hand certain commissions—he had a bundle of papers in his hand—commissions that had been tendered to the clerks, or to the Committee of Commissions, and had been refused; and that, he desired now to present them, for the purpose of completing the roll. I asked him, where they were from, or whether they were from Presbyteries in connexion with the Presbyterian Church at the close of the session of the Assembly of 1837—I am not certain which form of speech I used, but one or the other of the two. He replied, that they were from Presbyteries within the bounds of, or belonging to, the Synods of Utica, Geneva, Genesee, and Western Reserve. I informed him, that he was out of order at this time, or now—using one or the other of these forms of speech. Dr. Mason observed, that, with great respect for the chair, he must beg leave to appeal from that decision. I remarked, that the appeal, also, was out of order at that time. Dr. Mason then, as I recollect, sat down. Immediately after this, a gentleman rose, whom I did not recognise, though I had had some acquaintance with him several years before: I afterwards heard that it was Mr. Squier. He stated, that he had a commission from the Presbytery of Geneva; that he had tendered it to the clerks, or to the Committee of Commissions; that it had been refused; 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 answered, that it was. I replied, "We do not know you, Sir." He made, in reply, some remark, the purport of which I do not distinctly remember, and sat down, or, at any rate, did not further press the matter. To the best of my recollection, I then repeated the call for the same kind of commissions, and in the same form. Before the last words of the repeated call were out of my mouth, the Rev. Mr. Cleaveland rose, with a paper in his hand, and commenced either reading or speaking, I can't say which; but he had a paper before him, which he held in both hands, and towards which he looked. Whether he made some prefatory remarks, or began to read, I do not know. He was frequently called to order. Several persons, around me, called him to order, in the tone usual in the Assembly. Mr. Cleaveland, however, continued to read; and I would say, at this time, that, during the whole of his reading, and until after the nomination of Dr. Beman, and the vote taken on that, I called "Order!" at short intervals. I did so, because I believed it to be my official duty. 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—the appointment of a Committee of Elections, to whom the informal commissions might be referred. This motion was entertained by me, as an officer of the Assembly, and I announced it.

While this was doing, Mr. Cleaveland was reading, but this diverted my attention from him, and for that reason, I did not 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, as I thought, on

the chair, he said something about their being advised by counsel learned in the law, and securing a constitutional organization; but these things were not in juxtaposition. Then at the close, I heard the phrases "not discourteous," "fewest words and shortest time possible," or something to that effect. He next moved, that Dr. Beman should take the chair, or be Moderator, I don't know which. Immediately 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: I regarded some of the voices 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 from what quarter they came, but they were simultaneous with the ayes, and in answer to the affirmative of the question. Upon this vote of aye, I saw Dr. Beman move out of the pew, the location of which has been already described, six or eight pews from where I sat, into the centre aisle. As he passed into the aisle, a number of persons from both sides of the same aisle passed into it, simultaneously with him. They fell into his rear, and turned off in an opposite direction from me; and the mass closed up, so that in a very short time my view was obstructed. What then passed I do not know. They seemed to advance the distance of a few pews. At this time, there was a simultaneous rising of all the persons in the north part of the house, and there was great excitement in that quarter. From about the place that Dr. Beman left, the great mass were on their feet. There were a number standing on the seats of the pews, and in my judgment at the time, some 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 continued to cry order during this period. Some gentleman said, "Is it not possible to have order?" or "Can we not have order?" I said, that I had done all I could to preserve order, and hoped that the disorder would be of short duration. At this time I supposed, that as Dr. Beman, and those with him, had passed to the north of the house, we might proceed with the organization of the Assembly, and I was about to put the question on the motion to appoint a Committee of Elections. But some one said, "We can't hear; we had better stop till the noise is over." I said "Yes," and formally announced to the house, that we would suspend our business till the noise should subside; that it was evident that the members could not hear at present. The suggestion came from the neighbourhood of the west door. Nearly the whole of this time I had been on my feet, but after this announcement I sat down. I then heard several successive responses of "Aye!" apparently made to questions put, but I heard no question and no nomination, except that already stated, the nomination of Dr. Beman.

While I was thus seated, all the members around the chair, for a considerable distance in front, were quiet in their seats. After some little time the actors in the 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 of the church, somebody announced, at one of the doors, that the General Assembly of

the Presbyterian Church had adjourned to meet, forthwith, in the First Presbyterian Church. After a little, the same announcement was made at another door, and I think also at a third, in the neighbourhood of the chair. I cannot tell what time these proceedings occupied. If I might make a calculation, I should say, from four to six minutes, but cannot profess to speak with any certainty. I did not look at my watch, and state this merely as 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, though not much, hissing from the galleries. Most of the sounds seemed to be in approbation. After they had left the house, we proceeded to the appointment of a Committee of Elections, and to the other business of the house. I did not hear Mr. Cleaveland's motion reversed. I recollect, that about the time at which Mr. Squier sat down, the clerks having closed their report, and the announcement in regard to other commissioners having been made, there was a commissioner, or a person claiming to be such, who stated, that he came from some Presbytery, the name of which I have forgotton, and that he had a commission, for which he seemed to be searching in his pockets; but he did not find it, and said, that he must have left it at his lodgings. I told him, that when he had it the Committee of Commissions would attend to the 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.

No cross-examination.

Dr. Elliott. I ought perhaps, to make a statement which may have some bearing upon the case, in regard to a subsequent transaction. After the appointment of a Committee of Elections, and 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 said, that they did not think this a matter of any importance.

Mr. Hubbell next offered to read from the Supreme Court Docket, July term, 1838, the entries of suits brought by Miles P. Squier, Henry Brown, and Philip C. Hay, against the Moderator and clerks of the Old-school Assembly, &c., to show the feeling of the plaintiffs in these suits, one of whom, Mr. Squier, had been examined as a witness for the relators.

Judge Rogers. It is hardly worth while to offer testimony to prove feeling. They all have feeling. I don't see that this has any thing to do with the case.

Mr. Hubbell. We are perfectly willing to acquiesce in your Honour's decision, but it was necessary to make the offer, in order to have the advantage of it hereafter.

Dr. Elliott—being, at his own request, allowed to explain the matter alluded to, at the close of his testimony. It is my impression, that there were a few other items in that transaction, besides those mentioned on the record. A committee to form the minute was appointed, as is usual.

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 suggested a number of particulars; but Dr. Nott replied, that it was not important that every particular should be mentioned, 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 in giving evidence, I have related additional particulars.

The counsel for the relators here withdrew their objection to the reading of the entries from the docket, offered by Mr. Hubbell. In the course of some remarks made by the counsel, in regard to this point, *Judge Rogers* remarked, that he had made no note of an exception to his judgment, overruling this testimony. *Mr. Ingersoll* said, that he thought it had been the practice in that court, to note every decision as excepted to, without a formal exception being taken, and that it was owing to this understanding, that his colleagues and himself had omitted to request the court to note any exceptions.

Judge Rogers. This is not the practice. It is frequently asked in bank, if exception was taken at the time. (After some further remarks from the counsel.) I do not think that there will be the slightest difficulty after this explanation.

The entries from the docket were then read, as follows:

Supreme Court, July Term, 1838.

J. Randall, *Meredith,* *Bradford*, d. b. e. *Kane*, d. b. e. 25th July, 1838. *F. W. Hubbell.*	56	Miles P. Squier, vs. David Elliott, John McDowell, John M. Krebs, William S. Plumer, and Robert J. Breckinridge.	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.*	57	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."

Mr. Hubbell. We now offer to introduce a series of witnesses, to show, that several 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. Perhaps this testimony falls within your Honour's previous exclusion.

Judge Rogers. I do not see the pertinency of it. It cannot alter the character of the original acts.

Mr. Hubbell. Will your Honour then please to note an exception. The witnesses offered, are Mr. Varnum Noyes, Mr. John V. Hughes, Mr. Edwin Bronson, and Mr. William Henry Snyder.

Mr. Boardman—re-called. 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, I am not positive which. I think it was after Dr. Mason had taken his seat, though as to this, I cannot speak positively.

No cross-examination.

Rev. Robert J. Breckinridge—sworn, with the uplifted hand. I was a commissioner to the General Assembly of 1838. I did not hear any of the questions, said to have been proposed by Mr. Cleaveland, Dr. Beman, or Dr. Fisher. I perhaps ought to say, that I should not have voted, if I had heard them. I was present the whole time, from the rising of Dr. Patton till the adjournment. I was in the house before the meeting, nearly all the morning. I have heard various statements made, in regard to the length of time that elapsed from Mr. Cleaveland's rising, until the adjournment. I can say, only, that it was a very short, and very confused space of time. I should have said, 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 I do not know who have been sworn. I cannot, therefore, answer, whether all of 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 that which one or two gentlemen have described. I was at some distance from Mr. Cleaveland. I heard the first few sentences that he uttered, but 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 question upon the nomination of Dr. Beman, and if I had been disposed, I could not have voted intelligently upon any motion, but the first. 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 nothing, except the vote of aye. To the best of my recollection, I heard no negative vote on any question. My own state of mind, perhaps, influenced my perceptions.

Cross-examined by Mr. Randall. I, perhaps, did not give so much attention to the proceeding, as I would have done, if I had viewed them in a different light.

Dr. Alexander W. Mitchell—sworn. I was a commissioner to the General Assembly of 1838. I took my position nearly opposite the east door, in the west side of the east aisle. Mr. Cleaveland was in a pew opening on the east side of the middle aisle, in the rear of the one on a line with that in which I sat; my seat was, therefore, one pew in advance of the line of his. I was about half way up my pew, and he about two-thirds of the way up his. He rose, and either made some observations, or

read from a paper. 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. The circumstance which diverted my attention was, that a gentleman, in the pew immediately in front of me was standing up on the seat. I asked him if he was a member; he said he was, Shall I go on?—(An objection being made to his proceeding to state what had passed between himself and the gentleman on the seat.) After this distraction I turned, and Mr. Cleaveland's back was towards me. When he finished, he was facing the north-west part of the house. He moved that Dr. Beman should take the chair or be Moderator—I don't know which. When he had made the motion, there was a loud response of "Aye!" The gentleman on the seat in front of me answered in a very loud voice. He was not the little man. 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 motion. I did not consider myself as taking any part in the proceedings. I regarded it as a disorder. I did not consider any thing 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 before seen, and Dr. Mason, of whom I had no knowledge until that day. I did not hear the question reversed: I do not believe it was reversed; for, if it had been, I should have heard it, 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: it was more like the yell of an Indian, than of a white man. At that time Dr. Beman moved out into the aisle, and there was a rising, all around, of the persons in that quarter of the house.

I cannot say that I know much of what occurred after he got into the aisle, for there were so many persons standing up around, that I could not see, and I sat down. I heard the ayes called two or three times. I remember that, as they were going out, somebody—not the man on the seat in front of me—announced that the General Assembly would meet, forthwith, in the lecture-room of the First Presbyterian Church. This was repeated two or three times, at the different doors—the last time, at the east door of the house, by a gentleman who is present. It was either that afternoon, or the next morning, that I first heard of Dr. Fisher's appointment. The whole transaction occupied but a very short space of time: I can't say how long, but I suppose about five minutes—not more. There was a confused noise in both galleries and in the northern part of the church.

No cross-examination.

Mr. Alexander Symington—sworn, with the uplifted hand. I was a member of the Assembly of 1838—a lay delegate. I attended at the organization of that Assembly, and sat in a pew on the west side of the western aisle, nearer the pulpit than the middle of the house, and nearly opposite to the pew occupied by Mr. Cleaveland and Dr. Beman. I saw and heard Mr. Cleaveland read a paper; that is, I heard a good many words, but I did not charge my memory with them. I heard distinctly

the phrase, "counsel learned in the law." I heard a motion to appoint Dr. Beman, Moderator, and a vote in the affirmative on that motion. I did not hear the question reversed. I am unable to say whether there were any negative votes. If there were, I have forgotten the circumstance. I did not vote on that question, or on any one put by Mr. Cleaveland, or subsequently by Dr. Beman or Dr. Fisher. I did not hear the motion to appoint Dr. Fisher at all; nor did I know of his appointment, until after the morning session, or perhaps that day, though I think I did some time that day.

No cross-examination.

Mr. William Hamilton—sworn. I attended at the organization of the General Assembly of 1838. I did not know Mr. Cleaveland, but I heard a gentleman, who I was afterwards told was he, read a paper. I heard him make a motion, or read, or say something. He was looking on a paper which he held in his hand. I was on the east side of the church, in a pew a little to the north of the east door. I could not hear what he read or said. There were a great number of gentlemen in my vicinity, but one only, that I knew. Mr. Cleaveland after reading a portion of the paper, turned partly round from the Moderator, and the gentlemen in his vicinity rising, I could not, after that, see him distinctly. I heard a very loud vote of aye. There were several ayes close by me, in the pew where I was sitting, and several in the pew before me. The person that I knew voted aye. That gentlemen was the Rev. Mr. Duffield. At the time he said "Aye!" his face was partly towards Mr. Cleaveland, so that I could see the side of it. He was sitting in the pew before me. After the ayes were over, another person who had sat beside Mr. Duffield, got up on the seat before me. Mr. Duffield had a cane in his hand, and he knocked it down on the seat, and said, "That was done according to law, as slick as could be." He said this three times, looking at me, and those around me, and seeming very much pleased. In a few moments, Mr. Duffield, and the others in my vicinity, left their seats, and went north, but I still remained sitting.

In the mean time, the crowd in the middle aisle moved toward the north and east doors. I heard then a loud "aye!" and a great part of those who had moved towards the doors, passed out into the lobby. A gentleman was standing at the door, and cried out with a loud voice, that the General Assembly of the Presbyterian Church had adjourned to meet, forthwith, in Mr. Barnes' church. Another person announced the same thing at the other doors, first at the north-west, and then at the north-east door, repeating the same words. Afterwards, a person made his appearance immediately before me, in the east door, and proclaimed that the General Assembly had adjourned to meet in Mr. Barnes' church. It was the Rev. Mr. Phelps.

Cross-examined by Mr. Randall. I was not a commissioner to the Assembly. The gentleman of whom I speak was the Rev. Mr. George Duffield. I had seen him in the Assembly of 1837: whether he was a member or not I don't know. I think I saw him in the Assembly, sitting amongst the members, but I can't say that I saw him taking any part in the proceedings. I have seen him perhaps four or five times, but have never spoken to him. I know that he is not in this city—that is, that he has no pastoral charge here. I don't recollect whether he carried

a cane when I saw him before. I remember distinctly, that at the time of which I have spoken, he had a cane, and that he knocked with it several times.

Mr. Joseph B. Mitchell—sworn, with the uplifted hand. I am Cashier of the Mechanics' Bank in this city. I attended the church in Ranstead Court at the organization of the Assembly of 1838. I sat in a pew nearly opposite the south-east door, but afterwards removed, and stood in the aisle opposite the pew, for the whole time, except a few moments when I walked round to the clerks' desk. I should say that I was ten or twelve feet from Mr. Cleaveland. If I recollect, he was near the dividing line of the eastern block of pews, three or four pews back of mine. I saw him with a paper in his hand, and he appeared to be reading it; but I did not hear its contents. I heard a word occasionally, and understood Mr. Cleaveland's object, but can't give any account of it. At first his face was towards the Moderator and his side towards me. I think that afterwards he turned: from the rising of persons between and the confusion, I lost sight of him, and have no recollection of seeing him at the conclusion of his paper. I think I heard something which seemed to be a motion, in which Dr. Beman's name was involved, but I don't know by whom it was made. I thought that it was for him to be Moderator, or to take the chair—I think to be Moderator. I did not hear the words perfectly. Very soon after this motion, I heard a number of voices crying, "aye!" in a very loud tone. The noise in the house increased. I did not hear the question reversed—certainly there were no negative votes in the part of the church which I occupied: I heard no negative votes at all. Of what followed I can give no definite account. I suppose that motions were put, for I heard loud votes of "aye!" but I did not know what had taken place till next day. I think it was on the succeeding day, that I first learned that Dr. Fisher had been appointed Moderator. I have a brother who is a clergyman in Virginia—Jacob Mitchell. I was not a member of the Assembly. My brother has not been in the city, I think, for a few years.

Cross-examined by Mr. Randall The last of my brother's official acts was with the New-school. When I last saw him, he sympathized with the New-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—sworn, with the uplifted hand. I attended the organization of the Assembly in 1838, in the church in Ranstead Court. I was a delegate from the Presbytery of Mississippi. I was seated in the fourth or fifth pew from the front, on the west side of the middle aisle.—I should think, about ten or twelve feet from Mr. Cleaveland. I think Mr. Cleaveland, and the gentleman associated with him, were in about the seventh pew, on the east side of the aisle, in a diagonal direction from me. I heard him read a paper, but, though so near, could not hear, distinctly, its contents. I heard him make a motion, however, that Dr. Beman should be either Moderator or Chairman—one of the two, but I cannot say, certainly, which. A rather tumultuous cry of "aye! aye!" succeeded that motion. I heard no reversal of the question, although I sat at such a short distance. I heard no reversal, and, I think, no nays: certainly there were none in my region, and I was sitting in

the body of the house. He then, I think, made a motion, relative to the appointment of clerks. I am not certain, now, that I heard the names of the clerks at the time: I presume that I did, but should not like to affirm it. Immediately subsequent to this, I think, was the removal of the body of persons, who seemed to be surrounding Mr. Cleaveland, to the lower, or north part of the house. The leaders, or those who seemed to be the leaders, appeared to be congregated in the aisle, where they seemed to form a sort of nucleus, but of this I cannot speak with certainty. I heard nothing distinctly after this, excepting ayes; and then, some person announcing, that the General Assembly of the Presbyterian Church had adjourned to meet, I think he said, in the church on Washington Square; which announcement was repeated by some person, or persons, at the east door of the house. It was a scene of such confusion and tumult, I did not measure the time so accurately, as I should have done, under ordinary circumstances. It was of very short duration—only a few minutes elapsed. I cannot say, with confidence, when it was, that I first heard of Dr. Fisher's appointment. It was either that afternoon, on my return to the Assembly, or next day—certainly not, as I think, until the afternoon. It was my impression, that Dr. Beman had been Moderator. I did not vote. I had no opportunity to vote upon the side that, of course, I should have voted upon, if I had voted at all.

Cross-examined by Mr. Randall. I am still connected with the Presbytery of Mississippi, unless my dismission from that Presbytery was granted at its last meeting, as I requested. I am now the pastor elect of a church in Bridgeton, New Jersey, which belongs to the Presbytery of Philadelphia. I presume that my dismission is now on its way to this place.

Mr. Samuel Agnew—sworn, with the uplifted hand. I was not a commissioner to the General Assembly of 1838, but I attended its organization. My position was near the south-west door. I saw Mr. Cleaveland rise, with a paper in his hand, and he proceeded to read amid a great deal of confusion. I did not hear what he said; the confusion was so great as to render it impossible for me to hear. I heard him make a motion, and the purport of it was, that Dr. Beman should take the chair, or preside, or be Moderator, I don't exactly know which. I heard him call for the affirmative votes, but I heard no reversal of the question, and my impression is, that it was not reversed; and the succeeding motion was so immediate, that I think there was not time to have reversed it. The next thing I heard, was what seemed to be another motion, but I cannot say what it was, the confusion was so great. A great many persons were standing in the church, and the confusion prevented both my seeing and hearing. After this, a number of motions were put; that is, I heard loud cries of "aye!" and therefore presumed that motions had been put, but cannot tell what they were. I heard no motion made to put Dr. Fisher in the chair, and I did not know, that he occupied that position until the following day. I remember the proclamation of an adjournment to the session-room of the First Presbyterian Church. I should say, that the whole process, from the time that Mr. Cleaveland rose, until the proclamation of the adjournment, occupied from five to ten minutes. I heard some votes from the gallery.

Cross-examined by Mr. Randall. I am a member of Dr. McDowell's church in this city—the Central Church.

Mr. Edward C. Norris—sworn. I attended the organization of the General Assembly of the Presbyterian Church, in the year 1838. I was standing in the door near the pulpit, on the graveyard—the south-west door. I saw Mr. Cleaveland rise with a paper in his hand. He appeared as if he were reading from the paper. He read in a very loud voice, and I could hear what he said, but do not now remember what it was. After he had finished the paper, as I presumed, he laid it aside, and moved that Dr. Beman should take the chair. I think I heard a very loud affirmative vote from the galleries, as well as from the lower part of the church. I did not hear the question reversed, and do not now recollect that I heard any negative votes. The next thing I heard, was some persons nominated for clerks, but by whom, I did not know. The next thing that I heard distinctly, was the motion, that the General Assembly should adjourn to the First Presbyterian Church, on Washington Square. Then those collected in the rear of the house, I don't know how many, arose and went out. Somebody, in a loud voice, announced, that the General Assembly of the Presbyterian Church—in the United States of America, I think he added—had adjourned to meet in the First Presbyterian Church. I should say, that the whole proceeding did not occupy more than twenty minutes—probably not that long.

Cross-examined by Mr. Randall. I was standing part of the time between the door and the stove, and part, between the stove and the backs of the pews. I was among the furthest back of those inside of the house: there were some outside. Those motions, which I heard, were made in a very loud voice. I was not a member of the Assembly. I am a member of the Episcopal Church, and feel no interest in the affairs of the Presbyterian Church. I went to the house in Ranstead Court, at that time, from mere curiosity.

Rev. John Maclean—sworn. I was a commissioner to the General Assembly of 1838. I did not hear Mr. Cleaveland's motion distinctly, but thought it was to this effect—that Dr. B.—I supposed Dr. Beecher, should take the chair—I don't recollect whether he used the words "take the chair" or not, but it was something to that purpose. This is all I heard of what Mr. Cleaveland said. I heard very distinctly the response, "Aye!" There was no reversal of the question, and no negative votes. I did not vote upon the question: I had no opportunity, and could not, if I had felt so disposed. I am perfectly willing to say, what I would have done, if I *had* heard. I am in doubt, whether I heard the motion, in regard to Dr. Mason and Mr. Gilbert, but I certainly heard nothing subsequent to that, I did nto know that Dr. Fisher had been appointed Moderator, till the next day, and, not until the afternoon, or the next morning, that Dr. Beman had been called to the chair. I supposed it was Dr. Beecher.

Cross-examined by Mr. Randall. I was a member of the Assembly of 1838, and took part in the debate, whether the words, "disorder," "tumult," and "violence," ought to be used in the minute. I objected to the word "violence," for the reason, that some persons might understand by it, that there had been personal violence, something approaching to an assault and battery. Further, I opposed it, 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 you thought there had been no more disorder, than might naturally have been expected under such circumstances?

Prof. Maclean. 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. And I made a remark to this effect: that there had been as little disturbance made by the members of the New-school party, as had been possible, in that state of things. The word was not retained, by the casting vote of the speaker: 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; for I had a respect for 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. There were loud exclamations of "aye!" in response to motions which I supposed were put, and there was great excitement. My remark was, that in that condition of things, the disturbance had not been greater, than was natural under the circumstances. I thought the proceeding disorderly: I have never thought it otherwise. 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. Would not the friends of the measure be most disposed to show approbation, and the opponents of it disapprobation?

Prof. Maclean. As an abstract proposition, I may say they would.

By Mr. Hubbell. I am not aware that there was any 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 mere *ex-parte* organization. The voices of the New-school, in voting, were raised altogether above the pitch necessary to their being heard. The voice naturally rises in loudness with excitement.

By Mr. Preston. I am almost confident, that Mr. Duffield was not a member of the Assembly.

Mr. Randall He was not: the record shows that.

Mr. Charles F. Worrell—sworn, with the uplifted hand. I was present at the organization of the General Assembly of 1838, as a spectator. I was in the house and seated, by nine o'clock in the morning, as near as I remember. I heard Mr. Cleaveland's motion. My seat was in the east gallery, in the front pew, the first after those that ascend from the pulpit. Mr. Cleaveland rose with a paper in his hand, having first consulted with a few persons in his own and the adjoining pews. He commenced reading—that is, he looked on the paper and I supposed he was reading. After reading a few words, he turned his face towards the west part of the church. I could have heard most of the words that he uttered, but my attention being distracted by the confusion that was in the house, I cannot tell exactly what he said. His preamble was very similar, I think, to the preamble of Dr. Patton. During the reading, he

turned round, till the side of his face was towards me and his back almost towards Dr. Elliott. He appeared very much agitated. His last words were those already so often proved—that counsel learned in the law had informed them, that it was necessary that morning, to organize themselves, and that they would do it in the fewest words and the shortest time possible. He was then facing the north-west corner of the house. He moved that Dr. Beman should take the chair, and, in the same breath, put the motion. By this time all the persons in the part of the house north of Mr. Cleaveland had arisen, and some were standing on the seats, and some on the tops of the pews. With one accord, there was a general yell of "Aye!" and there was one aye louder than the rest. That one, so far as I could discover, came from Dr. Beecher of Cincinnati—the old gentleman. The side of his face was towards me, and so far as I could tell, it was Dr. Beecher. There was considerable clapping and some hissing. Some votes came from the galleries on both sides of the house. The motion was not reversed. Mr. Cleaveland then moved, that Mr. Gilbert and Dr. Mason should be temporary clerks, which motion was immediately put without any 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, so that he could not go very far and stopped. He then called for motions, and some person, I don't know who, moved, that Dr. Fisher should be appointed Moderator. This motion was put, but not reversed. I heard then Mr. Gilbert and Dr. Mason nominated for clerks, and that motion, also, was put without any reversal that I heard. It was then moved that they should adjourn to the First Presbyterian Church: the motion was put, but I heard no negative. There were some noes at the same time, or nearly at the same time with the ayes, in an under tone. Then it was announced, that the General Assembly of the Presbyterian Church in the United States of America, had adjourned to meet in the lecture-room of the First Presbyterian Church, and the whole body, with about one third of the audience passed, out at the north door as rapidly as possible. When they were nearly all gone, Mr. Edward Beecher proclaimed, that the General Assembly of the Presbyterian Church in the United States of America, had adjourned to meet in the First Presbyterian Church, and requested all the delegates to attend. Some person made the same proclamation at the east door, but I could not see who he was; during which the appointment of a Committee of Commissions, which had been moved some time before, was under consideration, and Mr. Breckinridge had the floor.

Cross-examined by Mr. Randall. I was merely a spectator. Princeton, New Jersey, is my present place of residence: before, I have lived in Lancaster county, in this state. I am a student in the Princeton Theological Seminary. Dr. Beecher, at the time he made the loud cry of "Aye!" was standing on the seat, or partly on the seat and partly on the back, or on the back, of the same pew in which Mr. Cleaveland had been sitting, or of one near it. I was almost right over his head. I have never lived in the same town with Dr. Beecher, but I had seen him and heard him make several short speeches in the Convention, at the First Presbyterian Church. Still, I do not say certainly he was the man. I had never seen him before that visit to Philadelphia, and have not seen him since.

I feel confident that it was Dr. Beecher, but might possibly be mistaken. I am as confident of its being he as I could be, after having before seen him only a few times, and then seeing but the side of his face. 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, or between fifty and sixty, or perhaps above sixty. Dr. Beecher's manner is rather mild and persuasive.

Court adjourned.

FRIDAY MORNING, March 15th—10 o'clock.

Dr. McDowell—re-called. We received, in the Committee of Commissions, and enrolled as unexceptionable, two hundred and twelve names, and we reported seven more to go to the Committee of Elections, 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—these all being without their commissions. 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, Mr. David R. Preston, minister, and Mr. Thomas Beard, elder. We reported two hundred and twelve on the roll, and these seven, to go to the Committee of Elections, whenever one should be appointed—in all, two hundred and nineteen. I can tell how it was in regard to Mr. Moore. When the Moderator asked, that commissions not yet presented should be brought forward, immediately, or soon after, Mr. Moore came, and laid his commission on the clerks' table; it was examined by the Committee of Commissions, after the retiring body had withdrawn, and the confusion had subsided, and reported by them. I am confident, that he presented the commission that morning, and his name is on the minute, as one of those called and recorded present in the afternoon. The roll was called in the afternoon, and there were one hundred and fifty-four that answered to their names. These included six of the seven, whose commissions had gone to the Committee of Elections. That committee was appointed in the morning, immediately after the body of the New-school had retired. Sixty-eight persons did not answer to their names. Of these, two, 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 these, thus marked absent, Mr. Scott rose, and being permitted to give his reasons for not answering, I believe withdrew and went home. That left but sixty-two. I do not know, of my own knowledge, that Mr. Scott went home. Of the one hundred and fifty-four, who answered to their names, Messrs. Rankin and Crothers, from the far West, rose, expressed a wish to be considered as not acting with that body, and withdrew. At the close of the session of our Assembly, the roll was called to mark those who were absent without leave; and we found fifty-seven so absent, all of them being of the number of sixty-eight recorded absent before. There were four commissioners, who

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 of those who acted with that Assembly, one hundred and sixty-one. I was not a member of the Assembly.

Examined by Mr. Preston. Dr. Witherspoon was present at the opening of the Assembly. He was the Moderator immediately preceding Dr. Elliott. Dr. Phillips immediately preceded Dr. Witherspoon. I suppose that Dr. Wm. A. McDowell was present, though he was not a member. He had been Moderator in 1833. There were other persons present who had been Moderators. Dr. Green had been, and the witness. Dr. Beman was moderator in 1831. I was appointed Stated Clerk, in the year 1836, after Dr. Ely had resigned the place. 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-examined by Mr. Randall. 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, (handing to the witness the Minutes (Old-school) of 1838, page 47.) Please to count again the list of absentees, and tell us how many there are.

Dr. McDowell, (after counting) I find the number was sixty-five. I must have made a mistake in counting before.

Mr. Hubbell. Had Dr. Hoge been Moderator since Dr. Beman?

Dr. McDowell. I am not able immediately to say.

Prof. Maclean—permission having been given to him to explain his testimony. I have been informed, that my testimony might be misunderstood. I was asked a question of this import: whether I had not said, that there was as little disorder as possible under such 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 he called him 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.

Here the Respondents closed.

REBUTTING TESTIMONY FOR THE RELATORS.

Dr. Hill—re-called. I think there was sufficient time given for the vote on Mr. Cleaveland's motion for the appointment of Dr. Beman as Moderator, and I think the question was reversed. I think I may say it *was* reversed, and I will give my reasons for saying so. When Mr. Cleaveland was about to put that question, in my estimation, it was the

most critical and interesting moment in the whole proceeding, because it was the incipient step in the organization. This awakened all my attention. I may state here, that I had opposed the separate organization.

Mr. Randall. We cannot go into the previous meeting.

Dr. Hill. I had determined, beforehand, to take no part, and was opposed to the proceeding, from the very first. I voted on none of the questions, and identified myself with neither party. I occupied neutral ground. I expected that a riot would ensue. My feelings were wound up to a very high pitch of excitement, which made me peculiarly attentive at this crisis. 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 which were very indecorously and offensively loud, but I know not from whom they came in a single instance. They appeared to come from back of me, but I did not turn round: I kept my face toward Dr. Elliott. Afterwards there fell in a few scattering ayes. Mr. Cleaveland, as, from the first, he had intended to do all in the shortest time possible, reversed the question very quickly: I dont know, that all the scattering ayes had ceased, when he reversed it. I heard a few scattering noes, only from the direction of the Old-school—a few from the south-west, and some from immediately in front of me. I was astonished at this, because I expected a thundering "No!" as they claimed to be the majority. As there were so few negatives, I was surprised that there had been any. I thought they were, at least, not well trained. For these reasons my attention was particularly called to the proceedings at that crisis. I think I cannot 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 the utmost decorum. He is, I believe, at present in Cincinnati, not here on the ground. He is very much of a gentleman in his deportment, so far as I am acquainted with him. My location was such, that I could not be deceived in regard to him, for I sat right 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-examined by Mr. Preston. I was surprised at hearing any noes, and disappointed. I had expected that the noes would be of another character, and was agreeably disappointed. I had anticipated these events, and had feared, that a great riot would take place. I really cannot say, from personal knowledge, whether the Old-school had a majority. I know they claim to have had a majority, and I rather suppose it was the fact.

Mr. James R. Gemmell—sworn. I attended at the church in Ranstead Court, on the day of the organization of the Assembly of 1838. I was near the south-west door, leaning on a pew, just under the gallery, not far from the Moderator. I remember Mr. Cleaveland's rising, and his stating that he wished to offer a resolution. There were a parcel of Old-

school brethren at my right. In the pew on which I was leaning, there was a great noise, and scraping and coughing. I said to them, that that was pretty conduct for ministers; that they might as well hear what the gentleman had to say. One of them answered, yes, that they might as well. I don't remember that there was any coughing; but there was a great scraping of the feet, and stamping, in the pew on which I was leaning. Mr. Boardman was there, and Mr. James Latta. I was called here, to give evidence very unexpectedly.

Cross-examined by Mr. Hubbell. I turned and said, this was pretty conduct for clergymen; that they might hear what the gentleman had to read, though he was not a member. I am not a member of any church. I attend the First Presbyterian Church—Mr. Barnes's.

By Mr. Preston. I knew but few of those near me. Mr. Boardman was two or three pews off, and so was Mr. William, or James, Latta. Mr. Finney, of New Castle Presbytery, was the nearest to me that I knew. My face was towards the Moderator, and I heard scraping among these gentlemen. Mr. Finney, I say, was the nearest: the others were not so near. I addressed those nearest to me, of whom, as I said, Mr. Finney was one. Mr. Boardman was a pew or two off. I knew 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 were near enough to hear it. There was a tumult through the house. I was in the midst of the Old-school party. I can't saw that I knew more than a few individuals who sat near me. 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, as Mr. Latta. I think all near me were Old-school: as well as I could recognise them they were; but I am not positive about those whose names I did not know. There did not seem to be as much noise near Mr. Cleaveland, as there was about me. I should not call it a riot: there was scraping and coughing. I was twenty or thirty feet from Mr. Cleaveland, and the noise, generally, was in that part where I sat.

By Mr. Ingersoll. I don't know whether the aisles of the church, or the pews, were carpeted. I rather think there is a brick pavement.

By Mr. Preston. I went to the church just before Dr. Elliott closed 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 as I was passing.

Mr. Randall. The Minutes show that Mr. Latta was a member of the Assembly, in both 1837 and '38.

Mr. Elihu D. Tarr—affirmed. My profession is the same as your own, (Mr. Randall's)—I am a member of the bar. I attended the organization of the Assembly of 1838. My location was three or four pews behind Mr. Cleaveland. I heard him put his motion, distinctly, and heard the ayes. I heard the question reversed, as I know, because I distinctly heard a few noes, rather to the north-west, and was surprised that the noes did not overwhelm the ayes. It had been intimated, as it was afterwards found, that the Old-school had a majority, and I was surprised that they did not vote the resolution down. It was from the *south-west* part of the house that the noes came. Did I say before the *north-west?*

As I stood looking at the pulpit, they came from my front, and my right hand.

Cross-examined by Mr. Preston. I am now a member of Mr. Rood's church. Previously, I belonged to Mr. Winchester's, then to Mr. Boardman's, and now to Mr. Rood's. I heard the noes distinctly. I have attended the legislature of this State. There were probably from three to half-a-dozen noes. I heard the question put in regard to the clerks, and if my recollection serves me, there were more noes on that 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 put. 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 surrounded by the New-school party, and was very near Mr. Cleaveland. 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. I am decidedly in favour of the conduct and transactions of the New-school party, and opposed to those of the Old-school; but it is due to myself, and to the jury, to say, that I did not make up my mind on this subject, until after the proceedings of 1838.

Mr. James W. Paul—sworn. I am a member of the bar. I belong to Mr. Barnes' church—the First Presbyterian Church. I attended the church in Ranstead Court, at the organization of the Assembly of 1838, and stood in the gallery, in front of the organ. I heard, distinctly, Mr. Cleaveland's motion, the vote on it in the affirmative, and my impression is, that also in the negative. I think I heard some noes distinctly, a short time after the ayes. I can't be certain, but this is my impression, and I will give a reason why I think my impression correct. Knowing that Dr. Beman was a very prominent man on the New-school side, I thought it very strange, that such a motion should pass without opposition. The noes immediately succeeded the ayes, but there was time enough for the question to have been reversed, if it was done rapidly.

Mr. Randall. You say, that if the reverse of the question was promptly put, there was time?

Mr. Ingersoll objected to this as a leading question.

Mr. Randall. If the reverse was promptly put, was there time for it?

Mr. Paul. My impression is, that there was—that there was ample time. I never expected to be called upon to testify, and therefore did not charge my memory with the fact.

No cross-examination.

Judge Henry Brown—sworn, with the uplifted hand. I attended at the organization of the Assembly of 1838. I heard Mr. Cleaveland put his motion, very distinctly, and heard it reversed, with absolute distinctness. I sat in a pew on the west side of the east aisle, one pew east, and two or three north of where he sat. I had a good view of him, and heard the question distinctly put. There was a very loud "Aye!" Then the question was reversed—I should say, with despatch, but there was time enough to hear it distinctly, and I heard distinctly several noes on the west side of the aisle, two or three to the south of me, and one very

near me. I am confident that the question was reversed, and that there were several noes. I was a member of the Assemblies of both 1837 and 1838, from Lorain Presbytery, in the Western Reserve. There was a man near me, who voted aye very loudly. He sat in the pew with me, and afterwards told me his name. His aye was twice as loud as any other in the house. His name was Foster. I twice took hold of him by the arm, and said he must not hollow so loud. Towards the close of the ayes, he got up on the seat, and, I think, sat down on the top of the forepart of the pew. I was standing on the floor. I was an elder in the Assembly. Mr. Foster, I understood, was an elder from the Presbytery of Montrose.

Cross-examined by Mr. Preston. I was a regular ordained elder. I said "Aye!" I think, every time. My commission had been rejected by the Committee of Commissions. I can't tell whether all of those, whose commissions had been rejected, voted. I know some of them were present: I can't say I saw them vote, but I have no doubt that they did. Yes, I *can* testify to one man's voting, and I suppose the others voted. I could not have been expected to see them all in such a promiscuous assembly. I have heard stated a doubt in regard to the reversal of the questions, which I do not feel. I heard the question reversed, distinctly, 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, louder than usual. I have never doubted, and do not now feel any doubt, as to this point. 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 at the west end of mine. We were probably ten, or it might be a dozen feet apart. There is one suit in my name, among those read from the docket. Perhaps there are five—I was not very particular about that matter. I left it to my counsel, and suppose he managed it correctly.

Mr. Thomas Elmes—sworn. I belong to the First Congregational Church of Philadelphia—Mr. Todd's. I was not a commissioner to the Assembly of 1838, but attended at its organization. I went in at the west door of the house, from the burying-ground, and stood leaning upon the rail of the pew opposite to the door. I heard Mr. Cleaveland's motion very distinctly put—the motion that Dr. Beman should take the chair. I heard the affirmative very distinctly, and several negatives—say two or three—at a very short interval. I stood pretty 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 and wished to have the tumult stopped, 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 a good many years, but have been intimate with him only about three. When in Philadelphia, he staid in my house for some time, and I never saw him

use a cane. His deportment was always very gentlemanly; I never heard him use coarse language.

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. This is what I meant when I spoke of tumult. There was a good deal of stir and bustle. I saw no other noise, or movement, until Mr. Cleaveland had made his motion. When that motion had been put, Dr. Beman rose and stepped into the aisle, and, at the same time, others rose and went into it. The vote was nearly unanimous. There were two or three noes. I did not hear the negative of the question put distinctly, but some said, "No!" I did not hear any ayes mixed with the noes. There was a pretty loud burst of ayes, then a few scattering ones, a short pause, and afterwards a few noes. I heard Dr. Mason nominated as clerk, but I do not know by whom. I do not recollect hearing the motion put. I do not know positively, but I think it was put by Mr. Cleaveland. I did not hear it reversed, and I don't think I heard any noes on that question. Dr. Miller was between me and the Moderator, sitting somewhere near the Moderator's chair. 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 had not interest enough in the proceedings to charge my memory. I can't say whether Mr. Cleaveland put the question in regard to the clerks: it might have been Dr. Beman. I belonged, at that time, to the Congregational Church. I was once a Presbyterian elder, 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 dont know what is understood by New-school or Old-school. I don't belong to either. Other people must judge which I belonged to. I profess to be a Calvinist. I was an elder in the Fifth Presbyterian Church. Mr. Duffield was pastor of it a short time. During the time I was in that church, I was a Presbyterian: I have since become a Congregationalist, in order to get out of the quarrels of the other Church. I don't recollect, that I ever stated, that this was a contest between Presbyterians and Congregationalists, and that the Presbyterians were struggling for their existence.

Mr. Preston. Is this your opinion—that it is such a struggle?

Mr. Meredith objected to the question.

Mr. Elmes. I never did conceive—

The objection withdrawn.

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. It is in Tenth street below Spruce.

Rev. James M. Davis—sworn, with the uplifted hand. I attended at the organization of the Assembly of 1838. I remember Mr. Cleave-

land's motion. I was standing half way down the middle aisle, when he rose, and heard his preparatory remarks. I heard Mr. Cleaveland's motion distinctly—the affirmative very distinctly, and the reversal with equal distinctness. I heard from eight to ten negative voices, and 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 cannot be mistaken. 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 as still as it possibly could be. 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 am a clergyman, and preach in the First Presbyterian Church of Fairmount. Previously, I have preached in the First Presbyterian Church at Manayunk. These churches belong to the Third Presbytery. I entirely sympathize with the New-school.

Cross-examined by Mr. Preston. I heard the reversal of the question, as distinctly as the affirmative, but it was more rapid. I think it was distinct enough for every one in the house to have heard it, if disposed to hear, as I was. An individual might have made so much noise, that he could not hear. It was put when the house was the quietest. I was about the middle of the aisle. Br. Beman came out of the pew directly by my side: I could have laid my hand upon his shoulder. He put the question, on the appointment of clerks, while standing directly by me. I was not a member of the Assembly, and did not vote. I am connected with Mr. McClelland, one of the relators in this case: he is my father-in-law. I stated this to Mr. Randall. He told me it was no objection. 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 in my position near Dr. Beman, until the close of the proceedings, and went away from the church among those who acted with him. I recollect some noise on the announcement of one or two of the motions, and a good deal, when Dr. Fisher announced the adjournment. Then there was considerable clapping and some hissing. I mentioned to Mr. Gilbert my relationship to Mr. McClelland, and he said that he would tell Mr. Randall.

Rev. Daniel W. Lathrop—sworn. I attended the Assembly of 1838, as a commissioner from Lorain Presbytery, in the Synod of the Western Reserve, one of the exscinded Synods. I came as a minister. I heard Mr. Cleaveland make his remarks, and heard the substance of 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. He stated the question in an audible voice, louder than usual. He put both the affirmative, and the negative, and there were some negative votes; one of them my own. I don't recollect any others in my neighbourhood. I was on the east aisle. Some two or three of the noes were in front of me, and the rest were in 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. They came, chiefly, from near the Moderator, and from west of him. I heard no noise, or confusion, in the vici-

nity of Mr. Cleaveland. With the exception of himself, and the others who proposed questions, all were silent, until he called for the ayes; then there was a distinct and loud response. There was no other noise in that vicinity than the one alluded to. There was one aye louder than the rest. The reason why I know there was a reversal of the question, is, that I voted in the negative. I recollect the reasons I had for so doing. I saw the gentleman, from whom I supposed the loud aye came: he was an elder from the Presbytery of Montrose. Foster was his name. It was not Dr. Beecher.

Cross-examined by Mr. Preston. I voted in the negative, on the first question. I did not also vote in the affirmative.

Mr. Preston. You have spoken of your reasons for voting in the negative: what were those reasons?

Mr. Randall. Is that a proper question—what the motives of the witness were?

Judge Rogers. The fact that the witness did vote is evidence, but his reasons for voting in a particular way are not.

Mr. Hubbell. Your Honour will please to note an exception to this decision.

Mr. Preston. With submission to your Honour's opinion, I would suggest that we do not now ask for general reasons: the object of the question is to discover whether there was not a preconcerted plan that some of the New-school should vote in the negative.

The counsel for the relators withdrew their objection.

Mr. Lathrop. I arrived in the city, at ten o'clock, on the evening previous to the opening of the Assembly, and had no opportunity for consultation with either party, or any school, except with two or three persons, whom I fell in with 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 the peculiar character of those services, and I was deeply pondering, and was very much affected by them. This continued, until my attention was arrested by the subsequent proceedings. When Mr. Cleaveland rose, and moved the appointment of a Moderator, this did not strike me as the course I should like to pursue. That was the simple, and only, reason for voting as I did—in the negative. I believe I voted aye on all the subsequent questions, excepting the first nomination of clerks—as to this, I am not positive. My commission had been rejected by Dr. McDowell. I think, that on my way, or as I was going 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 regard 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 on no other standing committee. I don't recollect whether I was on any other committee. I think I was not on the committee to revise the minutes. I think I was a member of the committee to form a Pastoral Letter. 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 can't tell how often I have sat in the Assembly; I think about eight times. One session I sat as a committee-man—the session of 1820. I came to that Assembly, of which Dr. John McDowell was chosen Moderator, from the Presbytery of Hartford, Synod of Western Reserve, then, now, and ever, a good, thorough Old-school Presbytery. 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 wave my right to have the question decided before a new Moderator had been chosen, and 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, that being the only church in the parish. I was licensed and ordained by the Rev. John McDowell, and his associates, in a Presbytery of New Jersey. Afterwards, I belonged to the Synod of Pittsburg, in which I remained until detached from it, in 1837. I have sent reports of the progress of this trial to the editor of the New York Journal of Commerce, and have seen two of them published. The reports in that paper are from my hand. I am a friend of the editor's.

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.

The counsel for the respondents objected.

Mr. Randall. I withdraw the offer.

The next evidence—Minutes (Old-school) of 1838—the minute of the organization of the Assembly.

"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 the General Assembly, and laid their commissions on the table, viz."

(Here follows the roll.)

"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 session of last year? Dr. Mason replied that they were from Presbyteries belonging to the Synods of Utica, Geneva, Genesee, 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, 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."

Mr. Randall. We offer, also, the whole of the statistical table appended to the same Minutes, but without reading, as it occupies forty or fifty pages.

The last evidence offered, was certain extracts from the unpublished manuscript minutes of some of the earlier Assemblies, going to prove the same point on which similar evidence had before been extracted from the printed minutes—that it had been customary, in the Assembly, to determine contested rights of membership, previously to the choice of a Moderator. Merely the references are given.

Vol. I. p. 26.—*Vol. II. pp.* 104, 308.—*Vol. III. p.* 378.—*Vol. IV. pp.* 198, 253.

Here the testimony for the Relators closed.

TESTIMONY FOR THE RESPONDENTS.

Mr. Hubbell. We offer the whole of the New-school Minutes as evidence against the Relators.

Mr. Meredith. We desire to know the particular parts which are relied on, and for what purpose.

Mr. Hubbell. Every part.

Mr. Meredith. We object to the offer of the whole.

Mr. Hubbell. These minutes contain repeated contradictions of the testimony of the witnesses on the other side.

Mr. Meredith. Will the counsel be good enough to point them out?

Mr. Hubbell. To do that I must make a speech upon the subject. You have the advantage of the conclusion.

Mr. Meredith. We make no objection to these minutes, if offered to contradict our witnesses, in matters brought out on the examination in chief; but as contradictory of their evidence on cross-examination, as to collateral matters, they are inadmissable.

Mr. Hubbell. I offer in evidence, according to our agreement, the whole of the Minutes of the body that met, in 1838, in the First Presbyterian Church: We see contradictions of the testimony offered on the part of the Relators, in every line. A part of these minutes has already been given on the other side—that relating to the election of trustees; and we have given a part of the Pastoral Letter. Now we desire to offer the rest.

Mr. Meredith. The thing would be simplified if my learned friend would give us an example of the contradictions which he alludes to.

Judge Rogers. Hereafter, I shall admit what is evidence, and what is not I shall reject.

Mr. Meredith. We are very glad of our minutes' being read, but not to contradict our witnesses, as to collateral facts brought out on cross-examination.

Judge Rogers. You both seem to be of the same opinion.

Mr. Meredith. I now understand it then for the first time. I understand, that the testimony is offered to contradict our evidence, and not statements as to collateral facts. But I have not yet heard such a declaration from the opposite party.

Mr. Hubbell. There may be some difference of opinion as to what facts are collateral.

Mr. Meredith. That your Honour must decide.

Mr. Hubbell. In whatever your Honour decides we shall acquiesce.

Judge Rogers. Gentlemen, I can't see how you differ. I hate these sweepings of the case.

Mr. Hubbell. As the opposite counsel have exacted an explanation from us, we ask the same from them.

Mr. Meredith. We stated at the time the offer was made, what parts we gave in evidence—the minute of the organization, and the statistical table at the end. These are all to which we shall refer.

(The Pastoral Letter from these Minutes has been already given. We here insert the minute of the organization.)

Minutes (*New-school*) 1838, *p*, 635 *et seq.*

"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 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 Third Presbytery of New York, then rose, and asked leave to offer the following preamble and resolutions."

(Then follow the resolutions before inserted—*Ante p.* 51.)

"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:"

(Then comes the roll.)

"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 the commissioners now present from the several Presbyteries within the bounds of the Synods of Utica, Geneva, Genesee, 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, Genesee, and the Western Reserve. The

Moderator then stated that they could not be received. Dr. Mason then formally tendered the commissions of commissioners from—"

(Next come the names of the Presbyteries within the four disowned Synods, with the commissioners from each.)

"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 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 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 Wilmigton, 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:"

(Then comes the whole roll.)

"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 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:"

(The same as before inserted—*Ante*, *p.* 51.)

"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."

The deposition of Rev. Eliphalet Nott, dated February 26th, 1839, was then offered. The counsel for the relators objecting to certain parts of it, the Court, after reading the deposition, decided that the portion relating to the occurrences at the time of the organization were admissible, but that the other portions were not.

Mr. Hubbell, requested his Honour to note an exception, and withdrew the offer, declining to present the deposition in a mutilated form.

Mr. Boardman—re-called. I have heard the testimony of the several witnesses examined this morning, in regard to the noise made by the Old-school party. Their statements are altogether counter to my own strong impression of the case, 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. Gemmell, that this was pretty conduct for ministers of the Gospel, &c.

No cross-examination.

Dr. Phillips—re-called. Mr. Boardman sat in the same pew with me, or in an adjoining one. I am positive that he made no noise, and that there was nothing unbecoming in his manner. There was no scraping or stamping in our vicinity. There were calls to order, in which I joined. I recollect that at some time during the proceedings of the New-school party, Mr. Boardman remarked to me, "How true it is, that whom God has determined to destroy, he first makes mad." He did not use the Latin words, "*Quem Deus vult*,&c." but the translation.

No cross-examination.

Mr. Lowrie—re-called. I did not observe Mr. Boardman's position at all. From what he says, 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: certainly there was no legislative coughing. There was no stamping or scraping in that part of the house, and no calls, excepting calls to order.

No cross-examination.

Mr. Auchincloss—re-called. I was close by Mr. Boardman, and neither saw or heard any stamping, scraping, or rubbing in that vicinity.

No cross-examination.

Mr. Krebs—re-called. In giving my testimony, I omitted one point. Dr. Mason 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 ever handed to me; his name was never on my roll, and I never uttered it.

I wish also to explain one thing in my testimony, in regard to Mr. Joshua Moore. I said, that the minute was incorrect, as to the precise point of time when he presented his commission, and was enrolled. The fact is, that there was an interval between his first appearance, and his presenting his commission, which he sent after to his lodgings.

Here the testimony closed.

MR. MEREDITH'S ARGUMENT.

SATURDAY MORNING, March 16th—10 o'clock.

Before addressing the jury, I beg leave to request, that your Honour will take upon your notes a few references to points on which my colleague intends to insist. I shall not myself dwell upon any authorities, in the course of my argument.

Angell and Ames on Corporations, 247, 8, 252, 275, 8, 219, 277, 244, 5.

I am very glad, gentlemen of the jury, that in discharging my duty to the relators in this suit, I stand in a court of the State of Pennsylvania: I am glad on your account, as well as on that of others. In this State, the law of corporations, governed as it is by the principles of common sense, is so well settled, so clearly determined, that it is not necessary to go into a lengthened exposition of it, or to cite numerous authorities. The question which you are to decide is solely a question of fact: the law applicable to the facts is perfectly plain and simple. The controversy in which we are engaged, is, however, one of a very peculiar nature—peculiar as regards the interests involved, the number of the parties concerned, and the depth of feeling which it has excited. I wish I could say it was an unexampled controversy: unfortunately there have been but too many instances of the same kind. Parties have but too often divided religious corporations, and been obliged to refer their differences to the decision of courts of law.

There is one thing which I beg you to observe in the outset: it will serve as a key to the whole case. The plaintiffs in this suit do not come into court, as a party desiring to deprive another of any of its rights or privileges. We have not thought to exclude any portion of our brethren, without trial, much less without accusation, from our ecclesiastical connexion. We do not claim to be the Presbyterian Church, in contradistinction to any other body claiming that title. We do not contend for a power like that exercised by our brethren of the opposite party—the power of deciding by our single *ipse dixit*, by a judgment given *ex cathedra*, who are, and who are not, Presbyterians; and this without leaving any chance of redress to the party thus judged, if wronged by the decision. I need scarcely add, that we, at all events, do not arrogate to ourselves the right of seizing and confiscating the property of others at our will. We merely stand in the defence of our own rights—our own rights of property, and, what is still more important, our Christian privileges, and our Christian communion. I speak thus of property, not that it is that for which we are here contending, but because the opposite party have chosen so to represent the case in this respect, as to prejudice your minds, and throw a false colouring over the controversy. A few words, therefore, in regard to this matter will conduce to a right understanding of the case.

You have heard it stated, that it is not the design of our opponents to affect, in the least, our rights of property, but that they are willing to share with us the funds of the Church. Here are the terms of compromise which are offered to us. "We," say our brethren on the other side, "We will take Princeton Seminary, and we, the Old-school will be the rightful successors in our corporate privileges; while you, the New-school, are to be considered as seceders." Then comes the clause providing for this equal and just division of property: "All other funds shall be equally divided between the two bodies, so far as it can be done in conformity with the intention of the donors." But the whole property was given by the donors to the Presbyterian Church in the United States, and to it alone. The moment, then, that you find any property susceptible of division, this very circumstance shows that it does not belong to the Church, but to some body else. Deny that the New-school brethren are Presbyterians—deny them the right of succession, and they are a body to whom no one of the donors ever intended a cent to be appropriated. The necessary consequence is, that under cover of this fair, just, and liberal offer, our opponents would retain every particle of the property in question. But we care very little about property, and, therefore, in our opening, laid very little stress upon this point. For charity's sake we might be willing to relinquish all our interest in the funds of the Church, nor even interpose a plea for the humbler worshippers who have raised their lowly temples for the service of God within the bounds of those four Synods. We care not much, even if they all should suffer under the operation of the plan proposed by our opponents; even if they should be ejected by strangers from the houses where their fathers have worshipped. To all this, though with aching hearts, we might agree: all would be of less consequence than the destruction of harmony and peace. We care not for Church funds, and for the sake of peace will sacrifice them; but we cannot, even for peace's sake, abandon our communion. On the side of our opponents, however, you see the question of property brought forward, as that of primary importance; and, at the same time, they seem conscious that some explanation on this point was necessary.

This cause is brought before you from the necessity of the case: it does not involve, as it has been said to do, any question in regard to theological doctrines, but merely a question of law. Driven by what we call harsh treatment and unjustifiable violence—by the course of proceedings pursued by our opponents, either to relinquish our rights, or appeal to the laws of our country for succour, we attempted in 1838, a legal organization of the General Assembly; but now we find those, who were really seceders from the Presbyterian Church, persisting in their unlawful endeavours to deprive us of our dearest privileges.

The simple question which you have to answer, in deciding upon this case, is, whether certain persons, the Relators in the suit, have been duly elected to fill the office of Trustees of the General Assembly. These Trustees were incorporated by an act of the legislature of Pennsylvania, in the year 1799, and are therefore amenable to the general law of corporations. Such is the formal issue presented by the pleadings, and therefore we were entitled to object to the course taken by the opposite counsel in their defence. But we have always desired, that the general features of the whole case should be developed, and that the investigation should

not be closely confined by mere technical rules. The determination of the formal issue depends, altogether, upon the decision of another question—a secondary issue, viz: which of two bodies that met in 1838, each claiming the title, was, in fact, the true General Assembly of the Presbyterian Church. You will recollect, that the members of the corporation—the trustees—are elected by the Assembly, according to the provisions of the act of 1799, which gives that judicatory the power of changing one-third of the whole number of trustees every year. Now a body claiming to be the General Assembly, has elected the Relators in this suit, to the office of trustees, and, in so doing, has removed certain other persons, the defendants before you. You will hear no objection made to the power of the General Assembly to make such a change. If we were the true Assembly, no objection can be made to our having thus acted: we have changed only one-third of the number of corporators, electing that many new trustees, thereby, of course, removing an equal number from their offices. This, I say then, is a secondary issue—not a collateral one. Was the body that met in the First Presbyterian Church, in May, 1838, the true General Assembly?

Now I need not tell you, that, for the settlement of all such questions, the law provides, and the tribunals of justice are ever open. The adjustment of every claim and dispute, touching such public franchises, or growing out of charters of incorporation, must of necessity be conformable to the general laws which govern corporations.

The corporation now the subject of your cognizance, is not of an uncommon species; but, at the same time, is not of the most ordinary kind. It is a corporation composed of the trustees alone, but without the power of keeping up its own succession; the filling of all vacancies, and all changes in its composition being left to the General Assembly, which is, therefore, though not a corporate body, *quasi* corporate, being similar to the corporations of municipal towns. The members of the Assembly constitute the electoral body. Now, in order to understand the powers and organization of this Assembly, it will be necessary to look into the Constitution of the Presbyterian Church. Those parts of the Constitution which relate to this subject, I shall therefore briefly explain, detaining you here but for a few moments, as I intend to perform the task allotted to me "in the shortest time, in the fewest words, and with the least interruption possible," hoping to give no offence. Unless you fully understand the nature of this Constitution, you can never fairly determine the matter in dispute, or comprehend the relative positions of the parties.

The Constitution, gentlemen, contains among other things, the Confession of Faith of the Presbyterian Church; but with that, fortunately, we have nothing to do. I trust we should all be disposed to treat questions involving the consideration of that part of the volume, in a spirit somewhat different from that, which may not be unbecoming in the present case. Here, I say, we have nothing to do with the larger and more important part of the Constitution—that we shall not touch. The Form of Church Government is the only portion to which your attention need be directed; and this differs, in some respects, from the forms of most other Churches. Presbyterian government is lodged in a succession of *judicatories*—so they are expressly and technically styled. These are courts of justice, and no proper legislative powers are delegated to any of

them; though I do not mean to say, that no act of discipline can be lawfully performed by them, unless in a strictly judicial manner: I do not deny them the ordinary rights of bodies corporate, or *quasi* corporate. As to the faith, the holy mysteries of religion, and the discipline of the Church, they are essentially defined in the book itself, and no power to pass them by, or alter them, has been given to any of these judicatories, or to all of them combined. Their general powers are thus prescribed:

"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."

These courts or judicatories are of different classes. The series commences with the church-session, composed of elders chosen for life, and holding an inferior ministerial station. Next comes the Presbytery, consisting of all the ministers, there being at least three, and elders, one from each congregation, within a certain district. Every minister in the district, and attached to the Presbytery, has a seat in his own right, and does not sit by a delegated authority. The elders, or *laymen*, as they are sometimes inaccurately styled, for they are regularly ordained officers, on the contrary, sit merely as representatives, each church having a bench of elders, and delegating one of them to represent it in Presbytery. In the session, or primary court, the elders have seats in their own right. They form a tribunal in every particular church, chosen it is true by the people, who may, therefore, be styled in one sense, electors, but ordained for life. They sit together in the body, the minister presiding. In the Presbytery all the ministers sit in their own right, the elders by right of representation. The Synod, to which appeals lie from the Presbyteries, is composed of representatives from those bodies. The General Assembly, however, which our present inquiries principally concern, passes over the Synods in its organization, its members not sitting by right of representation from those judicatories, but being elected by the various Presbyteries. Therefore the General Assembly, as to the cognizance of appeals, is the next higher court to the Synod, but as to its constitution, has no reference to the Synods; but each Presbytery has a right of representation therein, by a certain ascertained number of delegates, proportioned to its size. All this may be made as plain as A, B, C, by comparing the Presbyterian system of government to the civil polity of this State. The Presbyteries are like the several counties of Pennsylvania, each of which has the right of representation in the legislature. The Synods are similar to our judicial districts, composed of three or more counties, with the right of appeal to the Supreme Court. These counties have an indefeasible right to be represented; and such is the right of the Presbyteries to send delegates to the General Assembly.

"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."

"The General Assembly shall consist of an equal delegation of Bishops and Elders from each Presbytery, in the following proportion, &c."

The powers of this Assembly are prescribed in the Constitution. It is as I have explained, composed of representatives from all the Presbyteries. When, therefore, the right of an individual to sit in this body, for the purpose of voting in the election of trustees, is called in question, we need ask, only, is the Presbytery from which he comes in connection with the Presbyterian Church; and has he been duly elected? Both these inquiries being answered in the affirmative, his right is undoubted.

The General Assembly has certain officers, to assist in the conduct of its business. These officers are of different kinds. The first and highest is named the Moderator, being the presiding officer; and no doubt this title originated in the nature of his duties, which were to moderate the Assembly—to heal up wounds inflicted in the excitement of debate, to cool the heats produced by sudden collisions, and to suppress disorder.

"It is equally necessary," says the Constitution, "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."

Then it goes on to enumerate his powers, which are those of an ordinary speaker; after which follows the regulation, that,

"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."

These are the constitutional provisions, in regard to the office of Moderator. Then the other officers, the clerks, which are also absolutely necessary to every organized body, are provided for. The next chapter commences thus:

"Every judicatory shall choose a clerk, to record their transactions, whose continuance shall be during pleasure."

The clerks, therefore, hold their offices, as it is expressly provided, during the pleasure of the judicatory; consequently they may be removed at any time. To be chosen by the body to record its proceedings, it is not necessary that a person should be a member. If this be disputed, we can show that the point was at one time raised in the Assembly, and a formal decision given, that membership was not necessary. I suppose Dr. McDowell was not a member of the Assembly of 1838.

We now turn to another part of the Constitution, the rules which govern the General Assembly when organized. Having briefly described the Presbyterian form of government, as to the organic structure of the several judicatories in the Church, tracing them down to their origin, in the ordination of bishops and ruling elders, we come to the action of the Assem-

bly, which is regulated by permanent and unchanging rules. Those to which I now direct your attention are found under the head of "actual Process."—*Book of Discipline, Chap. IV.*

Mr. Meredith here read a large part of this chapter. We refer the reader to page 28 of our report. After reading sect. 8, he observed,

Some "counsel learned in the law" must have drawn up these rules—some one familiar with the law relating to indictments for crime. Here, you see, a provision is made for the proof of an *alibi*—the only prudent defence, as old Mr. Weller thought, in any case. If we could prove an *alibi* here, it would be of essential service. We could demonstrate that we were members of the Assembly, if we could only show that we lived out of the infected district.

This then is the sort of action in regard to offences, which is within the power of the Assembly. The form of criminal process is in every particular regulated by the fundamental provisions of the Constitution itself. In a subsequent part the nature of the offences for which this disciplinary process is prescribed, is explained: *Chap. V. Sect.* 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.

"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.

"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."

These rules provide for the case of heresy and schism—for any violation of the doctrine or of the discipline of the Church. I, if a Presbyterian, which I am not, would be pronounced a heretic in a moment. Although I am happy to believe that there is no material difference between this sect and that to which I belong, that they both agree in all that is essential to Christianity, I do not believe in the peculiar doctrines of Presbyterianism, and therefore, if professing to belong to that Church, might be justly censured as a heretic. I do not believe in the divine institution of an order of Church officers called ruling-elders, chosen and ordained for life—I am an Episcopalian. If a Presbyterian, I should be a heretic, because I differ from the standards of that sect in a matter of faith. Discipline is established merely for convenience, and relates to matters which are non-essential; and he who who offends against rules of discipline is a schismatic—attempts a neologism. But he who departs from the faith of the Church, the essence of which is believed to be of divine institution, is guilty of heresy. It is no answer, therefore, to say to a man, who belongs to the Presbyterian Church; who has adopted its Confession of Faith; who has lived forty years in its communion; who has subscribed to its funds, and participated in all its trials and conflicts—it is a poor answer to such a man, or to a hundred thousand of such men, to say, "You are very good men; you may be Christians, for aught we know, but you are not

Presbyterians. We don't charge you with any offence—no offence at all—you are guilty of none; but you hold false doctrine. You may be good Episcopalians, or good Catholics; or, as one of my learned friends has suggested, if not Christians at all, you may be very good Turks; you may be exactly suited to the longitude of Constantinople; but here you are interlopers. We do not, however, accuse you of any thing infamous: we do not even call you fanatics—we wish to be perfectly polite. We only hold you to be parasites; and we say that you form a nucleus around which fanatics always gather; still you are very worthy, very polite men:—You exhibit every virtue in your intercourse with your neighbours; you are honest, industrious, and sober; but somehow or other your house is the resort of all the drunkards in the ward. Pray, gentlemen, don't get into a heat; we mean nothing personal by this; it is all said in a parliamentary sense." I say, and so says the Constitution, that these are offences—offences for which a criminal process, and criminal punishment are provided. If a man in connexion with the Presbyterian Church, refuses to conform to its doctrines and order, or violates its rules of discipline, he is an offender; and it is not necessary, that he should be also a bad man, to make him guilty of an indictable offence. I have read to you passages from the Constitution, which show, that the punishment of heresy and schism are expressly provided for. It clearly points out a mode in which those guilty of these ecclesiastical crimes may be brought to trial, and censured or expelled.

I have thus endeavoured to give you a full understanding of the constitution and nature of the respective judicatories of the Presbyterian Church, as necessary to the comprehension of the mode of proceeding, which is clearly provided, for the punishment of heresy and schism; and to your arriving at a satisfactory result, in regard to the matters which are to be found by you, under the instructions of the court. We have shown to you, by the evidence produced on the part of the Relators, that, from 1802, until after the commencement of the session of the Assembly of 1837, not all of them, indeed, during the whole of that interval, but having been formed, at different periods, and every one in full existence at the time last mentioned, there were among others, four particular Synods, containing twenty-eight Presbyteries, represented in the General Assembly. These bodies, in 1837, embraced five hundred and ninety-nine churches, five hundred and nine ministers, and near sixty thousand communicants. I mention the number of communicants merely, not taking into account the much larger mass of humbler worshippers, who had not ventured to join the spiritual communion of the Church, but who, nevertheless were entitled to a representation. I do not mean that these worshippers were entitled to a direct representation; but they were certainly entitled to become members, unless found faulty in the initiative examination, and were thus capable of acquiring the right, while, in the meantime, they were worshippers, according to the faith of their Church, and the customs of their forefathers. Of these Presbyteries only I take notice, for fear of embarrassing you, by larger arithmetical calculations. I do not include the Third Presbytery of Philadelphia, which contains some of the most ancient churches in the city, among others the first one in which a Presbyterian ever worshipped God in this place, and also the next to this, in point of age—the case of that Presbytery, that you may suffer less em-

barrassment, I do not introduce, except to say that it was dissolved by the Assembly of 1838. We shall direct your attention only to the four Synods above mentioned, thirteen of which were formed before the year 1821, a fact which may prove to be important.

Now, I say, that from the minutes, the best evidence of which the case admits, evidence which is undenied, it has been conclusively proved, that from 1802 to 1837, these Presbyteries, all according to their respective ages, had been in every possible way, recognised as a part of the Presbyterian Church. What? is not the proof as strong as any testimony could make it? It would be burning daylight to attempt further to substantiate the fact. First, their commissioners sitting, acting, and voting, year by year, in the General Assembly. Secondly, the record of these bodies regularly sent up to that judicatory for examination, and in almost every instance approved. In the Synod of the Western Reserve, on one occasion, a sentiment had been expressed, in regard to a point which we would not have considered of any vital importance—that the institution of ruling-elders was not essential to salvation, or to Presbyterian church order. To that the Assembly did not agree; but with this exception, I believe the record was approved. They were recognised in that way; and in the next place, by the receipt of their contributions, poured into the common treasury during this period. They were recognised by the appointment of several of their members, at different times, to various offices in the Church. The next fact proving their recognition, is their being mentioned in the statistical tables, digested from the reports of the Presbyteries, which the Assembly has directed to be put every year upon the minutes; in which tables they are mentioned uniformly, no distinction being made between them and other judicatories, which are still acknowledged to be strictly Presbyterian. Now what is to establish the rights of any man breathing, who comes as a delegate, from a body claiming the privilege of representation, if we have not in the present case established the right of these judicatories? Their commissioners being received by the Assembly, and they making their report to that body, sitting, debating, and acting in it. Any other Presbyteries—the First of Philadelphia, or the Presbytery of New Brunswick, might be challenged to give more conclusive evidence than we have given, of their belonging to the Church. Just as well might the Assembly undertake to exclude any Presbytery, or church in Pennsylvania, as these.

The Assembly is a body of limited powers. It has been said that it has the right of judging of the election of its own members. This, as a lawyer, I deny: it has no such power, unless it proceeds by the process of a formal trial. Suppose, that after one of its sessions is half over, because some particular motion is not carried, you report that a certain Presbytery is not a constituent part of the Church, and that its commissioners have no right to sit. What can they show to prove their right, but that the representatives from that Presbytery have always been received and acknowledged; that it was even a party to the adoption of the Constitution? What more could they show? But all this we have shown. In 1821, thirteen of these Presbyteries had already been admitted, one in 1802, and the others subsequently. For seventeen or eighteen years, therefore, they had been component parts of the Church. In 1821, the Assembly proposed certain amendments and alterations of the Constitution, and these,

as was necessary, were sent down to all the Presbyteries to be passed upon by them. The thirteen Presbyteries mentioned, passed upon that constitution, and it was adopted by their votes, joined to the votes of the others. It would be burning daylight to detain you on this point. The human imagination cannot invent proof more conclusive than that which we have given here. These Presbyteries send commissioners, who sit and act in the Assembly; their records are examined and approved; they join in the formation of the Constitution of the Church; and, now, in 1837, their delegates are actually sitting. Recollect, therefore, that, at the opening of the Assembly of 1837, there was competent evidence of the right of those Presbyteries to be represented. This right had never to that hour been doubted—I beg pardon: I mean to say no man had openly doubted it; that no notice had been given of any such doubt. At the opening of the Assembly of 1837, and for some time afterwards, they were treated as undisputed members of the Church.

I have said that it is in evidence, that thirteen of these Presbyteries joined in the adoption of the present Constitution. Their rights, then, were as the rights of the thirteen Old States, which had united in forming the constitution of this country; and as well might Rhode Island, or South Carolina be turned out of the confederation, because we did not like their votes; as well might we deny that they ever had been members, as dispute the right of these Presbyteries. I admit that if false doctrines, or a laxity of discipline had been discovered; if heresy or schism, had been found to exist; if any member of a Presbytery had acted in violation of the established rules of order and discipline, he might have been subjected to an ecclesiastical trial, to censure, and even to expulsion. But there is a wide difference between a liability to exclusion by the sentence of a regular tribunal, after trial, and to the mere arbitrary fulminations of such a body as the General Assembly. This point is so clear, that I pass on. No impartial man can doubt, that these Presbyteries were as much entitled to their accustomed representation, as any one of the thirteen original states to theirs in Congress.

So stood the Presbyteries embraced within these four Synods, regularly received and recognised, and their commissioners acting with the Assembly, at and after the commencement of its sessions in 1837. Now having brought them thus far, it is necessary that I should go back to the history of another series, or of two other distinct series, of events.

From the earliest period of the existence of this Church, as appears from the express terms of several written acts of the General Assembly—acts which, for the honour of religion, I hope were passed for the purposes expressed upon their face, and not for those which have here been opened to you by the opposite counsel—from the earliest times to which our evidence goes back; from the very infancy of the Church, it has been its practice to associate itself in different ways with brethren of other kindred persuasions. Now it is necessary, that I should present to you a brief outline of these associations—of their nature, character, and extent, in order that you may understand the relation which was borne to these cognate churches. Then I shall endeavour to distinguish between the associations to which I refer, and another matter, which has been confused with them, and which it has been the main effort of our opponents to re-

present as the same thing—the same as to its purposes, and the end to be accomplished. You will, I trust, see the difference.

The terms of all but one of these associations "plans of union and correspondence" as these are called, may be found in the Assembly's Digest. They were the acts of the elder patriarchs of the Church; and for your satisfaction, I shall refer to them, that you may compare them with the acts of those, whom for distinction's sake, I shall call the juvenile patriarchs—those who have in these latter days taken the Church under their particular charge.

The first plan of union was that formed in 1792. I am happy to say, while speaking of the patriarchs who formed these various plans, that one of them still survives; and that every act of this kind had the advantage of his concurrence, and his wisdom. I refer to Dr. Green. In 1792 a "plan of union and correspondence with the General Association of Connecticut" was adopted by the Assembly.—*Assem. Dig. p.* 292.

"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:"

A note to this paragraph states that the convention spoken of "originated in measures adopted by the General Assembly in 1790 and 1791, for affecting this union of intercourse." So you see that the Assembly invited their Congregational brethren to associate with them.

"'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—'"

These important purposes are those which I ascribe to the respected men who entered into the negociations. We shall in a little while, show the purposes, which are ascribed to them by the other party.

"'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.'"

Then follow the measures proposed for this purpose. "'——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 authorised 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.' * * * * * * *

"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"—names which must ever stand high in the history of this Church—"to be a committee of correspondence, agreeably to the 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."

Then follows the appointment of "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 the ratification of the plan by that body. In 1794 an alteration in the plan was proposed by the Assembly.

"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 General Assembly."

This amendment was agreed to by the Association, as its scribe, Jonathan Edwards, certifies.

The next plan of intercourse entered into by the Assembly, was that with the Convention of Vermont, proposed by the former, in 1803. *Assem. Dig. p.* 300. The terms of this plan were:

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

"II. 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.

"III. 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."

This plan was ratified by the Convention, and adopted by the General Assembly. Subsequently, I believe, the right of voting was taken away from the delegates for whose appointment it provides. That was done in these latter times by the juvenile patriarchs.

With the General Association of New Hampshire a similar union was formed in 1810. *Assem. Dig. p.* 303. The proposal in this instance seems to have come from the Association. The plan was formed on the same principles as that with the General Association of Connecticut, and the commissioners appointed to make the proposal to the Assembly, being invited to sit as members of that body, "accordingly took their seats." The provision in regard to the delegates voting, was subsequently altered, the right to vote being taken away.

With the General Association of Massachusetts a like union was estatablished in 1811. *Assem. Dig. p.* 305. The proposal came from that body and was accepted by the Assembly. This plan conferred the right of voting on the respective delegates, a provision which, in

this case also, was subsequently abandoned. The next thing in the Digest is the mode of electing such delegates, adopted by the Assembly in 1796. *Page* 307.

In 1802, the Presbytery of Albany communicated to the Assembly the terms of a plan of friendly correspondence between that Presbytery, and a body known as the Northern Associate Presbytery, agreed upon by a joint committee. The terms were,

"1. That there shall be occasional communion between the members of the particular churches, subordinate to these 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:

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"The Assembly after due examination and deliberation, expressed their approbation of the said plan of correspondence."—*Assem. Dig. p.* 309.

An association with the Reformed Dutch, and Associate Reformed Churches also was proposed in 1798. In that year "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

"I. The communion of particular churches;

"II. A friendly interchange of ministerial services; and,

"III. A correspondence of the several judicatories, of the conferring churches.

"This plan was unanimously approved by the General Assembly; but it was not accepted by the judicatories of the other churches."—*Assem. Dig. p.* 311.

It appears then that down to the year 1811, beginning with the plan of union with the General Association of Connecticut, adopted in 1792, there were no less than six of these agreements entered into between the Assembly and other cognate bodies, by which the ordinations of each were mutually recognised, ministers allowed to make friendly interchanges of service, and the travelling ministers of one denomination received by all the others. The Assembly, in most instances, sought this intercourse, and was the first to propose the mutual appointment of delegates, with powers to sit and vote in each other's judicatories. Such was the close and intimate nature of the union which that body saw fit to maintain with kindred associations, and which was not regarded as any violation of Presbyterian doctrine or discipline, until were introduced these neologisms, the inventions of latter days. Down to this period, the patriarchs of the Church sought every means of enlarging her communion, for the purpose which is set forth in the book from which I have just read—the extension of the Redeemer's kingdom, overlooking all minor and unimportant differences of religious opinion, and the Assembly itself seeking the union, it being the more numerous body, and, in order to have some share of control in the other associations, seeking the right of sitting and voting in them, by delegation, and giving the same right in return to all of them, except the Associate Reformed and Dutch Reformed Churches, which

had never a right to vote. This policy was observed from a very early period down to 1811, and may be traced to a much later time. We could show several acts in confirmation of this, but, for fear of wearying your patience shall refer to only one; and that dates as lately as the year 1821, when some of the senior members of the band of juvenile patriarchs must have begun to break through the shell. Not satisfied with plans of mere correspondence and association—the informal admission of cognate bodies to their fellowship, they brought a whole Church into direct and full communion with them, taking away every shadow of distinction between the two, without dreaming of any limit to their power in this respect. In 1821, the General Assembly made a proposition to the General Synod of the Associate Reformed Church, that the two Churches should be united. This was acceded to by the Synod, and the coalition was actually consummated.

Mr. Meredith here read the whole of the extracts from the minutes of 1821, p. 9; and 1822, p. 11; which are given at length, *ante p.* 126. As he did not comment upon them while reading, we merely refer to that page.

Now, as to the other associate bodies, with which the General Assembly entered into plans of intercourse, we have no precise evidence as to their faith or discipline. As to the Associate Reformed Church, however, we have the testimony of its own Constitution. I have looked over this volume cursorily, but as I have not got it here, must state from memory, the differences between it and the Presbyterian Constitution, which I have observed. The terms of union saved to each of the respective bodies the right of preserving its own Presbyterial organization and form of government. The differences which I shall notice are, I admit, slight and immaterial; still they will throw some light on the course and policy of the Assembly towards cognate bodies. The first difference, however, is very material, if we believe that the subject of it, as an article of faith, is essential to salvation—it is in the part relating to civil magistrates. In the Confession of Faith of the Presbyterian Church, there is a slight departure, in this respect, from the Westminster Confession of Faith, in order to accommodate it to the circumstances of this country.

"Civil magistrates may not assume to themselves the administration of the word and sacraments; or the power of the keys of the kingdom of heaven; or, in the least, interfere in matters of faith. Yet, as nursing fathers, it is the duty of civil magistrates to protect the church of our common Lord, without giving the preference to any denomination of Christians above the rest in such a manner, that all ecclesiastical persons whatever, shall enjoy the full, free, and unquestioned liberty of discharging every part of their sacred functions, without violence or danger. And, as Jesus Christ hath appointed a regular government and discipline in his Church, no law of any commonwealth, should interfere with, let, or hinder the due exercise thereof, among the voluntary members of *any* denomination of Christians, according to their own profession and belief. It is the duty of civil magistrates to protect the person and good name of all their people, in such an effectual manner as that no person be suffered, either upon pretence of religion or infidelity, to offer any indignity, violence, abuse, or injury to any other person whatsoever; and to take

order, that all religious and ecclesiastical assemblies be held without molestation or disturbance."—*Conf. of Faith, Chap. XXIII. Sect.* 3.

Now there is a variation from this in the book of the Associate Reformed Church. I do not look upon it, however, as a material difference. There is another in the Form of Government which is more material—in that part establishing the basis of representation. There may be other discrepances; but these two are the only ones which I shall venture to state now from memory. By the Presbyterian Constitution, a Presbytery must be composed of not less than three ministers, with as many elders as there may be within particular bounds.

"Any three ministers and as many elders as may be present belonging to a Presbytery, being met at the time and place appointed, shall be a quorum competent to proceed to business."—*Form of Gov. Chap. X. Sect.* 7.

Of course, under this rule, no Presbytery can exist in a district which does not contain at least three ministers. In the Associate Reformed Church however, no particular number of ministers, as necessary to the existence of a Presbytery, is specified, and two are sufficient. Consequently, as each Presbytery of that denomination, was after the union, entitled to at least one delegate in the Assembly, in the same manner as each Presbytery before belonging to the Assembly, two ministers of the Associate Reformed Church might have the same representation in that judicatory, as three Presbyterian ministers. These two differences may not be very material, but still they are differences.

I may mention a third variation, if indeed it be a variation. Supposing the system of doctrines the same in both Churches, the terms of subscription are different. I notice that the Associate Reformed Church requires —I have not the book before me—that the Confession of Faith should be received only for substance of doctrine. But one of the main accusations made by our opponents against the members of the exscinded Synods, is, that they profess to have accepted the Presbyterian Confession only for substance. It seems to be a most fortunate—I will not say providential—circumstance—certainly it is a peculiar advantage to the cause of justice, in this case, that whenever the opposite party have attacked and slurred either the principles or practice of my clients, we find them directly censuring the most formal and solemn acts of the General Assembly itself.

Now suppose that this is a matter of vital importance; and that the Assembly formed associations with various bodies, *bona fide*, for the purposes which are set forth in the Digest, considering them as holding the essential doctrines of the Christian faith, and for the sake of peace and union, overlooking differences in non-essential points. I trust, gentlemen, that no man will prevail, in an attempt to convince you, that the Assembly acted with a purpose different from that avowed; to lead you to suppose, that from 1792, to 1821, while making professions of this kind, that body was really and truly adopting these measures for temporary purpoposes, thinking to make the brethren of kindred Churches their dupes, and to cast them off, whenever strong enough to do without their assistance. Then in all such cases; or take for example the instance of the Associate Reformed Church—in that instance the Assembly has admitted to its communion, persons who, on the face of their confession of faith, acknowledged more error, than all that we are charged with. Indeed no

offence was formally alleged against us. Proselytes have been made from Jews, Turks, and Infidels, who, on showing their belief in the essential doctrines of Christianity have been permitted to join the Presbyterian communion. But here, five hundred ministers, formally admitted into the Church, having subscribed its Confession of Faith and Form of Government, and amenable to the Church courts, if they have in any respect failed of their duty, on a mere suggestion, by a simple resolution, no reasons being given, are suddenly exscinded. They are not excluded, but told, "You have never belonged to us. The property which you have subscribed will be given up to you, if the will of the donors permit." Then in the next breath, "You have no right to it: you must leave the Church. We consider you as seceders. You are respectable men, moral men, very good men: we find no fault with you, any more than we do with the Turks." If such is the policy of the Presbyterian Church, I should be unwilling for it to be publicly believed. They have taken into their communion their Associate Reformed brethren, who adopt the Westminster Confession of Faith only for substance. These are the words in the book of that Church. These brethren profess nothing, except that they agree with the Presbyterians in the substance of their doctrines; yet are they admitted. Well then, on the principle that all these unions were temporary, the General Assembly may say, "Here is the Confession of Faith. You say you adopt it only for substance of doctrine. We don't mean to persecute you; we don't impute any offence. But, as your votes don't suit us, it is evident you never belonged to us. Go as Lot went—go in peace. As to the funds to which you have contributed, they shall be divided if the intention of the donors will permit."

Much as the best of men may be blinded by passion, to the light which heaven sheds upon their path; much as they may yield to the temptations of their weaker nature, I will never believe that during forty years and upwards, the patriarchs of the Presbyterian Church, have formed repeated unions with the brethren of various sects upon their borders, avowing one purpose, and covertly acting with another; and, that now, having waxed strong by the assistance of these associations—the lion's cub having been sustained until it has grown to its full power—they will, for this reason, say to their deluded brethren, "You are not of us: you never belonged to us: go into the desert with your flocks and your herds."

I have thus shown the course of policy pursued by the Presbyterian Church towards sister Churches; her liberal terms to proselytes from other sects; her arms being ever open to receive into her communion all those not differing materially from her standards of faith. If there be any truth in a record, these recorded proceedings of the patriarchs of the Church cannot be denied. The series of acts, however, which I have described, are not so material in themselves, as from the bearing which they are alleged to have upon another act, which nevertheless is of an entirely different aspect, and was intended to subserve a different purpose. It is an act of much importance in this case; for on it the rights of my clients rest, if I can show that they are in the right, which I apprehend I shall make as clear to your perceptions as the sun at noon-day. I refer to the "Plan of Union" of 1801.

An attempt, no doubt, will be made to confuse this act with the others

that have been exhibited to you; to convince you that they are all of the same nature. But I tell you, gentlemen, they are of a totally different aspect—as different as they can be in their practical effects. Those were plans of intercourse and correspondence, or acts formally embracing whole bodies of men who held the doctrines and adhered to the discipline of the Presbyterian Church. This act was totally different: it concerned nothing but the relaxation of the rules of the Church in a few unessential points of discipline. It originated in a proposition made by the Assembly to the General Association of Connecticut.

Mr. Meredith here read the "Plan of Union," for which we refer the reader to page 48, *ante*.

The Minutes of 1801, show that Dr. Green was a member of the Assembly by which this plan was proposed, and I take for granted that he concurred in its adoption.

Now, what is the meaning of this act? It does not admit any body into the Presbyterian Church, nor does it provide for the appointment of Congregational delegates to sit in the General Assembly. No person who is not a Presbyterian acquires by virtue of it the right to sit in any of the judicatories of this Church. It speaks for itself clearly and distinctly; it permits certain relaxations of discipline, in regard to Congregational churches and ministers, or promises to overlook them. If a Presbyterian congregation calls and settles a clergyman of another sect, this is a breach of discipline. And if a particular body of people be half of them Presbyterians and the other half Congregationalists, these two portions cannot unite, and form a single church, without losing each its ecclesiastical standing. This is the necessary law of every denomination. If an Episcopalian or Catholic clergyman preaches to a Presbyterian congregation, agrees to relinquish his own forms of worship, this is the worst sort of schism, because it confuses things that ought to be kept totally distinct. So an Episcopalian or Catholic congregation, if it calls a Presbyterian minister, whose ordination their Church does not recognise as valid, are guilty of a breach of ecclesiastical discipline. And in the same way here, where there was an intermixture of Presbyterians and Congregationalists, a like difficulty was experienced. But by the act of 1801, passed by the highest judicatory of the Presbyterian Church, they said, a Presbyterian minister may officiate for a Congregational congregation; and a Presbyterian congregation may call a Congregational pastor, without forfeiting their Presbyterial character. And a mixed people may retain the favour of their respective Churches, although joined together in a single flock. And in the isolated case of such a mixture of the sects in a single body, and of a dispute arising between two members of the body, one a Presbyterian and the other a Congregationalist, in that isolated case, where an appeal is made to the Presbytery, the inferior court of the mixed church shall be represented by one of its members in the Presbytery while the latter is trying such appeal.

This is the whole scope of the plan: all the wit of man cannot stretch its provisions farther. It does not give a single Congregationalist the right to sit in Presbytery. A Presbyterian minister, in that district, may go and preach to a Congregational church, may remain with them as their pastor, without committing a breach of discipline; or rather, the Assembly agree to pass over his offence, for the sake of peace and har-

mony, and the extension of the Redeemer's kingdom—matters of paramount importance. Such a minister before, would have been liable to process: he might have been tried and punished. But here, the highest court of the Church says to him, "You shall not be tried; we will not consider that you have committed any offence; or, at any rate, we guarantee to you a free pardon." This act concerned not the general administration of the government of the Presbyterian Church incorporated by the legislature; but it concerned the personal standing only of individual members of that Church—nothing else. It said to ministers, "You shall not lose your ecclesiastical character, by preaching to a Congregational congregation, and considering them as your pastoral charge." So also the members of a Presbyterian church, who wish to call a Congregational minister, not differing in doctrine from themselves, "You may have such a minister." Therefore a Presbyterian minister preaching to a Congregational church, retains his right to a seat in the Presbytery, but the church does not, by the connexion, acquire any right to representation there; except that a mixed congregation may depute one of its members to sit in that judicatory, while an appeal from their decision is tried. On the other hand, a Presbyterian church, settling a Congregational minister, may send an elder to the Presbytery, but their pastor cannot claim a seat. Into the body of the frame work of the government, cannot come a single man who is not a strict Presbyterian: all others are excluded. I say then that these were measures deserving of praise—wise measures, as they affect in this way, only the personal standing of individuals, but do not allow a single member of another denomination to enter the tribunals of the Church.

Now the legitimate effect of the appeal or abrogation of this "Plan of Union" was that, from the time of the repeal, these acts of irregularity, these breaches of discipline might no longer be overlooked; that if, afterwards, a Presbyterian minister should accept the call of a Congregational church to be their pastor, and should settle with them, he might be brought to trial and expelled. That if the Congregational church chose to retain him, and he to remain with them, ecclesiastical censures having failed to destroy the connexion, he might be detruded from the Presbyterian communion. This, and this only, was the legitimate effect of the repeal. In other words, it removed the injunction on all the "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." The repeal made it the duty of Presbyterians, not to endeavour, any longer, to promote peace and harmony. They must put themselves apart from those with whom they had been accustomed to associate; must come out of the common fold in which they and their Congregational brethren had been so long gathered in unity and peace. It said to the latter, "We have done caring for you. When we were young and weak, we joined our lot with you for a season, while we might increase in strength; but this union was only intended to be temporary. We cannot any longer consent to touch the abominations of your faith. The time for harmony and brotherly love is past. We now come to you with the sword, determined to put down your

heathenish doctrines. We shall exclude you for ever from our company, if you don't abandon them."

In 1835, the Assembly did thus repeal the "Plan of Union," as to its future operation, but with the reservation of the rights of churches formed under it. Here was a minister, who for forty years had been pastor of a Congregational church; who had beheld the members of his little flock growing up about him, and was bound to them by the ties of spiritual parentage. He was not to be compelled suddenly to abandon his people, because they were suspected of Congregationalism. On the other hand, here was an humble Presbyterian congregation, who, not able to find a pastor of their own sect, had followed the advice of the Assembly, and chosen a Congregationalist to break to them the bread of life. They were not now to be forced to drive away from them their pastor in his old age—him, who had ministered to them even from their infancy. Would this have been kind; would it have been generous—not to speak of its legality? Would it have exemplified the spirit of Christian charity? In 1835, the Assembly

"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."

That is churches composed, each of its minister and congregation. Thus a church, of which the minister was not a Presbyterian, need not on that account discard him; and still their ruling-elders might have a representation in Presbytery. Their minister never had had a right to sit in that judicatory; there is no evidence that any Congregational minister ever claimed a right to a seat there. No such right ever existed. In 1835 it was resolved, that no new connexions of this kind should thereafter be formed; but kindly and generously, not to break the ties already binding closely together so many pastors and flocks.

Now you see, gentlemen, from this short explanation, the entire difference between the act of 1801, and the plans of intercourse with other denominations before mentioned. These were plans either of correspondence and intercourse; or for incorporating one body with another. That merely a waver of the right to inflict discipline in individual cases, from motives that do honour to the pious fathers of the Church—to the venerable man whose name is connected with its history from the earliest time; vindicating his character from the aspersions which have been cast so lavishly upon his doings, amid ceaseless professions of respect and reverence for his person, not for a single, a casual act, but for forty years of untiring and consistent labour, to promote the peace and harmony of his Redeemer's kingdom, ending in the Assembly of 1835, with the act just read, to which no doubt he cheerfully consented. These men at that time, had no right to say, "We were seduced into this connexion. The best part of our lives has been consumed in the service: some of us have

laboured thus for forty years. It is too late for us to form new connexions. And must we do this, or be driven from the bosom of our Church?"

Thus the matter stood at the commencement of the meeting of the Assembly in 1837, to which we now come back. Thus it stood, or seemed to stand: because, though it is not in evidence, yet one of the opposite counsel in his opening has admitted—we are thankful for his candour; and, indeed, there has been no want of candour on the part of these gentlemen—has admitted, that among the commissioners who were sent up to the Assembly of 1837, there were those who considered that body but nominally, as some believed it really, a homogeneous body, all its members being bound together in the same faith and discipline, and personifying the peace, union, and harmony of the Church which they represented. This was the opinion of a large portion, certainly, of the delegates, while the other portion, as we are told, came up to meet their unsuspecting brethren predetermined on two points. First, they had resolved that the differences in doctrine which they supposed to exist, and in regard to which the Church was nearly equally divided, should be finally settled at this meeting of the Assembly. And, secondly, the same body avowed their determination not to submit to the General Assembly constituted as their book prescribed, and as for forty years it had been constituted, but that the final decision of the questions which were to be agitated, should be influenced by the votes of none but those whom they thought fit to vote. In the prayer at the commencement of the session, in which all united, there was doubtless a petition for the peace and harmony of the Church; and yet these men had resolved, that, before any important question should be decided, they would exclude from their councils a portion of their brethren. Well might the doctrines of the Church be finally and conclusively settled, to their own liking, if they first excluded all who were expected to oppose their measures: this was a new mode of instituting a *curia advisare*. Instead of subjecting the proposed questions to the regularly constituted tribunal, they first turn out all that don't agree with themselves, and in this way secure a decided majority. Not in the true Christian spirit, regarding the slight errors of their brethren, as the mere sallies of weak humanity, which, at most, deserved but to be rebuked as faults; but—I say it, because it is an admitted fact, a fact candidly disclosed to you in the opening—coming to meet their unsuspecting brethren, with the fixed resolve, that those questions of doctrine, which the juvenile patriarchs had prepared for the consideration of the Assembly, should not be decided until they had expelled a sufficient number of the members to insure a decision suitable to their views, and to place themselves in a permanent majority. Now, in the first place, I say this was an unlawful combination. I stand here, regarding this as a corporate question, upon the laws of the land. Looking at the Assembly as a *quasi* corporation, I say that if the Old-school brethren came with such a purpose, they had formed an unlawful combination. And that no acts affecting the corporate body could be valid, when these acts commenced in the condemnation of brethren, against whom they were all pledged to bring in a verdict of guilty. In the next place, I say, with great submission, though I shall not stop here to make any professions of respect, that even in an assembly of the world, such conduct would not be considered entirely candid. It is not the mode in which members of

the same body should meet—one portion of them open as the day, and with no secret purposes, coming to consult with their peers; the other coming with a covert design lurking in their breasts—a determination to strike a blow, at the earliest possible opportunity, which should cut off their unsuspecting brethren from their fellowship. Whether such a design was entirely Christian, I do not pretend to judge. I can speak for it in a worldly and legal point of view, and in these alone. If they were in the right, I thank God that such a duty did not fall on me.

This predetermination of the Old-school, is a key to all that has happened since, the subsequent acts of both parties being conformed to the general scheme above described. One side always open and confiding, asking to consult with their brethren on the affairs of the Church; the other coming up with a fixed, determined purpose, which they have now avowed, to exclude a portion of the commissioners.

Thus the two parties stood in the Assembly of 1837, at the opening of its session. These gentlemen from the four Synods were afterwards declared not to be members of the Presbyterian Church, though some of them had been acknowledged as such for forty years, and though the Presbyteries to which they belonged had assisted in the formation of the Constitution of 1821, and at the commencement of this very Assembly, they had been admitted to their seats without debate. The clerks had no difficulty at that time in deciding whether their names should be enrolled. In 1837, though the plan had been preconcerted—and why that particular year had been fixed upon by the Old-school I do not profess to know, though perhaps I might guess—there was not the least hesitation about the reception of these men. Dr. Elliott then had no scruples of conscience in regard to their admission. No question was raised touching their right to sit: and no doubt, in their minds, the fallacious hope was excited, that by the action of this Assembly, the borders of the Church of Christ would be enlarged, that nothing would occur to endanger its union and harmony. Near two weeks elapsed, and they still sat as unquestioned members of the judicatory. In the mean time there was no disclosure made by the Old-school, of their ultimate designs; but they proposed to divide the Church, to destroy that union which they had all sworn to promote. They contended that the only way of securing harmony and union was to enforce a separation. Even to this, the party whom I represent, patient and long-suffering, agreed: they acquiesced in the division of the Church. They had no preconcerted purpose; were pledged to no particular measures: they answered, "If this be the only chance of peace, we are willing to separate from you; we acquiesce even in division." The Old-school, with a settled scheme of action in their minds, make a proposition for a treaty. They propose, that the New-school, who desire no separation, who adhere to the Confession of Faith and Form of Government, should, in the first place, acknowledge that they are not of the Presbyterian Church. "As to the property," say they—"we have no disposition to quarrel with you about property. We'll keep Princeton Seminary, established partly by your contributions, partly by ours, and partly by the funds of the Associate Reformed Church. As to the other property, we intend to be very liberal. We will give you full half of it, if the intention of the donors will permit; that is half of all which by accident the donors did not give to the General Assembly of the Presbyte-

rian Church." "Well," say the others, "will you let us be one of the successors of the General Assembly? As you have made no charge against us, as we have hitherto formed one association of brethren, as we have been coming up together year by year to our Jerusalem, we ask as a small boon, that we may be one of the successors of the Church. You allow that we are not apostates, but unfortunate collisions have occurred, difficulties springing from various minute sources, differences arising from the frailties of human character. If you insist on division, we agree, but leave us the right of succession." "We," say their opponents, "claim to be the true and only Assembly: you may take what other name you please. As to the property, the law of course will decree, that all which was given to the General Assembly shall remain with us, the successors of that body. If you can find any other property belonging to us, that we will divide." My clients had exercised the most christian long-suffering. They made no difficulty as to any other proposition, though offered, with a knife at their throats. But now they were asked to put upon the record, a confession that they were no part of the Church of their fathers; that they were not successors to the inheritance of its original doctrines; that they were false apostates from the faith. Their patient forbearance defied the power of wrong, until they were asked to confess that they were not of the true Church. An equal division of the succession was not allowed—succession which is the life of the Church. They were willing to leave all the property in the possession of those gentlemen; but they refused to abandon entirely their history and their succession; and this any man must have refused, having the ordinary feelings of humanity.

I do not know, gentlemen of the jury, why their request was denied: I can see no reason for it but the desire to quarrel. They were told to abandon all the recollections of their lives, even from earliest infancy; to confess themselves no longer steadfast in the faith which their mothers had taught them. But why was all this? Why must they sacrifice all their fondest recollections, and destroy the tenderest ties? Why sever the most sacred cord that vibrates in the human heart? Why should they be denounced as apostates, or as Turks? You may take all our property, and we will go forth from among you a small and humble band: You say that you are strong enough to form an Assembly by yourselves, and there can be no peace and harmony while we remain among you. But don't deny us the right of looking back to the religion of our ancestors. We can never record ourselves as heretics and apostates.

The next thing proposed, and it was proposed the moment that this negotiation had ended—perhaps it had been agreed upon previously, in accordance with the fixed design of the Old-school party, though it is probable the precise manner of arriving at the desired result was not planned until a subsequent period—the next thing was to get rid, in some way, of a sufficient number of the New-school, to leave them in a poor and miserable minority. If any fault had been found with their doctrine; if they had at all offended in point of discipline, a constitutional course of proceeding was open to the other party for their trial and expulsion. That course for some reason or other they did not pursue. Possibly because they found it would be difficult to prove any particular fact; or that a judicial investigation would be very troublesome; or because they were too polite. In truth they cared not for a *reason;* an *excuse,* on such an oc-

casion, they thought quite sufficient. By a very small majority the following resolution was passed:

"But as the 'Plan of Union' adopted for the new settlements in 1801, was originally an unconstitutional act of that Assembly—these important 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 I have said, that this seems to me merely a part of a mode devised to carry out a predetermined purpose. First, in 1835, the Assembly had come to the conclusion, that it was best to take no farther order upon this subject. Secondly, in this resolution, they characterize the "Plan of Union" as unconstitutional. Now I defy them to show a single provision of it, which can be made to appear so to any but the jaundiced eye of prejudice. In the third place, if in casting their eyes about in search of an expedient, they could have discovered any other scheme equally plausible, they would not boldly and roundly have pronounced an act performed by the venerable fathers of their Church, "unnatural and unconstitutional."

Was the plan unconstitutional? If so, for what reason? Because it was not within the powers of the General Assembly? The Constitution provides that no rules shall be obligatory upon the churches, unless they are first sent down to the Presbyteries, and approved by a majority of them. Was this a rule obligatory on the churches, or was it a constitutional rule at all? It imposed no obligation upon any church in the whole United States. You belong to a Presbytery, being entitled to a seat therein as a minister: now, by that Plan, you may preach to a Congregational church, and discipline being relaxed in this respect, it will be considered as a mere venial offence, and you shall not be prosecuted for it. Was the plan unconstitutional? Why, it did not touch the Constitution. It had a merely personal operation on individuals. No church or no Presbytery was affected. And even if it was a constitutional rule, such as should have been sent down to the Presbyteries, the want of their direct approval had been supplied by their tacit acquiescence for near forty years. After such a lapse of time, an act of Assembly, an act of Parliament, or a grant from the crown, will be presumed, in order to support acquired rights. These very Presbyteries too, formed a new constitution in 1821; but did not repeal, or at all affect the "Plan of Union." By the adoption of the new constitution the old was at an end; and on this new or amended one all the Presbyteries voted. Yet now twenty years afterwards, some of these Presbyteries are told, that because they came in under the "Plan," though I deny that any did or could so come in, by its abrogation, they are cast out. They stepped lightly over this act in forming the new constitution; they did not consider it a material, a vital point. The law is plain: a regulation of church discipline, if not essential, may be acquiesced in by the Presbyteries. But this was not even a rule of discipline; merely a plan for the promotion of peace and harmony. I say, however,

that if it had been a constitutional rule, the acquiescence of the Presbyteries was equivalent to their approval, and must be presumed, first, from the length of time that had elapsed; and secondly, from the fact of their having in the mean time formed a new constitution without disturbing the "Plan." In the first place, that is a necessary member of a body who participates in the formation of its constitution: so all of the thirteen original States were necessarily members of our confederation, no matter what differences there existed among them, while they were colonies. Secondly, a new constitution being formed pending the operation of this act of union, its formation was a clear acquiescence in that act, or was tantamount to an acquiescence. If you pass a divorce bill, if you pass an insolvent law, if you pass a bankrupt law, the custom before its passage must always be considered in the interpretation of the act, according to the doctrines of cotemporaneous construction.

I next call your attention to what alone is material in this case—the act immediately succeeding the final report of the committee appointed to agree on terms of separation. The moment that my clients had declared, that they would never consent to record themselves, without any reason at all, a secession from the true Church, this measure was proposed. They desired no separation; they held the doctrines of Presbyterianism in all their purity; they found nothing in the standard with which they did not agree.

"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."—*Min.* 1837, *p.* 440. *Ante, p.* 44.

There the matter rested, and a few other votes were taken, by which the Old-school found that their action had not been so decided as was requisite, for the accomplishment of their object. Besides, their first resolution had not been quite syllogistic in its form; they had not given it sufficient logical force; and some persons might not have seen the exact connexion between the premise and conclusion. When, therefore, they make the next cut, something like a reason is given.

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

"1. That in consequence of the abrogation 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 Genesee, which were formed and attached to the 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."

You see that they here change the phrase: it is not "*by the operation of the abrogation,*" but "*in consequence of the abrogation.*" This is followed up by certain other resolutions.

"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 past 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.

"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 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."

That is, that they have no relation at all to the Presbyterian Church in the United States, and never have had any.

"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."

Now, in the first place, I beg leave to deny, that these Synods, or any other Synods can, by all the ingenuity of man, be made to appear to have come in under, or in execution of that "Plan of Union", because no such thing is provided for in the plan. There may have been other acts that admitted Congregationalists into the Church, perhaps into the Synod of Albany, and there may have been irregularities as to some of the Presbyteries; but that the act of 1801 had the capacity to admit a single individual not a Presbyterian, we utterly deny: there is not a shadow of proof that it had. But, next, suppose the fact proved; suppose that the "Plan" did admit Congregational churches, and that these sent delegates to sit and vote in the General Assembly; where is the evidence that the four Synods, or a single one of them, was formed in any other way than as all the rest of the Synods were. We have here Synod after Synod constituted in the ordinary mode, according to the rules of the Church, of ministers and elders regularly ordained. Now what right had these gentlemen to lay their hands on one part of the Church, and undertake to cut it off, and to declare, that, by the operation of a previous act, that part was to be considered as never having belonged to the Church? If that act were repealed, whether in 1835, or 1837, the legitimate consequence of the repeal was not that because a part of the members of the Assembly chose to vote as they pleased, therefore they, and the Presbyteries which they represented were out of the Church; but that if they persisted in dealing with Congregationalists, they would come under ecclesiastical censure; that if a

Presbyterian minister still preached to a Congregational flock he would be subjected to trial, and still refusing to submit to the laws of the Church, to expulsion. But instead of this, by an act proposed and determined on by the juvenile patriarchs, before coming to the Assembly, into which they introduce a few harsh words—"unconstitutional," "unnatural"—they abrogate the "Plan of Union;" a plan which never admitted any body into the Church, or if it has, never admitted us; for the records of the formation of these four Synods do not differ from those in regard to the formation of all the others; and then pass a mere declarative resolution—not a judgment, not a trial, not a legislative act, but a mere declarative resolution, that these Synods, in consequence of the precedent abrogation, never had been a part of the Presbyterian Church; that the ministers, elders and communicants within their bounds never had been church members. I beg leave to say, gentlemen, looking upon these people as a body of electors, on their having come into the Church in the regular and ordinary method, as the record itself shows, no reference being made to the act of 1801, and their having been acknowledged as Presbyterians for years before, that this mode of exclusion—I will not call it legerdemain; I will not call it a manœuvre—but I say that it was an unlawful mode; one which no court of justice can sustain. All the prescribed forms of trial were here disregarded. They are simply told, "You are out of the Church; it was all a mistake to suppose that you ever belonged to it;" and it is resolved that they never have been a part of it. Farther they are told by these very men who have excluded them, "This is no excision, no exclusion. The proceeding is not a judicial one: we accuse you of no crime: you are guilty of none: we say only that you are Turks. This is not a legislative act; not a bill of attainder: it is merely a declarative resolution. We didn't put you out of the Church: you were out already." They did not consider any body put out, though in terms excluded. The first of the exscinding acts runs thus:

"*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."

They had not yet gone the length to which they afterwards ventured; nor had they seen the logical deduction subsequently discovered. They say the Synod of the Western Reserve is *no longer* a part of the Church. This looks something like putting it out. But when they come to the next resolution, they change their tone, and propound the sentence thus:

"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 Genesee, 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."

Not these Synods are no longer a part of the Church; not, on the abrogation of the plan, they were *ipse facto* out of the Church; but they were never in. Then they go on to say, "We make no charge: we wish to be

civil, gentlemen, and hope that you will take no offence; but would merely make a general reflection; "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, &c." Then comes the clause, under their construction of which, the counsel on the other side at length avow that these men were never put out at all. "That the General Assembly has no intention, by these resolutions, or by that passed in the case of the Synod of the Western Reserve"—now observe the words—"to affect in any way, the ministerial standing of any members of either of said Synods." Not affect their ministerial standing! No, they are simply told, first, that they came in under an unconstitutional and unnatural plan, and that they never were members of the Church; and, secondly that they have been guilty of gross disorder. I do not know what was left for our inference from all this; but we are assured that it did not affect the ministerial standing of any body! "You are all good, moral men, and if you will repent of your sins, and come back, we will treat you as we treat all ministers coming from other denominations—we will not require your re-ordination."

"Nor to disturb the pastoral relation in any Church:"—Certainly not; for the pastors and their flocks were all on a footing—all turned out together. What a mockery! After having cut off from the Church, fifty thousand communicants, with their churches and pastors and ecclesiastical organization, at one sweep of the battle axe, to say, "We have no intention to disturb the pastoral relation among you. You are very good Turks, and may do well enough at Constantinople." "Nor to interfere with the duties or relations of private Christians in their respective congregations:"—No, thank God, that was beyond the power of the General Assembly. They, forsooth, do not mean to interfere with the private duties and relations of Christians—they might do so, in welcome, if they could! "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."

These Synods are declared not to be constituent parts of the General Assembly. But the Presbyteries are but the constituent parts of the Synods, the churches of the Presbyteries, the ministers, elders, and private members, of the churches. All these, therefore, are declared out of its connexion, and it is asserted that they never did belong to it. They go on—I will not say that they add insult to injury: I will not say that they use a single harsh expression—of this you must judge, they go on, after having excluded these Presbyteries, and charged them with gross irregularity and disorder, to say,

"That inasmuch as there are reported to be several churches and ministers, if not one or two Presbyteries"—they had not taken any pains to discover whether there were any such, before excluding them—"which are strictly Presbyterian in doctrine and order"—there you have it: these men were expelled because they were not "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 to those Presbyteries belonging to our connexion,

which are most convenient to their respective locations;"—that is, all those of you who wish to become Presbyterians, may come and ask for admission, just as converted heathen, as Jews and Turks may; as Congregationalists or Episcopalians you may come and apply—"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." And they are to apply for admission, with the prospect of the like consequences as before: that when they shall have been admitted, when they shall have again passed forty years in the communion of the Church, when they shall have again contributed their money to its funds, and their prayers to its spiritual treasury, they may again be ejected, because of their alleged admission under this same "Plan of Union" of 1801, that being first repealed or abrogated. Yet now the gentlemen on the other side, are driven to the point of asserting, that there has been no exclusion. Our learned friends see the necessity of this ground to their case, viewing it as lawyers, though my reverend friends do not. I say they find themselves driven in point of law, to maintain that the four Synods were never exscinded, because they were told, that if they repented they might be re-admitted to the Church. But it must be obvious, even to gentlemen of far less sagacity than our learned friends, that this latter position is totally untenable. No man can read those exscinding resolutions, and the subsequent proceedings of the Assembly, by which the commissioners from the four Synods, then in the house, were put out, and believe that these gentlemen were never excluded at all—if indeed the act could put them out, which I deny, agreeing with our opponents in the fact, that none were excluded by those acts; not supposing, however, that the Assembly did not intend to exclude them, but that they had not the power to do so.

Sensible that this extraordinary position could not be long maintained, our learned friends have advanced another still more extraordinary: that though the General Assembly has now been sitting yearly, since 1801, there never has been a constitutional Assembly since that time, until the sort of body, which they call a General Assembly—I shall not bestow any epithet upon it—met for the glory of God in the church in Ranstead Court. This is a justification to be sure! These Synods cannot be constituent parts of the Church, because the Assemblies that formed them were not true and constitutional Assemblies! Then who *can* claim to be true-blue Presbyterians?

This position was taken early in the case, and therefore we have had an opportunity of applying our minds to it carefully. It seems that it is all a mistake; we are none of us Presbyterians. There have been no such things as moderators or clerks, or members of the Assembly. There has been no Assembly at all, and, of consequence, no Church; for the General Assembly is essential to the existence of the Presbyterian Church. I shall not stop to argue this matter, except as to one point. All of the defendants in this suit, with the single exception of Dr. Green, who was appointed by the legislature, were elected by the General Assembly; and, by Assemblies which fall under my learned friends' sweeping condemnation. Now this is proceeding upon a *quo warranto*, and of course the

question concerns merely the title of the defendants. Then all we would have to do, would be to make a slight alteration in the pleadings, which might be done here at the bar, in five minutes, and the issue would thus be brought to the point suggested by my friend, and his clients must be ousted.

Mr. Preston. Will you agree to do so, Meredith?

Mr. Meredith. Oh no; we won't quarrel about that. But I am now going to show that Dr. Green must, in that event, go too; because we could not be so unjust and unfeeling, as to leave him alone in his old age, to stagnate in the midst of his own corporate acts. We could not consent to leave him the sole corporator, with no power to elect other trustees, or keep up the succession—the single survivor of this Tontine. That undoubtedly would conduce to harmony and peace: there could be no such thing as the removal of a moderator, or of clerks; or as what our opponents charge us with having intended—a separate organization. No doubt the reverend gentleman would hail with pleasure a *mandamus* that would give him some companions. It however happens, whether fortunately or unfortunately I do not pretend to say, that if we made this amendment, and the assertion of my learned friends be correct, Dr. Green must fall too. The assertion rests upon the supposition, that under the "Plan of Union," Congregationalists sat, or were represented, in the General Assembly. Our opponents say, that as the act of incorporation contemplated none but Presbyterians, if a Congregationalist has sat, or been represented in any body claiming to be an Assembly, it was no Assembly. Well, we show, that in 1794, delegates from the General Association of Connecticut were allowed to sit and vote, and this with the sanction of Dr. Green himself. *Assem. Dig. pp.* 295, 296. The Assembly gave a right of voting to Congregationalists sitting under the Act of 1792. If then a single Congregationalist exercised that right, the whole Assembly was vitiated: a single rat in the cellar renders the whole dwelling untenable. So Dr. Green's appointment as trustee, by the Act of Assembly, was all a mistake. There was no Presbyterian Assembly then in existence, whose trustees could be incorporated by the Legislature. The result, then, of this argument of our opponents, if it prevails, must be to show that the whole of these trustees, as there was no Presbyterian Church in being, at the time they were incorporated, were appointed by a mistake, a mere legislative blunder; and that all the property confided by benevolent persons to this Church, to be distributed in charity, must revert to the donors. How far such a notion may have alarmed the Associate Reformed Church, and induced its members to institute the legal proceedings lately resulting in the restoration of their old library, given at the time of the union of 1821 to the Seminary at Princeton, I cannot pretend to conjecture. We certainly desire nothing better than that this position taken by our learned friends should be established. I shall not stop therefore to argue that the rules of any Assembly are sufficient for itself, and if found not to be in accordance with its charter of incorporation, still its acts are valid, until they are regularly annulled. I dwell on no such strict points of law. If the assertion of the opposite counsel be true, the expulsion of their clients is even more certain, than made by the establishment of our positions.

Next, we come to the declaration of my learned friend, that we have

ourselves acknowledged the validity of the acts of excision, by formally determining in 1838, that there were no vacancies in the Board of Trustees. For, says he, one or two persons were appointed to that office in 1837, after the passage of those acts. Of course, then, you cannot now aver, that by them the Assembly dismembered and destroyed itself. But, in the first place, it by no means follows, from any part of the evidence given, nor will the law presume, that we knew of the fact of the subsequent appointment of these trustees. It was not our duty to read things so disagreeable, as the Minutes of 1837 may naturally be supposed to have been to us, after we had been so politely shown to the door. Secondly, we have not thought fit to make more trouble than was absolutely necessary to the attainment of all proper legal advantages. This, which we have chosen, is a better mode. With pleasure we refer to our Minutes as containing no such unnecessary charges as those found in the resolutions of the Old-school. We desire to end this controversy, without any violation of the law of charity; and have applied gratuitously no reproachful epithets. The minute speaks of no "gross disorders," without any specification, of no "unconstitutional and unnatural" acts. Perhaps too, we might have been mistaken in point of fact: perhaps there was no election in 1837. We only acted upon the best information we could get: it was fortunate, indeed, that we discovered who were members of the Board of Trustees at all. Every thing done in the Assembly of 1837 was not put upon the printed minutes.

(Here the jury were allowed a recess of ten minutes.)

It is contended, gentlemen, on the other side, that admitting the acts of excision to have been unlawful, the legitimate consequence must have been that there could be no lawful Assembly in 1838—the unlawful act must have caused a discontinuance. But such a conclusion does not by any means necessarily follow from the premises. The Assembly of '37, even after the passage of those acts, was still the Assembly *de facto*, so long as there was no adverse claim. It must be obvious from a mere glance at the authorities—it cannot at this day be matter of dispute—that even an omission to meet at all would not work a discontinuance. If the Assembly of 1837 had adjourned without naming a day of meeting, and simply by the general consent of the Presbyteries, decided by a majority of them, a day had been afterwards appointed, the Assembly convened on such day would have been a lawful body.

One other thing I wish to say in regard to the Assembly of 1837, before I leave it entirely. The members of that Assembly, or at least a majority of them, having come to the meeting of the body with a fixed determination to exclude a portion of their opponents, and perhaps doubting the validity of the exscinding resolutions, after they had been passed, as their next act—having certainly abjured the advice of all "counsel learned in the law," as they had before disregarded the law itself, they felt that, as members of an ecclesiastical court, they had got rid of their opponents by a species of legerdemain—I don't use this as a term of reproach—that they had turned them out of doors without just cause, and without trial, or notice—they felt this so forcibly, and were so doubtful, whether their resolutions would be carried into effect, even by their own officers, that their next act was to exact a pledge from the clerks of 1837, that they would enforce those resolutions in the formation of the Assem-

bly of 1838. And it so happened, though I will not suppose it was so intended—that it was meant as an injury to the fifty thousand victims of the exscinding acts—it happened, that, as the previous purpose of the Old-school had been kept hid, so the subsequent pledge was not made known, until the next meeting of the Assembly. I do not charge this as a breach of duty; but state merely as a fact, that the minute of the proceedings connected with this pledge of the clerks, was not printed, was not published to the world. It is said that this was an error of the Committee of Publication. I agree. That it was not an intentional wrong. I agree. That a New-school man was a member of the committee. Agreed. If he did not publish an account of its proceedings, he may perhaps have communicated his personal knowledge to some few in conversation. But there is, nevertheless, the fact, that the minute was not printed, and that therefore, not only the origin, but also the consummation of the act of excision was not disclosed.

Then, before we leave the proceedings of 1837, let us look at their character in point of fact, as to the sort of selection which was made of Synods to be put out of the Church. The Synod of Albany was not excluded; and here is a list of the churches belonging to the several Presbyteries of that Synod—not of Congregational churches; for this statistical table shows that no such church has been admitted. It gives the name of each minister, and then certain memoranda, which by their manner of entry show the exact construction of the act of 1801. The number of pastors is reported, and the number of churches. The Synod of Albany, you will recollect, was not touched. Well, in one single Presbytery belonging to that Synod—the Presbytery of Londonderry—you have reported eight Presbyterian ministers, pastors of Congregational churches, being near one-third of twenty-five, the whole number of ministers; while there are but twelve Presbyterian churches, in the same district. Yet all these ministers are good Presbyterians. Next comes the Presbytery of Newburyport, belonging to the same Synod. Here there are sixteen ministers reported; and of these, also, eight are pastors of Congregational churches, two are professors, and there is but one solitary pastor of a Presbyterian church—yes, there are two. This Presbytery, however, is perfectly sound in doctrine and discipline, though at the same time we hear Congregationalists denounced as little better than Turks and Infidels. These Presbyteries, parhaps, voted on the right side: their time had not yet come: they were still strictly Presbyterian.

Now let us turn to some of the Presbyteries exscinded. Take for example the Presbytery of Otsego—or the Presbytery of Oneida, which is larger. This Presbytery has forty-seven ministers, and there is not one pastor of a Congregational church amongst them—not a single one. The Presbytery of Otsego has nine ministers, and to this the same remark applies as that made in regard to the Presbytery of Oneida. Take the Presbytery of Geneva. This has thirty-seven ministers, and to it also the same remark applies from beginning to end. Several ministers are reported as without charge, and several as being what are called "stated supplies" of particular churches. This was the Presbytery which Dr. Elliott did not know. Now I exhibit these statistics, in the first place, to show the practical operation of the act of 1801; and, secondly, to demonstrate as a fact, or as an inference from a fact, which you are to find if necessary;

that although the plan of 1801, and the cry of irregularity and disorder, were made the excuse for the exscinding acts, they were not, in point of fact, the cause of the excision, since other Synods, which, as you have seen, were doubly obnoxious to the charges made against the four that were excluded, were not touched. The cause assigned was unreal: the real cause was that which has been opened to you by the counsel on the other side: that the Old-school party came to that Assembly determined to get a vote satisfactory to themselves, and, if necessary, to put out of doors enough to secure a majority. I ask you to find that this was the true cause. The jury will determine whether it was not formally opened to them by the opposite counsel.

Mr. Hubbell. You have mistaken my meaning altogether.

Mr. Meredith. I should be glad to find out that I had. Gentlemen, you must determine, whether it was or was not formally opened to you, that the Old-school party went to the Assembly of 1837 determined, in the first place, to have a final settlement of certain questions of doctrine; and, secondly, that these questions should be decided by the votes of none but Presbyterians; and whether this determination was not carried out by the exclusion of these gentlemen. Now, since it was alleged that they were not Presbyterians; and since the questions referred to were settled agreeably to the wishes of the Old-school, by their exclusion, because they would not agree in certain views, I ask you, gentlemen, to say that the facts are as I have stated. You must decide whether I am correct.

I now come to the meeting of the Assembly of 1838; and this is the vital part of the inquiry: all that I have said, hitherto, has been but preliminary to it.

Judge Rogers. This is a good resting place. We had better adjourn till Monday.

Mr. Meredith. On Monday then, gentlemen, I will proceed. I am ashamed of having occupied your attention so long, but shall endeavour, as I promised, "to do all in the shortest time possible."

MONDAY MORNING, March 18th.—10 o'clock.

May it please your Honour—Gentlemen of the Jury:—On Saturday I endeavoured to show the invalidity of the exscinding acts of 1837. That the General Assembly, while it had the power to admit Presbyteries and Synods, had no power to expel them. That, therefore, the resolutions of 1837, not being judicial acts, were unlawful as regarded the Assembly of that year, and null and void as regarded all subsequent Assemblies. That the assertion, that for thirty or forty years there has been no real General Assembly, that that body has not had any existence in fact, taken in its only real sense, condemns the defendants according to the judgment of Solomon; showing that when they find that they cannot succeed, they are willing to sacrifice the true General Assembly, rather than that their opponents should recover their rights. That as to the Assembly of 1837, the acts of excision were unlawful, and as to all subsequent Assemblies, they had no semblance of existence. That it was as if the common councils of the city should cut off four of the wards, and turn their representatives out of the council hall; in which case the act would be absolutely null and void, and the election for councils in those

wards would the next year go on as usual—as if the excision had never taken place. Thus we stood at the commencement of the session of the Assembly in 1838, to which body two distinct parties came up. On one side the representatives of the twenty-eight Presbyteries which the Old-school had pretended to exscind, and those who sympathized with them, conscious that great injustice had been done their brethren: on the other side the remnant of the accidental majority of 1837, who, in violation of the Constitution and laws of their Church, which they had pledged themselves to maintain, had rebelled and mutinied, and like Sampson, in blindness as well as strength, were endeavouring to shake down the pillars of the temple. The latter came in 1838, determined to carry out their rebellion. They were resolved to destroy every thing like a lawful organization of that body, and with an ungoverned license to place the whole Presbyterian Church at the mercy of a mere numerical majority; to throw off all legitimate ecclesiastical rule. Thus constituted, that body assembled, and we find, taking into consideration the conduct of the two parties, that they bore the same marks as in 1837, and came with widely different spirits. The New-school came without any previous combination, and assembled in a meeting for consultation, to which, by public advertisement, all of both parties had been invited, to devise means for the fulfilment of their legitimate duties. This consultation meeting was openly attended by members of the Old-school—at least by enough of them to keep a watchful eye upon the proceedings, and communicate all that was done to their friends. The opposite party, those setting up to exclude a large portion of their brethren, came with plans which were not communicated to the other side, and met together in secret conclave. I don't care whether the fact that they did so meet is in evidence or not. Certainly they did one of two things; they either held a secret conclave, or they went to the house in Ranstead Court and took their seats at nine o'clock, to the exclusion of all those who differed in opinion from themselves. These are, however, but introductory matters, on which I am sorry to have detained you so long, but which are important as exhibiting the spirit of the two parties.

You must now turn your attention to the testimony of the witnesses in this case, from which you are to find facts most important to the issue. Undoubtedly the witnesses on both sides are gentlemen of great respectability, and though their evidence is, to appearance, contradictory, after sifting carefully the whole, there being twenty odd witnesses on each side, I am not able to find any necessity for weighing those of either party in the scales of credibility. On the main facts of the case they are all agreed. This assertion may appear strange to you; but I pledge myself to make you see, that, notwsthstanding the apparent discrepancy, there is no fact in regard to which it will be necessary for you to judge of the credibility of a single witness.

Our case is, that those whom we represent lawfully organized the General Assembly of 1838, in the church in Ranstead Court. We say that the officers bequeathed to that Assembly by its predecessor, the Assembly of 1837, decided wrongfully in repeated instances; and that this misconduct—whether it was wilful or not, is another question, one which is entirely foreign to this cause; but it would have been still more unjust if wilful—was a sufficient reason for their removal. That after

their misconduct, a motion was made in a lawful manner, that they should be removed; that this motion was lawfully put to the house and carried; and that thereby these officers were removed. This being once demonstrated, it flows from it directly as a corollary, that the Assembly, which, under the new officers, by whose appointment the old were deposed, held its sessions in the First Presbyterian Church, was the true General Assembly, and the relators were duly elected trustees.

Here, at the outset, we meet several points of law. Our opponents contend that the removal of these officers was in itself illegal; that the time of removing them was improper, and the manner irregular and disorderly. On each branch of their argument we shall dwell; and since they are not satisfied with one code of laws, we will take three—the common law, the regulations and usages of the Assembly itself, even if they are contrary to the principles of the common law, and the usages of parliamentary order. On the provisions of this latter code, I must however speak with great diffidence, as I am confronted by opponents of so much more parliamentary experience than I can boast.

I say that, in the first place, we allege the misconduct of the officers of the Assembly. The clerks were mere ministerial officers, and not necessarily members of the body; in this case indeed, they were not in fact members. These clerks are, by usage—a usage growing, in the first place, out of a regulation of the Assembly, and harmless in itself—a Standing Committee of Commissions. In this capacity they sit, before the meeting of the Assembly, to receive the commissions of the members, to decide whether they are *prima facie* regular, and if so, to enrol the the names of the commissioners. To them, the commissioners from the four exscinded Synods, as they are called, presented their commissions, which, however, they refused to receive. Now, I call your attention to the fact, that there is no pretence that these commissions, or any of them, were defective in point of form; but the commissioners were distinctly told, that the Assembly of 1837 had put the Presbyteries from which they came, out of the Church, and that the clerks were therefore precluded from receiving them. Bear in mind, that from the first step of the clerks, down to the last act of the Old-school in 1838, including "The Three Acts," which have been mentioned by one of the witnesses, there was at no period any doubt expressed as to the authenticity of these commissions, their being regularly signed by the proper officers, or their being in every respect in the ordinary form. This point will be very material in the remaining part of the case. The difficulty made to their reception by the officers did not arise from informality; but these officers had entered into a combination to disregard them entirely, though perfectly formal, and to exclude them, on the ground that they did not come from a proper constituency. The question was not in regard to their authenticity, but whether by some nicety in proceedings the Assembly had not the power to exclude a portion of its own electors. The commissions were not even examined, to see whether they were formal. This then was the question, and of the acts done you must judge by reference to it. These commissions were presented to the clerks, sitting in the session-room of the church on purpose to receive commissions, and the matter had their undivided attention: they even locked the door, that their minds might be unabstracted. The commissioners from the four Synods, requested that

their names should be put upon the roll, but their request was refused. The committee did not say "Your commissions are not authentic." No; they refused them for a defect in their constituency. They were acting under the proceedings of 1837, which they had given a solemn pledge to sustain and carry out in all their parts. And if faith be pledged even to the devil the pledge must be redeemed. It is plain that these clerks violated their duty as officers, unless they stake their conduct upon the legality of the exscinding resolutions of 1837.

Another misconduct of one of the clerks led to all the subsequent confusion and disorder, by whomsoever made. It is the duty of the clerks, although they are to put upon the roll of the house only those whose commissions are in due form and are duly authenticated, to receive all others which may be presented, and report them to the Assembly according to the circumstances. But these they would neither put upon the roll, nor report on the list of doubtful commissions, so that they might come before the body for its judgment. Were they wrong in this? We have the opinion of one of these gentlemen themselves, that they were. The record shows no pledge that they would not report the commissions to the house. Mr. Krebs tells us that he was desirous to receive and report them, according to the facts of the case, and thus to give the Assembly an opportunity of acting upon them. The other member of the committee, not indeed being a majority of it, for there were only two, but the superior in point of years, was not willing to adopt this course. Mr. Krebs seems to have been the most active member of the committee, and why Dr. McDowell objected, he has not explained, though examined once or twice. When, then, we say that the clerks were guilty of repeated acts of misconduct, our opinion is supported by that of Mr. Krebs. Indeed it was obvious that his proposition was most reasonable. Here were mere ministerial officers, deciding on the rights of members to their seats, nay, on the rights of the constituency of the Church, without giving the chance of an appeal from their decision, but leaving the exscinded Presbyteries to bring their case before the Assembly in the best way they could. They were endeavouring to make their decision, on the subject of the admission or re-admission of these men, conclusive and final.

Who were these clerks? Not members of the Assembly—never so of necessity, and, in fact, not so in 1837. The tenure of their office, which they held during pleasure only, as you have seen from the express language of the Constitution, made them at all times liable to be turned out of office, by a vote of the Assembly. So much for the course which they adopted and pursued.

Next we come to the most vital part of the inquiry, the conduct of the higher officer, the Moderator of the Assembly of 1837. In the first place we find him coming in at the commencement of the divine services, not as usual, untrammelled and unpledged; not simply to perform his duty, the principal part of which is the conducting of divine service; but from nine o'clock in the morning—perhaps they had slept all night upon their arms —he with the other champions of the Old-school occupied the house, a compactly formed and regular phalanx. The troops were stationed in different parts of the building. The Moderator with his picked cohort occupied the centre, he with the mysterious hammer in his hand. Then

the different corps were disposed about the south-west portion of the house, at the different points of action. Some of them, it seems were afflicted, though not with a legislative cough, with a very troublesome asthma, and therefore it was, I presume, that the attendance of the surgeon of the forces was found requisite; for how else Dr. Harris had crept into the place which he has told you that he occupied, I cannot imagine, as he was not a member of the Assembly. They may be compared to the knights hospitallers of ancient times—a most gallant band indeed! Now, I say, first, that any person casting his eye upon the Moderator, might have seen that he was pledged and trammelled; that he had his forces arrayed for open rebellion against the sovereignty of the Assembly of 1838. The high places were all occupied, and pickets had been stationed behind, which were to be called in when the final prayer should be concluded. The Moderator was acting not merely in the regular discharge of his duty; but he was at the head—the leader—of an insurrectionary force; and whether the rebels were too strong for the loyal subjects is the only question which you have to determine.

On the other hand you see the opposite party, though they came not as a party, but as their forefathers had been accustomed to come to the house of religious worship—you see them wandering round to the farthest doors of the church, and taking the lower seats which had been left vacant. Many of them came in directly from the country, as one of them has himself told you, without having had any previous consultation. They all expected an orderly and harmonious meeting of the Assembly, and dropping in, each one as he arrived, they sat down as they entered in the humblest places.

All this serves as a clue to the explanation of the Moderator's behaviour. His misconduct was occasioned by violent excitement and loss of temper: this I am authorized to say from the evidence. It is impossible that in calm moments he could have acted thus. I assert then, and shall clearly show, that Dr. Elliott laboured under great and unpardonable excitement —unpardonable except as it arose from the infirmity of his nature. The first motion was that made by Dr. Patton. It seems by the testimony given on the other side, though none of our witnesses chanced to hear it, that a prior step in the proceeding was a call from Dr. Elliott for the clerk to report the roll. Our witnesses did not hear this call, for very obvious reasons, and Dr. Patton took the floor. He desired to make a motion in reference to the formation of the roll, but was denied the privilege. He appealed from the decision of the Moderator, and his right to make an appeal was also denied by Dr. Elliott, who gave as a reason for his decision, that there had been no roll reported, and that consequently there was no house to which any one could offer a motion or appeal. Dr. Patton then, without the least violence, or the smallest demonstration of warmth or excitement took his seat. The report of the clerks was then read by Mr. Krebs, and was found to include the names of commissioners from every Presbytery belonging to the Church, excepting those from the third Presbytery of Philadelphia, and from the twenty-eight Presbyteries belonging to the four exscinded Synods. Dr. Elliott then declared, that those persons whose names were contained in this select list were to be considered members of the Assembly. The house then, such as it was, was at that time organized, and organized according to the Moderator's own liking. Dr.

Elliott then made a call for other commissioners of a certain kind to be presented. Some difficulty has been raised in regard to the precise words and meaning of this call, and it would be well if the matter could be understood. It is a curious fact that on the question of the particular words used, in this one act, performed at a time when there was no noise or confusion, there are no less than three distinct and varying accounts coming from the other side. The minute of the Old-school, a paper prepared with great care—for the preparation of it was confided to a committee specially appointed for the purpose, of which committee, too, Dr. Elliott was himself a member—this minute, written after a full consultation with the clerks, formally reported to the Assembly, and, as we are told, unanimously adopted, though neither the appointment of the committee, nor its report, appears upon the face of the record, testifies that the call was in these words:

"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.*"

This is the formal record made, not by the clerks, in the hurry and confusion of the proceeding, but by a formal committee appointed for that special purpose, of which Dr. Elliott himself was one. This committee, too, consulted with the clerks, and then adopted what I have read as the solemn record. This says, he "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." Next there are twelve or fifteen witnesses, on the part of those who adopted this minute, all of whom themselves voted upon its adoption, who say, first, that Dr. Elliott called for commissions which had not been presented to the clerks; and next, that Dr. Mason, when he rose, said that those which he tendered had been presented to the clerks and by them rejected. This is the second account of the matter. Now taking their own minute as correct, there can be no difficulty or dispute that this was the very time for Dr. Mason to offer the commissions which he held. According to that, the call was for commissions of regular commissioners, who had not been enrolled, and the commissioners from the four exscinded Synods had none of them been enrolled. These two contrarient statements are, then, from the same sources; and I do not know who is better qualified to decide between them than Dr. Elliott himself, whose testimony you have heard: it furnishes the third account of this matter. This agrees not in terms exactly, but in spirit, with the first account; with the second, in neither its terms or its spirit. Where there is such a contradiction as to his own words, he is certainly the best arbiter of the dispute. "I called," says Dr. Elliott—"I called for commissions which had not been presented to the clerks and enrolled." Now those which Dr. Mason tendered, had not been presented and enrolled. So according to the testimony of both the Old-school minute and Dr. Elliott himself, Dr. Mason's offer was directly in answer to the Moderator's call. I take in this

case testimony selected by the other side. When Dr. Patton rose and offered certain resolutions in regard to these very commissions, he was told that was not the right time—*not the right time;* that the formation of the roll was the next thing in order; the clerks must first make their report. Well, the report of the clerks is read and received; and then Dr. Elliott announces, that now is the right time to do what before was out of order. So my clients understood his call. They thought he meant to say, "Now the moment has come: you were too hasty before. Now all such commissions as have not been enrolled, as have not been included in the report of the committee, may be presented." Upon that hint Dr. Mason rose and spoke. He was plainly in order; for the call of the Moderator had made him so. And unless you throw out the testimony of Dr. Elliott, who certainly is to be presumed, until the contrary is shown, to know best what he himself said, and the testimony of the formal record—the minute carefully prepared immediately after the transaction, by a committee appointed for the purpose—unless you discard this testimony for the loose suggestions of persons, who, many of them, were not at all aware of the real import of the call, you must believe that the Moderator explicitly called for commissions which had not been enrolled, from Presbyteries entitled to be represented in the Assembly.

But apart from the testimony, and whether he called for such commissions or not, a matter which is perhaps of very little importance, by the laws of the land, and universal parliamentary law and practice, the motion of Dr. Mason, even if the Moderator made no call at all, was strictly in order—was offered just at the proper time. In Parliament, before the house is organized, no question as to disputed rights of membership can be tried. These were not disputed commissions; but even if they had been, at any period, after the report of the clerks, and the declaration of the Moderator that the house was now organized, the members would have had a perfect right, according to the strictest parliamentary law, and the law of the land, to claim their seats. Dr. Mason's resolution had nothing to do with technical rules of order; nor was it to be considered in the light of a privileged question. Various rules of order have been introduced, but such rules are not essential, and they may be violated by any house five times in an hour, with perfect impunity. But first, by all the laws and usages of the Assembly itself, Dr. Mason had a right to present the motion which he did present. This indeed is but a statement of the doctrine of all law—of the clearest principles of common sense, and common justice. I should be very sorry that such a question as the present should be decided upon a mere point of order. I have examined carefully the regulations of this Assembly—this *quasi* corporation—and I find among them no rule violating the law of the land. Secondly, Dr. Mason was in order according to general parliamentary rules, though these and parliamentary law are totally distinct. The first are, it is true, essential to the due transaction of business; they are rules of convenience; but they may be violated forty times a day, and there will be no destruction of the rights of individuals. For instance, it is a law of every parliamentary body, that the first business shall be the formation of the roll, in order to ascertain who are entitled to seats; a question not to be decided by ministerial officers, except temporarily, until the body itself can determine the matter. This is not a mere parliamentary rule: it is a law absolutely

essential to the very existence of a body of this kind. If a rule were made constituting a standing committee of the body, a court to decide the rights of members to their seats, authorized to try these matters by hearsay testimony, and providing that the admission of such claimants should be the last business transacted, it would be null and void—a direct violation of the privileges of all the members of the body corporate. The regulation, then, before mentioned is essential to every organized Assembly, and it is founded on parliamentary law, which is the law of the land. As for the other code it is of little importance here. This one is sufficient, and no matter what were the rules of the Assembly of 1838, or the preceding Assembly; or whether the latter continued in force until the former were enacted: we are bound in this case simply by the laws of the land. Suppose a rule of order prescribes that the old Moderator shall address the new in a certain set form of words: the omission of these words will not invalidate the election of the new Moderator. Or suppose a rule directs to give the Moderator a cane: this is a non-essential matter, and might be disregarded, without any injury, or the violation of any man's rights. But when you come to the great provisions of parliamentary law you find them imperative. This law cannot be violated without exposing individual or corporate rights to injury. I do not know what the unbound and half-bound authorities—the little books of parliamentary order which have been produced here—may decide upon this point, but what I have laid down must be of the essence of every law.

The right of a member of any parliamentary body to his seat is a *question of privilege*—a very different thing from a *privileged question*. A privileged question is one which is entitled, whenever it arises, to a certain prescribed place in the course of proceedings; and the rule giving it precedence may be departed from without injury to the rights of a single individual. Privileged questions are, however, to be distinguished from the order of business, which is the mere general arrangement of the whole business that occupies a body—the distribution of it in a regular succession or series. The order of business is governed by the standing rules of Parliament. In our legislative bodies the regulations in regard to the time of transacting each particular species of business, giving each a place in the series, concern merely the order of business. Thus in the Legislature of this State, the first thing is the reading of the journals; second, comes the presentment of petitions, according to the direction of the Constitution; third, original resolutions; fourth, reports of committees; fifth, bills on third reading; and so on of other matters. A privileged question is one which does not necessarily belong to the established order of proceedings, but whenever it arises is entitled to take a certain place in the course of business. Such are questions on amendments of bills or resolutions; on commitment; on postponement; the previous question; or that which takes precedence of all these, a question on adjournment. Then come thirdly, questions of privilege, distinguished from both the order of business and privileged questions. If the attention of a deliberative body is called to a question of privilege, this must take the place of any other business in which the body may at the time be engaged. If a member rises in his place, and proposes a question of privilege, every thing else is dropped, and the member's privilege must immediately be taken into consideration. Such is notoriously the case;

yet perhaps no house has a written rule to this effect. Indeed from the very nature of things, a question of privilege supersedes, for the time, every written rule respecting the details of business.

All of you, gentlemen, have had some experience in these matters; or you have learned something in regard to them, either from the records of other times, or from some manual of parliamentary practice—some "*Order made easy.*" Show me the case in any parliamentary body, in any deliberative assembly whatever, in which a member has risen and presented a question of privilege, and the presiding officer having declared him out of order, his decision has been sustained. When a bill is before a house on its third reading, any one who comes in, or rises in his place, is entitled to be instantly heard on a question of privilege, and the reading of the bill, with every other business, must be suspended, till that question is decided upon. Well, the most important question of privilege that could be raised, that which goes to the very root of a body's existence, is a question in regard to the claim of a seat. Then the complaint which was to be made of the misconduct of the clerks involved a question of privilege of the most important kind. The clerks had violated their duty, and had attempted to mutilate the body; to exclude a part of the commissioners to the Assembly, whom they did not like, and whose names they refused to report to the house. This complaint immediately raised a question of privilege of the highest nature; and Dr. Mason had an unalienable right to be heard, according to the law of the Assembly, the universal parliamentary law, and the law of the land; and most of all, when his application was made at the very time selected by the Moderator, and in obedience to his direct call for the commissions.

Here it will be well to mark some other matters of smaller importance, but still serving to elucidate the case. What was the meaning of the Moderator's reply to Dr. Mason, supposing that the words used were those which some of the witnesses for the defendants have sworn to, but which seemed to have escaped the hearing of ours—that he was out of order *at that time*, or that he was not *now* in order? Dr. Elliott himself declares that this was the form of speech which he used, and I do not mean to endeavour to contradict him. He certainly may be supposed best able to give an accurate account of what he himself said. Suppose he did say, "You are out of order at this time." He certainly then meant to say, "There is a time when you will be in order"—in five minutes, perhaps, or an hour. What was this motion which the Moderator thus declared out of order at that time? It was not a motion made according to the provisions of the Act of 1837—a motion craving admission for the excluded members, on proof of their repentance, and their having corrected the errors charged upon them. It was a motion to complete the roll by adding to it the names of those commissioners whose commissions had been presented to the clerks, and unjustly rejected by them. If Dr. Elliott and his friends of the Old-school party, decided that a time approached when this motion would be in order, it was the strongest proof in the world that they thought it a legitimate motion. Now it could be legitimate only on the supposition that the proceedings of 1837 were void; else it would have been out of order at any rate, and at every time, just as would have been a motion for the admission of a member for Constantinople. The evident corollary from this is, that Dr. Elliott knew he

was acting wrongfully. He knew, that if the motion was in order at any time it was at this. He knew that the exscinding resolutions were void; and that he was lending himself to carry out the unconstitutional and unjust purposes of the majority of 1837. This is a conclusion, the legitimacy of which cannot be denied. If you give any force at all to these words of the Moderator, it is an absolutely necessary conclusion. Now at this very time as I have shown, Dr. Elliott did actually call for the commissions of the rejected commissioners. I have shown then clearly, that Dr. Mason's motion was strictly in order; that such commissions as he presented, might have been presented at all times. This was the first day of the session of the Assembly, and it is the duty of the officers of that body, and of the house itself, to admit a member presenting himself at any period of its session. The question, moreover, in regard to the right of membership is a privileged question and always in order. Further, Dr. Elliott himself called virtually for the commissions which had been presented to the clerks and rejected.

Dr. Mason appealed from the Moderator's decision; but the right of appeal also was refused. By what code will our opponents pretend to justify this refusal? They cannot say that no house was yet in existence. The house was at this time organized, or at least partly organized. Those members whose names had been enrolled had been declared entitled to seats: they were the house. There could be no pretence that the body of men, whose commissions had been approved, were not an assembly sufficiently organized for business, since immediately after the New-school had left the house, or even before, if the statements of some of the witnesses are correct, a motion was actually made, put, and carried, for the appointment of a Committee of Elections. Show me the rule which gives the presiding officer of such a body the right to determine any question finally, and refuse to put an appeal from his decision. Where is the rule which provides, *stet pro ratione voluntas?* This would do very well for a Roman Emperor. Indeed, one gentleman has compared Dr. Elliott to a Roman dictator, his *sic volo, sic jubeo* being set up for a supreme law. But I say, show me a single case in which the speaker of a house has ever before refused to put the question on an appeal from his decision. The power of declaring a decision of a presiding officer law, is a power belonging to the house exclusively. But here we see it usurped by the officer himself, pretending to be the sole judge of the validity of his own decision. You can see here the very same lust for power beginning with the clerks, and creeping up from the lower to the higher officers. First, the clerks assume the right of giving a final judgment on the claims of certain members; and then we find the Moderator usurping the same power, by a higher authority.

But, if the rejected commissioners were really entitled to their seats, notwithstanding the decision of the Moderator and clerks, they were still in the right. It is a mistake to suppose that even the house itself has the power to determine finally the claims of commissioners. They may decide whether a commission is properly authenticated, but their judgment, if it goes farther than this, is subject to review and correction. There was no power in the majority of the Assembly of either 1837 or 1838, to determine finally the rights of any member's constituency.

Speaking in a parliamentary sense, I say that an appeal is, under all

circumstances, required to be put. What was to prevent the question being propounded on Dr. Mason's appeal? It was out of order at that time, said the Moderator. But suppose the original resolution had been altogether and confessedly out of order—suppose it offered an amendment, while the previous question was pending, and the Moderator had pronounced it out of order: could not an appeal be taken from his decision? Was the Moderator to be the sole judge? His refusal showed plainly his purpose to assist in carrying out the void proceedings of 1837: it showed that he, like the clerks, had been pledged to a certain course of conduct; that like them, he did not consider the Presbyteries from which these commissioners came, as belonging to the Church at all; but that they had been entirely and lawfully excluded by the exscinding resolutions of 1837.

Thus far the proceedings had been all quiet and peaceable. Dr. Patton had not shown, in any thing, the least irritation or warmth of feeling: Dr. Mason's conduct was entirely respectful. Several of the witnesses brought forward on the other side have spoken of his extreme civility. In the mean time, however, there was a change evidently taking place in the Moderator's feelings. Nothing is so apt to make a man lose his temper as his being put evidently in the wrong. Nothing is so hard to be borne, as that persons whom we wish to consider as engaged in a disorderly proceeding, should succeed while behaving in the civilest manner possible, without our having the power to resist, in putting us entirely in the wrong. We can show the effect in this case produced upon the mind of Dr. Elliott, from his behaviour in the next scene of the drama. Thus far he had had no excuse for losing his temper: he had issued his orders to the right and to the left, and they had been obeyed. The next scene was that in which Mr. Squier made his claim to a seat and tendered his commission. We shall show by his conduct to him, what the Moderator's feelings were by this time. Mr. Squier rises and presents his commission—not the commissions of all the rejected delegates—but merely his own, as he himself declares. He presents it as a commission which has been before offered to the clerks and refused; and he claims a seat on that floor. The question, from whence he came, was asked by the Moderator. He answered, from the Presbytery of Geneva, and that that Presbytery was within the bounds of the Synod of Geneva. Then Dr. Elliott replied, "We do not know you." He did not mean that he was not acquainted with Mr. Squier; for he tells us, that, in point of fact, he had a slight personal acquaintance with him. He did not mean that he had no knowledge of the man. But his words uttered as they were, by a divine to a divine, had a most significant import. You all remember that they are a part of that dreadful denunciation, which shall be pronounced at the last day, upon those who shall stand on the left hand, the goats, consigning them to eternal woe. He might as well have continued, "Depart ye cursed into everlasting fire." This would have added nothing to the strength and dreadful character of the expression. He might as well have said at once, go to a place which must never be mentioned to ears polite. And why should he direct him to go to that place: why should he utter such a terrible denunciation? His words show plainly the violent excitement under which he laboured, though he was able to keep his countenance from betraying the emotion struggling in his bosom. There can be no other reason given,

than that a cloud of human passion had risen in his breast, and overshadowed, and obscured the diviner light which usually shone into it from above. Dr. Mason took an appeal with the utmost decency and civility. There is certainly no book of authority which shows, that a similar application was ever before so received. In the British House of Commons a son of Edmund Burke once committed a most grievous breach of order, by marching into the house and depositing some papers on the clerk's table. The serjeant-at-arms endeavoured to arrest him, and a regular chase commenced under and over the tables, and over the benches; but young Burke finally escaped, after having done as much mischief as a bull in a china shop. Yet we do not hear of the speaker's telling him to go to that nameless place. When Vice President Burr was suffering so intensely from Randolph's torturing invective, and lacerating sarcasm, he permitted no expression of this kind to escape him. Show me the case, before this one, in which a civil application of that kind, has been met by such an awful denunciation as was uttered by Dr. Elliott. I certainly know of none. One such, indeed, has happened recently, since the proceedings in the Seventh Church in 1838; and perhaps in this case, the precedent furnished by Dr. Elliott was followed. The Speaker of the Arkansas Legislature, improving the example, left the chair, and buried a bowie knife in the heart of one of the members who had offended him; and sent him unceremoniously to that place to which Dr. Elliott merely directed Mr. Squier to go. Perhaps, after this exploit, he said, "I hope we shall have order."

Could there have been a greater violation of order than that of which Dr. Elliott himself was thus guilty? Not only were Dr. Mason's motion and appeal refused, but he uttered this tremendous denunciation, which was quite as well understood as if he had used the more common and vulgar phrase. What stronger reason could there have been for his deposition? On the other side it is said, that all this was no matter; that he might have been as immoderate as he pleased himself, and yet the house have had no right to turn him out. Now, in the first place, observe, gentlemen, that Dr. Elliott was not the Speaker of that house, nor was he independent of it, and entirely irresponsible for his conduct. He was the person whom the rules of the Assembly said should preside in the body, if present, after preaching the sermon at the commencement; but only until another Moderator should be chosen. In other words, he was—not what my learned friend, by a figure of speech has called, though not very accurately, the germinating root of the New Assembly; for then we should have the anomaly of the plant growing and flourishing without any root, or in the absence of it; since the moment the former rears its head above the soil the latter perishes—he was a mere accident to the Assembly of 1838; and if that Assembly had thought fit that Dr. Beman should preach the sermon, and preside during the organization, he might have done so without difficulty or irregularity, a majority concurring in the choice. The rule provides that the old Moderator shall preside until a new one be chosen: does this mean that another shall not be chosen until he shall agree? The old Moderator is but the leaf of the old year still hanging on the bough, but ready at any moment to be pushed off by the fresh foliage. He is a mere accident to the new Assembly. He has no legitimate powers, but is placed in the chair merely to preserve order.

He is subject, by the express tenure of his office, to be removed, because he is to preside merely until a new Moderator is appointed. But, besides, Dr. Elliott had been guilty of gross misconduct, and that was the reason of his being removed at that precise time, though, as I have shown, he was liable to removal at any time. That every house has a right to remove its Speaker, at its own pleasure, will not, I presume, be doubted. There have been frequent instances in the history of the English Parliament of the removal of Speakers, or of attempts to remove them. The last occurred in the year 1673, when an endeavour was made to depose Sir Edward Seymour, and the question was put upon his deposition, but was not agreed to. This being the state of the case, and it being obvious that the Moderator was applying all the force of his mind, and the force of much more than his legitimate authority, to obstructing and hindering, instead of facilitating the transaction of business; and that so long as he presided, the organization of the house could not be lawfully effected, it became necessary to remove him. It is a well settled principle of parliamentary law, that nothing shall be allowed to contravene the evident will of the house, regularly ascertained by a formal vote. If a lawful vote be taken on any subject, for all the purposes of the body's own government, at least, that, which the majority of those who vote sanction, is obligatory upon all the members. This is the case as regards every question lawfully put and lawfully carried by the actual vote of the house, and there can be no injustice in the rule. Members cannot be permitted to sit still, without voting, when a question is proposed, or to make a noise when they ought to be attending to the question, and then to determine for themselves the will of the house, from some other evidence than the actual votes cast. This would put the business of every Assembly into constant and inextricable confusion. In the present case there was no injustice done to any man by our proceedings: The body that met in the First Presbyterian Church excluded no one. The whole roll of the Assembly, including the names of all the commissioners both Old-school and New, both those who left the church in Ranstead Court, and those who remained, was called every morning. Our doors and our hearts were continually open to receive back those who had seceded from us. We excluded none: indeed we had no right to exclude any body. We attempted no such thing.

Was Mr. Cleaveland's question properly put: did it properly come before the house? I have already, I think, shown conclusively that it was a lawful question. Now let us see whether it was not, as to the mere manner, lawfully put and lawfully carried. Mr. Cleaveland was a recognised member of the house, as were also Dr. Patton and Dr. Mason. All these gentlemen had been recognised as members by Dr. Elliott himself, for their names were upon the roll reported by the clerks. Mr. Cleaveland, upon the final act of the Moderator, by which Mr. Squier had been annihilated, commenced a very civil statement of the difficulty in which the house had been placed by the misconduct of its officers; but used no harsh expression, applied no reproachful epithets to his brethren, and made no remarks upon the madness of any of them. He merely stated, that, as it was obvious that the regular and lawful organization of the Assembly could not proceed under the present Moderator, and clerks, as they had been advised by counsel learned in the law that it must be organized

at that time and place, therefore he proposed a change of officers, and that Dr. Beman should be Moderator. Now here came the pinch: was the Assembly prepared by a fair vote, to sanction the proceedings of the Assembly of 1837, and the conduct of the Moderator and clerks, who were evidently lending themselves to carry out those proceedings? I am happy to say, that the majority of the house, judged of by the actual vote, were not prepared to give their countenance to such proceedings and such conduct. It was honourable to both their heads and hearts, that they did refuse to give them their sanction. The same feeling, however, did not prevail with all the members; and I am very sorry to perceive that the malecontents were disposed to cast a slur on our profession. It seems that as soon the words, "counsel learned in the law" were uttered, a tremendous uproar broke out instantaneously from the south-west corner of the house, where the Old-school members were packed. I do not, however, pretend to conjecture, whether these reverend gentlemen meant to express their contempt for our profession, or their determination not to be subject to the law itself. I cannot tell. But certainly at those words the uproar commenced. The hammer of the Moderator and his tongue led the way, and at that unpropitious moment the members of the Old-school were seized with a universal and most afflictive asthma. It has been said that there was no legislative coughing; that if any coughed, it must have been from disease. Well, if there was any epidemic disease, perhaps it had been engendered at an earlier period of the proceedings, at the time when Dr. Elliott and Mr. Squier were engaged, by the choking fumes of imaginary brimstone. Mr. Lowrie heard no legislative cough. Mr. Lowrie, however, has been accustomed to legislative coughing from more practiced hands—from the members of the House of Representatives at Washington. There was not here such a deluge of asthmatic sounds as that which overwhelmed Mr. Flood in the British House of Commons; who said, when he was put down by the simultaneous coughing of full two hundred members, that gentleman might cough in that house as much as their infirmity required; but that if on the street the most afflicted of them dared but to wheeze in his hearing, he should call him to account. These reverend gentlemen were practising that day probably for the first time; and they were as yet a very awkward squad, though they had been preparing themselves ever since nine o'clock that morning, in the presence of the surgeon-general of the forces, who was there doubtless to explain the mechanism and most advantageous use of each part of the organs of the throat. I think however, that from the testimony, it appears to have been very fair for a first effort, and shows that they would soon have rivalled the most veteran legislative asthmatics. Certainly they succeeded by their coughs, in preventing themselves from voting on Mr. Cleaveland's motion.

Never was a disease more unfortunate and unseasonable. Dr. Patton and Dr. Mason had been declared out of time, but this was certainly much more out of time. While the Old-school were struggling in the agony of their pulmonary complaint, Mr. Cleaveland's motion was put and carried, settling the question where, for the future, these afflicted gentlemen should be permitted to cough. From Dr. Elliott, Mr. Plumer, a gentleman who sat in the south-west corner of the house, and from the Episcopalian—the only representative of that denomination examined,

you have learned that there were ten or a dozen distinct noes coming from the south-western portion of the Assembly; and this fact clearly demonstrates two things—first, that the question put was distinctly and audibly stated, the object being clearly made known; and secondly, that it was put to the whole Assembly, and that so the Old-school members understood it to be put. The motion made was that Dr. Beman should be Moderator, or should take the chair: the present case does not depend upon the question, which are the exact terms that he employed; and it is conclusively established that the question was put distinctly, and so that it could be heard by all, who were not making a noise on purpose to prevent themselves from hearing. The other witnesses of the Old-school party say that there was a general "aye!" but that there were not any noes. I cannot tell why they did not hear the noes: possibly they were at the time busily occupied in coughing. The greater number of the gentlemen examined certainly concur in the statement, that there were a few scattering noes. These facts I collect from the witnesses all round.

There can be no question that Mr. Cleaveland's motion, proposing to try the sense of the house upon the conduct of the Moderator and clerks, was a perfectly lawful motion: else must the Moderator have continued to preside until he saw fit to allow a new Moderator to be chosen. Nor can it be doubted that the question was intelligible, and was put audibly. But, say our opponents, in the first place, it was not lawfully put: Mr. Cleaveland had no authority to put it himself. Why, gentlemen, if he had waited till Dr. Elliott would put it, he would have been waiting there yet. He did not wish, and I am sure I should not have liked, to propound such a motion to Dr. Elliott. If his language to Mr. Squier was so terrible, what must have been his language to one, who should have dared to propose that he should have given up his seat to another. If there was any mystical force in that little hammer, I think the man hardy enough to make such a motion would have felt it. Luckily, however, it falls into this case, that Mr. Cleaveland's proceeding was supported by precedent—we are not without a direct authority for our measures. This we derive from the Assembly of 1835. At the commencement of its sessions, Dr. Beman took the chair, and presided for some little time; but it became necessary to make a motion to put him out of office. This motion was to the same effect as that made by Mr Cleaveland, though received by both Dr. Beman and his friends, in a temper very different from that manifested by Dr. Elliott and the Old-school party in 1838. The minutes of 1835 are not at hand: I will refer to them hereafter. When that motion was made, it was put, not by Dr. Beman, but by a third person, a simple member of the body. Indeed it is the universal custom of all deliberative bodies in this country, and of this very Assembly, that when a motion, touching personally the Speaker himself, is made, it be not put by the Speaker, but by some member.

Mr. Hubbell. In 1835 the question in regard to Dr. Beman was put by the Stated Clerk, Dr. Ely.

Mr. Meredith. I was not aware that Dr. Ely was the Stated Clerk; but you will see that he was a member also; and it was in his capacity of member that he put the question. But suppose he put it as clerk: why that makes my argument still stronger. A clerk is certainly inferior

to a member. Will you let a footman do what his master cannot do? It is, at least, a little extraordinary that a proceeding which was perfectly proper when Dr. Beman was to be put out of the chair, should be entirely improper when he was to be put in the chair; that because he was to be put in, it was not lawful for the motion to be made until Dr. Elliott chose to entertain it, which I presume would have been never at all. He would have held the chair as long as he thought proper.

Well then, the question was lawfully put by Mr. Cleaveland, and it was put audibly. I cannot say whether he had taken advice of "counsel learned in the law" during the previous year; but if he had, certainly that was no fault. I apprehend that it is no offence against the divine law, for men to seek such information as will enable them to keep within the rules of human law, and to preserve their own rights. The question then was put, and that by a person who had a right to put it. Moreover it was carried: there can be no doubt of this, regard being had to those only who actually voted. But it is said that the question was not reversed. Now, in the first place, it is the undoubted parliamentary law—it has been so considered in the British House of Commons for at least one thousand years—that where there is but one candidate nominated for any office, the reverse of the question need never be put. If there be but one, he is immediately led to the chair. True, it is said that here two persons were in nomination: one nominated by Mr. Cleaveland, the other already in the chair, and entitled to hold it until the question had been put upon his removal. Why, if it had been necessary that such a question should be put, and that Dr. Elliott should himself put it, before he could be removed from his place, he would have sat there so long, that like the man in the farce of Aristophanes, on attempting to rise, he would have left his sitting part behind. You can hardly say that Dr. Elliott had been nominated. But let us throw away parliamentary rules or usages, and admit that Dr. Elliott could be deprived, only by a vote of the house—not of his hammer, not of his three-legged stool, but of his office. Was not the question reversed? This is the point to which at last our opponents are driven; and if from the testimony we can show that it was reversed, your verdict must be for the relators. The very existence, then, of the whole Presbyterian Church depends on this one little question: was the negative put on Mr. Cleaveland's motion? Did he say, "Those of the contrary opinion will please to say, no?" Now from twenty to thirty witnesses in all have been examined on our side in regard to this matter, and every one declares that the question was reversed, and many of them give their reasons for remembering that it was. They heard the reversal distinctly, and, most of them, votes in the negative, and their testimony puts the matter beyond the reach of doubt. All the other witnesses—I shall not trouble you with an examination of each one's testimony—all the others swear that they did not hear the question reversed, though most of them heard the motion and understood its purport. With different classes of these witnesses different causes operated to prevent hearing. One gentleman who could most probably have decided this point, Dr. McDowell, was not examined in regard to it, though called upon the stand. I have made a rough list of the witnesses who have testified as to this matter, and find, that against about fifteen on our side, who swear that the question was reversed, there are about three-

and-twenty of the Old-school, who swear that they did not hear any reversal. Now, of these latter there are several classes. Some, like Dr. Elliott, were calling to order, and were, besides, too much excited to hear distinctly. Others had their attention distracted, partly by the business that some of the Old-school were pretending to transact, and partly by the noise and confusion. Some who expected to hear the reversal, as a matter of course, but who did not intend to vote upon the question, perhaps paid little attention to the proceeding. Another class, who were doubtless looking for absurd motions, thought that Mr. Cleaveland proposed a new body, turning the words "new Moderator" into "new body," by the help of a little imagination. Others seem to have been engaged in their own private disputes, or were remonstrating with those who got up on the seats of the pews. But in regard to this testimony, it is enough to mention one plain principle of the common law and of common sense. There are sixteen witnesses of the most respectable character, who were located in distant parts of the house, and swear positively that they heard the reversal. Certainly our witnesses are fairly in for it on this question. Any one who says, when asked if the negative was put, that he knows it was, if it was not put, must have wilfully forsworn himself. On the other side there is an equal or a greater number; but they say only, that they did not hear any reversal. One or two of them—I believe they were not ministers—have ventured to declare that they know the negative was not put, for that they must have heard it if it had been. Their error may be accounted for by reference to the confusion that prevailed. Now it is a general rule of evidence, that if one respectable witness swears positively that he saw or heard a particular thing, his account is to be taken in preference to those of five hundred others, who can testify merely that they did not see or hear it. In the former case you are to judge, not of the probability of the thing's existence, but merely of the witness's good faith. Where there is no doubt of a person's credibility, there can be none of a positive fact to which he directly swears.

But in the next place, we should consider what this thing was which escaped the senses of so many persons. Was it a very extraordinary thing, one not before heard of, like the stamping and scraping, and coughing to which several persons have testified, or the words "counsel learned in the law," which I believe were heard by every witness? Far from it: it was a regular and ordinary matter, which every person must have expected to take place. Our attention is engaged and fixed upon an object, on one of two principles: either that we desire to apply ourselves, and to learn something, or that the nature of the object itself is remarkable. If a proceeding be a very common one; and we think that it is in the hands of persons capable of conducting it regularly, we are very apt not to attend to its details. If any of you belong to a club or debating society, and were now asked whether you heard the question reversed, on any particular motion made at its last meeting, most of you could perhaps hardly swear to the reversal, though it had been reversed. Expressions that have become common, which are always expected, as a matter of course, to occur at a particular time and place, lose their effect. So well is this matter understood by the members of the Presbyterian Church, that they repudiate all written forms of prayer; certainly not supposing that extemporaneous prayers can be better than written ones; but having

observed that the power of attention is in a measure lost, after a thing has become habitual, and is expected always to follow in a certain order. The clock above us, gentlemen, has struck eleven since you have been sitting here this morning—I wish it had not yet struck—yet very few of you, sitting in that jury box, have noted the sound. Perhaps some who do not reside in Philadelphia may have heard it. The reason is that they do not hear every day and every hour the tone of that tremendous bell, that echoes through the county for miles around. Those who are accustomed to the sound ringing in their ears from hour to hour seldom notice it. Why, if it was a strange thing to them, they could not sleep at night. Now the practice of reversing questions was so familiar to all present, was regarded as so much a matter of course—for most of these individuals had been in other Assemblies, and had attended the meetings of Synods and Presbyteries—that they confidently expected a reversal, and therefore did not listen particularly. We have shown circumstances enabling our witnesses to recollect positively in regard to this matter. How many of you, gentlemen, who heard the crier open the court this morning, can now swear to the fact? How many of you can go back over all the time that we have been engaged in this cause, and declare on oath that you have heard him open the court every day. Very few of you perhaps could say that you did hear it: I hope none of you would swear that the thing did not happen.

I wonder, indeed, that any of the gentlemen of the Old-school heard any thing at all; for they were not endeavouring to hear. They sought to bolster up their own disorderly proceedings, by treating those of the opposite party as a disorder. At last, as a forlorn hope, they may have determined not to hear. During a part of the time, indeed, something else was going on in the part of the house occupied by Mr. Krebs, Dr. Elliott, and their friends; and there was great excitement and much noise. I hope that this noise did not come from the New-school: I do not believe that they were guilty of such a parricidal, or rather suicidal, offence. It was not they that were troubled with such an asthma, as to make the attendance of a medical ruling elder necessary. They did not subject themselves to rebuke for indecorous conduct—behaviour unbecoming ministers of the Gospel. But it is not enough to say there was a great deal of racket in the church—though, first, it appears that there was so much that the motion was not heard; and then so little, that all could hear that the question was not reversed—not enough to say that ladies were rising up, that there was a clapping of hands and a rustling of silk dresses. The stentorian voice of Mr. Cleaveland could hardly be drowned by the noises which were vibrating through the hall, or by the slight rustling of heretical petticoats in the galleries—for it seems that the ladies are on our side. I feel rather proud of their favour, though they are not subject to any tribunal, and suffer no appeal from their decision, in which respect they are rigid Congregationalists.

One of the Old-school witnesses, a gentleman from Princeton, says candidly, that these noises came most likely from those whose interest it was to make them—those who did not desire that the questions should be heard. All the witnesses on that side were asked, "Was the question reversed?" The universal answer was, "I did not hear it reversed." But we have the direct and positive testimony of witnesses on the other

side who did hear it. And several of them have told us of circumstances that particularly fixed their attention, and impressed their memory. They were very anxious as to the result of the vote: they feared that the question would be voted down. They therefore listened with great solicitude to the reversal, and were exceedingly gratified to hear no more negatives. Mr. Lathrop voted himself in the negative—a fact which, while it proves conclusively the reversal of the question, shows the want of concert among the members of the New-school. He says the rest of the noes came from the south-west portion of the house. Those who made the noise then, and prevented themselves from hearing, are plainly responsible for that noise. I ask that your Honour should charge this jury, as a point of law, that if the Old-school created the disturbance, they must suffer by it; and that in such case, it being proved that the proposition was put, it will avail them nothing to show that they did not hear the question, or the reversal.

I said that I would not cite any authorities in the course of my argument, but a case in point occurs to me—the case of *Rex vs. Foxcroft*, more usually called *Oldknow vs. Wainwright*, found in 2 *Burrowes*, 1017. That was a case where a majority of the electors had not only refused to vote, but had made a formal, written protest against the election. They could not say however that the question had not been lawfully put, and Lord Mansfield decided that they should have voted against the candidate; that in that way only could they oppose the election.

Do you believe that any one of these gentlemen can say in candor, that he intended to vote; that if he had heard the reverse put he would have voted no? Dr. Wilson, I think it was, who told us very frankly, and without reflection, that he was sure he could not have heard even if he had endeavoured to hear. They did not try to hear; they did not intend to take any part in the proceedings; it was their plan not to vote. They had determined to regard the whole of the measures of the New-school as a disorder, as entirely void in law. Therefore though they might have heard Mr. Cleaveland's motion, and might have heard the question reversed, they preferred not to hear; and Dr. Elliott went so far as to entertain a motion made while Mr. Cleaveland's was pending, and just as he was slipping off of his chair. This reminds me of the prayer of the carpenter, who when rolling off of the roof, began very appropriately to say, "Now I lay me down to sleep."

No wonder they could not hear: I only wonder that they heard so much as they did. The most of them have told us that they heard distinctly Mr. Cleaveland's motion, and the vote in the affirmative. Of the whole Old-school party, the three who were placed in the position most advantageous for hearing, were Dr. Elliott, Mr. Krebs, and Dr. McDowell. Mr. Krebs was the most active of the three, being the junior of the others, but his attention was occupied with the roll, the motion for the appointment of a Committee of Elections, and the application of a member, Mr. Moore, to have his commission examined. I see that this was the case from the Minutes, and their testimony does not vary from Mr. Krebs's own statement. But why was not Dr. McDowell examined, in regard to this point, when he occupied such a commanding position, and was here on the stand several times? I am sure I do not know why; but I should be very glad to know whether he was as deaf as the rest.

You can judge only by the actual vote, whether the question was lawfully carried; and if any confidence is to be placed in human testimony; if there is faith in those whose sacred character we have all been taught to venerate, you must believe that a large majority voted in the affirmative. But mark, there was no division called for. The Old-school party chose to consider the whole proceeding a disorder and a rebellion. They wished to put the Assembly itself at the feet of the Moderator of the preceding year. Where was there one who called for a division—the only orderly method of testing the majority, when there exists a doubt of the manner in which a question has been decided? No man objected at the time. Even if the question was not reversed, all the members of the Old-school, excepting those who were making a noise, assented by their silence: they acquiesced, and suffered the motion to be carried. But, further, in point of fact, the question was reversed. They, the defeated party, heard it reversed, and uttered a few scattering noes. They knew that they were the defeated party, and were silent: they sat, as one of the witnesses has told you, in mute amazement. But as soon as the New-school had gone off with a proclamation of the adjournment, they began to recover the use of their senses, and to cast about for some means of relief. They begin to ask, "Didn't some ladies in the gallery vote? Didn't some of the commissioners from the exscinded Presbyteries vote?" Suppose they did vote: I do not care. If a majority of those entitled to vote, and who actually voted, voted in the affirmative, the motion was lawfully carried: a few ayes or noes from persons not members could not invalidate the whole proceeding. They were the defeated party, and felt that they were; but affecting to believe that they were really triumphant, they made use of such charitable expressions as that given in evidence: "Whom God wishes to destroy, he first makes mad." Their acts show that they felt themselves defeated. They immediately began to look about for circumstances that would excuse their not voting, and invalidate the vote of their opponents, like the Sabines, who, when all human means had failed, imagined that they saw Castor and Pollux coming to their assistance. Dr. Beecher, they were told, had uttered an aye which might have been heard across Washington Square; and Mr. Duffield who was not accustomed to carry a cane, had struck his cane upon the seat, and exclaimed, "That was done according to law, as slick as could be." These things are better calculated to excite laughter than to increase our respect for those who gravely urge them. They were all phantoms of the imagination—mere apparitions. None of you, gentlemen, can for a moment believe in such spectres. It was a time of great excitement, and it is not wonderful that the senses of some should have been deceived; that one person should have fancied that Mr. Duffield carried a cane, which he had never carried before, and has not carried since; and that he used language which certainly never came from his lips. These things show that our opponents are conscious of defeat.

We, gentlemen, have not entered into any devious paths. The directness and simplicity of all our movements differed entirely from the quirks and quibbles of our opponents about points of order. They say, "We called you to order; the Moderator of the last year is the germinating root of the new Assembly, and presides *sui juris* in its organization. You can't form a house without his assistance; of this perhaps you have

not been advised by your learned counsel. You must observe the old law which provides that each Moderator shall read a certain set of rules to his successor, on declaring him elected," and so forth. But we were not skilled in parliamentary manœuvres. With directness of purpose, and in the simplicity of our hearts, we went forward—we are not ashamed to say it—we went forward to effect a *legal* organization. This directness of proceeding, this very want of skill, as awkwardness sometimes foils the most expert swordsman, was perhaps the cause of our success. Powerless and defenceless as to all human means, we were sustained and borne onward by that power which is usually manifested in the hour of man's most deplorable weakness.

Gentleman, I have now gone through with the remarks which I have thought it proper to make in this case. It is not necessary that I should further try your patience by stopping to consider the various minor points which it presents. There is nothing at all in the mystical hammer, about which so much has been said. The old officers, I have shown you, were lawfully displaced; an adjournment was lawfully voted; we proceeded to the First Church, and all the commissioners were invited to attend; our doors were always open, and every one that chose remained a member of the General Assembly. We proceeded in a legal manner to the election of trustees, and those trustees are the relators.

I hope—sincerely hope, that the end of this proceeding will be peace: such is the fervent desire and prayer of my clients. They wish that the two portions of the General Assembly, now separated, may again come together—that union, harmony, and love may again prevail. That losing sight of all sinister objects, and no more breathing the spirit of discord and war, as brethren we may be joined together in heavenly communion. That none may hereafter come up to the Assemblies of the Church, with any mental reservation, any secret design to expel a portion of their fellows; that each may be greeted with the kiss of peace, and the Christian salutation, "Is it well with thee my brother?"

If unfortunately I have been bitten by the angrier part of the spirit of this controversy, and have spoken a single word harshly or unkindly, those who know me must know, that it has not been an intentional offence.

MR. PRESTON'S ARGUMENT.

May it please your Honour—Gentlemen of the Jury:—It is a personal misfortune to me, that I come to the performance of my part in this case, exhausted by forty-eight hours of severe indisposition, and labouring under great debility. I would beg the indulgence of the court and jury, did I not feel that, if I have any strength remaining, I should expend that, before trespassing further upon your patience, which must already be well nigh exhausted. I regret this as a personal misfortune, merely, not as likely to affect, much less to endanger the cause of my clients; for I may say, with all candour, that after having heard everything which has hitherto been urged by our opponents, I feel convinced, that the complete vindication of those whom we represent will require from us but a very little expenditure of either zeal or talent. Unquestionably, the whole of this proceeding has been conducted, on the part of our learned friends on the opposite side, with signal ability. We all must have been both entertained and instructed by the luminous and able opening of the honourable gentleman, to whom on Saturday, and to-day, we have listened. But, notwithstanding the ability and learning which he has brought to the aid of his cause, and nowithstanding the accidental increase of my own incapacity, I do not feel a whit daunted: I am still unshaken in my confidence, that your verdict will be in favour of the defendants, and will restore to the Presbyterian Church that peace, which, without such a verdict, it is vain to expect.

The learned counsel have, perhaps, in nothing else, so clearly illustrated their ability and zeal, as in the general course which they have pursued in the opening of their case, the development of their testimony, and the disposition of their argument. They have devoted the greatest length of time to the proceedings of the Assembly of 1837: upon these they have dwelt with the greatest stress and urgency. In the opening of the case to the jury, these occupied two-thirds, and in the exhibition of testimony, three-fourths of the time; and of the learned gentleman's argument, from four to five hours—the whole of Saturday—were devoted to this part of the case, and to the remaining portion he has given but the two hours, which he has consumed this morning. Yet by his own declaration, forced from him by the necessity of the case, just as he was concluding his argument on Saturday, he admitted, that as yet he had been occupied with preliminaries alone, promising that to-day he would come to the merits of the subject. According, then to his own calculation, the preliminaries of the case are to its real merits, as five to two. While entertained, amused, and instructed, by perhaps the longest exordium that ever adorned an argument, we looked with great anxiety to the importance and extent of what was to follow. But we have found the whole speech little more than a preliminary—that on which the counsel has chiefly relied is something anterior to the case. The structure that he has reared is all portico: in vain we look for the substantial fabric. Feeling

that it is not my duty to imitate the learned gentleman, I shall not consume your time in a long exordium, or by distant approaches to the subject. To-day, I shall direct your attention to nothing but its real merits. And if now I were about to discuss it for the first time, I should feel exonerated from saying a single word in reply to the voluminous argument, which has been founded on the proceedings of the Assembly of 1837, feeling confident, that they could have no bearing upon your decision in regard to the merits of the case. But others having thought differently, at an earlier stage of this cause we picked up the gauntlet thrown down by our opponents, and promised to vindicate those proceedings. We shall, therefore, advert to them hereafter, though not until we have disposed of the more important matters, on which, as we still believe, the final adjudication of the court and jury must depend—the proceedings of 1838. I will take up the subject where the honourable gentleman left off, deferring to my peroration all that has furnished matter for his protracted exordium, His plan of proceeding has reminded me of some able general, who after heaping up piles of dust which the wind drove directly in the enemy's face, commenced his attack under cover of the cloud. But I think that the dust has by this time been blown away, and that we shall be able to examine clearly the true merits of the case.

It must be apparent, gentlemen, to you all, that the counsel for the relators have entirely failed to designate, in any part of this proceeding, in the whole of their voluminous testimony and argument, a single distinct point, on which, if established, they can rest their case, unless it be embraced in a proposition which I shall here state to you, and which it is very important you should bear in mind. They have not been able to advance any other distinct proposition, or certainly they would have done it. Indeed the learned gentleman who has preceded me was forced to acknowledge, that this was their only ground, and, with submission to the Court, I take upon myself the responsibility of telling you, that it is the true point on which the whole case depends. It is all that you are called to try: the issue is joined upon it, and on it must you decide by your verdict. This, may it please your Honour, is the proposition—the only one advanced by the opposite counsel: that by intendment of law and the rules of parliamentary order, the party whom we represent voted with the other party, or, by silence, acquiesced in their proceedings. Here is the whole case: every thing else that has been urged is but auxiliary and ancillary to this. There has been a waste of all the testimony that does not support this point. Wit, argument, and eloquence have failed to illustrate any other proposition on which they can pretend to claim a verdict, than that by intendment of law the Old-school voted with the New. It is for no mere forensic parade that I tell you, that I have not been able to ascertain what the learned counsel would be at, if it be not this. And I would say emphatically, that this is a question more of law than of fact; that you are called upon to decide, in the exercise of your function as jurors, matters of fact, indeed, but these mixed up with most important principles of jurisprudence. You are to determine, whether in the Assembly of 1838, our silence was, by intendment of law and of parliamentary rules, an acquiescence in the revolutionary proceedings of the New-school party; for if it was not, they cannot ask a verdict at your hands. To establish this sole proposition is both the beginning and end of their case.

Before I proceed to examine minutely the different points of law and fact upon which this proposition depends, I would endeavour to present a general view of the attitude in which the respective parties to this proceeding stand before the court and jury. It will be of great consequence, I think, that you should carry along with you a clear understanding of their relative position.

In the course of the remarks which I have before made, I endeavoured to illustrate the attitude of these parties for purposes and with results, which I shall not again detail at large; but even in regard to the points thus presented, it seems necessary that I should yet say a word. These Relators have not asserted, that our Assembly of 1838 was not the true General Assembly: if they had, we should have demurred to their suggestion. It is not their business to impugn and to vituperate our proceedings. We are a mere nonentity, and do not, from the necessity of the case—*ex officio*—stand up for the acts of the Assembly of 1837 or 1838. It is a fundamental error, to suppose that we are bound to vindicate either. Our duty is merely to contend that the relators have not been legally appointed, that they have no rights to establish in this court. I may be considered as attorney for the Princeton Seminary: we say that that institution shall not be used and managed by the relators; that they have no just claim to it, and that we choose to retain possession of its funds. We deny that theirs was the true General Assembly.

The first general ground which we take, and I say it with no asperity of feeling, is, that the management of those sacred charities, which the pious people of the Presbyterian Church have confided to our hands, shall not be seized upon, and forced from us by men claiming authority, against the evidence of the clearest facts, by a mere intendment of law. The learned counsel have distinctly placed their claim upon that ground, for they freely admit that in 1838, a decided majority of the representatives of the Church met in the body that held its sessions in the house in Ranstead Court. They say that because we sat mute, though we refused to give countenance to the proceedings of the New-school party, regarding them as a disorder and an outrage, we surrendered our rights to them; and they now come into court, and seek to establish, by the verdict of a jury, in spite of the notorious fact, under cover of a mere technicality of law, that they have superseded us. They ask you to make the minority, those who took advantage of their brethren by a legal artifice, trustees of the beneficence of the whole Presbyterian Church. In the outset we tell these gentlemen, that we shall avail ourselves of every means which the law puts within our power, in a contest with men who rest their whole claim upon an intendment of law, and assert in direct contradiction of all the evidence of facts, that the majority of the General Assembly of 1838 agreed to measures, which they never agreed to—measures which they have always denounced in the bitterness of their hearts. Doubtless, gentlemen of the jury, every one of you has been somewhat conversant with legal proceedings, but I venture to say, that you have never before seen any litigant come into court, and boldly declare, "I claim a verdict against the notorious facts of the case, against the clearly expressed intention of the parties to the transaction upon which the jury is to decide. By a trick I have supplanted my opponents. I know that they understood the transaction in one way, but, by a quibble, I can make you understand it

in another way." I venture to say in advance, that, if the relators in this suit are successful; if the court and jury establish their suppositious case; if by a mere legal technicality they triumph, it will be the first time that I have known such a triumph. I am aware of the existence of a vulgar notion, that the law is full of tricks, and technicalities, and sly meanings, and adroit artifices. I beg, gentlemen, that you will not, for a moment, think thus of the common law. God forbid, that I, an humble officer in the temple of the law, should ever behold a sheer artifice, a trick, a quibble, prevail over justice. But this is altogether a mistaken conception. The common law is a fabric built by the skill of ages—a system of wisdom moulded by the experience of centuries. It has grown with the wants of society, and rests upon the sacred principles of justice. From time to time it has been amended and improved. It is a rich alluvion washed up by a thousand fertilizing streams. Such being the character of this glorious system, will you narrow it down to a miserable technicality, and fritter away the eternal principles of right to mere quibbles, and legal intendments? It cannot, it must not be! Suppose I were dealing with my neighbour, and should give him a paper to sign; that he should say "I understand the instrument thus," and upon my acquiescence in his view of the matter should subscribe his name. And suppose I should then go to a lawyer and say to him, "I know that my neighbour understood this paper according to the intent that appears upon its face; but cannot I convince a court and jury, that by intendment of law it must bear another construction, a construction which will deprive him of the very rights which he imagined the instrument was framed to secure?" Would not every honest man reject such a proposal with scorn and indignation? Or, to put another case, if any one of the gentlemen engaged in the transactions, on the character of which you are called to decide, had come to us and said, "Gentlemen, we are informed by counsel learned in the law, that if we put this question to the whole Assembly, and you are silent, you will be considered as acting with us, as acquiescing in our proceedings"—would they have got our vote? They do not pretend that they would. Yet, as the testimony shows, keeping their intention private, without putting us upon our guard, they proposed the question, and we remaining silent, they have gone away and declared that the whole Assembly voted; that those agreed to the measure, whom they know to have been in direct opposition to it. Is this fair: is it equitable? Shall we resign to such men the complete control of these funds of charity, or agree, without a desperate struggle, to surrender the rights, which they would wrest from us by an intendment of law? No! It is our sacred duty as trustees to resist, to the very uttermost, every such attempt. The whole of the relators' case depends upon the proposition that the Old-school voted with the New. Did they thus vote: did a majority of the Assembly of 1838 acquiesce in the proceedings of the New-school? Did we assent to their measures? Did we assist in the organization of their Assembly? Unless these questions can be answered in the affirmative, I say, with submission to your Honour, that the relators are out of court, that they cannot ask this jury for a verdict.

Will any thing authorize a conclusion in spite of the clear testimony of facts? There is a maxim, to which in my practice I have always adhered with pride and solid comfort, and which I believe is in accordance

with the dictates of sound reason: that law may be found for whatever a spirit of equity sanctions. Never yet have I failed in the application of this doctrine, unless in the present case. Tell me what is right, and fit, and according to eternal justice, and I will find law for it. But here our opponents say, "The facts are clearly against us; in equity we are not entitled to the charitable funds of which we claim the control; yet can we find law that will set aside the principles of justice; some nice technicality that will support our claim." But they cannot succeed even on this ground. There is something in the benign spirit of the common law that will protect it from such abuse and degradation. I cannot suppose that any legal technicality or fiction can be productive of aught but the common good. But I do not rely merely upon the common law of the land, when these pious charities are at stake. There are profound and holy questions of religious right which are beyond the spirit of human laws. I invoke the sanctions of that eternal law of heaven, by which right and justice shall in the end triumphantly prevail, however they may be tortured and disfigured by human tribunals.

Such, then, is one view of the attitude in which the respective parties to this proceeding stand. There is another, gentlemen, which is hardly less important. Here we have a minority—a clear and, an avowed minority, claiming to exercise the rights of a majority. I say that our opponents avow themselves to be the minority; yet there is a reservation in this acknowledgment, and I must say that it is with pain I mention it. There have been many unpleasant things in the history of this transaction, but to me, the most unpleasant is the means by which these mistaken gentlemen attempt to shield themselves from the imputation of being a revolted minority. They say that the Old-school are to be considered as a part of their body, that their list included all. That when they went away from the church in Ranstead Court, it was the departure of the whole Assembly. In the first place they assert, that by intendment of law, we are to be considered as voting with them, as acquiescing in their violent measures; and then, that by another intendment of law, we, who continued our session in Ranstead Court, were a part of the body that assembled in the First Presbyterian Church. So notorious is the contrary, that if this were stated as the naked fact, every body would be shocked at the perversion of truth. And when, by a mere pretext, a mockery, they seek to support their assertion, we must be permitted to say to the counsel learned in the law, whose authority they invoke, you have mistaken the law most egregiously. What! we went with them? Suppose we had gone, in accordance with their invitation, and their hollow protestations of brotherly kindness: suppose we had marched in solid column into the church on Washington Square—what would have been their position? Did they intend that we should go with them? Did they expect us to go, and vote them down? How their kind hearts would have dilated with joy, if we, the defeated and suppliant majority had taken our seats among them, and voted them out of the Assembly. Would this have been what they expected and wished? Why immediately they would have resumed their march. As soon as Dr. Elliott had, by *our* votes, regained possession of the chair, they would again have organized themselves, "in the fewest words, in the shortest time, and with the least interruption possible," and would have retired to the next Presbyterian

church. Following their advice, and accepting their kind invitation, it would have been our duty to follow them immediately to this second church; else they would have begun to be the General Assembly, and to regret, most profoundly, the absence of their brethren. Well, we follow them to the next, the same scene is re-enacted, and so on until they are driven out of the town—perhaps to some place within the bounds of the exscinded Synods, to find a locality for the organization of the true and constitutional Assembly. This must have been the result, had we proceeded in the course urged upon us by our opponents. We could have established our rights only by the subversion of theirs. Did they intend that we should be of them? Perhaps this was an *intendment of law.* Could they have constituted their Assembly, could they have proceeded one inch, had we been present? Their intention undoubtedly, notoriously, was to split us off, to separate us from them. It is a mockery, an offensive mockery, to tell us, that we, the majority of the General Assembly, were with them, when they know, that if we had been there, we should have defeated their purpose, and subverted all their machinations. There, gentlemen, is another thing, that I beg you will carry along with you.

I proceed to a third point—to still another position taken by my learned friend. He asks who we are, and who are they. In this part of his argument he has answered the first question, but like some of his friends has forgotten to reverse it. I make the same inquiries, and shall attempt to answer both. Who are the members of this Old-school party? "Juvenile patriarchs" we are told; hot-headed young men who are striving to sieze the reins, like a youth of old, who drove another chariot athwart the sky. But which are these young heads? Is that reverend gentleman (Dr. Green) one of the "juvenile patriarchs," who have been thought fit subjects of merriment and derision? His sword was fleshed in our political wars, before he passed from the ranks of the Revolutionary army, to the head of the Presbyterian Church. God forbid, that he has been spared, only to weep now over the tomb of all he has most loved and cherished! Or is the Rev. Dr. Alexander the rash, impetuous youth, who would lay a parricidal hand upon the institutions of the Church? Is it that hand, trembling with age, that has aimed the deadly stroke? Around you, in every direction, you behold grey heads and bent bodies; and these are the "juvenile patriarchs," the unholy band, that would destroy the Church of their fathers!

Who are they upon the other side? Men of whom the largest portion, as I trust, after a serious contemplation of the several vexed questions that have divided the Church, have come to the conclusion that the New-school are right. I hope and trust that they are candid and conscientious in their differences from us. But are there no youths among them! If the statistics of their ages were taken, would not we be their elders? If their faith be measured by the Presbyterian standard, must we yield to them in orthodoxy? Has any body or sect, any man, woman, or child, ever denied that the cause we advocate is Presbyterianism—thoroughgoing, true-blue Presbyterianism? Has any one pretended to doubt whether Dr. Green, and Dr. Alexander, and Dr. Miller are Presbyterians? None, even in the heat of theological controversy, or when labouring under the exacerbations of party strife, have ever asserted the contrary. And what are our opponents? Some of them have sat as committee-men

in the judicatories of our Church; some of them have sat in Congregational churches. They have not deemed this a matter of serious importance. The difference between the two sects they regard as trifling and frivolous, and now they are Presbyterians, now Congregationalists, and again Presbyterians. Some of them have travelled over the country with an assortment of faiths in their pockets. Here is a sample for Congregationalists; here another for Presbyterians. We are not contending about money: I'll show you that we are not. We go for the doctrines, the faith of the Presbyterian Church. My learned friend has spoken of an infant prayer lisped at the mother's knee—I wish I could remember the beautiful language in which he depicted that kneeling infant. But they of whom he speaks, they who have received these early lessons, are Congregationalists, and their only language is that which they have been taught in infancy. By such training, the propensities of their nature have been fixed, and with the burden of that lisping prayer still upon their lips, they come to seize upon our faith and sacred charities. Have we any thing of this kind among us? We are Presbyterians, whatever they may claim, or are proved to be. If this case is decided against us, it will be decided against the Presbyterian Church.

But what is the purpose of our opponents? Remember, gentlemen, that on the third Thursday of May, 1838, a disorderly, loose, disjointed mass of men swept from the portals of that church in Ranstead Court, and that, to us, the next indication of their doings, was the bolt of lightning aimed at the head of the venerable man before you. They talk of caring naught for money; they talk of reverence for age, and call us the "juvenile patriarchs." Yet their only efficient act is the blow by which they would have stricken down that aged and trusty servant of the Church; an act which says in language too plain to be mistaken, "We want the money; we are not willing to intrust you with these funds." This is their fraternal feeling, their meek forbearance, their Christian kindness. And their object is to be accomplished, this reverend father is to be excluded from his seat, and the funds of the Church to be given over into their hands, against, and in spite of the evidence of facts, by an intendment of law!

Court adjourned.

TUESDAY MORNING, March 19th.—10 o'clock.

May it please your Honour—Gentlemen of the Jury:—I yesterday stated to you, in the first place, my notion of the real question on which you are to decide; and then, as my duty seemed to require, attempted to illustrate the true attitude of the respective parties to this suit, in order to remove all prejudice from your minds, and that you might carry along with you, a clear understanding of their relative positions. I submitted to your Honour, that the real and sole question on which the case turns, that which must be the essence of the finding of this jury, is, whether by intendment of law, the majority of the Assembly of 1838 are to be presumed to have acquiesced in the proceedings of the minority. This question of legal intendment, gentlemen, is for the Court. Whether there are facts to authorize such an intendment is for your decision. If instruct-

ed, that under certain circumstances, that intendment will arise, it will be your duty to determine whether those circumstances actually exist in the present case. The first question is merely a question of order, and turns exclusively on parliamentary rules—rules not even of the dignity of parliamentary law, strictly so called, but of the nature only of regulations of parliamentary order, made to facilitate business. Now, it is not for me to disparage parliamentary rules of order; certainly they are of great propriety. Prescribed forms are necessary to the due execution of any business, and cannot be deviated from without danger. Justice is best secured by a strict adherence to these forms. Therefore, I cannot concur with my learned friend, in considering them of an unimportant and trifling character, whether prescribed by the General Assembly, or any other parliamentary body. He has been pleased to speak in a light manner of their influence and power; to ridicule them as contained in unbound, or but half-bound books. And this, when his whole case may depend upon the very slightest, the most unimportant of them; when, but for one of these rules it would be impossible for the plaintiffs to come into this court. Not only do they claim under rules of order; the very least of them is the foundation, the corner stone of their proceeding. Here it is: (*Appendix to Constitution, R.* 30.)

"Members 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 the rule on which the relators' case hangs—a rule in some sort unauthorized, though adopted by the General Assembly, for the regulation of its own conduct. And not only does it appear in an unauthorized shape, but, as we are told, must according to the practice of the General Assembly, be adopted at each meeting, before it becomes obligatory. In the very case before us, this very rule was considered of so slight an authority, that Dr. Beman, when Dr. Fisher had, as it is said, been elected Moderator, instructed him only, that his future conduct should be governed by the rules to *be subsequently adopted;* that is by an *ex post facto* law. This code, according to the declaration of our opponents, is not binding upon any Assembly, until first re-enacted by that body. In other words, each Assembly is to be organized, according to fundamental rules, which rules, however, do not exist until the Assembly re-enacts them after its complete organization; and which, therefore, when re-enacted, must be retro-active. Such is the opinion of the learned counsel in regard to these regulations of order, though on one of them, as I have said, their whole cause depends. Of course I shall not complain of this. Indeed the thing will correct itself. All bodies regularly organized must be organized according to rule. And I am willing now, to presume, that, in the present case, the rule just read, did exist, previously to its re-enactment by the Assembly of 1838; and, if, by virtue of it, our opponents can make out their case, you must find a verdict for them.

Now, gentlemen, have they brought themselves under the law? I think I can show that they are not within its provisions; that they cannot claim by it. It is conceded on all hands that we did not vote; that we did not intend to vote; that, if we had voted, it would have been against the resolutions, and to contradict any intendment of law. But, say the learned

gentlemen, "silent members must be considered as acquiescing with the majority."

Under what circumstances can this acquiescence be presumed to take place? Only where a question is actually put. If a question be put in a legal manner, to a legally organized Assembly, and a portion of the body refuse to vote, they are considered as acquiescing with the majority. Although of this, on its mere enunciation, there seems to be no doubt, though it appears like a very simple proposition, yet, in fact, it is most complex, depending on a great many elements of very nice consideration, and in themselves conflicting. It has been stated in the summing up of this case, that there was a question proposed, that it was put in the affirmative, that it was reversed, and this in a proper form, that it was put loudly enough to be heard, and that it is no matter whether it was actually heard or not. The learned counsel has omitted the most important and striking particular. Not only must the question be put, and reversed, but it must be put by a competent person. This item he has omitted. Of all the requisite elements he has cautiously avoided that which is the most essential. We are now engaged, it must be remembered, upon a point of order. The rights of the respective parties to this proceeding depend upon your construction of a rule of order. And, in the beginning, I tell you that one of the most important elements in your inquiry, is, whether the question was put by the proper person. In regard also to all the other elements you must decide: not only whether the question was put by a proper person, but whether in the proper manner, and at the proper time—whether it was *in order* at that time. It is of the utmost consequence that the proceeding should have been orderly, and according to parliamentary rules. If it was disorderly, we were not bound to vote upon it. If in its commencement it was disorderly, our rights are not affected: the rule does not oblige us to take part in a disorderly proceeding. It is only when a question is in order, that all who are entitled to vote, and do not dissent, are considered as acquiescing. If the vote is upon a question not properly put into the possession of the house, no one can be bound by it. The act is disorderly, and none but an orderly act can be binding upon any one.

I ask then, was Mr. Cleaveland's motion put? And, first, to put a question requires a competent person. Under this rule there is an agreement in the nature of a contract—a contract that whenever a question is put by a person having authority to put it, and is voted upon, all the members shall be bound by that vote. Had Cleaveland a right to put the question which it is said he put, according to parliamentary rules? I am not now speaking of the nature of the question itself. Could any question be put by an individual member, so that the vote upon it should be obligatory? Was Mr. Cleaveland authorized to rise, and, superseding all forms and rules, to put the house in possession of any question, by a vote on which they would be bound? I believe that in the whole history of this General Assembly, or of the British Parliament, from which all our laws on this subject have been derived—and they embody the collected wisdom of ages, beginning even with the date of the *Wittenagemote*—or in the history of the Congress of the United States, or any legislature in all the twenty-six individual States, a single instance cannot be found of a question's being put by a private member of the body. I

will not presume to say positively, from my narrow acquaintance with the history of these different assemblies, that no such instance has ever occurred: certainly I have never heard of one. I believe farther, disembarrassing myself of the contemplation of such high and stately assemblies as the British Parliament, and the Congress of the United States, that the experience of every one will bear me out in the assertion, that no debating club, or ward meeting was ever put in possession of such a question, but by its own constituted officer. The proceedings then of the New-school party were at least novel, and most strange, if amid all the scenes of contention and violence, which marked the earlier stages of the British Parliament, and the whole progress of the French Revolution, so revolutionary a measure is not to be found. It is not for me to insist upon the dangerous consequences of such a disorder, in a large and tumultuous assembly, amid the storm, the tempest excited by the conflict of parties, each conspiring to take advantage of the other. How great would be the confusion, in even a small body, if it were divided by half-a-dozen parties, of different feelings and sentiments, forming half-a-dozen *cliques*, and each proclaiming itself the constitutional majority! How monstrous might be the issue of an attempt in a larger assembly, thus to supersede the regular organization. For every body like the General Assembly has always a certain degree of organization: officers as the foundation of its structure, with rules and orders of binding authority. There must be always both a government, and those governed. Where all are equal, a house cannot be organized so as to be capable of business, and the acts of each member can be binding only on himself. It would be monstrous, even if there were no express parliamentary rule to govern in the case, for an unauthorized person, *ex mero motu*, to seize the reins, and attempt to direct the proceedings of a deliberative assembly, according to his own wishes. If such an act be a revolution, and not a rebellion, it can be so only by virtue of success. And a revolution in the very nature of things resolves the body revolutionized into its original elements, and involves usurpation of authority. Although it may be righteous, and the actors in it virtuous men, still it is a usurpation, and is not to be tried by rules of court—is not to be decided on by you gentlemen, or by his Honour on this bench.

It is a great mistake, and indicates a very narrow view of the subject, if any one for a single moment supposes, that the mere suggestion of a question is putting the house in possession of it. Any person might arise in the midst of an assembly, and propose a question to the whole of the promiscuous crowd which not unfrequently is collected in legislative halls; but would a vote upon it bind any one, or conclude his rights? Suppose all were called upon to answer, but many, regarding the act as disorderly and riotous, should, from a sense of decorum, remain silent; would they be considered as acquiescing in the vote? Or would the individual putting the question be justified to go abroad and proclaim that the majority of the whole house had assented to his proposition? If I should quit addressing you under his Honour's direction, and should say, "Gentlemen of the jury, I suppose your verdict is with me. Are not your minds made up upon this question? Remember that silence gives consent"—could your silence be taken as consent? Suppose you were silent, and I should go forth, and announce that we had gained the great

Presbyterian cause, but, a day or two after, you should give a different verdict, would not my position be exceedingly awkward? But why? Why are you not called upon to answer when I address such a question to you? Because, although I am an officer of the court, I am not authorized to demand or receive your verdict. But if his Honour asks you, "Gentlemen, have you agreed upon your verdict?" you are bound to answer him, because he is exercising a proper authority.

What is putting a house in possession of a question? Is the mere unauthorized act of an individual sufficient? When a member has made any proposition, saying, "I move you, Sir, so and so," is the proposition then in the possession of the body? Unquestionably not. Other powers and rights intervene: there must be an intermediation between himself and the other members. Upon this point there is an express rule. It is found in 2 *Hatsell's Parliamentary Precedents*, 105.

I venture to quote from this book, may it please your Honour, as the highest authority on the subject. The author has written with the precision of a lawyer, and as a man of long experience. Though the principles which he lays down are not in the form of rules, they are so wise, that all succeeding books of order have referred to this book of John Hatsell's. He says:

"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 from Hatsell his own words, but they are followed by Jefferson in his Manual. The member who makes a motion must rise, and address the presiding officer, and that officer being thus in possession of the question, puts it in the possession of the house.

Well, gentlemen, I trust that you perceive, by this time, that rules of order are of essential import. The counsel have been pleased to treat them lightly, because they were contained in little books: I hope, that at last, I have found one big enough for them. (Mr. Preston held up to view, 2 Hatsell, a volume in quarto.) I beg that you will attend to the import of these rules, as illustrated by the present case. Every regularly organized Assembly must have an organ through whom questions may be presented to the body, that every member may understand them distinctly, hearing them propounded by a responsible person. Hence it is, that the presiding officer of every body, has a conspicuous place assigned him, from which he can see and hear whatever is said or done in the house, and where he may be heard and seen by all the members. Thus his Honour, while presiding in this court, does not take a promiscuous stand among the spectators, where he cannot be seen or heard; nor is it merely a matter of form, but of substance, that he is seated upon that bench, from which he can superintend and direct the proceedings. The convenient administration of justice requires, that he should occupy such a position. Otherwise, there would be interminable confusion; none would know who was acting or what was done: there would be a perpetual riot and tumult, almost equal to that which took place in the church

in Ranstead Place. It is not, however, from Hatsell, or from Jefferson, alone, that I derive this rule of order. I can appeal to a more direct authority, which cleaves down at a single blow, the cause of our opponents. If they themselves are out of order, when they seek to bind us by a rule of order, they are not capable of so binding us. I call your attention to the proceedings of the General Assembly itself, in regard to this matter. That body has established rules of order for its own government; and that these rules are obligatory, our opponents themselves, do of necessity assume. What form does the Assembly require to be observed, in order to put the house in possession of a question? That very Assembly of 1838, established this rule. *Append. to Const. R.* 11.

"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."

The obligatory nature of this regulation, as I have said, our opponents acknowledge. You have heard the learned counsel ask each of the witnesses, "Was the question seconded?" Why was this? They found it necessary to admit the obligation of that part of the rule, which, however, is separated from the remaining provisions by a mere comma.

I put it to you then, gentlemen, was the General Assembly of 1838 put in possession of Mr. Cleaveland's motion, according to the rules of order which I have just read? Was the motion "seconded, and afterwards repeated by the Moderator or read aloud?" If not, what obligation was there upon the gentlemen sitting in that house to give it their attention? When were they bound to vote? When, by intendment of law, must they have been considered to have acquiesced? When a motion had been made, seconded, and repeated by the Moderator. Then, and not till then. He who usurps the right of proposing a question to the house, tramples upon the constituted authority of the Moderator. He is disorderly and rebellious, and deserves chastisement.

In attempting then to put the question on a mere motion of his own, and by virtue of his rights as a private member of the Assembly, Mr. Cleaveland trampled on every rule of order, and put himself without the pale of law. Whatever he, or those who acted with him, did, was not obligatory upon the other members, and they were not called to give it their attention. Let not the learned counsel answer, that this was an extraordinary case, a case unprovided for; that there was an extreme necessity that the question should be put, and that the Moderator would not have put it. Even if it had been such a case, no member had a right to rise and assume the reins, though they had been tossed down by him who held them—to make himself the presiding officer of the house. If this may be done in one instance, it may be done in any other. If Mr. Cleaveland was authorised to usurp the office of the Moderator in a case of necessity, judged of by himself alone, what power is not constantly liable to usurpation? Where will you put a stop to the thing? Necessity has always been the tyrant's plea, to justify the greatest enormities. When you have usurped the power of the Moderator, you have nine-tenths of the whole power that regulates the Assembly in your hands. And what is to prevent a similar usurpation of the power of the clerks? If they refuse to do what in your estimation is their duty, why may you not, in like manner, assume their functions? Mr. Cleaveland, it is said,

took upon himself the office of Moderator, because Dr. Elliot had acted in derogation from his duty. Well, the clerks, as it is alleged, had been guilty of a similar offence. Why did he not take the place of the Stated and Permanent Clerks, also? The making of the roll is not more important, than the observance of the mode provided for putting the house in possession of a question. Distinguish, if you can, between such an usurpation of the office of Moderator, and an usurpation of the clerks' place, with every other function exercised in the Assembly. To put the matter in a still more striking point of view: suppose the clerks, merely, had violated their duty, but that the Moderator had been willing to put the question insisted on: why was not Mr. Cleaveland authorized to march up to the clerks' table, seize a pen, and on the tyrant's plea of necessity, himself complete the roll? This case is not one whit stronger than that before us. He might have proceeded in the latter way with the same propriety with which he began at the highest office—the head of the Assembly.

If, however, he was entirely unauthorized to put any question, having put one, were the other commissioners bound to vote upon it, or must their silence be construed an acquiescence? We take for granted that the Assembly knew its rights. They knew full well that Mr. Cleaveland had no right to act as Moderator; full well that they must look to another source for authority. They knew full well that if the Moderator propounded a question they remained silent at their peril; but that if any body else propounded one the peril was his, and a vote was wholly void and inoperative. If Mr. Cleaveland had addressed his motion to the Moderator, and the Moderator had put it to the house, they would not have hesitated to give it all their attention, and however disorderly it might have been, if any had kept silence, after it had been thus put by the legitimate authority, by intendment of law they might have been considered to have given their assent. Here is an established government, an organized series of institutions; a single individual usurps the chief executive direction of the whole, and every one who does not utter his dissent is declared to have submitted to the usurpation. Nothing can be more dangerous than such a latitudinarian doctrine. All tyranny commences with it. Julius Cæsar overturned the liberties of his country by the assent of a constructive majority. Augustus ruled under a like sanction; and every tyrant has done the same. This was the very means by which Napoleon rose to sovereignty, while so many of the powers of Europe were prostrated at his feet. He ruled by constructive majorities. He put the question of his supremacy to the people in every Prefecture throughout the kingdom, and though he obtained a majority of all who voted, they were but a third or fourth part of the nation. In the first place he had not a real majority; and besides, the people were intimidated by his train-bands, who made the air resound with their huzzas, and were ready to enforce all his orders.

What are Mr. Cleaveland's pleas for this most extraordinary proceeding? I beg, gentlemen, that you will remark his own statements—the category in which he places himself. He rises, with a paper in his hand, beginning with a formal "Whereas." He reads, comments, and recites, but offers no motion to the Moderator. Here is a question of order which is to be decided. The Moderator is not in possession of his motion: he refuses to put him in possession of it. It is in proof that he does

not say "Mr. Moderator," but turns away from Dr. Elliott. He does not say, "I move you, or I move the house"—nothing like it. Without a pretence of having any personal grievance of which to complain, and without any reference to the decision that the former motion was out of order, merely on the ground that the Moderator has acted tyrannically, he assumes the right to interfere in the organization of the Assembly, and to make a motion which does not purport to be made to the Moderator. If he had been refused his seat, as had Mr. Squier, he might have had some pretext for such a proceeding, but as there had been no such refusal, his language was, "I choose to appoint myself Moderator *pro hac vice*." Besides, he did not try whether Dr. Elliott would put the question on his motion, and he is not entitled to presume that he would not have done it. I believe he would, if the motion had been properly presented.

Mr. Cleaveland, then, had suffered nothing of which he could complain; he had given the Moderator no chance to violate any of his rights; not a hair of his head had been touched. But voluntarily, *ex mero motu*, he clothes himself with the power of the highest office in the Assembly, and claims to exercise it in the face of Dr. Elliott, the regularly constituted officer, and of half-a-dozen other persons on the floor, who were better entitled to the place than himself. I beg that you will remark who was next entitled to it, according to the rules of the Assembly; for you will find that every step of Mr. Cleaveland's proceeding, was disorderly. Besides Dr. Elliott, there were half-a-dozen persons present, who had previously been Moderators, and their rights, as well as his, were trampled on. Mr. Cleaveland should have moved that the Moderator next preceding Dr. Elliott, the Moderator of 1836, should take the chair. That was the only orderly motion that could be made. If the next preceding Moderator was present, he was the only person that could lawfully preside, or that was capable of putting a question; and if he was absent, the Moderator next preceding *him*, should have been called upon, and so on *ad infinitum*, all that had ever held that office being entitled to precede Mr. Cleaveland. Remember, I am not now speaking of Dr. Beman: I shall come to him by and by. Mr. Cleaveland rose, and in effect, said, "Gentlemen, Dr. Elliott is no longer fit to be Moderator: I am fit, and therefore shall assume that office, put questions to the house, and proceed to organize the Assembly." He did proceed to organize an Assembly, and upon this organization our opponents rest their claim.

You may now, I think, venture to decide this point—whether any individual can, of his own mere volition, create himself a presiding officer, beyond the power of control, and exercise all the duties of the chair. This whole case rests upon the question whether Mr. Cleaveland was authorized to constitute himself Moderator. It might perhaps have been awkward for Dr. Elliott, to propound a motion for his own removal, but the duty was therefore the more obligatory. If he was not fit to put the question, who was? By what rule is the speaker of a body disqualified to put such a question? But suppose he had abdicated the chair, was *functus officio*, was self-annihilated: whose duty would it then have been to propose questions to the house? The English parliamentary law on this point is quite clear; it has been well settled for the last two hundred years. If the speaker does not take the chair, or refuses to put a question, it becomes the duty of the clerk to put it. So necessary has it been found

to have an official organ, by whom questions may be propounded, that, although some may think there is little reason for the rule, yet the experience of ages has decided that the duty, in such cases, devolves upon the clerk. This rule is to be found in 2 *Hatsell*, 158, where all the precedents are collated; in 6 *Grey*, 406, 408; and in *Sutherland's Manual*, 104.

"When but one person is proposed, (for the office of speaker,) and no objection made, it has not been usual in parliament to put any question to the house; but without a question, the members proposing him conduct him to the chair. But if there be objection, or another proposed, a question is put by the clerk. As are also questions of adjournment."*

This rule was established in the British Parliament more than two hundred years ago, and we, before we acted for ourselves, received it from England. In accordance with the English practice, and *ex necessitate rei*, all of our parliamentary bodies have uniformly adopted it. In every State Legislature, and in both Houses of Congress, the clerk puts the question whenever the speaker is not present. My friend, Mr. Lowrie, who was examined here, and who told you that he had been for a number of years clerk of the United States Senate, has often put questions to that body to be decided upon. This is also the practice in your own State. But what right, say our opponents—what right has an inferior officer of the Assembly, the mere hand—the writing hand—the pen of the body, to exercise the high functions which not even a member can be allowed to exercise? And why may he not have the right? Is it that the clerk's office is not of sufficient dignity? Is it that a duty which may be performed by any body else is too important for the clerk? Here my learned friend's argument fails entirely. I have already shown that long established precedents are against it; but I have something more than precedent to oppose. The clerk's office not high enough for him to be allowed to put a question, when it is expressly provided by the laws of the Church, that he shall, in a certain emergency, supply the place of the Moderator! In the Form of Government, under the head of the *Presbytery* you will find the highest power of the Moderator—the power of calling together the Presbytery in special meeting, conferred in some cases upon the Stated Clerk. Experience has shown that when the Moderator is out of the way, the clerk is the most proper person to perform his duties; and so this inferior officer, the mere hand, finger, or pen of the judicatory may exercise the high prerogative of calling together the members of the body, as if he were the Moderator. The rule is as follows:—*Form of Government, Chap. X. Sec.* 8.

"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, &c."

Now mark, the words, "with the concurrence or at the request of two ministers and two elders," do not apply to the clerk alone, but also to

*The rule as here given, is quoted from Sutherland.

the Moderator: both in this case, are to consult with the same privy council. The clerk is to stand exactly in the shoes of the Moderator. If a presiding officer refuse to put a question, by general parliamentary law, the clerk is the person to take his place; and here by the rules governing one of the judicatories of this very Church, the power and dignity of the Moderator are given to the clerk, in a case of far greater importance. The learned gentleman has chosen to denounce the authority of the clerk, yet by the General Assembly itself, in the year 1835, where the delicacy of the Moderator prevented his putting a question, it was decided, as long before it had been in the British Parliament, that the clerk should put it, although the Moderator was present and presiding at the time. From all quarters then we have brought the most satisfactory proof, that in every parliamentary assembly, strong analogy being confirmed by direct rule and precedent in the case of our highest Church judicatory, when the Moderator refuses to put a question, or is absent, or labours under any disability, the question shall be propounded by the clerk.

I have not even yet completed the enumeration of the disorders into which Mr. Cleaveland fell, in this single transaction. In our view, every thing that he did was disorderly. He had placed himself in a most unfortunate predicament. Immediately, upon his rising, points of order strike him, like the man in the picture of the signs in the almanac, in all his vitals. The question that he put was disorderly, and this of itself would be enough for our purpose. He rose and moved that Dr. Beman should take the chair, or be Moderator—the witnesses are not agreed upon the precise words of the motion, and *non mihi tantas componere lites.* Several of the friends of the other party who have been examined, have sworn that he was called to the chair, and with this testimony the rest of the *res gestae* certainly concur. Mr. Cleaveland said that it was necessary to organize the Assembly—of course to re-organize it, as it had already been partially organized—he moved that Dr. Beman should take the chair, until a new Moderator should be elected, and immediately proceeded to the election of this new Moderator. Dr. Beman was, then, a mere *locum tenens.* He was but chairman of the preparatory meeting, or else you have three different Moderators of the Assembly, all in about the space of six or seven minutes. Dr. Beman evidently was not a Moderator or Speaker: he sat merely during an interregnum. He was but a chairman—a sort of intermediation. If, then, the proposition was that he should take the chair, it was in itself, a disorderly proposition, one under any circumstances disorderly, because entirely unknown to the house. Such an officer, as a chairman, I say, is unknown to the General Assembly.

The question put by Dr. Beman was, shall Dr. Fisher be Moderator. Now it is perfectly immaterial whether he or Mr. Cleaveland first made a motion for the appointment of a Moderator. One of them must bear the saddle, and one or other of them, if not both, I shall show to have been out of order in this particular. It is necessary that you should pay careful attention for a little while to this point. What question would have been in order? The only orderly one that could be proposed was, "Shall the Assembly now proceed to the election of a Moderator?" This was never put: the house never had a chance to vote upon it, and of course there could be no tremendous majority in favour of the measure.

Our opponents shrunk from such a motion. If it had been put, we would have voted. When they came to seize our inheritance by an intendment of law, we should have voted them down. But the proposition made by Mr. Cleaveland was that Dr. Beman should be Moderator, or if, as we contend, he called him merely to the chair, at least the motion put by Dr. Beman was, that Dr. Fisher should be Moderator. They dispense with the orderly question, and get rid of the old presiding officer, in a way that relieves all the awkardness of the regular proceeding. This is an important point, that they go immediately, without any preliminary step, into the election of a new Moderator. It has never before been known, in the history of this body, that a Moderator should be passed upon as a motion simply by yeas and nays. He is appointed, not on a mere resolution, but on a nomination. Now we show that there were two persons in nomination, and that no question at all was put on one of them. A presiding officer had been nominated before, and it was not a question of courtesy, but a conflict between these two men for the chair. Our opponents now state, that on every other motion the vote was unanimous, but that on this there were some nays, feeling that it was not proper that the question should have been taken without reversal. And yet the learned counsel has himself told you, that if there is but one nomination, no vote at all is necessary, that all are to be considered as acquiescing; but that if there are two nominations, the yeas and nays must be called, the question being put on both. Here were Dr. Elliott, and Dr. Beman or Dr. Fisher, both to be voted upon. If there had been but one it is granted, that he might have been chosen without calling the yeas and nays; but where there are two, they must be called for both A and B. But does the record say that the questions were put by calling the yeas and nays: does it declare that the question was put at all in regard to Dr. Elliott? If Dr. Beman or Dr. Fisher was elected by a simple resolution, such a thing was never before heard of in the Assembly. The motion was out of order: it was a motion entirely unknown in Presbyterial proceedings.

Another rule of order to be taken into consideration here is, that a person rising to make a motion must address the Moderator—must submit his motion to the Assembly through the established organ. The presiding officer of a body is the conduit pipe, through which every communication between an individual member and the body must pass. But Mr. Cleaveland did not address the Moderator; indeed when he made his motion his face was turned away from the chair, towards the gentlemen who were near him, and to them he put the question. He not only did not put it through the presiding officer, but he put it standing in the rear of the Assembly. He voluntarily got behind the whole body, and while in this position, constituting himself the Moderator, propounded his resolution. And how was it with the succeeding motions? Did Dr. Beman address the Moderator? He too did not address even the members, for he stood in their rear. The locality of the proceedings is a matter of some consequence. Suppose these disorderly speakers had put the questions which they proposed in some corner of the house, or in the lobby, would that have been in order? I remember to have heard of a bragging fellow, who, having been called to order by the court, boasted that he had shaken his fist at the judge, and called him a tyrant. But, inquired somebody,

"How did he take it?" "Oh, he said nothing," was the reply. But being forced to explain, he acknowledged that he had shaken his fist under his cloak, and called the judge a tyrant below his breath. All the proceedings of these men were conducted in the rear of the Assembly, behind the great body of the members; and they all turned away from the Moderator to address themselves to the New-school party. A rare spectacle indeed!

I proceed to make still another point of order, and a point of paramount importance. The accumulation of these points shows clearly, that whenever persons attempt to do a violent act, and press on with haste and tumult to its consummation, they necessarily fall into gross irregularity. Now, our opponents cannot pretend to stand under the rule which I am about to mention. If this point of order be made in any Assembly, it prevails and rides over every thing else, and at once resolves the house into a committee of the whole, to determine it. Even in the torrent and tempest of party conflict, though a speaker be upon the floor, the single word "Order!" from the presiding officer, or any member, at once arrests the proceedings. The speech is interrupted, until the question of order has been decided upon. When Mr. Cleaveland rose, with all that galamatias of a "whereas," and so on, cries of order instantly burst forth from the very point from which they might have been expected, and were frequently reiterated. But in spite of this point of order, he proceeded. What was, in this case, the duty of those, who claim what they are contending for, under a rule of order? On the first echo of that all controlling, that emphatic word, they should have stopped, and awaited in silence the decision of the matter, or taken their seats. It was not necessary to this, that the Moderator should cry order: the cry was equally efficacious from whatever quarter it proceeded. It instantly became the express and solemn duty of the presiding officer, to insist on the point of order thus raised. It was his duty to stay the proceedings at all hazards, and to invoke the aid of every member present. Whatever business was before the house was instantly superseded, and there should have been a solemn pause to try the question of order. Now, in the teeth of the authority of the Moderator, in open violation of the rights of every member of the Assembly, and trampling under foot this most essential rule, Mr. Cleaveland prosecuted his disorderly proceeding. For all the purposes of this argument, it is no matter whether he was really in order, or not. From the instant the Moderator called "Order!" though perhaps he may have been wrong, until the question was finally decided, Mr. Cleaveland was out of order. What? Are we told that we could not in any way protect ourselves; that we were utterly powerless; that when we were crying "Order!" and the Moderator shocked and agitated as he was, was also calling "Order!" and vainly endeavouring to stay the torrent, the proceeding being pushed forward in spite of all our efforts, we are now, by intendment of law, bound by it, considered to have yielded our acquiescence? Why, by the mere cry of "Order!" Mr. Cleaveland was put out of order, and no member of the Assembly, who had the least regard for the rights of the Assembly, could have ventured to vote upon the resolution. Had he done so, he would have been partaking in a riot. There were cries of order from every side, and yet, by intendment of law, the question is to be considered as legally put! I read a provision on this

subject, from the General Rules for Judicatories.—*Append. to Const. R.* 28.

"If any member 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."

Now, the privilege of the member, and the duty of the Moderator, do not depend upon the question, whether the person called to order is really in order or not. The propriety of the call does not rest on the fact of his being out of order, but upon the Moderator or member's *considering* him so. Whoever thinks another out of order, has a right to call him to order, and to have the point immediately decided. Now, when Mr. Cleaveland rose, he was thus called to order. The Moderator called him to order, and with his hammer, as one of the insignia of his office, rapped upon the desk before him. The members, on all sides, in the exercise of their privilege and duty, cried "Order!" In the midst of these repeated calls, in derogation of the authority of the Moderator, in violation of the rights of the individual members, in contempt of all decency, Mr. Cleaveland proceeded to put the question, on his own responsibility. And was the resolution still carried by intendment of law? Did we yield our consent?

There was another point of order made necessary by the general call to order. It is in evidence, gentlemen, that Dr. Beman, Dr. Fisher, Dr. Mason, and Mr. Gilbert, with many others of the New-school party, were standing. Even the new Moderator, although he is said to have been unquestionably in the chair, was standing up in the aisle, at least forty feet from any chair. From every quarter, persons rushed forward towards the scene of this most quiet, and Christian-like organization. They burst from the pews, crowded over the tops of the pews, and all stood in the midst of the house. Now, there is a rule, that whenever more than three members are standing, they are *ipso facto* out of order. The Old-school party might, therefore, have sent forth a universal cry of "Order!" and those who stood to the end, notwithstanding these cries, were perpetrating a gross disorder. I will read the rule to which I have referred. *Append. to Const. R.* 27.

"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 law of the Assembly, every member has a right to call for its enforcement; and whenever, in any body, there is a cry of "Order!" the proper question is, "Who is out of order?" Then it might be answered that more than three members are standing, as in this case, where not only more than three, but the whole association of the New-school, or, at least, a majority of them, were standing, and rushing together; and the Moderator would be bound to restore order, before any other business was attended to.

But there is a graver, a more deeply important consideration which this case involves. Heretofore my remarks have applied equally to all assemblies of gentlemen, of whatever profession they may be. In a mere civil assembly, composed of politicians and men of the world, there are no special obligations resting on the members, but those arising from the rules of politeness, and from the regulations necessary for the transaction

of business. But the clergy are, by their ordination, set apart from the world, and are bound, above all others, to regard the holy doctrines of peace and order. The business of their lives, and the habit of their minds lead them to examinè carefully into the rules of propriety, to cultivate a spirit of deference to authority, and of meek forbearance. The institutions of the Church would be incomplete, if her ministers were distinguished from others only by the outward forms of these institutions. But more has been exacted from the ministers of religion, than from the mere children of the world. There is a standing rule of order for the regulation of all the judicatories of the Church, which is in these solemn and hortatory words:—*Append. to Const. R.* 24.

"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."

In addition to every thing exacted from the members of mere temporal assemblies, great gravity and dignity of behaviour are here enjoined. Have they conformed in the present case to this crowning exhortation? Were these proceedings characterized by the gravity, the dignity, the Christian forbearance, becoming ministers of God? Did they quietly keep their seats, and obey the orders of the constituted authorities? This would have been expected from even an assembly of politicians. Yet on them would have rested only the high obligations of gentlemanly character: the rules of Christian conduct are of a still higher import. A gentleman rises and declares that a certain proceeding must be had in that place; that a re-organization is necessary. In a hurried and broken voice, he partly reads and partly recites, interlarding both the reading and recitation with extemporaneous remarks; and then, his hand trembling, and in an agitated tone, "in the shortest space of time, and the fewest words possible," even of these few words but one here and there being caught by most of the auditors, he moves that Dr. Beman take the chair. How is this proposition received by that grave and respectable assembly of men, bowed down under a sense of their solemn responsibility, and sacred functions? It is answered by a shriek, a yell of "Aye!" which drowns every call to order, and stuns the ear. Does Dr. Beman then proceed gravely to take the chair? He rushes from the pew into the aisle, retreats down the aisle, takes his stand in the midst of his party, and a chairman without a chair, a Moderator with no insignia of office, he proceeds to business, without even a single call to order. The Assembly thus organized is not constituted by prayer. Who indeed was there among them all, hardy enough to address the God of peace, and ask his blessing on that hurried and boisterous proceeding? No, by these grave and orderly gentlemen, question upon question is put and seconded, being succeeded by volley after volley of "Aye!" "Aye!" "Aye!" shouted forth by men rushing from every part of the house, huddling together in confusion, and hurrying onward to their strange destiny. See them dashing and foaming through the open portals, and when they have passed by, fearing least those who remain behind in mute astonishment, do not

know that they have gone, sending back a vociferous messenger to announce their departure.

And did these gentlemen "maintain great gravity and dignity while judicially convened?"

The space of time which these proceedings occupied is a matter of curious inquiry, and the consideration of it may assist us to determine, whether, supposing the questions orderly in themselves, we had an opportunity to vote, or could be bound by intendment of law. Order, in parliamentary language, is regular succession in business, and nothing else. To decide, then, whether certain proceedings were in order, it is necessary to inquire, whether the time which they occupied was sufficient for them to be perfected. Now what was the space of time which elapsed between Mr. Cleaveland's rising, and the departure of the New-school body from the church in Ranstead Court? First fix this in your minds, from your recollection of the evidence, remembering that it was intended, that all should be done in the shortest time possible; and then you will inquire whether the time so fixed was long enough for every thing said to have been done, to be done decently, and in order. I think the time was from four to seven minutes.

Mr. Meredith. The only Episcopalian examined, said twenty minutes.

Mr. Preston. His testimony is very doubtful; but, gentlemen, you must make your own conclusion in regard to the matter, and then, having ascertained the time, see what was done. In the first place, Mr. Cleaveland made a sort of speech, or recitation: you have here ten or fifteen lines of confused remarks. Then he made the motion that Dr. Beman should take the chair, put the question upon it audibly and distinctly—some, I believe, say with deliberation—first in the affirmative, and then in the negative. Then a motion was made, for the appointment of temporary clerks, on which also the question was put and reversed. Then a nomination for Moderator, with the question on Dr. Fisher put and reversed; and the same in the choice of clerks. Last of all came the motion for adjournment, the question on which was also put and reversed. In all then, from fifteen to twenty different propositions were put to the Assembly, were put audibly and distinctly, as is alleged, in the time limited, whatever that may be. Now, I venture to say, that if so many propositions were put in any time suggested by any one of the witnesses, no parliamentary body has ever before proceeded with such extraordinary despatch. What the New-school party did, if we are to credit their assertions, was this: They dissolved one body, and completely organized another, all in due form; and translated every vestige of power from one to the other—the whole in from four to seven minutes. It was the creation of a world as regards the Presbyterian Church. The creation of our world was with Omnipotence a work of six days; but here a world was annihilated, as well as a world created; and both the creation and annihilation occupied but from four to seven minutes!

I know, may it please your Honour, how wearisome are these minute investigations. Nothing but the exactions of duty would compel me thus to exhaust your time, and as I fear I may be doing, your patience, by such inquiries. But I see where the case presses upon our opponents,

and must therefore endeavour still farther to strengthen the position, that their proceedings were out of order. I think that I am not going beyond the exigency of the cause. I have proved them out of order by a mass of collateral evidence, but shall now endeavour to demonstrate, that they could not have been otherwise than out of order; that they themselves did not otherwise intend; that they were acting apart from us, as a separate body, and it cannot now avail them any thing to assert the contrary. I will show that in truth, these gentlemen never, either then or since, considered themselves as acting in conjunction with us. I will show, and defy them to contradict the proof, that they were entirely segregated from us. After this investigation, it will be impossible for them, I think, to pretend to be the inheritors of the property and name of the Presbyterian Church. I know that this will strike some of you, gentlemen, as very bold language, but you will find that the point will go through and through their case. I propose to give it a blow upon the head, and expect to see it tremble throughout the whole nervous system. I say that the New-school party did not consider themselves as part and parcel of the same body with us.

The first witness which I shall examine on this subject is Mr. Cleaveland. What says he? The paper which is found on the New-school Minutes is not the same that he read, which it is very desirable should be given to the public eye; but it has been expressly adopted by the New-school party, as containing the substance of the original. This is its language:

"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, &c."

They have thought proper to give us the substance only of this remarkable paper: we have in vain made efforts to get at the original, or an exact copy. "As *we* had been advised by counsel," says Mr. Cleaveland. Who had been advised? The General Assembly of which by intendment of law we formed a part? Had *we* the *Old-school* been advised? Did *we* institute the proceedings? Did Mr. Cleaveland *mean* that we had been advised? It is evident that this was not his meaning; that he did not consider us a part of those whom he addressed. But let us look at the remaining portion of the paper. "He trusted it would not be considered as an act of discourtesy." Discourtesy? To whom? Surely not to his own party—those who had advised and prompted the measure; but to *us*, the members of the Old-school. His language was, "I hope that you, gentlemen of the Old-school party, will not consider us discourteous to you, if we now proceed to organize the General Assembly of 1838." Can any thing be more clear than that they intended a select organization of a set of men to whom we did not belong? Was there not in these words a plain declaration, that they were about to form a separate organization; and an appeal to our courtesy, that we would not interrupt

them? Let us suppose, that without informing the Old-school of their real design, they had requested permission to use the house for the purpose of organizing themselves, and permission having been accorded, had taken advantage of this courtesy, to deprive us of our rights by a legal intendment: of what gross fraud would they have been guilty! No, this had not at that time entered their heads: they did not deliberately set a trap, a pit-fall, in which their brethren were to be caught by legal intendment. Suppose that we had acquiesced, being requested to stand silent, while they performed a certain act; and that they now came into court, and said "Gentlemen we deluded you. You agreed to remain silent, and this can be construed into an acquiescence. We can make it appear that, by intendment of law, the vote was put to you, and you assented to our act." Would you give them your verdict? Why, if we had voted upon their resolutions, after permission had been asked and given, for them to have the use of the house, they would have complained of us as disorderly and riotous: they would have said, that, after promising not to interrupt their proceedings, we had assailed them and voted them down; that we would not allow them to take advantage of the only chance that they had of engrafting themselves on the Assembly of 1837, as they had been advised to do by counsel learned in the law. The preceding motions were proposed to us through our Moderator, but Mr. Cleaveland's was never proposed to us in any manner.

Let me suppose still another case:—Suppose that his paper had not on its face exhibited his intention; and that in order to entrap us, the other party had sent a messenger, who had informed us that they intended to make a separate organization, and begged that we would remain silent; that, on this understanding, we had complied with the request. And suppose they should now say, "We have deluded you: you rested on a false security." Why, gentlemen, this would have been setting a legal steel-trap. Such is not the conduct of honest, honourable, Christian gentlemen. No court would sustain so monstrous a fraud. Yet I cannot see that that case is stronger than the one before us, if our opponents really did what they now pretend. Mr. Cleaveland gets up in the rear of the Old-school party, and says that this time and place are of very great importance to him and his friends; that he hopes we will not consider it discourteous, if he should proceed with a small matter of business; he trusts we will not interrupt him. He thought it necessary to make a formal apology to us; and his words certainly implied the asking of permission to do what he contemplated: it was a matter of necessity, and he begged that it might not be considered discourteous. This word, "we" clinches upon our opponents the conclusion that they intended a separate organization. I will leave no dispute respecting the manner in which they considered themselves as acting. Out of their own mouths shall you convict them. Here is a Pastoral Letter, in which the Assembly of the New-school addressed all the Presbyterian Churches of Christendom, with a solemn exposition of what they had done. I venture to say, before I commence reading it, that if you find them really to have done what they here say they have, it is utterly impossible that you should give them a verdict. In this Pastoral Letter, they first advert to the difficulties that had sprung up in the Church, and lament over them. They

recognise the existence of two distinct parties, and the differences that had arisen betwen them. They then state the efforts that they had made to restore harmony, union, and peace, to these two divisions of the Church.

"As the result of these efforts," say they, "to change the terms of subscription and union, the General Assembly of 1837, "convinced that the 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—" "*We* did?" Who are "we?" Who had been "apprised by counsel?" We, the Old-school? Had we, by intendment of law, taken advice of counsel? It was the New-school that had been so advised. "We," certainly cannot mean the whole General Assembly, for at the time here spoken of, the body was not in existence. "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 ——" Were they acting as the Assembly, before the Assembly met in Ranstead Court? This meeting for consultation was not identical with the Assembly. We cannot by any trick be made a part of it. "We," the whole body of the commissioners, could not have sent a "proposal to a large number of commissioners to the Assembly met in another place." Well, "we did" 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 commissioners from all the Presbyteries recognised in the organization of the General Assembly of 1837, in all respects according to the constitution, &c." The commissioners present were to do this. Present where? Not in the Assembly, but in the consultative meeting. "We," who had met for prayer and consultation—"we," who had been advised by counsel—"we," the New-school, resolved, "That should a portion of the commissioners to the next General Assembly——" What portion? those who were present? No, but those who were meeting, "in another place"—the Old-school—that should they attempt a certain thing, it will be our duty—"the duty of the commissioners present"—"to organize the General Assembly of 1838." Such was their resolution before the meeting of the Assembly, and a little farther on they say, "By this answer, all prospect of conciliation, or an amicable division being foreclosed, we"—the same "we"—"did after mature deliberation and fervent prayer, proceed, at a proper time and place, to organize, in a constitutional manner, the Assembly of 1838." Yet after all, *we* acted with them by intendment of law; *we* sent a communication to ourselves, and returned ourselves an answer; and *we* proceeded to organize the Assembly. Have I not proved, gentlemen, that they were not part or parcel of us; that they never intended that we should act with them, or gave us a chance so to do? If their's is a perfect organization, it must be for some reason which they did not at the time contemplate.

(Here the jury were allowed a recess of ten minutes.)

I am aware how very tedious and exhausting this inquiry is becoming,

but I feel that I am performing a solemn duty. The case is one of very great consequence, and exacts from us a careful discharge of our obligations. I must therefore endeavour to omit nothing—to clear up every thing. I stand here to defend, not merely the immediate parties to this suit, but thousands of Presbyterians scattered thickly over the whole broad territory of the United States. The prayers of a thousand pulpits bear this cause as their burden up to the throne of grace. I crave therefore, however exhausted you may feel, your patient attention, and your indulgence.

I have now nearly done with the consideration of the points of order involved in this case, and it seems to me, that I have effectually demolished the proceeding of our opponents. However, though the monster is beaten down to the ground, it will be well to give him one or two more blows. Mr. Cleaveland was out of order, from the fact, that previously to his rising, a call had been made upon the Moderator to enforce a standing rule of the Assembly, that the first business of the body should be the appointment of a Committee of Elections. It appears from the testimony, that a motion had been made for the appointment of that committee before Mr. Cleaveland rose. Now if such a motion was actually pending before the body, any other question raised while it was pending, was disorderly, unless it had no relation to the subject matter of the former. The appointment of a Moderator is not a privileged question, nor was it at all german to the proposition which was before the house, as being an amendment, or otherwise. Besides, in all parliamentary bodies the standing orders which they have established must invariably precede and override every other business. And a formal vote that such an order shall be obeyed is not necessary, but the call of a single member is sufficient to compel its enforcement; and his call must of necessity prevail against any other proposition whatever. These are what are called privileged questions, or subsisting orders of the house. Now the General Assembly has such a subsisting order to this effect:—*Min.* 1826, *p.* 40.

"The first act of the Assembly, when thus ready for business" (i. e. immediately after the report of the clerks, or 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."

This was a subsisting rule of the house, and its enforcement might be called for by any member, no matter whom; and even if no call had been made, it was the duty of the Moderator to enforce it. The execution of the rule was the first orderly act which the Assembly could perform, and was a matter of course—a privileged proceeding of fundamental importance. Any other business, which might have been allowed a priority, would have been *ipso facto* out of order, even though the attention of the house had not been called to its subsisting rule. Any member, I have said, may make the point of order, and insist upon its being first disposed of. Now, in this case, not only after the execution of the established regulation had been called for, did Mr. Cleaveland make a motion in defiance of the regulation, but after being called to order, and informed of the existence of the rule, persisted in his purpose. The Moderator, Dr. Elliott, has, on his oath, informed you that he could not enforce this standing order, because of Mr. Cleaveland's persistence. He says dis-

tinctly, that he was called upon to enforce it, but was prevented from doing so. And further, that it was enforced, as soon as Mr. Cleaveland with his friends had retired from the house. Now, the rule in regard to standing orders, which I have laid down, is, in its application, the commonest in the world. Hatsell gives it in these words:—2 *Hatsell*, 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."

Then, in a note to this passage, we find the following—"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 cases 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."

You see then that for the enforcement of a law of the house any member may call. And how can the house get clear of the difficulty, if it does not choose to conform to such a rule? Only by repealing it, by a vote of a majority, or two thirds, according as the regulations may require. So long as the rule subsists, any member may call for and compel its execution. To give a case in point: if the General Assembly, or any parliamentary body, should decide that the order of the day at twelve o'clock, should be the appointment of a Committee of Elections, the sound of the clock striking the hour of noon must arrest all business—even a member in the middle of his speech. Or, if the tongue of the inanimate instrument should fail to make him pause, he would instantly be called to order. And even if the house should prefer to listen still longer to the speech, any one member might compel all the rest to attend to the order of the day, unless the rule should be suspended by a solemn vote. The experience of parliamentary bodies has shown that it is better always to decide such matters beforehand, and not leave them to the caprice of the moment. Therefore the call for the execution of the standing rule of the Assembly, in regard to the appointment of a Committee of Elections, was in order, and no other business could come before it: it crushed every thing else, and especially the proposition of Mr. Cleaveland. While it was pending, no man, not even the Moderator himself, had a right to propose any other question. And if another had been proposed, the members would not have been obliged to give it their attention, and would not be bound by a vote upon it: they could not be in possession of one, while another was before them. You cannot take the sense of a house on more than one question at a time. Yet during the time a question on a Commitee of Elections was pending, Mr. Cleave-

land and his friends proposed half-a-dozen others, and now say that they took the sense of the Assembly upon them all. Well, if the members had voted—every one of them—the Moderator being opposed to the proceeding, and endeavouring to enforce the subsisting rules of the house, I maintain that the decision of the Moderator would have been right, and the whole house besides in the wrong. I make this point of order, on the ground of the standing rule of the Assembly, and the authority of Hatsell.

So far as Mr. Cleaveland's motion is concerned, I here dismiss the question of order. I have greatly deceived myself, if I have not demonstrated, that, in many particulars it was disorderly, and that his proceeding must be considered as the mere interference of an unauthorized individual. I now propose to make a point of order applicable to both Cleaveland and his colleagues. If I can establish this point the relators must be turned out of court. Mr. Cleaveland made his motion, on the ground that the constitutional officers of the Assembly had refused to do their duty. Dr. Patton, Dr. Mason, and Mr. Squier, had all offered resolutions previously to the full organization of the Assembly, and for refusing to entertain these resolutions they say the officers were removed. They proceeded to organize the Assembly, because Dr. Elliott had declared certain motions out of order, until the organization had been completed. What do you think, gentlemen, of their completing the organization of their Assembly before passing the motions? They dissolved our body, because we would not perform a certain act, which they said was essential to our existence; yet they themselves afterwards neglect its performance. After choosing Dr. Beman chairman, or temporary Moderator in the place of Dr. Elliott, they proceed to elect their officers, and to organize the body, and then adjourn. Not until after all this had been done, were Dr. Patton's resolutions introduced and passed upon. *We* cannot organize an Assembly, because we have excluded certain resolutions or certain persons; but they can organize themselves before admitting these same persons or resolutions. They declare their Assembly organized; then it is moved that they adjourn, and the motion is carried. "The Moderator then," says the New-school Minute, "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."

Remember that it was for a refusal to admit these resolutions, that our Moderator and clerks were turned out of office, and the Assembly reorganized out of its original elements. Remember too, that the delegates from the four exscinded Synods, the rejection of whom was complained of, all actually voted on the several questions put by Mr. Cleaveland, Dr. Beman, and Dr. Fisher, and that after every one of these questions had been finally determined a resolution was passed that they should be allowed to vote! First, our opponents affirm, that the Assembly cannot be organized until certain names are added to the roll, and on this account repudiate our organization; then they organize themselves, proceed to business, and *afterwards* add these names by vote. Is not this blowing

hot and cold with the same breath? Every one must start back from the monstrosity of such a proceeding. These men, after completing their organization, passed upon a resolution proposing the admission of the delegates from the four Synods—the very thing which we ourselves, from the beginning, had proposed to do: we had never refused to do it.

Yes, may it please your Honour, they censure the Moderator of our Assembly, divest him of his dignity, turn out our clerks, neck and heels, and then, by their own vote, show that the commissioners, because of whose rejection by the Moderator and clerks, they proceeded thus, were not entitled to their seats until an act of the whole Assembly had admitted them. By the last of Dr. Patton's resolutions, the clerks—the new clerks—are directed "to form the roll of the General Assembly of 1838, 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, Genesee, and the Western Reserve." In virtue of this act of adoption, came in these rejected members, a chance to pass such an act not having been given to us; and, wonderful anomaly! all of them voted on the question of their own admission! Such are the difficulties to which our opponents are driven.

> Oh! what a tangled web we weave,
> When first we practice to deceive!

They have been caught in their own trap—have subverted their own principles. I leave Mr. Cleaveland to you, gentlemen of the jury.

I now take up the whole of the proceedings of the organization in 1838. I have not as yet consumed so long a time as my learned friend did in his exordium; the substance of our argument, however, will probably occupy as much space as the preliminaries of the other side. The first remark which I make upon the organization of the Assembly, on the 17th of May, in the church of Ranstead Court, is this: If the impugned proceedings of 1837 were valid, and can be vindicated, then, in any and every point of view, the Old-school organization of 1838 was correct and constitutional. Farther, supposing the acts of 1837 as unconstitutional as you please, still our organization in 1838, either with or without those acts, was substantially correct, and can be vindicated in a court of law. By the resolutions of the Assembly of 1837, the commissioners from four Synods were stricken from the roll, for want of a proper constituency. By a solemn act of that body, they were decided and declared to be no part or parcel of it. Here two questions arise, and let me distinguish between them. First, was the original act of exclusion invalid? Next, supposing it so, what was the duty of the Moderator and clerks, who presided over the organization of the Assembly of 1838? Both these questions I shall examine, beginning with the last.

What was the duty of those elements of the Assembly of 1837, which still subsisted in 1838? What were these elements? The Moderator and clerks, who were the only surviving relics of the former body. Who is the Moderator? An executive officer of the Assembly. It is necessary that you should understand exactly the nature of his office. His duties are prescribed in the Form of Government, Chap. XIX.

"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 statement of the object of the vote; and the vote being taken, he shall 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.

"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."

You perceive from this the general nature of the powers deposited in the hands of the Moderator. He is to execute and enforce the laws of the Assembly, and is the only channel of communication between individual members and the house. *Ex officio* he has neither legislative or judicial powers. He is not entitled to judge of the propriety of any thing determined upon by the Assembly, nor of its constitutionality; but must enforce whatever the house orders: as to him, any law of the body, of whatsoever character it may be, is obligatory. All executive officers are of the same nature: it is not their business to judge of the legality of measures which by a competent authority they are called upon to execute. Such an officer cannot say, "I believe this law is unconstitutional, and therefore shall not carry it into effect."—Here the officers of 1837, in proceeding according to the requisitions of their office, to organize the Assembly of 1838, on looking into the minutes of the former year, find there an act of the body, an act unrepealed, commanding them to exclude certain persons from the roll. It is their business to execute this law: they must leave it to others—to the legislative or judicial power—to repeal it, or declare it void and inoperative. For an executive officer to judge of the constitutionality of an act is a gross violation of power; it is erecting an appellate tribunal utterly unknown to the law. Admit that the act of 1837 was unjust, were the Moderator and clerks competent so to pronounce it? They and it were emanations from the same source. Would they not have transcended their powers, and acted dis-

orderly, if they had said, "We will perform our duty, according to our own understanding of the law and Constitution?" I hold that they would have been bound to execute the order, though persuaded that it was unconstitutional, and to refer all complaints to the body itself, by which alone the order could be repealed. Did they do so? They stated explicitly, that they were bound by the law so long as it remained unrepealed, and, when urged to insert the names of the excluded commissioners in the roll, answered, that the rights of those commissioners must be adjudged by the General Assembly. To require them to do otherwise was to require them to assume the responsibility of repealing a solemn act of the Assembly. They referred the whole matter to the decision of the only competent tribunal, that which alone could, and which, if the relators are to be believed, finally did, determine the question, knowing that the clerks could not. They repealed, by a solemn and formal vote of the body, the very enactments which they say were so utterly void, that Mr. Krebs should have disregarded them.

But these executive officers were officers of the new body, in virtue of the powers of the old Assembly. Their duties in the new house depended entirely upon what had been done in the old. The Assembly of 1837 propagated that of 1838, by providing the means of its organization. Pledges, it is said, had been exacted from the clerks. Now, this is immaterial whether true or false; but it is, besides, not true. It is not so either in fact, or by legal intendment. The difficulty here is in the manner of using the English language, the words being susceptible of two meanings. Our opponent say, that pledges were exacted and given: we, that they were exacted, but refused. These officers replied, "We will give no such pledge; but we will take occasion to say what we consider to be our duty." This was altogether a different thing from that charged by the other side. *Ex mero motu* they declared what they intended to do. The rejection therefore of the commissioners was the result, not of Mr. Ewing's resolution, proposing the exaction of a pledge, but of their own conclusion that it was their duty to carry into effect the disowning acts of 1837. They were entirely independent of the Assembly of 1837, excepting as it was an authority on which they relied.

Now, gentlemen, admitting the unconstitutionality of the law, how clear is it, that a mere executive officer, entrusted with its execution, must consider it a solemn act of a competent legislative or judicial authority? The clerks referred the question to the house for decision, and they were right in so referring it. According to the rules which have been read, the clerks first decide whether each commissioner is entitled to his seat, and in this case they decided that certain commissioners were not. The executive tribunal adjudges that these cannot be admitted to the roll: who then, can admit them? The house, and the house only. At what period? Before the organization is complete? The clerks having rejected them, it became necessary that the question should come before the Assembly, and by a standing rule of that body, the matter must be referred to a Committee of Elections, appointed by the house, that is, by those members whose seats were undisputed, who had been admitted by the clerks. The clerks having made their report, the first business in order, is the appointment of this committee, to which are sent all doubtful and disputed

cases. The clerks had a right to decide, when the question was within their jurisdiction: they must decide according to their own judgment, and the reasons of their decision are not open to investigation. God forbid, that this or any other civil court should entertain an appeal from an ecclesiastical body, in regard to a matter confessedly within the powers of the latter! Once establish that the clerks had the jurisdiction, and with their reasons you cannot meddle. Else you make the civil courts appelate tribunals from the ecclesiastical—a most anomalous result, to which none of us is prepared to submit. Whether the clerks did right or wrong, is not to be decided here. Their judgment was absolute, until the matter had been referred to the Committee of Elections, they had reported, and on such report the question had been proposed to the Assembly. Then, and not till then, could the subject come before that body. This course was open to the gentlemen on the other side; they knew that in this way they could bring the matter before the house; and if, by a solemn decision, the house had decided to abide by the acts of 1837; if the subject had been fairly met, and the commissioners had still been excluded, then the very question which they now desire to present, would have arisen.

When might this proceeding have taken place? Not until the roll had been completed. If the mode and manner which I have explained be conceded to us, then the question of time is immaterial. Still I put the case upon that ground also. The proper time for the Assembly to act upon the rejected commissions was after the report of the Committee of Elections: before this the organization was but inchoate. The Assembly sits during the process of its organization by the act, and under the officers of the preceding Assembly. First, it is constituted with prayer, and then proceeds to the business of forming its roll. When is it prepared for all other business? The *constitution* of the body is a peculiar process, and not identical with its *organization.* The case is this: the Moderator offers a prayer, and then in the usual form declares the Assembly *constituted:* afterwards he proceeds to *organize* the house; and until this was effected there was no house by which any name could be added to the roll. But these gentlemen did not wait for the complete organization of the body. Who were the Assembly at the time of their application? All the men, women, and children, in whose presence the constituting prayer had been offered? This is absurd. All who pretended to be members? No, certainly not. Those whom the clerks had rejected in the initiatory proceeding formed no part of the body. It was composed of the members whose rights were undisputed, and all such that were present must have been admitted to their seats before the organization could be complete, or the house could perform any valid act. If but fourteen commissioners with regular commissions were present, they, *ex necessitate rei*, constituted the house, for all the purposes of its preliminary legislative existence. They were the only persons to whom a question could be put. If then, the application of the rejected commissioners was made to all those present who claimed a right to seats, it was made to some who were not entitled to vote upon it. Such claims must be determined by the undisputed members. How monstrous, that on a question in regard to the validity of a commission, the commissioner himself who demands a place should give his vote!

There is another fact which should here be noticed. The proceedings

of the Moderator are supposed to have vitiated the organization of 1838, to such an extent, that our opponents were entitled to do what they did. But the Moderator is not the house. Dr. Elliott, indeed, was but the Moderator of the Assembly of 1837, continued in office by that body to preside in the inchoate organization of 1838. The house then were not responsible for his acts, and should not have been punished for them, unless they sustained him; and that they did has not been proved. Was any question put to the house? An appeal was taken from the decision of the Moderator, that a motion was out of order at that time, and the appeal was declared out of order. Now are we to take for granted that the house sustained him in his decision? The opposite party must contend that we did; or else why did they consider the organization of the Assembly, so far as it had gone, entirely void, and proceed themselves to re-organize it from its original elements? But at the same time it is necessary to another part of their case, to maintain that we did not acquiesce in the Moderator's judgment. For one set of purposes they must establish one ground, and for another set, a ground entirely opposite. Both propositions they must demonstrate. In what endless mazes does cunning usually involve itself!

Let me explain this matter more fully. They say that the Moderator acted badly, and that they turned him out of office on account of his misconduct. Then as they left us behind, and disregarded our partial organization, they must assume that we had sustained him in wrong doing. We had no opportunity given us of acting at all in the matter. But, say the gentlemen on the other side, you acquiesced in his refusal to put the appeal. What question is before a house when an appeal is taken? The question whether the decision of the presiding officer shall be sustained. Was this proposed to the house? Did Mr. Cleaveland venture to say, "Gentlemen, the Moderator has refused to do his duty; therefore, I put it to you, will you sustain him?" In this there might have been some appearance of wild justice. But he did not put any such question, and therefore we could not have acquiesced in the Moderator's misconduct. He was, besides, not *our* Moderator: why should we be responsible for him? A dispute arose between him and a member, and the latter was checkmated; but how did the house, or how could it, interfere? There cannot be any acquiescence in this case by legal intendment. The question which I have mentioned was the only one that could have been put, even if, *ex necessitate rei*, any body else than the presiding officer could have put it. But farther, this was not a case in which a person was justified to take the law into his own hands; it was not a case unprovided for by parliamentary rules. The refusal of the speaker of a parliamentary body, to put the question on an appeal, if he is wrong, is a breach of the member's privilege; and a question of privilege immediately rises and supersedes every thing else. The member may say, "I stand upon a question of privilege; I move that the speaker be impeached; that the serjeant-at-arms take him into custody, and we proceed to try him; and that the clerk be put in his place." He may be deposed first, and afterwards, if the body is authorized to inflict such penalties, may be fined and imprisoned. But when was it ever heard of, that the refusal of an executive officer to perform his duties, endowed the person aggrieved with executive powers? If a sheriff refuse to execute the process of the court,

are you therefore at liberty to execute it yourself? If the President of the United States refuse to fulfil the requirements of his office, do you thereby become President of the United States? Or because the speaker of a house is recreant to his trust, does that endow you with the qualifications of a speaker? He may be prosecuted and degraded, and then you may bring the question, which he had refused to put, before the house. This was decided two centuries ago in the British Parliament. 2 *Hatsell.* 175, 6. 5 *Grey*, 133. *Sutherland's Man.* 95. Thus the law provides a remedy for the misconduct of a presiding officer, without a revolution, without force and violence—*ultima ratio regum.* All the proceedings of the speaker are subject to the supervision of the house, but cannot be brought before the body, until he has first been impeached.

I now propose to call your attention to the circumstances that show each part of the proceedings of the New-school party to have been out of order, and not capable of binding any body. I appeal to the testimony of their own minutes. First Dr. Patton made a motion; and you perceive, gentlemen, that all these things were done upon advisement. The drama had been written out, the various characters cast—each was in his place, and anxiously seeking a hole into which he might thrust himself. "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 Third Presbytery of New York, then rose and asked leave to offer the following preamble and resolutions." The benediction had scarcely fallen from the lips of the Moderator, before the farce commenced, by Dr. Patton's presenting his preamble and resolutions. To whom, or to what, did he present them, and for what purpose? Certainly, at that time, before the roll had been reported by the clerks, there was no house in existence, unless it consisted of all present—the men, women, and children collected in the church. To this mixed multitude then the Rev. William Patton, D. D. addressed his preamble and resolutions. "The Moderator declared him to be out of order, and refused to allow them to be read." He said that the first business—that which superseded every thing else—was the report of the clerks; that all this rigmarole of Dr. Patton's was out of order, was premature, as there was no house to put any question to. Dr. Patton appealed from the decision. I am inclined to think, that the refusal of the Moderator was unexpected, and disarranged their plan of operation. Dr. Patton and his friends knew full well that if the resolutions offered had been put, the decision would have been against them, and to meet that state of things, they had shaped their course. The Moderator declared the appeal also 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. Yet by law the clerk was the person first entitled to the floor, and the next business after his report, was the appointment of a Committee of Elections. Dr. Patton was endeavouring to trample upon all law and order; to embarrass the process of organization; to force the Assembly to vote upon a disorderly resolution. He was in direct opposition to the rules, and being reminded of this, was

instantly struck dumb, and took his seat; so obvious was it that the clerk's report upon the roll was absolutely necessary to the very existence of an Assembly. There was an end of Dr. Patton.

Dr. Mason's part came next. "Thereupon the Rev. Erksine 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, Genesee, and the Western Reserve."

Was this a response to the previous call of the Moderator, in whatever sense you may understand that call? If it was a call for commissions not presented, then it is clear that Dr. Mason's motion was not a response. If for commissions that had not been enrolled, still it was evident that it contemplated cases of an entirely different kind from those embraced in that motion. The call, no matter in what words made, was clearly for commissions to be presented to the clerks, and by them, if regular, enrolled; while Dr. Patton offered a formal resolution, that certain commissioners who had already been rejected by the clerks, should be added to the roll—a resolution entirely unprecedented and disorderly. The Moderator called for business which the executive officers were to transact: Dr. Mason's application was to the legislative power—it was no response to the call. These executive officers—the clerks—were to receive all commissions presented in obedience to it, and on presentation they were to be enrolled or rejected by them. If rejected, they were to go to the Committee of Elections. Knowing all this, Dr. Mason, nevertheless, appealed directly to the house; not to that committee—not to the tribunal established by the Assembly. Superseding the Committee of Elections, he applied primarily to the house itself. He was clearly out of order.

The object of the Moderator was to form the roll, in order to ascertain who were entitled to vote: the object of this proceeding to supersede the decision already given, and bestow a vote upon all who chose to claim the right of membership. It was an appeal by the rejected commissioners to themselves. Dr. Mason proposed that the gentlemen of the four Synods, should sit in judgment on their own case—should vote upon the question whether they had a right to vote.

He did not move for the repeal of the standing regulation of the house, in regard to the Committee of Elections. It may be that two-thirds were necessary to carry a motion for the repeal of that regulation, while he desired to take away the decision on the disputed seats from the committee, by a naked vote of the Assembly.

I now direct your attention to Mr. Squier, who also played a conspicuous part in the drama. "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, &c." We can despatch him in very short order. Mr. Squier was one of the rejected commissioners, and without any pretext of membership whatever, or any *prima facie* claim to a seat, presumed to submit a motion to the Assembly. I might, with as much propriety, do the same in any body under heaven. The only tribunal before which his case had come, had decided that he was not entitled to a seat. Yet he undertook to make a speech and a motion—

a most unprecedented undertaking, for one, who, so far from being known as a member, was most notoriously not so! It bespeaks the disorderly nature of the whole proceeding. The thing was absolutely ludicrous and absurd. There was not a woman or child in the whole assemblage, that had not just as good a right to deliver a speech as had Mr. Squier. He was disposed to make a very early display of his abilities as a speaker. He was out of order by his own showing. He knew, not only that he was not a member, but that until the Committee of Elections had decided him to be such, he had no right to open his mouth. Besides, there was as yet no Assembly to whom he could put a motion. To whom did he offer his resolution? The roll was not yet complete. He offered it, then, to all present, himself among the rest. It was a solecism in terms, and a confusion of ideas, for him to make such a motion, not being a recognised member.

Another matter occurs to me, in connexion with this proceeding of Mr. Squier's. He declared that his commission had been presented to the clerks, and rejected; and in the same breath showed, that a General Assembly had decided that he was not a member. In the face then of both executive and legislative decisions, he claimed to be a member, entitled to make a motion. The Moderator said to him, "We do not know you, sir." Could any reply have been more simple and appropriate? "The Assembly does not know or recognise you: you are not a member, by your own showing." No answer could have been more correct. "We do not know you," included every thing that suited the case. Yet the learned counsel has thought it his duty, on account of this simple declaration, to cast an imputation upon Dr. Elliott, which you must think strange—which you cannot but know to be inappropriate and gratuitous. He has allowed himself to accuse that reverend gentleman of pretending to hurl terrible anathemas at the head of Mr. Squier, and decide upon his eternal destiny. To assert, that his heart boiled over with malevolent passions; that he presumed to usurp the province of our last Great Judge, and in the bitter malignancy of his spirit, to send a fellow creature to eternal damnation. Is it not pushing the thing a little too far, to impute to him a denunciation of so awful a character? He had no such intention: the imputation is groundless. He did not allude to the anathema of that awful text. The supposition that in the excitement of feeling—the boiling tempest of passion, he uttered words, intended to bear so dreadful an import, betrays the morbid imagination of our opponents. They are ready to suppose every thing diabolical in our conduct—I will not say by reflection from their own bosoms, but from the excited condition of their fancies. Is it not a high proof of an excited and morbid imagination, that they can ascribe to Dr. Elliott this damnatory denunciation? He repels the imputation with pious scorn and horror! But it is of a piece with other things; with the picture which they have drawn of the Old-school party, sitting in solemn conclave, tremulously expecting the approach of an adversary; with their taking advice of lawyers, and under legal direction concocting their minutes, as if fearing all sorts of strange occurrences. In the heat of their distempered minds, they see in every man a lawyer, and in every word a quirk or quibble. Intending to spread a snare themselves, they walk very cautiously, lest they should be first entrapped. Well, this feeling they have imparted to the learned

counsel, in giving him instructions: that it originated in his own mind, is not to be conceived.

Dr. Mason has manifested the same wild and creative imagination. He tells us that he copied his roll from that read by Mr. Krebs, and from the newspapers. "How did you do this? "Why, I did it." "Did you see Mr. Krebs' list?" "No." "Did you see the commissions?" "No—I will tell you how I did it. I heard Mr. Krebs read over the roll, and I wrote down some of the names." "Well, did you make out the whole of your roll from his reading?" "I only corrected it." "Where did you get your original list?" "I got that from the newspapers, and as Mr. Krebs read, I corrected it, putting in or striking out names as was necessary." Here was a most violent effort of the imagination. He had also a roll which Mr. Krebs had not: and this was on a separate paper. That he got from some other source; and these were the rolls which he held in his hand, when he acted as clerk, standing in the aisle, like Dr. Beman, the chairman, who stood up in his imaginary chair. "Had you any paper, pens, or ink?" "No, but for all that I was a clerk." "Well, how did you make up your roll out of the two lists?" "Why I considered the two as one, and so considered the roll formed." The New-school roll then was formed by an act of consideration, an effort of the imagination; may it please your Honour, by an *intendment of law.* I don't object, however, to the gentleman's having any thing, or all things in his imagination, even as he had the pen, ink, and paper.

Mr. Gilbert, too, discovers a most potent fancy. He is an ardent party man, and extremely zealous in this controversy. Well, he comes to the church in Ranstead Court, and essays to pass through the session-room. As, labouring under terrible excitement, he passes by the place where the clerks are sitting, instantly he begins to amagine that they have some mysterious purpose, are engaged in some diabolical machinations. They have pens, ink, and paper, and hold frequent consultations. "What a horrible conspiracy is here! Let me only catch a word, and I'll blow them all up." Hear the awful sounds! Dr. McDowell says to Mr. Krebs, "Lock that door!" What an awful conspiracy! Bars, and bolts, and dungeons, crowd upon his imagination. "Lock that door!" The words have left an indelible impression upon his mind: they are always present to him waking and sleeping. He is called into this court, and they burst from his quivering lips—"I heard him say, 'Lock that door!'" What infernal images must be ever running riot through his brain—what

> Hydras, and Gorgons, and chimeras dire!

when to such an act as the locking of that door, he could attribute enough importance to have conned over the words—learned them by rote, in order to cast them into our teeth. What frightful fancies would have possessed his mind, if Dr. McDowell had leaned over the table, and whispered, "Brother Krebs, will you lend me your knife?" In horror he had fled from the house. He would not have been seen again in that Assembly. I doubt not that by this time his amagination would have been so fearfully excited, that he would have expected to see a bowie knife, at least nineteen inches long!

Gentlemen, there are other points on which I deem it necessary to say a few words. I would leave them to the learned counsel who is to fol-

low, if I did not feel that the duty I have assumed requires something more at my hands. If you will grant me farther indulgence, I will touch upon the remaining points to-morrow morning.

Court adjourned.

WEDNESDAY MORNING, March 20th—10 o'clock.

May it please your Honour—Gentlemen of the Jury—I take it that, in every organized assembly, however constituted, independently of its own special rules, and of general parliamentary law, there are always certain causes existing externally, which from the general nature of things, must operate as strongly as any actual regulations. In other words, there are circumstances, which, independently of all rules, from their own nature, control a body, though no reference may be had to their existence. In examining, then, into the acts of any organized body, with a view to determine whether they have been according to law, it is essential to inquire, whether, at the crisis contemplated, there did not exist circumstances rendering it impossible to establish any plan of action. Where there is a moral or physical disability, this fact alone is sufficient to reduce the body to a state of dissolution, and of incapacity to arrive at any valid result. To illustrate this position: a man may by the laws of God and of his country do thus and thus, supposing his organization, physical, moral, and intellectual, complete. But if circumstances exist, without, to prevent the exercise of his accustomed powers, the same thing cannot be predicated of him. If he receive a blow upon the head, which renders him senseless, it is obvious that nothing can be predicated of him as an organized being. So there may be circumstances affecting an assembly of men, which prevent all regular organic action, and produce either temporary incapacity or dissolution. Well, in this case, what aspect did the Assembly of 1838 present, considered as an organized house—a corporate body, if you will permit the expression: what was its condition? Under the direction of the testimony, I tell you, gentlemen, that at the time of these proceedings, it was rendered physically incapable of corporate action; that it had received a blow upon its sensorium, which had deprived it of its senses. Once admit that the members of the Assembly were physically incapacitated for regular action, and you divest them of all accountability to law; they cannot be held bound by any legal intendment. Unquestionably the body would have been dissolved by the irruption of a foreign body, violently separating its members, and by force taking possession of the place of meeting. Unquestionably, on the 18th Brumaire, when the troops of Napoleon entered the hall of the Legislative Council, silenced the members, and at the point of the bayonet drove them from the house, the Assembly was dissolved. The members were overawed, subjected to duress; it was impossible to speak, and speaking was necessary to legislative action; impossible to hear, which was absolutely necessary. A deliberative body could not perform its functions in the midst of a cannonade, or while a drum was beating in their hall. By the existence of any portion of these circumstances, all attempts to proceed with business would be fruitless, and any thing done invalid. The body would be dissolved, or at least stunned and lifeless.

Now, it is proved, that in the present case, the Assembly was physically incapable of judging of any matter brought before it; and, therefore, I say it was released from all obligation, and cannot be bound by any intendment of law. Am I asked, where is the proof of this? With assiduity we have collected a large number of those who were present in the Assembly, as members of that body, and all these gentlemen have told you that they did not hear the question on which the whole case turns; that it was impossible to hear it, by reason of the noise made by the New-school, aggravated, if you please, by the noise of the Old-school. Take it for granted that both parties were guilty of indecent violence; and that the disturbance created by the two combined prevented the question from being heard. It makes no difference whether one or all, a portion, or the whole body make the noise. If the whole Assembly participated, if the whole was in such disorder, that it was impossible to act, for the moment it was dissolved; and *ipso facto*, every thing done was void. During this time of outrage and disorder, the body was in such a state that it was impossible for business to be properly perfected. If the whole body or a large portion of it, did not hear what was proposed, this released them from all liability on account of it. If in consequence of uproar and riot it was impossible for all to hear, the proceedings were as void, as if conducted in the remotest part of the gallery, or by persons speaking below their breath. The fact that we heard must first be proved, before we can be bound. We have anxiously and industriously collected witnesses, and asked them all distinctly, "Did you hear these questions put?" "No." "Did you hear them reversed?" "No." "Did you know what was done?" "No, I did not until the next morning." Not a single one of them has sworn that he heard these questions. Now, we have examined from twenty to thirty who were members of the Assembly—as many of the Old-school party as we could get, and we made proclamation for more of them. Are we asked to call up persons of the other party and examine them? We are not bound to do so. The question is whether *we* heard. *We* are the persons to be made liable; and when all of us have been called upon, and have sworn, that there was such an uproar it was impossible for the Assembly to act; that we did not know what was done until the next day, excepting that the other party had adjourned, and even this, not until it was proclaimed by a public crier, the question is conclusively settled. Here was the interposition of a physical fact which made it impossible for us to participate in any proceeding. Will your Honour say, that notwithstanding this, the question being put, we were bound to hear, although it was by their own act that we were prevented from hearing?

It is contended on the other side that there is an extraordinary discrepancy in this part of the evidence, between our witnesses and theirs. All ours swear that they could not hear, and all theirs, excepting one or two, that they could, and even could hear distinctly. Now one positive witness, is worth a thousand negative, says the learned counsel. This principle is correct, but here is misapplied. Either that we did, or did not hear, is a positive fact. Can any body but myself answer, whether I did or did not? All the persons examined have been competent witnesses, and there are, I think, about thirty of ours against twenty of theirs. There is an apparent, I will not deny that there is a real contra-

diction; for one party swears that all the motions were made, and the questions put and reversed, audibly, and distinctly; the other that they did not hear them. Now, perhaps the former mean, that they were made and put audibly, to a person whose ear was in close contact with the speakers, not audibly to all who were in the house. But, however that may be, the exigency was that they should be audible to us; we swear that they were not, and no one can swear to the contrary. We prove this by positive witnesses, and by witnesses who have not been, and cannot be contradicted. The other side may swear until doomsday, and they cannot disprove such testimony.

The learned counsel has referred you to metaphysical principles, to strengthen his argument on this head. He has told us that the ear does not mark sounds, to which it is accustomed; that these were too familiar to strike forcibly at the moment. The sounds which echoed through that church were wonted and familiar! This scene so orderly, these transactions so exactly in the common routine of business, as not to arouse the attention! My learned friend would have you believe that it was all some twice-told tale. Why, it was the most extraordinary scene that perhaps those walls had ever witnessed. Every person in the house was aroused, and in an extraordinary state of excitement. It was impossible that any one should not listen with anxiety to each sound that issued from that tumultuous body. My friend told you, that during his speech, you had not perhaps once marked the striking of the clock above us. There was a much better reason for that, than that the sound had grown familiar. Even a stranger would scarce have taken any note of time, though speaking with an tongue of iron. Mr. Meredith prevented us from hearing just as his clients had done before; else we should have heard.

But there is a way in which perhaps the apparent discrepancy may be reconciled, consistently with the utmost respect for the integrity of the witnesses on both sides; and I am anxious to avail myself of every possible means of doing this. It may be that the gentlemen of the New-school had heard what was intended, and were all on the alert. The plan of proceeding had been arranged beforehand, and knowing just what was to happen, they caught the slightest intonations of voice. Or, persons possessed of imaginations much less active than some of those gentlemen have manifested, from expecting that certain things would take place, may have taken for granted that they did take place, and now fancy that they heard them. The wish, too, is father to the belief, while the imagination cheats the memory. Another mode of reconcilement suggests itself, and perhaps this goes to the root of the difficulty. Here were two separate bodies, or separate portions of the Assembly. The New-school party were entirely in our rear, and those by whom the different questions were put stood in the midst of that party, and addressed themselves to them. But nothing is more natural than that the tone of voice should be accommodated to the distance of those whom we address—that it should be pitched to meet their ears. When I turn from you, gentlemen, to address the judge, my voice instantly falls; instinctively it obeys the dictate of the eye; and again it rises when I say, "Gentlemen of the jury." Nature, and not design, thus pitches my tone, so that it may be heard by those to whom I speak. By reference

to this principle alone we may reconcile the discrepancy, supposing that the New-school heard because they were near; and that the Old-school, being more remote, heard nothing. Who then was in fault? If we participated in the noise and riot, so far we were guilty; but never before have calls to order been considered riotous; and where a party who is called to order persists, notwithstanding the call, if there were a universal and overwhelming cry of "Order!" all would be in order but the one who disobeyed the cry. The mere raising of the point of order would make him disorderly.

It is thus, alone, that I can reconcile the testimony of the witnesses. Charity forbids us, if we can in any way get clear of the difficulty, to impute a want of candour or of truth, or even to acknowledge a belief of its existence to our own minds. I say then, that we were physically incapable of organic action, and therefore cannot be bound by intendment of law. We are no more bound than if each of us had been stunned, had been struck with sudden deafness. No man totally incapacitated for any sort of action, by the privation of all his senses and powers, can be construed to have assented to what he could not oppose.

To what was said in regard to the examination of Dr. McDowell, I may be permitted to reply in a few words. We have been taunted because we did not put the question, whether he heard the different motions that are said to have been made. We did put the question to Dr. Elliott, and he, from his situation, was certainly of all the most likely to have heard. But my learned friend taunts us, emphatically, with shrinking from the examination of Dr. McDowell on this point. Why did we not ask him? You would infer from the manner of this taunt, that it was pregnant with meaning; that we knew that, had we asked, the answer would not have been satisfactory to us. Well, we present Dr. McDowell here, make him our witness, place him on the stand. Here he is: as to credibility and competency the other side are not responsible for him; and if his evidence is against them, they may deny and disprove what he says. We return the question: why did not they examine him? We were not bound to bring out their case: we are here to develope our own. Thus we may retort upon our opponents; but, gentlemen, I will tell you the reason, and the only reason, why we did not examine Dr. McDowell and all the rest, in regard to every point in the case. We saw that his Honour the judge was weary, that you all were exhausted by listening to such a mass of testimony, and we refrained for fear of overlaying the case. We felt that the only fact important to this part of the cause was, whether those who were members of the Assembly, those whose silence is to be construed an acquiescence, heard the questions put. But the witness was presented to our friends for cross-examination, and depend upon it, if they had thought to get any thing from him favourable to their cause, they would have promptly asked the question.

Is the case of Dr. McDowell the only one of the kind, which my learned friend has been able to discover? We called all the witnesses present—every one that we could lay our hands upon. We made proclamation for others to come forward; and unquestionably, all the main actors in the scene, of our party, have been examined: we should have considered it unfair if they had not. But who have been produced on the

other side? Where is the arch-anarch; where the leaders, the generals of their forces; where the standard bearers and trumpeters? Europe has one; Ohio another: these were the generals, and the only ones who are competent to explain fully the occurrences of that day. We have brought forward all—rank and file; even the surgeon-general has not been omitted: where are their superior officers? They have sedulously adduced proof to show, that these men are at a distance. Why are they not here, when the welfare of the Church requires their presence? Why are not Dr. Beman and Mr. Cleaveland here to answer for themselves? It is their own conduct that is passing in review. Why was not the paper read by Mr. Cleaveland, the chief subject of animadversion, produced? Or if these men are unavoidably absent, why are not their depositions in court? You will be surprised, gentlemen, to hear that they are; that they have been all along in the hands of the counsel. Why have they not been read? Perhaps, we might not have adverted to these most extraordinary, and significant circumstances, but for the taunt of my learned friend. But we ask emphatically and triumphantly, why were not the depositions of the main actors in all their proceedings read, when they had been taken, and were here in court, in the hands of the counsel? Dr. Beman was the very Coryphaeus of the choir, and Mr. Cleaveland held the next most elevated position. Their depositions were taken, in nicely phrased documents, and the opposite counsel have them here in their pockets. They were the leaders of the forces. At the sound of their voices calling to the contest, the host rallied. Every thing that they proposed was answered by a shout from their zealous followers. Their testimony would be a panorama of the transaction. Still they are absent; and the very paper on the construction of which the whole case may turn, is not produced.

The contradictions in the testimony may, of themselves, furnish reasons for a very important conclusion. They show that during the scenes which the witnesses describe, there must unquestionably have been great confusion, since such intelligent, honest, Christian gentlemen did not all see things in the same way. Both parties, too, have sworn that there was great noise and disturbance, although differing as to the source whence they proceeded. The testimony of both, however, goes to establish the fact that there was so much tumult and confusion, that no regular and orderly business could be effected.

There is not only a great discrepancy between the opposing witnesses, but, what is still more remarkable, all the New-school witnesses contradict the deliberate and solemn declaration of the whole Assembly that met in the First Presbyterian Church. That body has made a statement of the facts connected with the organization, in their minutes. Now, many of the witnesses who have sworn to the fact of the different questions being reversed, say that they heard negative as well as affirmative votes—many are confident that they heard both. Several of them knew that the question was reversed, only from the fact of having distinguished these negatives. And, indeed, one of the New-school men, Mr. Lathrop, swears that he himself voted in the negative. Such are the statements of those who are brought forward to prove that the reverse was put. But these same gentlemen, or many of them, being members of the body in the First Church, have given us as their original understanding of the

matter, each by his vote upon the solemn record, a very different account. This record declares that two of the motions were carried unanimously. Within a few hours after the occurrences of the organization, these gentlemen sat down, coolly and deliberately, being now relieved from the excitement and anxiety of revolution, and declared that each question previous to that on the nomination of Dr. Fisher had been carried without a dissenting voice. Now, is it not a most extraordinary spectacle, to see near twenty of the very same gentlemen come forward and swear that there were negatives to each of these, after the whole body, of which they were a part, have solemnly asserted that there was no dissenter? What confusion, what excitement of the imagination must we suppose there to have been, when there is this extraordinary variance between the testimony, not merely of different men, but of the same individuals at different times and places! The minute to which I have referred says, "and no other person being nominated, the Rev. Dr. Beman was unanimously appointed such Moderator;" and again, "no other persons being put in nomination, they" (the Rev. Dr. Mason and Mr. Gilbert) "were unanimously appointed;" and again, "The motion to adjourn was carried unanimously." Indeed the only exception to this complete unanimity is in the case of Dr. Fisher, who is said to have been "chosen by a very large majority." Perhaps here the objection will be started, that according to the standing rules of the Assembly, where there is but one nomination, the question may be put without reversal, and therefore the vote was technically unanimous; that the minute does not mean unanimous in fact, but by intendment of law unanimous. Thus they may reconcile the discrepancy. I am willing to take this excuse. Well then, the minute, when it speaks of Dr. Beman, gives, not the fact, but the intendment of law; but in regard to Dr. Fisher it gives, not the intendment, but the fact; for it is said that the latter was elected by *a large majority!*

In conclusion of this part of the subject, gentlemen, I make a remark, in which his Honour will bear me out: that up to the moment when the New-school party seceded from the General Assembly of 1838, that Assembly had done nothing of which they could complain, or of which they have complained. What they complain of is, that the officers of the Assembly of 1837 endeavoured to defer, for a short period, the decision in regard to the rights of certain commissioners: they bring no charge against the house which was first constituted with prayer, and afterwards partially organized, before their proceedings commenced. On the adjournment in 1837, the Assembly was dissolved, melted into thin air: the elements of which it had been formed still existed, but as a body it was forever extinct. In 1838, met another Assembly of equal powers, and, though of instructed powers in relation to the four Synods, fully capable of undoing whatever the former body had done. Now there was no application made to the Assembly of 1838, to admit the representatives from those Synods to the seats which they claimed, and no one complains of any part of the proceedings of that Assembly. I should be glad to know then, by what power, or for what cause, the rights of one hundred and fifty commissioners—the majority of the house, were trampled upon, their business being cast into confusion, and their organization blown to the winds, on account of the misconduct of the clerks and Moderator. By what were our proceedings invalidated?

How were we bound to answer for the Assembly of 1837; and what operation had the acts of that body upon us? If either it or its officers had offended, was it proper that their sin should be imputed to us? This is imputation with a vengeance—the offence of one corporate body imputed to another! Suppose they complain of the acts of 1837 as unconstitutional and void, we are not bound to vindicate those acts. If in the heat of excitement they choose to vilify and blacken even with demoniacal virulence, the Assembly of 1837, we are not affected. They cannot stain the reputation of the legitimate successors of that body. They talk of the acts of excision as tyrannical and cruel, as a despotic blow. But why have they exscinded us—the majority? Why have they driven us from the General Assembly? Why do they seek to take possession of the funds of the Church? If on them has been inflicted a despotic blow, have not they dealt another? Because they were for a time unjustly deprived of control over any part of the funds, do they now claim to control every thing, even the Princeton Seminary, which never belonged to them, which they have never supposed to belong to them? I know they say that, by intendment of law, we excluded ourselves. They call us a limb torn off from the trunk—a limb only four or five times as big as the body! This limb, bleeding and torn, lies in the dust; while the body, but one-fourth or one-fifth as large, lives and flourishes! They say, we might have come into their Assembly, whenever we chose; that their doors and their arms were open to us. This is only adding insult to injury: it is a mere mockery. They know that we, the majority, would have killed them by going in. What? by intendment of law we were present, when if present in fact, we should utterly have annihilated their Assembly! Away with all such vain pretexts, such shallow artifices! They were entirely separated from the majority: they had exscinded, not merely four Synods, but the whole of us, at one fell swoop. We, the majority, complained of no grievance. The members of the four Synods alone had been aggrieved, if any body; even the others, that sympathized with them, had suffered nothing at all. Well, now, we may retort upon our opponents, that our Assembly was open to all of them. Those who had not been excluded, but who went off voluntarily, might, of course, have come back whenever they pleased. And, as to the gentlemen belonging to the four Synods, they could have returned to us as easily as we could to them. We had provided a mode for their return, as they say, they also had for ours. Says the learned counsel, in the spirit of humility, "It would have degraded us to seek admission into your body, after being told that we did not belong to it: we meek and humble Christians are too proud to approach you in the way which you have chosen to point out." Is this the religion of the meek and lowly Jesus? They are too proud to bow their stately necks to the requirements of the Church! Their manhood forbids it. What? Call on them to come as suppliants? No, they must reign supreme. They will not stoop, or abase their haughty diadem. But *we* may degrade ourselves. *We*, the majority, must follow the vagrant minority, and, as suppliants, beg for admission. They will not regard the terms which we propose, but we must accommodate ourselves to theirs.

The gentlemen on the other side, talk of union and harmony, and lament that these two portions of the Church cannot be brought together

again. This is impossible. See the state of feeling which exists. You have at least a faint emanation from it here, where the parties stand on a temporal arena, like gladiators, toe to toe, and point to point. They propose union and harmony, while they are seeking either to compel us to join them, against our will, or to strip us of every thing which we consider dear and sacred. Why hold out such a delusive proposition? Why attempt to deceive, by crying, peace! peace! when there is no peace? They know full well that we can never be of them, unless dragged in in fragmentary portions, No,

> Never can true reconcilement grow,
> Where wounds of deadly hate have pierced so deep.

What would probably be the effect of a verdict establishing the minority as, what they claim to be by intendment of law, the whole General Assembly? We appeal to the candour of these gentlemen; what would you do with the money, after you had got it? What with the Princeton Seminary, snatched by a trick from our hands? How would you manage it? How would you manage the Seminary at Pittsburg; and how the affairs of the whole Church in Pennsylvania, the South, and in all the length and breadth of the United States? I will tell you how: the present case shows it clearly. They have turned out Dr. Green first, and every venerable pillar of the Church would soon be prostrated. They would not rest until every office, and every post of honour, was filled with New-school men. What have they to do with Princeton Seminary? Did they establish it; or do they support it? Is it sustained by the gentlemen from the four disowned Synods, or by the New-school? It is, as they themselves acknowledge, an Old-school institution. The very ground on which that Seminary stands was the donation of the venerable man whose name they first struck off from the list of Trustees—Dr. Green. The object of the relators now is, to take this away from him, and to bestow it upon the representatives of the Synod of the Western Reserve, and of the other Synods in the interior of New York state. I correct myself: I am informed that Dr. Green gave only one-half of the Seminary lot. Suppose they gain possession: why, when the excitement of the contest is over, when coolly they can look upon the past and the future, they must find that your verdict has given them that to which they had no just title; that they ought not to have undertaken the management of these charities. They have Auburn Seminary: we do not wish to exercise any control over that, even could we do so. Their funds we do not desire to touch. To their own consciences and before God let them answer—Dare you, by a mere intendment of law, seize upon our inheritance?

Gentlemen of the jury, I have now shown you what our opponents claim to have done in 1838, and what they actually did. From this view of the subject every one must regard the disposal of the Church funds according to the exigency of your verdict, should you concur with the relators, as establishing their entire and exclusive control over them, without restoring peace to the Church; as the utter disfranchisement of the Old-school. If their claim to the funds of the Princeton Seminary, supported by the allegation of imaginary wrongs, be sustained, the moral sense of every one must revolt from the decree: they have themselves

acknowledged that they had no title to those funds. What was their feeling in 1837? This carries us at once to the proceedings of the reviled Assembly of 1837. What did each party then propose? In that Assembly the Old-school had a majority, and a joint committee, chosen from both parties, the representatives of each in the committee, forming separate bodies, negotiated formally in regard to the terms of an amicable division of the Church. The Old-school, I say, had a decided majority, and from them came the proposition for the appointment of this committee, or rather this diplomatic college; for it was composed of five from each of the two opposed parties. The Old-school commissioners commenced the negotiation thus:—*Ante. p.* 40.

"The portion of the committee which represent 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, &c."

This was the first solemn proposition made by the committee of the majority, to the committee of the minority. And what was the language of the others? Did they say, as now, that if all the funds were given to them, it would restore peace? Their first paper runs thus:

"Whereas the experience of many years has proved that this body is too large to answer the purposes contemplated in 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 view 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."

"*Difference of view in relation to important points of Church policy and action, as well as theological opinion, are found to exist.*" Such was the language of the New-school, before the exacerbations of this melancholy contest had so embittered their spirits. Then they say, "*Now, it is believed, a division will be of vital importance to the best interests of the Redeemer's kingdom.*" Yet here they tell us, that a separation would be unnatural: that the two parties must be kept together by compulsion; that we must be bound hand and foot, manacled, and delivered over by the law to them, as the only means of preventing this division, which is of "vital importance to the Redeemer's kingdom." On this view of the necessity of the case, at that time, they go on to propose—I am speaking the language of the Minutes—that,

"The General Assembly of the Presbyterian Church in the United States of America, shall be divided into two bodies."

This is their proposition founded on the foregoing acknowledgment, that division was necessary, on account of the wide differences that had grown up in the Church, in relation to its policy and action, and even as regarded its faith. Farther, they admit the power of the General Assembly to act in this matter, with the proviso, however, that the final deci-

sion of the question shall be referred to the Presbyteries. Then, in offering terms of division, they make ten distinct specifications, the last of which runs thus:

"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" (the Old-school Assembly) "to be constituted. The other funds of the Church to be divided equally between the two Assemblies."

They offer then to transfer the whole Seminary fund to these very gentlemen whom I now represent; but when we merely accede to the proposition, merely repeat their own words, we are accused of a fraudulent intention. It is said that under cover of a liberal offer, we wish to retain every vestige of the property. Yet, I repeat it, in the proposition thus characterized, we use their own terms, and unless *they* intended fraud, how can these terms become fraudulent in our mouths? If there be any covert fraud they alone are responsible for it—it is theirs, not ours. "The other funds of the Church to be equally divided between the two Assemblies"—of course, they mean, if the intention of the donors will permit. If this be not their meaning, they show even more astuteness than my learned friend would ascribe to us, when we repeat the words by them put into our mouths. They propose that half of the other funds shall be transferred to them, whatever the intention of the donors may have been—that they shall have half at any rate; and then a chance of getting the rest, by reference to the will of the donors!

In their second paper, which immediately follows that from which I have read, the committee of the minority object to the use of certain terms employed by the others, and insist upon an equal division of the funds. Then comes No. 2, of the majority. First, they agree to accept several propositions of the minority, with different modifications, and in regard to the division of the property speak thus:

"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 to 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 principle 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, so as in all cases to prevent an appeal by either party to the legal tribunals of the country."

This is the offer of the Old-school, and they use almost the very terms put into their mouths by the other party. But the proposition for the appointment of committees to adjust the matter, and of arbitrators, with "full power to settle finally the whole case in all its parts," is original with them. The provision too, which guards against any appeal "to the legal tribunals of the country," comes from the Old-school. The New-school had declared, "that a division was of vital importance to the best interests of the Redeemer's kingdom," and in view of this, we proposed the appointment of arbitrators, who might adjust the whole plan, pledging ourselves to abide by their decision, and hoping to save the Church from presenting this unusual, and humiliating spectacle, one portion being dragged by the other before a public tribunal of justice, there to contest with the acrimony and violence incident to such proceedings as the present, their respective rights, exposed to the gaze and scandal of the whole world. In the spirit of equity, and to preserve the peace of the Church, they propose, what the dictates of their religion enjoin, to submit the controversy to the decision of an impartial tribunal, to avoid the pain and reproach of engaging in public litigation. But this was not the purpose of our opponents; it did not suit their views. Such an arbitration would have been not only possible, but also consistent with the strictest equity. But here the two parties would have been equal; the other side could not have rested their case upon a bare intendment of law; therefore they would not assent to the proposition. Here is what the committee of the minority answer. At this time it is evident that they had not yet consulted "counsel learned in the law," and did not understand legal technicalities.

"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 in the United States of America, hereby constituted."

Such was the feeling of the parties in 1837, and such their views in regard to the disposal of the funds. I think now, that no impartial person can charge us with a violent attempt to seize upon the property of the Church. I say it, and say it boldly, that a more just and liberal proposition than that made by the Old-school, could not have been devised by any court of equity in the land. Three honourable and impartial men, of other religious denominations, to settle all matters in dispute, and we pledged to abide by their decree, and to make such division of the property as they should direct. Yes, we were willing to give up every cent, if they should so determine; and if our opponents had acceded to these terms, and the arbitrators had decided that we should surrender all, even Dr. Green's donation, had they but left us the Doctor himself, we would have agreed.

I have thus shown you what the Old-school intended in 1837, and now, at this moment, they are ready to bind themselves to the same terms. Here in court, we will sign the agreement, if the gentlemen on the other side but say the word, and all are bound to abide the issue, so as to relieve both parties, and the whole Presbyterian Church from the scandal of these proceedings.

This they were willing to do in 1837, and are still willing to do. I propose now to show you, gentlemen, what they have actually done, how they did it, and by what authority. I know that you are tired of these details; and I am ashamed of being obliged to tax farther your patience. What we have done is the very thing so nearly agreed upon between the two parties. First, however, I must dispose of a preliminary matter which has been used on the other side for effect, to prejudice you against my clients. The learned counsel has supposed, according no doubt to his instructions, that the gentlemen of the Old-school came up to the Assembly of 1837, pre-determined to exscind a portion of their brethren, and thus to insure a vote, on certain points, agreeable to their own views. He would have you believe that they had entered into a plot, a conspiracy, to secure to themselves a decided majority. This is a great mistake—the very reverse of the real facts, as the documents in evidence themselves clearly show. How greatly has my learned friend mistaken our views and intentions. We were the ones to propose the appointment of the joint committee of five from each party: the proposition for an amicable adjustment of all matters in dispute came from us. By the refusal of the New-school to accede to any terms of division, we were driven to the wall, we were compelled to adopt the measures of excision. May we not rather say that our opponents had formed a conspiracy, when, professing to acquiesce in a peaceful separation, they could not be brought to any terms of compromise? But we will rather suppose, that the plan for division failed, simply because both parties could not see the same things in the same point of view.

When this expedient for restoring peace had failed, another proposition was made by the Old-school, and these successive but ineffectual attempts on our part show clearly the absence of any conspiracy, or covert design. This proposition was the same afterwards made by our opponents—the citation of certain judicatories for trial at the bar of the General Assembly. It was carried; but, strange as it may seem, though they now say that this was the only constitutional method of dealing with the recusant Synods, for their departure from our Confession of Faith and Form of Government, every New-school man voted against it—it was a pure party vote. Every man of them, though they had acknowledged that "difference of view in relation to important points of Church policy and action, as well as theological opinion," had been found to exist, though they had acknowledged this on the record; and though now they contend that citation would have been the right measure—every man voted against the process of citation. I hold in my hand a list of the yeas and nays, from which this fact is apparent. In what situation were these gentlemen to try the judicatories to be cited? They who were to sit in judgment had already prejudged the case. By what mode could we hope to enforce the laws of the Church? The farce of a trial had already been gone through with. Our opponents, while acknowledging differen-

ces of faith, so great, that a division of the Church was "of vital importance to the best interests of the Redeemer's kingdom," nevertheless refused to subject themselves to trial, or ecclesiastical censure. And who were to try them? They themselves. What would have been done, if the judicatories cited had not attended, had refused to obey the citation? The Assembly must then have proceeded against them for contumacy. They would have yet stood out against its decrees, supported in their insubordination by a powerful minority in that body, and would have defied all process. The case could never have been tried upon its merits. Something like this had before been experienced in the case of Mr. Barnes. The majority saw the danger of being entirely foiled in their purpose; and even if they should not be ultimately foiled, the difficulties to be overcome, the excitement, the party contention and violence, the confusion and discord, which such proceedings must inevitably produce. But the other party had all opposed the citation, and this should have forever closed their mouths.

What was the next best mode of proceeding? The act of excision. It was the only mode left by which the purpose could be effected.

"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 Genesee, 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."

This is the celebrated act, called the "act of excision." These Synods were "declared to be out of the ecclesiastical connexion of the Presbyterian Church," and were hereby excluded. The "Plan of Union" had before been pronounced unconstitutional and void, and, now, all the bodies that had grown up under it, fell with it to the ground. Having already passed the act of excision, the Assembly merely declared by this resolution, what was the necessary consequence of the abrogation of the "Plan"—that the Synods formed in execution of it, were, as Church judicatories, dissolved. This act was merely declarative. But it is most important that you should observe the reservations. Our opponents would have you believe that it was a bloody and Draconic sentence—a sentence of temporal and spiritual excommunication. They make a great parade of words. They allege, that these brethren have been turned out of our communion, and marked with the stigma of heresy. There is nothing like all this, except in the imagination of the parties concerned. We did not harm a hair on the head of one individual, in all the wide extent of territory embraced in the four Synods. Not only so, but we provided carefully for each one's case: we shielded them all effectually from harm. By this proceeding was not the situation of a single man made worse by the tithe of a hair. Read the following resolutions:

Here Mr. Preston read the three remaining resolutions.—*Vid. ante. p.* 46.

These resolutions preserved the rights of every man who was really a

Presbyterian. What was it that they proposed? The "Plan of Union" had been declared unconstitutional. It had been shown, that these men had not entered the Church in a proper manner, and now they were told, "There is a defect in your title, and we desire that you should remedy that defect." Was there any wrong in this; or was it a captious direction? It was as if it had been said to the members of the four Synods, as private men, "There is a flaw in the instrument by which your ecclesiastical privileges are secured; there is a link in the chain of title defective. Go and have the instrument renewed." Or, "Fellow corporators, I perceive that there was an error in the mode of your admission: you had better remedy the evil." Or, "Your ecclesiastical bodies were established by mistake; still we do not wish to cut you off at one ruthless blow. We desire that you should perfect your title, for your own happiness." Even if we were wrong, had we any evil design, in thus remitting them back to their original state, that they might be organized anew in a constitutional way?

Gentlemen tell us, that all the Presbyteries belonging to the four Synods were regularly constituted. What then prevents their joining some other Synods according to the provisions of the act of 1837? Let them come and show that they are strictly Presbyterian, and they will be admitted. Many of them do differ from us in faith, according to their own showing: those who do not may at any time return: our arms are open to receive them. The mode has been pointed out; and is it a Christian-like proceeding for them to raise this clamour, under pretext of their exclusion, when a door has been opened by which all who are really Presbyterians may freely enter? We maintain that it is impossible for them to prove themselves such. They cannot say that they are Presbyterians: if they could they would. If they could they were bound not to separate from us. But their language is, "Stand back: we will not degrade ourselves by returning in the manner prescribed. We scorn to submit to the discipline of the Church. We will not say that we are Presbyterians. If Presbyterians were as thick as blackberries, we would not give one upon compulsion." They cannot say that they are Presbyterians. They have already admitted differences in point of doctrine and of discipline: they cannot come back, and declare that they belong to the Church.

Such, gentlemen, is the mode provided by the Old-school for the restoration of those who complain of being cut off, and such is the temper manifested by both parties. Those Synods which had come in under the operation of the "Plan of Union," were dissolved, that their original elements might again unite and form Presbyteries regularly organized. Does not this appear to you a most cruel and outrageous act? Does it not display a most violent, lawless, and vindictive temper?

Now, may it please your Honour, what power had the Assembly to do this? In 1837, the New-school party admitted that these Presbyteries had come in under the "Plan of Union," and appealed to that plan as a justification. The churches of which they were composed had, many of them, been formed by virtue of it, and others were forming up to the time of the excision, or have been established since, in the same way. That they had been admitted in execution of the plan was declared on both sides, and the excision was but the legitimate consequence of the repeal. These four Synods situated in the western part of the State of

New-York, and in Ohio, embraced a tract of country which in 1801 was a wild, unsettled frontier. It was not then filled, as it now is, with the hum of men: scarcely a single trace of civilization marked the far spreading wilderness. And so it continued certainly down to the period of the last war. At that time the whole region was an untamed forest, excepting perhaps a few scattered hamlets. He who rides over that country at the present day, can hardly imagine the changes which the few intervening years have wrought. The city of Rochester seems to have sprung up as it were since yesterday: it is not of so old a date as the "Plan of Union." Christians of different denominations were anxious that the benign influence of the blessed religion of the cross should be shed upon the wandering, passing population of these wide forests, a heterogeneous mass of people connected in an informal and irregular state of society. On one side was the Presbyterian Church, with Philadelphia as the centre of its organization: on the other side the General Association of Connecticut; and between the two was this extended wilderness, a spiritual waste, into which missionaries, both Presbyterian and Congregationalist, were from time to time sent forth. The two denominations were here mingled: it was impossible to establish a distinct church of either sect. The Association of Connecticut therefore on the one side, and the General Assembly on the other, entered into an agreement in regard to this vast field of labour, and adopted the "Plan of Union," which has such an important bearing upon the present case.

The first proposal did not however come from Philadelphia; but the Association of Connecticut, being nearest to the field of missionary enterprise, sent delegates to the Assembly, and through them proposed to that body the adoption of a plan of union, which should foster the holy doctrines of Christianity, and the blessings of peace and harmony, and extend the sphere of the benign charities of the Church. This proposal struck the members of the General Assembly, then recently organized, as wise and benevolent, and they immediately entered into an agreement intended, however, for congregations in that desolate section only. It was agreed that the members of one sect might act officially with the members of the other, on certain terms. It was not proposed, indeed, to form in these new settlements a complete Presbyterian or Congregational Church organization. The means of public worship only were to be afforded, without the establishment of any ecclesiastical system; the plan being intended only as a temporary expedient for the new settlements, and the two sects being expected to separate, as soon as each should have increased sufficiently to meet the exigencies of independent existence and regular organization. The plan authorized a Presbyterian church to call a Congregational pastor, and a Congregational church, a Presbyterian pastor—the whole code, indeed, was appropriate to the region for which it had been framed, and, on its face, was intended only for that section of country, and the particular state of society which existed there at that time, providing, as it did, for the worship of God in an anomalous manner. The plan itself did not contemplate the formation of any Presbyteries or Synods out of these mixed materials: all such organizations were cautiously avoided, because the Assembly could not, by virtue of its delegated authority, uproot and destroy the whole Presbyterian system, nor had the fathers of the Church any inclination to do so. Congre-

gationalists were not to be governed by Presbyterians, nor Presbyterians by Congregationalists. The moment that Congregationalists had been allowed to organize themselves in Presbyteries and Synods connected with us, there would have been a dissolution of our Church, and a re-organization—the production of a mule by unnatural copulation. Therefore it was not intended that Presbyterians and Congregationalists should thus unite; but, gentlemen, the intention of those who draw an instrument has frequently very little influence upon the effects produced by it. Who that writes a constitution to day can tell what construction it will wear in a few years, or even months. No matter what his intention may be, by intendment of law, and the restless working of human ingenuity, the instrument may, from its inherent defects, be diverted entirely from its original purpose. In those waste places of the Church was established an anomalous system of worship, under which peace and harmony for many years reigned; but it suited only the scattered and transitory population of the new settlements. It was not intended for a thickly peopled region, and it was always supposed that when the two distinct sects should each become sufficiently numerous for separate existence, in its own peculiar organization, they would no longer worship at the same altar, and adhere to the same form of ecclesiastical rule; but would separate, appealing and becoming subordinate, each to its respective head.

(Here the jury were allowed a recess of ten minutes.)

When I left off, I was stating and endeavouring to show, that the "Plan of Union" was intended to be limited as to time, by the extent of the term "new settlements." Each of the two parties to the agreement or treaty considered it as confined in its operation to such settlements, and that it authorized nothing more than the formation of mixed societies for the worship of God, in the wilderness, among a scattered and floating population, where enough of either sect to form, conveniently, homogenous congregations were not to be found. When, therefore, this time was at an end, when those regions became densely peopled, and each denomination was able to sustain itself, the different portions of the mixed congregations should have segregated themselves, each subjecting itself to its own peculiar administration. In other words, by the "Plan of Union," churches of anomalous structure were allowed to be created on certain terms, but it was never contemplated that the fundamental principles of Presbyterianism should be uprooted, that such churches should continue to exist after the necessity that occasioned them had ceased. But, as it turned out, the members of the two sects thus united did not separate: perhaps, indeed, it might have been foreseen, that when such relations as sprang up in consequence of the "Union," had become familiar, the connexion could not easily be dissolved. It might have been foreseen, that the sympathies excited by such habitual association would create indissoluble ties, and that the two sects must ever after be inclined to unite, even if a dissolution were effected. And it so happened, that when the time came for the "Plan" to be abandoned, according to its own limitation, it was not abrogated; instead of the two denominations' forming independent bodies, they still remained in connexion, and, not content with even this, proceeded to establish a regular church organization. In the first place, they formed churches; and these were recognised by the Presbyteries, and, even by the General Assembly itself.

Next, they proceeded to constitute Presbyteries; and next, Synods were established. Such results were certainly never contemplated by those who formed the "Plan:" it did not give authority for these proceedings; it did not authorize the formation of a single Presbytery or Synod, from the heterogeneous materials thrown together by the "Union" of 1801. Still the practice of associating in these anomalous churches gained ground, and the mixed Presbyteries composed of such members did not depend on the fundamental rules and principles of either one of the denominations to which their elements belonged.

I have said, that the "Plan of Union" did not authorize these ecclesiastical organizations, but that still they were established under it. There can be no doubt of the existence, in 1837, of numerous mixed churches; and not only did they exist, but a large majority of the churches belonging to many of the Presbyteries were of this mixed character. The attention of the General Assembly for a long time had not been called to the subject. The "Plan," upon its front, seemed to allow of little more than a relaxation of discipline, a temporary indulgence, in which that body had acquiesced from a hope that thereby the doctrines of their holy religion would be more widely propagated. They did not examine into the matter: though Presbyteries and Synods were formed under the "Plan," the minutes show that no examination was ever made. A slight relaxation of discipline it was hoped would be productive of great good. Such considerations seem to have monopolized entirely the thoughts of the fathers of the Church, and they did not dream of the dangers which threatened it. In the prospect of general and lasting benefit they winked at what they considered trifling, and but temporary irregularities. In this they obeyed only the ordinary impulses of our nature.

Nevertheless, they had opened a most dangerous flood-gate of evil, and a torrent of disorders rushed into the Church. They had planted in their soil a strange vine, and by the Church had it been watered and permitted to grow upon the outside of the ecclesiastical building. I will not say it was a parasitic plant, but it spread rapidly, and twined itself over the wall, and before any danger was apprehended, had insinuated its tendrils through every crevice, until they had reached the inside, and destroying the cement which at first had bound the stones compactly together, threatened to demolish the fabric by which its luxuriant growth had been sustained. But for a long time the danger was not discovered; I am sorry that it was not seen earlier; for when the alarm was first given, the whole building had begun to totter, the mortar was gone and the stones trembled. Indeed it was found necessary to tear down a portion of the wall, in order to detach the foreign growth, and to save the remaining parts of the fabric from ruin.

It is curious to observe, that about the time when this relaxation of church discipline was first permitted, there was an acquiescence in other and equally dangerous abuses. Permission was granted to delegates from bodies not at all Presbyterian, to enter the various judicatories; and these delegates were allowed to sit, debate, and vote exactly in the same manner as if they had belonged to the Church. The acts permitting these disorders have, however, most of them, since been repealed. Yet, although such departures from Presbyterian principles were wrong, God forbid

that I should censure the wisdom and piety of our ancestors. They acted, as they imagined, for the best, under the guidance of the clearest light which was afforded them. Doubtless they supposed that as society, in those regions for which the "Plan of Union" was provided, advanced to a more perfect state, the Presbyterian Church would be reintegrated, and at length entirely accord with the symmetrical arrangement of which they drew example from the times of the apostles.

But unpleasant differences sprung up in the Church, which during a prolonged period of contention, have continually threatened disastrous collisions, and the final ruin of both parties engaged. These difficulties some years ago riveted the attention of many persons upon the "Plan of Union" and its fruits, and they became the subject of much warm discussion. In 1826 this matter was brought forward, and for a time agitated the Assembly, which then already was divided into two parties in regard to it. In 1831, there was a desperate struggle between these parties, and fires were kindled which threatened to consume the peace of the religious community; and for seven years thereafter the same subject was a continual source of contention and conflict, until they resulted in the scenes exhibited in 1838, in the church in Ranstead Court.

Now one of two things is perfectly manifest: the Assembly at the time of the creation of the four Synods and the Presbyteries which they embrace, either knew that they were composed, in large part, of mixed or Congregational churches; or they did not know the fact, and took for granted that the churches were all strictly Presbyterian. If they knew it, and if these churches came in under the "Plan," that plan being unconstitutional, they had no right to admit them, and could not bind themselves or their successors by the admission. If the churches came in on any other ground than the "Plan of Union," it cannot be denied by any one that the Assembly had no power to receive them—to receive any other than Presbyterian churches. The "Plan" furnishes the only pretext for their recognition. If they knew that these churches were Congregational or mixed, and yet admitted them, they trampled on the fundamental principles of Presbyterianism, dissolved the Presbyterian Church to which that charter of incorporation was given, and formed a new ecclesiastical establishment. If at that time it was unknown that these churches were not Presbyterian; if while in fact something else, they came in the outward form and garb of Presbyterianism, and were admitted by mistake; when the falsehood was detected, when the error was discovered, when they proved to be Congregational or mixed churches, then the only course that could be pursued was to turn them out, and completely re-organize those portions of the Church which had been irregularly constituted. In every point of view the subsequent act, the act of 1837, was necessary, and most clearly within the jurisdiction of the Assembly. By-and-by we shall show, that that body has more power than was requisite for this purpose.

That is not a Presbyterian church which is composed of other than Presbyterian members. Who has a right of representation in the General Assembly? An association of Presbyterian churches. And what must be their component parts? Pastors and ruling elders. If a church be otherwise constituted it is not a Presbyterian church, by whatever name you may call it: about this there will not be any dispute. A General

Assembly therefore, cannot admit into its communion any other than Presbyterian congregations. The admission of others is forbidden by the Constitution and laws, the Catechisms, the Confession of Faith, and, as we believe, by the eternal record of the Bible. The fundamental maxim of Presbyterianism is, that its forms of doctrine and of government are of divine institution and ordination, and that no human power has a right to repeal the acts of God. This belief lies at the very foundation of the whole system. The principles of our faith and worship came directly from the Saviour, and have been handed down to us.—Such is our confidence; and of course these principles admit of no alteration—allow none to deviate. In the belief of Presbyterians, I say, Presbyterianism is of divine ordination, established by our Lord himself, and man cannot set it aside or abrogate any portion thereof. They believe that by divine ordination, Presbyteries are to be formed of Presbyterian pastors and ruling elders; that this order cannot be changed or destroyed. That a Synod must be composed in the same manner; that this law cannot be abrogated. It is vain to say that man may alter or destroy a system of heavenly origin: it is the fundamental maxim of the Church, that what God has done, no man may undo. This is the corner stone of the whole Presbyterian system—of every system of faith. Now, if you take an indigested mass, a confused congeries of individuals or churches, you may perhaps have a very effective organization, but not a Presbyterian system. The whole Church which I represent, reposes on the New Testament as its constitution: its faith is, that God established it; that its principles were received from his lips, and from his inspired apostles. Ours, we believe, is the true primitive Church—the apostolic Church. We say to such men as those whom we have excluded—Congregationalists and representatives of mixed churches—not in the spirit of that awful denunciation put in our mouths, but in the spirit of Presbyterianism, "We do not know you. You may be good Christians; you may be wise men; but you are not Presbyterians. We don't know you, and you know not us. We should not be Presbyterians if we received you." If I am an Episcopalian and you are a Roman Catholic, can this Church admit us to its communion? So soon as we were admitted, it would cease to be what it is now: instead of a Presbyterian Church it would be an amalgam of distinct sects; it would be like none of its component parts.

What is to prevent any member of a church thus composed—a mixed church—of claiming the privileges and immunities of either sect? He may be either a Presbyterian or a Congregationalist, or he may be neither, or both. If the Presbytery calls him to account, and would try him for a misdemeanour, he holds up the "Plan of Union," and claims to be a Congregationalist. If his own congregation commence process against him, he is a Presbyterian. He is, in reality, a sort of bat, flying in the twilight, and bearing affinity to neither the beasts nor the birds.

Now, gentlemen, looking at the "Plan of Union" in this point of view, I do not mean to contend that it was not just and proper. If it was merely a relaxing of discipline, a dispensation from church censure, it may have been perfectly wise and justifiable. It had this exigency and no more: that Presbyterians and Congregationalists, otherwise bound to preserve their unity, and distinctive organizations, might associate together, without becoming liable to Church censure. But when Congre-

gationalists coming in under this plan, claim to be a portion of our Church, to be represented in its judicatories, then the question arises, whether their admission is in accordance with the fundamental law of Presbyterianism. Presbyterians believe that an order of Church officers called ruling elders, is of divine appointment. But can they try a Congregational church, which has no ruling elders—try it for the want of them? Why the latter would reply, "We don't believe in ruling elders." How was the General Assembly to try these men, and for what? For not having in their churches regular Presbyterian elderships, when they do not acknowledge elders as of divine appointment—when they recognise no such ecclesiastical officers? Will you try them for not being Presbyterians? If you do try and convict them, your jurisdiction must rest entirely on an intendment of law. Throughout the whole affair you must consider the facts to be otherwise than as they really are. *Pro hac vice*, in order to try them for not being members of the Church, you must consider them members.

But this Assembly is a *quasi* corporate body, and any infusion of Congregationalism into the Church which it represents, is a derogation from the Act of the Legislature by which it became such. This act does not admit of mixed Synods and Presbyteries: it is confined in its operation to a church governed by ministers and ruling elders. It was not granted to a General Assembly composed in whole or in part of committee-men, or their representatives. The words "ministers and elders" are repeated in the act over and over again. And if the "Plan of Union" admitted any one else, it was unconstitutional, and the corporation could have been proceeded against by *quo warranto*. Did the Legislature intend to grant a charter to Presbyterians alone, or to the whole of Christendom—to all religious denominations? The charter was given to none but ministers and elders, and he who introduces any others into communion in its privileges, violates it both in letter and in spirit, and his act is null and void. I do not mean, however, to say, that because the Assembly passed an unconstitutional act, the proceedings of all subsequent Assemblies, formed under the operation of that act, have been utterly void and nugatory: they were still Assemblies *de facto*, though not *de jure*. Congress refused to continue the charter of the Bank of the United States, and some of its opponents took the ground that the act of incorporation was unconstitutional; yet no one ever pretended that all the transactions of the bank were nugatory. Or, to put a still stronger case, the community in general seems to have settled down in the belief, that alien and sedition laws are unconstitutional; but while such laws were in existence, all acts done in execution of them were considered valid: no one dreamed of regarding them as null and void: the power to declare them so was to be found no where but in Congress, or in the judiciary. They had their day; but now all sides view them as unconstitutional. Still so long as they existed, they were law, and by intendment of law were acquiesced in by a majority of the people.

As regards the act of incorporation, such a departure from the fundamental principles of Presbyterianism as is involved in the admission of others besides ministers and elders, is void. The General Assembly has not the power to transfer the franchise granted to them to others. There

is no possible mode of divesting itself of its privileges, and bestowing them upon any body else: the moment that this is attempted, it ceases to be the General Assembly for which the act provides: the object of the act no longer exists. The law granted the franchise to us, not to Congregationalits and committee-men. If deacons were admitted into the Assembly, this would be a violation of the trust: the Legislature provided for ministers and elders only. And not even for all ministers and elders, but for those only of the Presbyterian Church. If, therefore, any congregation not belonging to the Presbyterian Church, should choose to designate its officers as pastor and elders, these could not be admitted to partake of the benefits of the franchise. The act of admitting them would be wrong in itself, in derogation of the charter of incorporation. And after all, the act of 1801 was but an act of the Assembly, and by the Assembly it might be repealed. And whenever it was repealed, the establishment reared upon it fell to the ground.

I say that the Assembly had a right to repeal the "Plan of Union," because it was an act of the Assembly. Such a power is absolutely necessary, whether you consider it as legislative power, or as an incident to the power of making treaties. If you consider it merely a legislative act, then the power to repeal it must be acknowledged. If it was a treaty, then the Assembly has the highest power which you could give—it can do that which none but a supreme power is allowed to do.

The only point of view in which the "Plan of Union" can appear of doubtful unconstitutionality, is its being established for temporary purposes—that it was never intended to operate, except in the wild settlements, nor to admit persons, other than Presbyterians, to exert an influence in the judicatories of the Church. If intended to be permanent, and to interfere in the Presbyterian organization, it was unconstitutional; and if a wrong construction of the act had produced such an interference, this was a perversion which the Assembly had a right to rectify. My proposition is, that the act so construed is contrary to the fundamental principles of the Presbyterian Church, and contrary to the provision of the act of incorporation; that it has admitted improper persons into that Church. And if this be the case, the Assembly had a right to repeal the "Plan;" and the consequence of this repeal was, that every thing built upon the "Plan," or depending from it, fell to the ground, unless certain rights had accrued therefrom, the instrument being in the nature of a contract, a *quid pro quo* having passed between the parties, the rights, in short, being of the nature of vested rights. Let us look at this for a moment.

In the first place, the act did not authorize that of which we complain, though we undertake to show, that by virtue of that act the Synods were established, and the rights of the parties, whatever they were, accrued. But is there any thing in the form of the "Plan of Union" at all like a contract between two parties, from which vested rights could spring? Here is no compact between the General Assembly and the disowned Synods and Presbyteries. The former is an appellate tribunal from the latter, but each depends on its own fundamental law, and though all are bound together by strong links, there is nothing like a contract or obligation between them. Your Honour sitting in this court has entered into no contract with any of the inferior courts: they are independent of

this in their organization, though dependent as regards appeals. These courts and those Synods have no rights vested: they are independent of this tribunal, and of the General Assembly, excepting as the latter are an appellate court. There has been nothing like a contract. But the introduction of these men was a fraud, and we say, "Gentlemen, you were admitted by mistake—if you please, a mutual mistake;—but you shall not on that account lose your standing. You must, however, be re-organized; your title must be recorded afresh." We had, incontestibly, the power to repeal the "Plan of Union," and the four Synods fell with the repeal.—When that which had supported them was stricken down, they sank with it to the ground, and were broken in pieces; but the scattered fragments may yet be collected, and re-organized.

Again, the General Assembly, independently of its unquestionable power over the "Plan of Union," had a right to dissolve any Synod and any Presbytery. And no reasons need be given for the exercise of this power. If we once establish the jurisdiction, it were a work of supererogation to investigate reasons and motives. This is an essential power, and the Assembly may apply it for their own private reasons without being responsible for its proper exercise. In the course of the argument on the other side, it has been contended that the General Assembly has no power except that of trying appeals; that it is not a legislative body, but merely a judicial one. I say, that it is like the United States Senate, and combines judicial, legislative, and executive functions. It has been supposed that such powers can never wisely be made to co-exist, but I'll show conclusively that they co-exist here.

The Assembly is a constitutional body, but neither it, nor the Presbyteries, nor the Synods, have power to alter the Constitution of the Church. The Assembly, however, suggests all changes in that Constitution, and submits them to the Presbyteries, which pass upon them. This is clearly a legislative act, and shows that it is not a mere judicatory or judicial body. A judicatory, in the strict sense of the word, is only a court of justice, like this in which your Honour presides. But the Assembly may propose amendments to the Constitution, passing upon them in the first instance, and then sending them to the Presbyteries for their concurrence, the latter not being able to make amendments unless they are first submitted by the Assembly, so that they exercise a sort of co-ordinate legislative power only. The power thus vested in the Assembly depends on the fundamental laws of Presbyterianism—I will not say on the Bible, for this, in regard to a multitude of even ecclesiastical affairs, is silent. The authority to propose constitutional rules to the Presbyteries is like that of Congress to alter the Constitution of the United States, with the concurrence of three-fourths of the several States. Indeed the Presbyterian Church is constituted in strange conformity with our own Government. It is a very curious coincidence, that, having grown up subsequently, and purporting to be of divine ordination, it should bear such a close resemblance, in many particulars, to the political institutions of this country; and this perhaps is an earnest of the perpetuity of our beloved Union. We fondly regard the latter as the purest specimen of a republican government which the world has ever seen, and on the same true basis of republicanism we find established this republican Church. I may suppose that the two are constructed after the same

model. And although a crisis in the affairs of both Church and State seem now to have arrived, we may confidently hope that both of these noble institutions will pass unharmed through the trial; that both, though for a time depressed, will revive and spread themselves through all future ages. This is not the first time that schismatic contentions have distracted our Church: before this the bush has been on fire, though never consumed. It will yet arise in renovated strength, and go forth conquering and to conquer down to the latest times. It has in itself a recuperative power: it can never become extinct: with the government of our own land it will descend to remote posterity. I do not mean that the Presbyterian Church will absorb and swallow up all others, nor do I wish that it should be so. Sectarianism purifies the Church, as parties purify the political atmosphere; and I hope that each denomination will always be secure in its own privileges. I claim for all forms of religion the same civil rights and immunities—for the Catholic, the Episcopalian, the Jew, and the Mohammedan. Let each pursue its own appointed course, without harm or interference from the civil power.

Now let us inquire what are the constitutional powers of the General Assembly: whether it has not the power of passing laws. It is a curious fact, that though all the courts of the Church are called *judicatories*, yet their rules prescribe a particular form to be observed, whenever any one of them "*is about to sit in a judicial capacity;*" just as a particular form is observed in the Senate of the United States when that body drops for a time its legislative functions to sit as a court of justice.—*Append. to Const. R.* 39.

"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 the high character, as judges of a court of Jesus Christ, and the solemn duty, in which they are about to act."

What power could be given in ampler terms than that confided to the General Assembly? In the construction of powers granted by a constitution, some general principles are to be remembered. There is a difference between a limited government with delegated powers, and a government limited in its powers. If a power is claimed for the government of the United States, you must point out a grant thereof in the Constitution—a grant either express or by necessary implication. Our government is one of specific, delegated powers. On the other hand, the several state governments are just the reverse of this: their powers are limited only by negation. Unless you can show a certain power to have been denied to any one of them, it must exist. In the one case it is a gift, in the other case an original power, merely not restricted. In the former it depends on your being able to show it in the instrument, in the latter upon the fact that no negation of it can be shown. The legislatures of the several states of the Union have all powers excepting those expressly taken away. If the government of the Presbyterian Church is like either of those which I have described, it is very easy to determine whether the General Assembly has the power which it exercised in 1837. If it is a body of delegated powers, we must show the grant of this particular one; if of restricted powers, we must show the restriction in this case. It

happens, however, that the Constitution of our Church can be judged by neither of these rules. It contains a grant of general powers, in very general terms, and on this account is most nearly assimilated to the constitutions of the several States. To illustrate this point: the Constitution of the United States provides that the general government shall have such and such powers; but to the General Assembly are first given all powers, legislative and executive, as well as judicial, and then certain restrictions are put upon those powers. Is there any similarity between the two?

"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." *Form of Gov. Chap.* xii. *Sect.* 1.

What does it thus represent? The powers of "all the particular churches." Whatever power they have is represented in this body. That authority which each church exercises within its own limits, the Assembly has, by delegation, over all the churches. This clause gives a general, sweeping delegation of the whole power of the Presbyterian Church, whether this be judicial, legislative, or of any other description. It is circumscribed only by the Holy Scriptures, or by the restrictions which are placed alike upon all the other judicatories. These are the only limitations. The power that belongs to the whole Church is carried up and attributed to the General Assembly in the boldest and broadest terms. Here there is a delegation of power, of all the power, possessed by those who formed the Constitution, and the grant is broader than that made to any one of our legislatures. If the people of this state were to grant all their power to the government, then only would its authority be commensurate with that of the General Assembly. And, unquestionably, it was the intention of the people of the Presbyterian Church to give to the Assembly that power throughout all its bounds, which Synods, Presbyteries, and church-sessions exercise within smaller limits.

"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." *Id. Sect.* 4.

Now, if all the power of the Church was vested in the Assembly in the first instance, by the great latitude of the terms employed, nothing farther was necessary, since, wherever a power is given, the right to carry it into effect, whether by legislative or any other means, is necessarily implied. Here is expressly mentioned a power to "review the records of every synod, and approve or censure them." These records, then, may be taken and examined, whether the Synod sends them or not: such a power is necessary to the exercise of that expressly granted: without it the words last read would be barren and inoperative. "They shall give their advice and instruction in all cases submitted to them, in conformity with the constitution of the church." And what if those whom they advise and instruct, should choose to disobey? Has the Assembly no

power to carry into effect its injunctions? Are its instructions merely hortatory? Then you have a government incapable of giving any sanction to its decrees. "They shall constitute the bond of union, peace, correspondence, and mutual confidence among all our churches." Suppose that the bond of peace and correspondence be broken, how are they to restore its strength. The power to preserve the peace of the Church is given; and has the Assembly no power when a member of that Church is recusant to force him into submission?

"To the General Assembly also belongs the power of deciding in all controversies respecting doctrine and discipline."—By this body, in the last resort, such controversies are to be determined. If they affect Presbyteries or Synods, the Assembly is the ultimate tribunal, and must settle all disputes finally and conclusively. The power, as regards doctrine, is too broad for the present case, but as it regards discipline is more german to our purpose. What? Is it said that the authority is applicable to controversies between individuals only, and cannot be exercised when Presbyteries and Synods are concerned? Why the great, the most important object of discipline is the regulation of these inferior bodies; and yet it is contended that the Assembly cannot enforce discipline in regard to them. "Of reproving, warning, or bearing testimony against error in doctrine, or immorality in practice"—in the case of individuals—*in personam*, not *in rem?*—"in any Church, Presbytery, or Synod."—Then here is an express power to regulate doctrine and discipline in Presbyteries and Synods; and how is the power to be applied, but by such censures and remonstrances as may seem proper, and when these are disregarded, by a higher exercise of authority—the dissolution of the offending bodies, and their re-organization in conformity with the discipline of the Church.—"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."

General powers were before granted, and here we have a specification of a few of these powers, which are themselves sufficient for our purpose. As to the mode of proceeding to carry them into effect, the Assembly is to exercise its own judgment. No form is prescribed. In virtue, too, of the power to erect Synods, the Assembly may dissolve, re-arrange, and re-model them: I believe this is not disputed. If they have the jurisdiction which I have mentioned, they may exercise it according to their own discretion, even according to their caprice. Your Honour will not permit any question to be raised here in regard to the manner in which an acknowledged power has been exercised.

Now having shown the necessary powers to be vested in the Assembly, by a broad and general grant, I assert that they have been always used by that body; that they have continually engaged in acts of legislation, in regard to a variety of subjects. A Committee of Overtures is appointed at the commencement of each session; and the appointment of that committee proves the exercise of other functions than those merely judicial and executive.

May it please your Honour, I have contented myself with a very cursory examination of these last topics, partly because I had before occupied so much time, and partly because, as I conceive, they have no relevancy to this case. More will be said in regard to them by the able and learned counsel, who is to succeed me: he will supply all the defects of my argument. And I hope, gentlemen, that on the view of what has already been, or may be hereafter advanced, you will find that the relators here have not established the claim of those whom they represent, to be, exclusively, the Presbyterian Church. I do not think that the Assembly of 1837 did wrong; but if it did, it was only to the four exscinded Synods, and but one half of these gentlemen who assert that they formed the constitutional Assembly, are from those Synods. The rights of the fifty-four commissioners excluded, are the only ones which the relators seek to establish by this most extraordinary proceeding. They say that we acted unjustly; but is this the only way of obtaining redress? Must they annihilate us to reinstate themselves. Suppose that our proceeding in 1837 were unjust and most tyrannical, why did they not return and ask leave to take their seats among us? Why did they not demand them, in the usual and prescribed form, from the Assembly of 1838, coming fresh from the people, and thus give us a chance of reviewing the conduct of the preceding Assembly, and coolly deciding whether it had been right or wrong? Or, if they did not choose thus to appeal to us, why did they not appeal to the laws of the land for the same purpose? Why do they seek to annihilate us—to obliterate our name? Must they sit in our seats and lord it over us, and exercise an unlimited, uncontrolled power in the dispensation of the charities of the Church? Why, I ask, did they not return, and make a formal application to the new body sent back in 1838, after the whole subject of their alleged grievances had been submitted to the people? Such an appeal to us was never made. Or, if they considered the Assembly of 1838 likely to prove unjust, why did they not apply to the civil power to restore them to their seats? Why did they not proceed by a *mandamus?* No, this was not enough. They were not content to recover merely what they alleged had been unjustly taken from them. Their motto is, *Aut Cæsar, aut nullus.* They do not desire merely their old places; now they must be all or nothing. They wish to seize upon the whole funds of the Church, and to propose terms to us—the minority to the majority. They must subdue and humble us: we must come as suppliants for their bounty. Were they unwilling to abide the trifling delay which a formal application to the Assembly of 1838 would have required? This delay might have been a misfortune; but, gentlemen, delays of justice are frequently the price which we are obliged to pay for our liberties. This, besides, is no excuse, because a civil court would have put them *in statu quo*, if they could have established their claim. If they did not want money, if they did not desire to strike down men obnoxious to them, and to seize upon the funds, there was another method in which they might have tried the right. I do not pretend to advise them, but merely to show that there was no necessity for such extraordinary proceedings as these. Their Permanent Clerk might have brought an action against ours to recover the books and papers. If an action of *trover* had been instituted by the clerk, in that way the question might have been peacefully brought up. Thus it might

have been decided whether they were a part, or, if they please, the whole of the Presbyterian Church. This question would have been involved in an action of *trover*, and the institution of such a suit would have shown that they were not disposed to strike down that venerable gentleman, (Dr. Green,) or to seize upon the purse. But instead of this, they attack directly our persons and our funds.

Well, gentlemen, it is for you to decide, whether they are the Presbyterian Assembly, and we no part or parcel of it. On your verdict the claims of each party depend: by it these questions must be solved. If you decide that we are not the Presbyterian Church, here is our money: take it from us, for it is but dross. We shall lament, but shall not be utterly stricken down. In the bosoms of the fathers of the Church there swells a Christian spirit that will yet sustain them. As of old they have rallied around the standards of their faith, an impenetrable array, so, with the noble company of young men who will feel honoured to perish at their sides, will they again rally, though a broken band. Those who have planted the Church; whose prayers have prevailed with heaven for a rich blessing on their labours; though that which their hearts have so fondly cherished be taken from them by the finesse, the legal artifices and intendments of their adversaries, will still find comfort in the midst of the sore affliction.

But I will not anticipate such a result: I look confidently to your verdict's being given for us, and I will tell you the consequences of that verdict. The Old-school party, now sustained by the bright example and Christian precepts of those who have gone before them, will be strengthened by your judgment. And soon the wild, prodigal son, that has gone forth to seek elsewhere his fortune, impoverished by your verdict, will return to the home of his father; we will kill for him the fatted calf; we will spread the banquet of peace and unity restored, and of never-ceasing love. If this result does, as I confidently hope and expect, follow from your verdict, all difficulty will be removed; the true flock will again be collected within its venerable fold; you will see perfect harmony reigning as before between Congregationalists and Presbyterians. Such a verdict, while it might be received with dismay by a small portion of the people of this land, would call forth from your own State an universal acclamation of joy and thanksgiving. From the shores of the Atlantic to the banks of the Mississippi, would rise one loud and general burst of gladness, mingled with prayers of grateful adoration to Almighty God.

I have now discharged, as well as I have been able, the duties of a responsible situation. I have perhaps trespassed too long upon your patience, but I have been urged on by the conviction, that I was called to devote to the subject my whole strength of both mind and body; and I humbly ask your pardon for having so long detained you. Gentlemen of the jury, I thank you for your attention. And may it please your Honour, I have perhaps marred the symmetry of the case, but I must thank the Court for the kind permission of appearing as an advocate for the defendants, which has been extended to a stranger, and for the courtesy to which I should not otherwise have been entitled.

MR. INGERSOLL'S ARGUMENT.

THURSDAY MORNING, March 21st—10 o'clock.

With submission to your Honour—Gentlemen of the Jury—Perhaps I cannot better break the formality of an opening to a mere business argument, than by making a very inadequate acknowledgement to the learned counsel who has preceded me. All who have heard him must feel themselves to be his debtors. His clients cannot fail to be grateful for the ability with which he has argued their cause. The court and the jury must be conscious, that their labours will be lightened by the learning and talents which he has brought in aid of their investigations. Even his antagonists will confess, that while they have occasionally suffered from the power of his argument, they have enjoyed the graces and the vigour of his eloquence. If they have smarted from the severity of his blows, they have admired the brilliancy of his weapons, and the dexterity with which they have been used. No one, perhaps, owes him so small a measure of gratitude as myself; for he has left me the duty of addressing you, with scarcely the privilege of having any thing to say. While he has reaped the harvest with an avaricious hand, he has committed to me the humble and unprofitable task of gathering only the scattered and imperfect gleanings of the field. But I should do injustice to my own feelings, and to the bar, of which we are for the occasion fellow members, if I did not unite in offering him my cordial acknowledgments for the example he has afforded to us all. Not so much for an example of abilities, learning, and eloquence—these are qualities which we might vainly endeavour to emulate—but through the whole course of an arduous and protracted controversy, he has manifested a distinguished courtesy; a fair, honourable, and urbane deportment; the due appreciation and imitation of which will, at all times, contribute to the delightful, and as I firmly believe, to the true administration of justice.

It is important in the outset to exhibit the essential differences between the parties to the cause. Not the mere abstract differences, the mutual claims of right, and imputations of wrong, which exist in every controversy. Much less the subtle and inscrutable varieties arising from the alleged preponderance in purity of motive. Each side might there safely challenge investigation, in the consciousness that no human tribunal is competent to the decision. But the visible and acknowledged points of difference, radiating, as it were, from the pleadings and the evidence which the parties have chosen to put forth and to fight under, as the sign and the standard of its cause. Engaged as we are in the active struggles of a divided and militant Church, we naturally seek for the respective manifestos which went out before the present state of hostile conflict began. They are not difficult of discovery, and to them we may advantageously apply all that has since been said or done by the respective hosts.

The plaintiffs are bound to show who are the present Trustees of the

General Assembly of the Presbyterian Church. They are bound to show that they are themselves entitled to that office against all competitors. But there are certain preliminary or constituent principles, the resolution of which will resolve the final inquiries. These are found in two positions, connected with the two principal events, which stand forth as the prominent circumstances in the history of the controversy. These positions the plaintiffs must assume and maintain. Reducing them to the fewest possible words, they are,

1. That the proceedings of the General Assembly of 1837, declaring four Synods to be out of the ecclesiastical connection of the Presbyterian Church, are null and void.

2. That on the 17th of May, 1838, a lawful change was affected in an existing General Assembly, and that a new one was substituted for it, which carried away the entire powers of the original body, and exercised them fully in another place.

The defendants deny both of these positions. They maintain that the proceedings of 1837 were valid and effectual. They assert, however, that even if they are wrong in this denial, their antagonists are as remote as ever from the object of their seeking, since they must not only demonstrate the invalidity of our proceedings, but the propriety of their own. They must create as well as destroy. If the transactions of 1837, which we undertake to sustain, are impugned effectually, those of 1838, which our antagonists must justify, are still defective and fruitless; for these last transactions made no effective change in the existence or powers of the duly organized body, but amounted only to a voluntary secession, and a distinct, independent, coexistent, and therefore abortive organization.

It will be readily perceived that the labour of proof is, throughout, assumed by the plaintiffs. It is incumbent on them to establish each of the propositions which have been stated. It is not perhaps very material to add, that in doing so, they have to make out, not only an affirmative but one of a compound character, inasmuch as each of their points is composed of a series of distinct yet dependent positions, no one of which can be made available unless it can both give support to the rest, and derive it from them.

I propose to consider, first, the proceedings of 1837. They are the earliest in date, and naturally precede in the course of discussion, those of a later period; and they are an indispensable foundation for the other parts of the plaintiffs' cause.

Look for a moment at the character of the General Assembly, its powers, and the nature of its proceedings. It was a competent and constitutional body, distinguished for wisdom and piety, containing some of the most virtuous and intelligent men of their order, made up of delegates, sufficient in point of number, and amply invested with authority, fully instructed as to the desires and interests of their constituents, and able to maintain their rights and vindicate their wrongs. It was entitled to especial confidence. In matters of this sort it is the very kind of tribunal that ought to be supreme. Where else can religious men look for authority and wisdom in religious matters, if not to the collected intelligence of the wise and pious of their especial sect? Every Christian Church has, what may be termed, its hierarchy: a system of ecclesiastical polity, which is necessary for its well being. In all ages of Christianity, the

highest council has been in its influence supreme; and it has been looked to as the safest guide and the best instructor. If there be infallibility any where, the Roman Catholic believes it to rest in general councils. Luther the great reformer, the founder of Protestantism, appealed to them with unhesitating confidence. Even Calvin, the apostle of Presbyterianism, maintained that the universal Church is infallible, and that God must annul his solemn promises if it were otherwise. Whether attained with the gorgeous splendour of one class of Christians, or the studied simplicity of another, the effect is the same. None are bound by the decrees of these religious assemblies, but those by whom they are sought; but upon those who seek them, their influence is greater even than that of temporal courts of justice, for they affect not only the conduct but the conscience also. . This kind of jurisdiction, however powerful in its peculiar sphere, implies no disrespect towards the laws of the land, or the tribunals that administer them, and occasions not the slightest interference with them. Individuals may by mutual consent submit their controversies to other individuals not more competent to judge wisely than themselves. Yet the judgments of the humblest tribunal, owing its existence merely to voluntary selection and submission, dignified by no judicial title, strengthened by no commission, clothed with no official power, possess a stability as complete as those of the ermined judge, who is surrounded with the implements and the insignia of office. All this is because the unofficial tribunal has been voluntarily selected by the parties. Can the effect be less certain when the umpire is of a more dignified and exalted character? Is the decision of a church council, so well chosen, so full of piety, so sound in judgment, so tried in experience, less entitled to respect than that of the commonest reference?

It is among a particular class of persons only that the determinations of an ecclesiastical body can be expected to be effectual. All the parties to this cause are, I presume, of that character. They are religious men, otherwise the decisions referred to would have no sanction. Talk to the profligate and the infidel of the judgments of the Church, and he disregards, if he does not deride its authority. The thunders of the Vatican traverse the Atlantic unheeded by those who are strangers to the Roman Church; but they sound as awfully in the ears of those who worship in its faith, as the communications of the law once did to the ancient people of Israel. It is the power of conscience which gives effect to these decrees. They do not influence by the dread of temporal penalties. They have no power to inflict a pecuniary fine, or to direct a moment's imprisonment. But they may exclude from Church fellowship, or deny a participation in the Holy Communion, and thus attain results more impressive than any of a merely temporary character.

When these Church councils have not exceeded their jurisdiction, and have duly exercised the authority voluntarily confided to them, no appeal can be taken from their decisions to any court sitting under the law of the land. In this country the tribunals of justice are not competent to interfere with them. There is no danger of an *imperium in imperio*. In such an independent exercise of authority as this case demonstrates, there was nothing like collision with the ministers or the principles of the temporal law, and there was the clearest evidence of the utility of the separation in civil government between Church and State. Well settled

authority will show that exalted as may be the court before which we are all now arraigned, it cannot reverse, because it cannot reach the proceedings of the General Assembly of 1837. It has no jurisdiction over them. The best elementary writers inform us that the sovereignty of the state cannot interfere with these matters unless they first interfere with a Church establishment, such as has no existence here. "Let us remember," says Vattel, "that religion is no farther an affair of state, than as it is exterior and publicly established: that of the heart can only depend on the conscience. * * * * It is a principle of fanaticism, a source of evils, and the most notorious injustice for weak mortals to imagine that they ought to take up the cause of God, maintain his glory by acts of violence, and revenge him on his enemies. "Let us only give to sovereigns," said a great statesman and an excellent citizen, "let us give them for the common advantage, the power for punishing whatever is injurious to charity in society. It does not belong to human justice to become the revenger of the cause that belongs to God." Cicero, who was as able, and as great in state affairs, as in philosophy and eloquence, thought like the Duke of Sully. In the laws he proposed relating to religion, he says, on the subject of piety and interior religion, "If any one commits a fault, God will revenge it:" but he declares the crime capital that should be committed against the religious ceremonies established for the public affairs, and in which the whole state is concerned. The wise Romans were very far from persecuting a man for his creed; they only required that people should not disturb the public order." *Vattel's Law of Nations, B. I. Ch. xii.* § 133. *Deorum injuria Diis curæ*, was the wise maxim of the Romans. Let the gods avenge their own wrongs. What is it to the government, in any of its departments, that I may have been dismissed from the communion table? or that any number of persons may have been excluded from a religious assembly, where it has not exceeded its jurisdiction and authority? In the case of *St. Mary's Church*, decided in the Supreme Court of this state, the subject was much discussed. Judge Duncan in his opinion says,

"Yet in deciding on the temporal rights of any religious society, it becomes their duty to inquire into the articles of their government and discipline; for no society can exist without some government, give it what name you please, call it ecclesiastical council, convocation, presbytery, synod, general assembly—some claiming the right to govern the church *jure divine*, or by apostolical institutions, and others with more humble pretensions, claiming spiritual authority from things merely human; each has a discipline and church government of *its own*, some platform, but this is confined to spiritual matters, and exercised *pro salute animae*.

"This is a principle well settled in this court. On a writ of error from the Common Pleas of Huntingdon county, *Riddle et al* v. *Stephens*, 2 *Serg. & Rawle*, 542, it is stated with great clearness and strength by the Chief Justice. The demand of the plaintiff below, Stephens, was for services rendered the defendants as their pastor. The Chief Justice observed, 'the Presbytery, according to the rules and discipline of the *Presbyterian Church*, had power to suspend the functions of the plaintiff, or even to remove him from his ministry;' so far as respected his suspension or

removal, the jury were directed to consider the proceedings as evidence, but no regard was to be paid to the details of evidence before the Presbytery; the particular facts alleged *or* proved, were to have no effect on the verdict. The decision of the Presbytery, as to the suspension or removal of the plaintiff, was the only matter to be regarded.

"Every Church has a discipline of its own—it is necessary that it should be so; because, without rules and discipline, no body composed of numerous individuals, can be governed. But this discipline is confined to spiritual matters; it operates on the mind and conscience without pretending to temporal authority. No member of the Church can be fined or imprisoned; but be he layman or minister, he may be admonished, reproved, and finally ejected from the society. So he may retire from it at his own free will. Under these restrictions, religious discipline may produce much good, without infringing on civil liberty. Both plaintiff and defendants were subject to the laws of the Church, both as to the induction and removal of the plaintiff; it was not in the power of the defendants alone to remove the plaintiff; the Presbytery alone could do it, with a right of appeal to the Synod, and in the last place to the General Assembly. This being the case, it was to no purpose to enter into the plaintiff's conduct before the jury; the cause had been heard and decided by the Presbytery, and so far as regarded the plaintiff's continuance in the ministry, the decision is binding, subject to appeal."—7 *Serg. & Rawle's Rep.* 556.

In the case of *Field* v. *Field*, 9 *Wendell's Rep.* 400; The court says, "So long as the forms and modes of proceeding, by the association under whose direction the original contributors placed the fund, are strictly complied with in its management and controul, a court of law are incompetent to interfere." Had the association undertaken to fine or imprison an offender, or levied a distress to compel the payment of ecclesiastical dues, they would have overstepped the magic circle of their jurisdiction, and would have interfered with civil rights. But when it appears that the parties have chosen, for certain purposes, a government for themselves, have voluntarily submitted to a spiritual assembly, they must be bound by its decrees, in all matters within its jurisdiction, and it is not in the power of man to afford relief. The rights and the obligations attendant upon such a connexion, are perfectly reciprocal. Dissatisfied members are not compelled to adhere to an alliance which is oppressive in reality, or which is, even in their opinion, vexatious. Those who have voluntarily connected themselves with any religious denomination, may, at pleasure, dissolve the connexion; the door is always open for their departure.

Authority upon this point is equally satisfactory. 5 *Watts*, 43, *Ebaugh* v. *Hendel*. "Where the acts of a corporation are in conformity to the charter, there is, perhaps, no choice for a dissatisfied corporator, but that which lies between submission and secession." Thus, the Church cannot punish any one who does not choose to submit to its discipline; it cannot extend censures beyond its own pale. Almost every man is attached to some Church; yet he is not bound to it by ties stronger than his own desires. When the Pilgrims, after their long and perilous voyage, landed on the rock of Plymouth, they formed a religious establishment, in accordance with the notions which they brought with them

from their native land. Amongst their descendants, every one is obliged by law, to contribute to the support of some religious body; but here we have no such regulation; tithes in every shape are purely voluntary. Here public sentiment and the law both secure perfect freedom in this respect. No ligament or tie, stronger than the power of conscience, binds any individual to his Church. No man is obliged to join any religious denomination, or remain with it longer than he desires.

We next inquire what sort of powers the General Assembly possesses. It has, perhaps, none in strict analogy to the powers of either our legislatures or courts of justice. The anathemas of a spiritual assembly can have no temporal effects—they can touch the conscience only. But why has it not legislative—*quasi* legislative, as well as judicial functions? No reason has been given except, perhaps, that which is derived from the use of the word *judicatory*. All the Presbyterian councils or meetings are called judicatories: the session, the Presbytery, the Synod, and the General Assembly, are all judicatories. The business of the body, so called, is hence inferred to be merely judicial; but this is a fallacious inference. Are we to be told, that the word *court*, means only this court of *Nisi Prius*, or the Supreme Court from which it emanates? That would be taking it in a very limited sense. The term is applied as well to legislative as judicial bodies. Such is the General Court of Massachusetts; and Blackstone speaks of the High Court of Parliament, the proceedings of which are mainly legislative. Our best writers use the term in the most enlarged meaning. Walter Scott puts into the lips of one of his heroes this well known phrase:

> "What cared the chieftain if he stood
> On highland heath or Holy Rood:
> He rights such wrongs wherever given,
> If it were in the *Courts* of Heaven."

We speak of the court of a temple, the court of a castle, a court yard, and of *Court* as the place of royal reception. The word is not confined to tribunals of justice.

What is to prevent the Assembly from exercising legislative power? It is plain that they are not always, nor usually sitting as judges; for when they are about to assume that character, a particular form of words is addressed to the members, reminding them of the greater solemnity of the business upon which they are entering. In the performance of their more ordinary duties, the same form is not observed. The Assembly has too, a Judicial Committee, just as the Senate and House of Representatives of the United States have; and when they proceed to the consideration of matters, brought before them by that committee, an especial appeal is made to the throne of grace; a more grave and serious deportment than usually accompanies the other proceedings of the body, is enjoined.

Take up the Minutes of 1832, page 316. "No. 1, reported by the Judicial Committee, viz: 'A complaint of certain members of the Presbytery of Philadelphia, against the Synod of Philadelphia, for refusing to divide said Presbytery,' was taken up. The Moderator read the rule requiring the members to regard their high character as judges of a court of Jesus Christ, and the solemn duty on which they are about to enter."

This is the mode of proceeding on all such occasions. The power is indeed limited: it falls very far short of what Blackstone rather profanely calls the omnipotence of Parliament: and in a judicial character, it is not half so strong as that of a common justice of the peace; yet though a limited, it is often a legislative authority. A few examples will suffice. Minutes of 1832, p. 322.

"Overture No. 1, viz: On the subject of Missions, was taken up and referred, &c."

"Overture No. 2, viz: On correspondence with Foreign Bodies, was taken up and committed, &c."

"Overture No. 3, viz: On reducing the rates of representation to the General Assembly, was taken up and referred, &c."

And so on with Overtures Nos. 4, 5, 6, &c. Then on the next page we find,

"Overture No. 11, viz: A request that the 31st of December, 1832, be recommended as a season of prayer for the conversion of the world, was taken up and committed, &c."

Is not that legislative—purely, benevolently legislative action? The appointment of a day of prayer for the spread of the blessed Redeemer's kingdom all over the world?

"Overture No. 13, viz: On publishing a new edition of the Book of Discipline and Form of Government, was taken up and laid on the table."

"Overture No. 14, viz: On the subject of the validity of Roman Catholic baptisms, was ordered to be taken up, &c."

"Overture No. 15, viz: On ordination by a deposed minister, or by laymen, was taken up, &c."

"The report of the committee to whom was committed the reference from the Synod of Philadelphia, in relation to the right of Presbyteries, to require every Minister or Licentiate, coming to them by certificate from another Presbytery, or other ecclesiastical body, to submit to an examination before he be received, &c."

All these are examples of church legislation, and if I chose I could multiply examples to any extent. Same Minutes, page 325:—

"It being understood, that Christians and churches, both in this country and in Europe, have at different times desired the public designation of a day, to be observed by all Christians throughout the world, as a day of fasting and prayer, for the outpouring of the Holy Spirit on the whole family of man, and this Assembly being deeply impressed with the importance and high privilege of such an observance; and feeling urged and encouraged to more importunate supplications, in view of the recent revivals of religion in this land, as well as the signs of the present time in relation to the prospects of the Church in other nations, therefore,

"*Resolved*, That it be recommended to the ministers and churches, under the supervision of the General Assembly of the Presbyterian Church in the United States, and the churches in correspondence with the same, to observe the First Monday in January, 1833, as a day of *Fasting and Prayer*, for the Divine blessing on the ministry of the Gospel throughout the world, for the revival of religion in the whole of Christendom, and for the entire success of those benevolent enterprises which have for their object, the world's conversion to God.

"*Resolved*, That other denominations of Christians in the United States, and the Christian Churches in all other countries, be, and they hereby are affectionately, and with Christian salutations, invited to concur in the observance of the day above specified."

These are instances of practical legislation. It will appear from a few passages in the Form of Government and Confession of Faith, that these church judicatories have, in their essential formation, legislative powers.

"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.*"—*Conf. of Faith, Chap.* xxxi. *Sect.* 2. How could you give more legislative power than is found in the last sentence? "to set down rules and directions for the better ordering of the public worship of God, and government of his Church." You cannot inscribe or imagine a more comprehensive grant of *quasi* legislative authority. Turn to the Form of Government, Chap. xii.

"The General Assembly is the highest judicatory of the Presbyterian Church."—The highest of all those councils, to which the Confession of Faith attributes such important legislative powers.—"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."

"The General Assembly shall consist of an equal delegation of Bishops and Elders from each Presbytery, in the following proportion, &c."

Mr. Ingersoll read also sections 4th and 5th. *Vide ante, pp.* 335–6.

Thus we see, that the powers conferred on the General Assembly are just as much legislative as judicial. Strictly speaking, they are neither one nor the other; but using the terms in the sense in which they have already here been used, this judicatory is both a legislative and judicial body, though, in each capacity, it acts only in a limited sphere.

So much it has seemed necessary to say, before coming to the consideration of the proceedings themselves, of the General Assembly of 1837. As they stand on the minutes, they appear in the form of a series of resolutions merely. They are nothing more, in either form or substance, than the discontinuance of a simple regulation of the Assembly, which was adopted in 1801. It was a regulation of expediency, designed only for temporary convenience, and, like all others of like character, subject to abrogation. The abrogation of it was lawful. It terminated an unsatisfactory and illegal connexion with a number of dissimilar churches. It dissolved a partnership, which had no settled or definite term. It consisted, of the breaking up of an association, for the establishment of which there had never been any motives of advantage to the one side, and there were no longer any claims for assistance, or necessity for protection on the other. It communicated to those, who had long partaken of many voluntary kindnesses, who had grown up under the fostering care of a distant friend, and become strong by borrowed strength, that, as they were now able, they ought to be willing to take care of themselves. It was (if you please) declining any longer to confer favours which it was believed were abused. An arrangement thus voluntarily entered into, might be voluntarily renounced. The regulation of devoting a particular hour, at particular seasons, for the concurrent worship of Almighty God in every

Christian community, is of much higher sanctity. Yet what could prevent the discontinuance of the arrangement by any particular body of Christians at their pleasure?

The abrogation was, not merely thus lawful, but it was of peculiar and obvious expediency, considering the relations in which the parties stood towards each other. It was a proceeding, founded upon the anticipation of strife, and a wise desire to avoid it. It was saying, "Is not the whole land before thee? Separate thyself from me. If thou wilt take the left hand, I will go to the right."

It was within the letter and spirit of the Constitution. It regulated inferior judicatories, so far as they were subject to legitmate control, and no farther: and it merely left apart those which were not properly subject to its influence. To the extent that it had power to do so, it *modified* Synods and their constituent parts; and, where it had no power, it assumed that there ought to be no connexion, and it *disowned* them. This was done, because the existing organization worked badly in practice, and threatened to become worse; because it was productive of present disorder, and was prolific of injurious consequences to the legitimate members.

The whole history of the General Assembly shows the power, and the practical exercise of it. The General Assembly, itself, was formed by the expansion of a pre-existing Synod.—*Digest, p.* 1, 2, 38. In 1834, the Synod of the Chesapeake was dissolved.—*p.* 317. In 1835, the Synod of Delaware was dissolved. In 1837, the Third Presbytery of Philadelphia was dissolved; and why should not four Synods be dissolved in 1837?

The history of the Third Presbytery is a history of dissolutions and revivals. It has been moulded and fashioned according to the will of the Synod and General Assembly, and has either submitted to every change, or, if it has not submitted, has been regarded as rebellious. First it was formed, then dissolved, then restored, then its geographical limits were altered, and, lastly, by the Assembly of 1837, it was finally dissolved. This history shows the power exercised by the General Assembly. In the other cases, certain Synods had been irregularly formed, and they were dissolved exactly as was the Third Presbytery. When the New-school complain in 1838, of the exclusion of those Synods, they lay no stress at all upon the case of this Presbytery. Dr. Patton's resolution does not mention it—does not even allude to it. He moved only that the roll should be formed, "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, Genesee, and the Western Reserve;"—*ante, p.* 51. The Third Presbytery he entirely overlooks: the exclusion of the Synods is the only cause of complaint. Nor did Dr. Mason say a word in regard to this Presbytery. I suppose that he was willing to admit the propriety of its dissolution. When he arose, saying that he had in his hand the commissions of certain Commissioners from different Presbyteries, had he any commission from the Third Presbytery of Philadelphia? Here is the bundle which he presented: it contains no such commission. His application was confined to the case of

the Presbyteries belonging to four Synods. This was a plain admission of the power of the Assembly to dissolve a Presbytery.

I have thus shown, by various precedents, the right of the Assembly to dissolve inferior judicatories; and that this right was exercised in the case of the Third Presbytery, at a season of the warmest party conflict, was acquiesced in by the New-school, and that no doubt of its constitutionality was murmured in 1838. And these dissolutions were effected, not by judicial acts, but by a clear exercise of legislative power.

The "Plan of Union" was *not a contract.* This must be acknowledged by my learned friends on the opposite side. They cannot for a single moment believe it to have been so. Who made the contract? It has no *parties*, and they are essential to a contract. It is on its face a plan of union among the new settlers; not a union between the General Assembly and the Association of Connecticut. Indeed it is characterized by its own words, as a mere set of regulations adopted by the Assembly and the Association. Now, I don't require to be shown a formal indenture, but what properties has it of a contract? Who are the parties? What was the consideration? What the sanction? It is no contract, and if it had the outward form of one, I should still contend that it had no binding efficacy; for the Association of Connecticut had not in law the power to bind itself.

Here is a work which has just been put into my hand—"The Encyclopedia of Religious Knowledge," a work published in New England, by Congregationalists themselves, and which therefore may be supposed to give a correct account of their peculiar institutions. You are aware, that there are few Presbyterians beyond Albany; that they are confined chiefly to the middle, southern, and western states; and that in New England the people generally, who are not Episcopalians, or Unitarians, are Congregationalists. You will find that the Congregational Associations are of most limited authority. There is another Assembly called a Consociation, which also, *ex vi termini*, is a Congregational body. Both these are strictly limited in their powers. Their decisions are merely advisory, and are of force only by courtesy or as they affect the conscience: even in spiritual matters they are not binding.

"Associations are composed of ministers only, who meet for their own benefit, and to consult for the good of the churches. They examine and license candidates for the ministry, but have no power of making laws for the churches." There we have the fact for which I am contending, distilled into a single phrase—"but have no power of making laws for the churches. Some maintain that on the general principle that a man is to be tried by his peers, a minister is accountable in the first case only to the association of which he is a member, so that until he is deposed by them, or by the consociation, before which they bring him for trial, he is not amenable to the church of which he is a member. Others hold, that a church has a right to try its minister in the same way that it would one of its private members. The principle laid down in the platforms is, that in the discipline of ministers, there is to be a council of churches where it may be had; but where this cannot be, the church may proceed to act. In Connecticut, a church cannot arraign a minister before a consociation, until the association have first decided whether there is sufficient cause for a trial." *pp.* 406—7.

Then on the same page, "In the year 1801, a plan was adopted by the General Assembly of the Presbyterian Church, and the General Association of Connecticut, by which Presbyterians and Congregationalists, in the new settlements of the western states, were effectually amalgamated. This plan places the two classes on equal terms in union churches, securing to each a mode of discipline corresponding to their principles, and gives to the members of the standing committee of Congregational churches, the same standing and powers in presbyteries and synods, as belong to the ruling elders of the Presbyterians. Four hundred of these union churches have been planted in the western states, by the Congregationalists in Connecticut alone.

Are we then told of having been ourselves sustained by the "Plan of Union," of having received from these Congregationalists money and prayers, and having "pocketed both," when under the auspices of that plan, by our countenance and aid, there have grown up four hundred of these mixed churches?

Mr. Wood objected to the counsel's reading from the "Encyclopedia of Religious Knowledge," as no part of it had been offered in evidence, and the court sustained the objection.

I am now about to enter upon a field not absolutely unexplored, nor yet, perhaps, sufficiently familiar to you—the proceedings of the Assembly of 1837. These were given in evidence by the opposite counsel themselves. Though the whole case, as regards them, may be distilled down to the question, whether the four disowned Synods were ever regularly and constitutionally connected with the General Assembly; yet there was a variety of proceedings of all which it is necessary that you should take notice. The first act was the resolution declaring the "Plan of Union" to be abrogated. The next a series of propositions terminating in the declaration, that by virtue of the act abrogating the "Plan," the Synod of the Western Reserve was no longer a part of the Presbyterian Church. Then a similar declaration was made, that certain other three Synods—those of Utica, Geneva, and Genesee, were, in consequence of the abrogation, out of the Presbyterian Church.

Judge Rogers. Can you tell me, Mr. Ingersoll, when the Synod of Pittsburgh was created?

Mr. Ingersoll. The Digest will show us. Here is an account of the matter, page 39. In 1802, the Synod of Virginia was divided into three parts, one of which retained the name of the Synod of Virginia; another was constituted a Synod by the title of the Synod of Pittsburgh; and of the third portion was formed the Synod of Kentucky.

I have said, gentlemen, that the second series of proceedings complained of, was that ending in the declaration, that by virtue of the abrogation of the "Plan of Union," the Synod of the Western Reserve was no longer a constituent part of the Church; and the third, that which resulted in a similar declaration with regard to the three Synods, of Utica, Geneva, and Genesee. Though these which I have mentioned were the principal, and most prominent proceedings, they were not the only ones to which I shall call your attention. There were, besides them, measures which served to illustrate the disposition of the parties, and the mode subsequently adopted. Two of these are of essential importance. They were opposed and finally arrested by the gentlemen on the other

side, though they now contend that one of them was the only proper measure to be taken by the Old-school, and press that point upon us. This was the citation of the four Synods. The other measure to which I allude, and upon its necessity both parties, at one period of the proceedings, seemed to be agreed, was the division of the Church. The former was opposed by the New-school when brought forward by the Old, and by Mr. Jesup among others, though afterwards, when his friends found themselves defeated, he proposed what was in substance this very measure. You will observe as I read, that all the acts of which the other party complain, were passed after ample deliberation; and it was only when abundant time had been given for debate; when each measure had been considered at length; when the patience of every one was exhausted by arguments which had extended beyond satisfaction to satiety; when the fondness for speech-making seemed to increase rather than diminish, and the discussion appeared likely to occupy weeks or months, unless in some way checked, that it was arrested by a call for the previous question. The subject of the "Plan of Union" began to occupy the attention of the Assembly at a very early period of its session. It began to sit on Thursday the 18th day of May.

On Friday afternoon, May 19th—the very next day, "A document purporting to be a memorial from a Convention of Presbyterian Ministers and Elders, now in session in this city, was presented to the Assembly, and was referred to the Committee of Bills and Overtures." That was the origin of the whole of these proceedings. On Saturday morning this committee reported, "Overture, No. 1, viz: 'Testimony and memorial of the Convention,' in relation to errors and irregularities in the Presbyterian Church," with three other overtures, being memorials on the same subject. "It was moved to receive and read these overtures, and after debate they were re-committed." Then on the same day, "The Committee of Bills and Overtures again reported the Overtures Nos. 1, 2, 3, and 4, which had been re-committed to them. Overture No. 1, was read and re-committed" to a select committee. On Monday morning, May 22d, this committee made a report, and after some debate, one branch of the subject was postponed till Tuesday, and that part of the report relating to the "Plan of Union" was made the order of the day for that afternoon, and accordingly was then discussed. At this time perfect harmony seems to have reigned. The report of the committee in regard to the plan of 1801, embraced three resolutions, and of these the first two, relating to friendly intercourse between the Presbyterian and Congregational Churches were passed, as it appears, without difficulty. The third was "discussed for some time," and then the Assembly adjourned. On Tuesday morning the discussion continued, and was also resumed on Tuesday afternoon, when, after considerable debate the resolution was adopted, by a vote of one hundred and forty-three, to one hundred and ten. This was the essential part of the report, and was therefore made the third of the series. The others, as I have said, related merely to the continuance of friendly intercourse. "The resolution," says the minute, "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,"—Now, gentlemen, whether I produce positive evidence of this fact—that the Association was entirely destitute of authority—or not, here it is given by the Old-school as one reason for the abrogation, and the other side are bound, at this time, to disprove it,—"and especially to enact laws to regulate the churches not within her limits;"—For these churches are as much out of the limits of the Association of Connecticut, as France is without the limits of the United States—" 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."

The reasons then for the abrogation are distinctly laid down in the resolution itself: here is the basis of the measure. It is therefore for our opponents to prove that these reasons are false. The evidence which I offered just now went to this point, but why did not they bring evidence in regard to the matter? They attempt to turn out our trustees because of an act which they say was unconstitutional and void. Well, they must show its unconstitutionality by demonstrating that the reasons for which it was passed were not good. These "unsuspecting brethren" certainly knew the grounds on which the abrogation rested; and should have been prepared with evidence to show that they were untenable. They have not been surprised by reasons started upon them in the midst of this proceeding. They were told in 1837, that the "Plan of Union" was "totally destitute of authority as proceeding from the General Association of Connecticut." I put it to your Honour, as a principle of this case, that the plaintiffs are bound to show why our act was unconstitutional and void; and that as we have given reasons for it in the resolution itself, the burden of disproving our assertions rests on them. It is not our business to sustain our reasons, but theirs to destroy them. These assertions were made nearly two years ago, and if they have not now been met, the attempt to disprove them must be considered as abandoned.

The next proceeding—*Minutes, p.* 422—was a farther report of the Committee on Overture, No. 1, "respecting so much of the memorial as related to the toleration of gross errors in doctrine, or disorders in practice, by inferior judicatories," presented on the morning of Wednesday, May 24th. You will perceive from an inspection of the Minutes, that these different subjects underwent full discussion, that ample time was given for argument before the decisions were made. On Thursday morning a motion was offered to take up the report last mentioned, and in the afternoon the house resumed the consideration of this matter, and the motion was carried, after which certain resolutions were presented—resolutions proposing a measure which our opponents now say should have been adopted, but which was then abandoned on account of their strenuous and stern opposition—" Resolutions to cite to the bar of the next Assembly such inferior judicatories as should appear to be charged by common fame with irregularities, were offered and debated for a considerable time." You would be surprised to read the names of those who opposed this measure. Were they Dr. Elliott and his friends? No, they were these "unsuspecting brethren," who have been excluded without

notice and without trial, who should have been cited to answer for their offences, with Dr. Beman and Mr. Cleaveland at their head—the two gentlemen who are forward to represent their party on every occasion excepting the present. They, at that time, opposed the measure of citation.

On Friday morning and afternoon these resolutions were amply debated, until at last the previous question was demanded. And what but the call for the previous question would have put an end to the discussion? This measure is always regarded as a hard one by a minority, for they are often inclined to continue debate until the end of the session comes to their relief. Though we cannot tell the precise number of hours which the subject occupied, or whether the Assembly sat till late in the evening, it is evident that ample opportunity was given to consider the question. Among the ayes we find Dr. Alexander, who has been present here with Dr. Green, during some of the stages of this proceeding; Dr. Junkin; Mr. Symington, and Mr. Lowrie, who have been examined as witnesses for the defendants, with others of the same party. On the opposite side we find Dr. Beman, Mr. Jesup, Mr. Cleaveland, and a host of their friends—in all one hundred and twenty-two, against one hundred and twenty-eight—a most powerful minority; there being but the small majority of six for doing, what was certainly the most natural and reasonable thing in the world, what the New-school, the very men that so strenuously opposed it, now say they wished; what they desired of all things. Not only were they a united opposition; not only was the question decided by a pure party vote; but the majority was so small that the Old-school, like the English ministers, who are obliged to leave their places when they are not sustained in Parliament, must have regarded such success as little better than a defeat. And no sooner were the resolutions carried by even this insignificant majority, than one of those gentlemen who afterwards brought some of the suits which have been given in evidence from the docket—Mr. Hay, "for himself and others, gave notice of a protest against" them—against the measures which it is now said would have been so just and reasonable. Mr. Hay introduced his protest, and there the proceeding was suspended, except that a committee was appointed agreeably to a provision of the act, to digest a plan of procedure. The resolutions were as follows:

"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 are 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 'Book of Discipline,' the members of said judicatories be excluded from a seat in the next Assembly, until their case shall be decided."—*Vid ante, p.* 38.

This never was decided; but is it fair for the other party now to com-

plain, that the measure was not carried out, after they voted with a single voice in opposition, and after Mr. Hay, in the name of his New-school brethren, offered a solemn protest against it? Though there had been no such protest, the plan must have been ultimately abandoned; but followed up as the resolutions instantly were by this protest, it became evident that the minority were too violent in their opposition for the measure to be pursued any farther. The necessary result of the proceedings of the New-school was, that the other party were driven to devise some new plan. After Mr. Hay's protest, "Mr. Cleaveland, for himself and others, gave notice of a protest against the resolutions adopted on Thursday, abrogating the 'Plan of Union;'" and then "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." This last notice was followed up on Saturday morning, May 27th, by a motion offered by Mr. Breckinridge, "that a committee of ten members, of whom an equal number shall be from the majority and minority, be appointed on the state of the Church."

Mr. Preston reminds me, that up to a certain stage of these proceedings, of which I am endeavouring to give a succinct account, there was no difference of opinion as to what must be the result. All seem to have agreed that there must be a separation between the two parties; that it was not Christian-like to attempt to hold together, when dissension had become so violent as to bring scandal upon religion. Mr. Breckinridge's proposition was not only necessary, but most Christian-like—he was but fulfilling his duty to his Redeemer. An attempt to prevent separation would have been treason to the cause of Him who has said, "By this shall all men know that ye are my disciples—that ye love one another."

"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. Jesup, on the part of the minority. The report was adopted, &c." It is not necessary to bring evidence to prove that these gentlemen belonged to opposite sides.

You will observe, gentlemen, that at this time none of the difficulties since discovered were suggested—they have all been after-thoughts. The whole difficulty in regard to the Church property was an after-thought. All then were agreed that division was expedient. The only reason why a division was not effected was one, which, according to the judgment of Solomon, must condemn our opponents. The difficulty at this time was, that the Old-school were determined to adhere to the succession. The others were willing to give it up, but to give it up only on the condition that neither should have it, that it should be destroyed. The Old-school insisted that the property which they were to keep—there was no dispute about the mere division of the property—should "*remain* the property of the body retaining the name of the General Assembly of the Presbyterian Church in the United States of America"—the Old-school Assembly. The New-school insisted that the

same property should "be *transferred* and belong to the General Assembly of the Presbyterian Church of the United States of America, thereby constituted,"—in short, on destroying the succession altogether. Here was the point on which they split. It is true that in the course of the negociations, the New-school proposed that the subject of division should be first sent down to the Presbyteries, before the Assembly acted finally upon it, and the Old-school were unwilling to accede, insisting on an immediate division; but this does not seem to have been so great a difficulty as that rising out of the question of succession. At any rate the whole plan proposed for the division of the property, which had originated with the New-school, was adopted by them. What did they care for the nursery of the Church? What did they care for Princeton Seminary? Nothing. They disputed about the name only, and that they called an unimportant matter, a mere meaningless phrase. While the Old-school are contending for the right of succession, the other party say, that they assent to 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 of America, hereby constituted." One would think that if the change proposed had been considered so trifling and unimportant, the New-school brethren might have been less eager to insist upon it. But no; they say that the succession must be abandoned, and how Mr. Meredith could have so mistaken their meaning I cannot imagine. They wished that the living child should be divided and destroyed. Yet he tells you that the New-school cared nothing for property, that we might have taken that and welcome, if we would only have left them the right of succession—that here was the sole difficulty. That the parties differed, not on a point of property or honour, but on a point of faith. Yet the object of the New-school, plainly avowed, was to annihilate the succession; and at the same time they call the change of phraseology on which they insist, a mere "trifling alteration." The parties separate on a mathematical point. One wishes the property to remain to them as the General Assembly, the other that it shall be transferred to them, as a new body. The latter are willing to relinquish the succession, if the other will consent to do the same.

Here we find the reports of both portions of the committee. They were agreed in all cardinal particulars, as we men of the world would construe them; but they differed in regard to matters which the parties themselves deemed cardinal. These reports, (*Vid. ante, p.* 39, *et seq.*) are accompanied by the papers which passed between the two parts of the committee. The committee of the majority in their paper No. 1, say, "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." This you will perhaps think was very strong language, but it is not so strong as the language of the committee of the minority on the same subject. They say, "Whereas, the experience of many years has proved that this body is too large to answer the purposes contemplated by the constitution, and there appears 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 view 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."

Could these gentlemen, as men of conscience, throw any thing in the way of a separation? If they cast down but a pebble to obstruct the plan of division, they had forgotten, at least for the moment, the duty of yielding obedience to the dictates of conscience: they did not practice as they preached.

(Here the jury were allowed a recess of ten minutes.)

You will be good enough to observe, that this proposition for the appointment of a committee to devise a plan of separation, followed immediately on the heels of Mr. Hay and Mr. Cleveland's notices of protest, and was, as it appears, unanimously concurred in, and adopted as a banner of peace and a city of refuge, at a moment of disaster to one party, and of storm to all. I was just now speaking of the first paper of the committee of the minority, in which they agree in the importance of a separation. I would notice here an inconsistency in the final report of this committee to the house, as contrasted with the language of the subordinate report, or paper No. 1, from which I have just read, which is a little extraordinary. In the latter, they agree that a division "will be of vital importance to the best interests of the Redeemer's kingdom;" and, in this opinion, they had jumped to the same conclusion with the Old-school committee, though without any influence from them. But mark how different the language of this *protocol*—for the parties were in fact negotiating a treaty—from that of the subsequent report to the house, in which the same gentlemen of the minority say, "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!" How can we reconcile these two conflicting statements coming from the same party, and appearing almost within the limits of a single page? When speaking to the other portion of the committee, they volunteer to say, that a division is not only to be deprecated, but "will be of vital importance to the best interests of the Redeemer's kingdom;" but a few hours afterwards, in addressing the house, they declare, that they "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." Adding, "Such necessity, however, being urged by many of our brethren, we have been induced to yield to their wishes,"—most accommodating gentlemen!—"and to admit the expediency of a division, provided the same could be accomplished in an amicable, equitable, and proper manner." It is very obvious that there was a marked difference between the two parties in point of disposition. The New-school were coy, and did not choose to be won without being wooed. I wish I could show you the real points of difference between them, as regards the plan of division. The minority committee go on to say, "From these papers, it will be seen, that the only question of any import-

ance, 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 think that this question, about sending the plan down to the Presbyteries, is the only material point of difference between themselves and the Old-school; but mark where the main difference lay, according to the opinion of the committee of the majority: it was at this very point—the succession. They were determined to adhere to the Presbyterian Church.

Here is No. 10 of the propositions of the minority: it contains the offer which Mr. Meredith has ridiculed so much; but mark that this comes from the committee of the New-school.

Mr. Ingersoll here read the proposition—*Vid. ante, p.* 42.

This, I say, is the proposition of the minority; and if it gives the lion's share to the Old-school, it is only by the offer of the inferior animal. What say the majority to this proposal? They agree to its terms, so far as regards the division of property, offering however some modifications in the form of the proposition. The minority propose, the majority accede, and then comes a matter of considerable importance. The minority reply, "We assent to the modification of No. 10, by No. 5 of the propositions submitted, with a trifling alteration in the phraseology," —Mark! What is this trifling alteration? The Old-school wish the property which it is agreed they shall have, to *remain* to them: they wish to inherit the succession. The New-school, to destroy the succession, create two new bodies, and *transfer* to each its proportion of the funds. The Old-school, I say, wished to keep up the succession in their own body: this was the rock on which their Church was to be built—the foundation which was to support it till the end of time, a fit emblem of St. Peter. Tracing back their Church to the days of the Apostles, they held to it with a tenacity which was unyielding: their veneration for it knew no bounds. The others considered the words framed to destroy the succession, as merely "a trifling alteration in the phraseology." That we should take the Seminary, they agreed: it was no child of theirs: they did not wish to have any thing to do with it: they were satisfied with half of all the property besides the Seminary funds. Indeed, they say that their only difficulty is in regard not to the effect, but to the manner of division. In answer to all this, the committee of the majority simply refer to their own preceding papers, as containing their final propositions. They say, "We won't part with our General Assembly: we must keep up the succession and the name. This is not a question of the mere destruction and re-creation of a corporate body, nor of the mere

renouncement and re-adoption of a name: these things are but the type of that for which we are contending. What you consider trifling, we think of great magnitude. You say it is but form—we, that it is substance: you dispute about words—we about things." The minority return an answer—their No. 4, the majority respond, and here the negotiation terminates.

"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."

You perceive, gentlemen, that now the last hope of peace was blasted. The two parties differ in their estimation of the main points of difficulty; but it is very obvious that one side were determined to adhere to the succession, and that the other were willing to abandon it, and build up a new organization. As the other proceedings had been merely suspended during these negotiations, the moment that the suspension seemed no longer desirable, and so it became after the committee had reported and been discharged, a resolution was offered, probably by the same gentleman who had proposed the appointment of the committee, "That the Synod of the Western Reserve is not a part of the Presbyterian Church." How obvious was the propriety of all these proceedings. First, the "Plan of Union" was abrogated; then the measure of citation was urged, but it was carried by so small a majority, and the vote was so immediately followed by protest upon protest, that it might just as well have been lost; then a scheme for an amicable division of the Church was proposed, but entirely failed; and it was not until every other expedient had been tried, and had proved ineffectual, until the measure could no longer be avoided, that as a necessary though very disagreeable remedy—a *dernier resort*, it was declared, that in consequence of the abrogation of the "Plan of Union," the Synod of the Western Reserve was no longer a part of the Church. This resolution was offered on Tuesday morning, May 30th, immediately after the report of the committee had been received and laid on the table; and after debate, the Assembly adjourned until the afternoon, when the subject was again debated. The discussion was resumed on Wednesday, occupied both the morning and afternoon of that day, and a part of Thursday morning, when the question was decided by a vote of one hundred and thirty-two to one hundred and five. You must remember, gentlemen, that every thing had been tried by the Old-school before this time; and that every offer had been refused, every effort at compromise and an amicable adjustment of the difficulty rejected, by our opponents. The Synod of the Western Reserve was thus decided to be no longer a part of the Presbyterian Church. It is proper that you should bear in mind the very language of this resolution, as here is the point on which these two parties radically differ. It was, "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."

We have shown that the Assembly has authority to control Synods—a greater power than was here exercised; for this was merely a declarative act, merely an announcement of the consequence of the precedent measure—the abrogation of the "Plan of Union." It followed from that measure as a corollary from a proposition: it was nothing but a declarative resolution. There that matter rested.

On Thursday afternoon, "the Assembly proceeded to the order of the day, viz: 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. Jesup 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." *Vide. Ante, p.* 45.

On Friday morning another protest was entered against the abrogation of the "Plan of Union," and was referred to a committee to be answered. The plan had been abrogated May 23d, and this was June 2d. On Saturday, June 3d, Mr. Jesup offerd a protest from the members of the Western Reserve Synod against the resolution declaring that Synod no longer a part of the Church, and Dr. Beman one, signed by himself and others, against the same resolution, as also against that providing for the citation of inferior judicatories; both which were read and referred. As these protests began to accumulate, we find that "resolutions were offered by Mr. Breckinridge respecting the connexion of the Synods of Utica, Geneva, and Genesee, with the Presbyterian Church of the United States." These resolutions set forth the nature of the proceeding more at large than the first had done, and a great part of them were applicable to the Synod of the Western Reserve as well as to the three others. "A division of the question was called for by Mr. Jesup; and after debate, it was moved by Mr. Jesup to postpone the resolutions, with a view of introducing the following substitute, viz." Now, gentlemen, I beg your particular attention while I show you what this substitute was. Remember, too, that it came from a highly respectable and a leading member of the New-school party, and that it was offered when Mr. Breckinridge, with reluctance, and after every thing else had been unsuccessfully tried, had presented, as a last resort, his resolutions against the three New York Synods. It was offered by the minority, the very party by whose vote the measure of citation had been virtually rejected, and against which measure Dr. Beman had this very morning entered a protest, signed by himself and upwards of a hundred of his New-school friends. The majority had desired a separation of the two parties: the minority would not permit it. They desired to cite certain inferior judicatories: the minority would not let them. They were thus driven to relinquish every measure tending to harmony and peace, and were finally obliged to resort to the declarative resolutions whereby four Synods were disowned.

But this roused the minority, and they attempt to substitute the very measure which at first they had utterly opposed.

Here Mr. Ingersoll read Mr. Jesup's substitute.—*Vid. ante. p,* 45.

This is in substance the same proposition before made by the Old-school. Theirs it is true provided for the citation of any inferior judicatories that might be charged by common fame with irregularities, while this was confined to the Synods of Utica, Geneva, and Genesee; but these were the very ones of the exclusion of which our opponents now complain, and which with the Synod of the Western Reserve would undoubtedly have been the first, if not the only ones cited, under the resolution against which the New-school had before protested—which had in effect, been rejected by their votes.

The next day of the session, Monday, Mr. Jesup's motion to postpone was thoroughly discussed, and in the afternoon, "the previous question was demanded, and decided in the affirmative; and the motion to postpone being cut off by the previous question,"—you know that such is always the effect of that question—"the resolutions were divided, and the first was adopted by yeas and nays, as follows, viz."

Here Mr. Ingersoll read the first resolution.—*Vid. ante. p.* 46.

I did not suppose that after our opponents had taken the position which they did in the course of debate on these resolutions and in the subsequent proceedings, any question would have been made whether these Synods and that of the Western Reserve were really formed by the operation of the "Plan of Union." It was reserved for Mr. Meredith to suggest a doubt as to this point. Here the fact is distinctly admitted: neither the protests nor replies present such an issue. I will now read the three remaining propositions, which were carried the same afternoon: they are of great importance to the equity of this case. They passed by a vote of one hundred and thirteen to sixty.

Mr. Ingersoll then read the last three resolutions.—*Vid. ante. p.* 46.

Now, gentlemen, is there not extreme churlishness on the part of those who refuse to be bound by this act? They who denied to the majority, when the question of separation was under debate, the privilege of enjoying the succession, and instead thereof, proposed that all power should be pumped out of the old organization, only to be pumped back into two new bodies; who were willing to throw away entirely all the benefits represented by the name and succession; these men will not agree to break up their subordinate organizations, and relinquish the Synodical names under which they now hold. They will separate from us altogether, and destroy the identity of the Church, but will not permit their ecclesiastical connexion to be dissolved, though but for a moment, though they are instantly to be restored, and though the measure is intended to promote the peace and unity of the Church. We say that the four disowned Synods, as now constituted of heterogeneous materials, are not entitled to representation in the General Assembly; but that their members, at least so many of them as are Presbyterians, ought not to remain separate; that they should apply for admission to those judicatories to which by the act they were transferred. They have not been cut off; they have not been disrobed. Who has thus suffered? Who has been shut out from the General Assembly? No man that represented a proper constituency. Not a single minister has been debarred his right of sitting in Presbytery.

The only churches which have been cut off are those Congregational churches, of the existence of which you have ample proof. The General Assembly will not recognise or receive the representatives of such churches; but what Presbyterian Church has been exscinded? Where have the acts of 1837 operated severely or unjustly? We are told that the members of the four Synods have been excluded. We deny that they have been. We disowned the Synods—dissolved them, as before we had dissolved the Synods of Delaware and Chesapeake, but the Synods only were disowned, and not their component parts, unless they are Congregationalists. The delegates from these Synods came to us under a false name; we found that they represented an improper constituency; but let them join the nearest Presbyteries which are properly organized, and then when they are sent we shall gladly receive them. They may come back to us whenever they choose. The mere destruction of a name does not destroy the thing. As members of the Synod of Albany, or of the Synod of New Jersey, their rights would be just the same. I want you to understand that there is no necessary correspondence between the limits of a state and of a Synod, or between the names of the one and the other. This matter is regulated entirely by convenience. The Presbytery of Montrose in Pennsylvania belongs to the Synod of New Jersey. The resolutions of 1837 do not destroy the ecclesiastical privileges of a single man. Any one entitled to Presbyterian rights may enjoy them now as fully as ever he did. But those who are not Presbyterians—the Congregationalists, unconstitutionally admitted to partake of our privileges, are excluded. The rights of the members of the disowned Synods have not been affected: only the name and form under which they are to exercise those rights have been changed. I say then that their conduct is at least churlish; and if the acts of 1837 have destroyed harmony, the fault is evidently theirs.

These acts were passed as I have shown—the one by a vote of one hundred and fifteen to eighty-eight; the other by a vote of one hundred and thirteen to sixty. They were followed by a protest read and referred as before. The resolutions touching the Third Presbytery of Philadelphia, which soon followed I do not care about, and shall therefore pass them, by in silence.

I have thus gone over, with some minuteness, the whole of the impugned proceedings of the Assembly of 1837, and have shown that they consisted of three cardinal measures. First, the abrogation of the "Plan of Union;" Second, a declaration of the consequences of that act in regard to the Synod of the Western Reserve; and Third, a similar declaration in regard to three other Synods. But between the first of these acts and the others, there was an intermediate space of time, which was filled up by endeavours to effect a compromise and amicable division, and to bring up the accused Synods to the bar of the General Assembly that they might be tried. But both these measures were finally abandoned by the majority, because they were unacceptable to the minority, and it was found impossible to carry them out.

I am now about to put a question to you which directly refers to a matter of a more comprehensive kind. Can a Christian body, organized to accomplish a certain end, meet in harmony, when each of its members is determined upon a different means of effecting the object in view? To

give a popular example: From one extremity of our land to the other, the people are divided between abolition and colonization, though the object of both parties is the same—both vie in their desires to emancipate the negro race from slavery, acting however by different means. The zealous colonizationist and the uncompromising abolitionist can no more meet together in harmony, than the abolitionist and the slave-holder. They cannot meet on common ground. Well, these brethren of the New-school have admitted that they do differ from us "in relation to important points of church policy and action, as well as theological opinon." Perhaps they do not understand some of the articles of the Presbyterian faith as we do; or perhaps they reject some altogether which we receive. At any rate the Old-school say that there are irreconcilable differences; and you must remember, gentlemen, that in matters of opinion, a belief that there are differences is often equivalent, at least in effect, to real discrepancy. Where persons are disagreed upon points of conscience, their roads to salvation are different and they must part. If for example one portion of a sect advocate perpetual change, and the other a strict adherence to established forms and doctrines, they cannot live together in harmony. We say that religion is not a thing to be constantly tinkered and mended. Our effort is to get back to the faith of our fathers, which needs no improvement—to get back to the faith first delivered to the saints. Could the apostle Peter have instructed us all, we should have received the water of life from the fountain head. But now when the stream has flown down some two thousand years to us, our only effort is to find the channel of pure and limpid water coming from the true source. One of these parties contends for a changeless uniformity in religious opinion; the other for unceasing change. Is it not best then that they should keep apart? There is a wide separation in feeling, principle, and doctrine: they cannot get along together. And besides these differences, there is another, the evidence of which is before you—a difference in point of church government, which has existed since the year 1801. The representatives from the four disowned Synods to the Assembly of 1837, came from a constituency composed in part of Congregationalists. The Congregational form of government is a pure democracy, which may be proper enough where all can unite without disorder, and without strife, though acknowledging no head—no superior. Congregationalists are not united except in councils, which can pass no decree obligatory upon their members. The Presbyterian form is republican—a representative, as distinguished from a pure democracy. But besides these differences in point of doctrine and form of government, there are others. Is it decent that men who differ so widely and essentially in feeling, and who are continually engaged in strife, should remain together? What stronger evidence can you have of this discordancy of feeling than the proceeding in which we are now engaged—the present suit? And even this manner of public strife, which is now consummated into law suits commenced at a very early day—in 1837. It seems that immediately after the disowing acts, an intimation was given that these legal proceeding were to be instituted, and indeed then our opponents took the first step towards referring the dispute to a temporal tribunal. I refer for the evidence of this to page 467 of the Minutes.

Here Mr. Ingersoll read certain resolutions, passed by the Assembly, June 7th, 1837.—*Vid. ante, p.* 47.

These resolutions, I say, resulted from a plain intimation given by our opponents, that they intended to carry the dispute out of the religious assembly, with the decrees of which they were not satisfied; that they would appeal from the spiritual to the civil power, and commit their cause to the protection of an arm of flesh; that they would refer the controversy to the decision of a court of justice and the laws of the land. That first act, with reference to which the Assembly passed the series of resolutions which I have just read, was but a prelude to all this course of litigation. And I wish here to correct an error which has been widely promulgated; that we have come into court voluntarily, that this is altogether an amicable proceeding. Not at all. That is an utter mistake. From the first intimation given to us of the intention of our opponents, we have eschewed and deprecated a resort to this tribunal. The present suit is solely of the seeking of the New-school party. However willing we may be to abide the result of their proceedings, they have been instituted against us, as we believe, unjustly, and there has been, on our part, no voluntary submission, no amicable arrangement. We have come into court because we were called by the ministers of the law. Unless we had been called, we should have had nothing to do with such proceedings. They must perpetuate our controversy: they make our differences matter of record: they must forever be a subject of keen regret to the true disciples of Christ. Nothing so widely separates men and brethren—separates them so hopelessly, as a law suit, where feeling and principle are involved. Where property alone is concerned, reconciliation may ensue; but let parties such as these, bring a spiritual controversy into a court of justice; let them indulge as these have in mutual reproaches and recriminations, and between them is a great gulf fixed, which neither can overcome. The gentlemen on the other side have resorted to the law: it is their own plan, their own wish. The seeds of litigation they have voluntarily scattered, they have purposely broad-cast upon the soil. You remember Mr. Brown who was examined here. Undoubtedly he meant to tell the truth, yet he said that he had brought but one suit; and when asked if he had not brought five, as the docket showed that he had, he answered that he did not know, that he had left that matter entirely to his counsel. He recks not of the extent to which the litigation is carried, so that it goes far enough: he leaves the matter in the hands of his counsel: they are to conduct it as they conduct any mere secular battle. Here are Mr. Squier, Mr. Brown, and Mr. Hay, each of whom—and I suppose each in the same reckless way—has commenced five suits against different individuals—in all fifteen at the very least. And we ask, why did they not pursue these actions after they had been commenced? They would have decided the matter just as well as the present suit. Why have they instituted this new action, intended to sweep away our trustees and our General Assembly, to send them all by the board. If they had not preferred the public scandal of such a proceeding as this, they would not have abandoned the other suits, which would have had the appearance of involving individuals only. Why should they carry out alone a proceeding so much worse than all the rest? It has been decided that the refusing to allow a

qualified member to vote in a Church election is a civil offence, and that the injured party may sustain a suit for the wrong. They might thus have tried the whole question; but they have chosen more publicly to cast reproach upon us—and I say that this proceeding is a reproach upon Christianity itself.

Not only so, but some of the other party have used phrases, which are in evidence, showing clearly that their view of this matter was the same that I have imputed to them. You have heard that in the meeting for consultation, in which the plans of the New-school were concerted, one gentleman declared in allusion to one of the greatest of all belligerents, who kindled the flame of civil war in his own country, "We have passed the Rubicon." "If I stop here"—reasoned Cæsar as he paused upon the borders of that stream—"If I stop here, I sacrifice myself; if I proceed, I destroy my country"—and he passed over. They too when they had determined on the measure, which I fear does not yet approach its consummation, had crossed the Rubicon. The die was cast. And against them this matter will stand recorded, through the duration of ages. The separation must now last—last for the lives of all of us—our children, in their lives, shall not see it ended. Their first act has been to discard the time-honoured father of the Church, with those of his associates most offensive to themselves. The wounds thus inflicted can never be healed. Worst of all, that which our opponents have done, has been done against the wishes, the interests, and the best hopes of a large, a very large majority of the Presbyterian Church, and especially of a vast majority of Presbyterians here in Pennsylvania. Apply any test that you please, and see if we are not the majority. Is it the test of numbers in the Assembly of 1838? The result is obvious. Is it that of the Assembly of 1837? It is too obvious to be pointed out. If on their part a hundred ministers have been cut off, there are a thousand opposed to these proceedings. If a thousand communicants, approve, tens of thousands condemn the policy of the New-school brethren. The only true rule either in Church or State is, that the majority must of necessity govern. You find this principle laid down in the Form of Government, in a note to Chap. XII.

"The radical principles of presbyterian church government and discipline are;—that the several different congregations of believers, taken collectively constitute one church of Christ, called emphatically *the church;*—that a larger portion of *the church*, or a representation of it, should govern a smaller, or determine matters of controversy which arise therein;—that, in like manner, a representation of the whole should govern and determine in regard to every part and to all the parts united, that is, that *a majority shall govern:* And consequently, that appeals may be carried from lower to higher judicatories, till they be finally decided by the collected wisdom and united voice of *the whole church.* For these principles and this procedure, the example of the apostles and the practice of the primitive church is considered as authority. See Acts xv. 1, 2, 4, 6, and from the 2d to the 29th verses; also Acts xvi. 14, and the proofs adduced under the three last chapters."

When the majority decide any matter, it must be conclusively settled: until then it will be always open. Suppose that our opponents succeed in this cause, the shadow of the majority must perpetually haunt them, and its substance must finally defeat them. Let them succeed here; let

them kindle the fires of litigation in every Synod, every Presbytery, and every Church in the land, though they have come resolved to exert the power of rebellion to the uttermost, they must at last be overcome if they have not numbers on their side; they must yield to the majority; they will accomplish nothing, but the bringing of destruction on themselves, and of scandal on Presbyterianism.

This doctrine in regard to the powers of a majority is distinctly laid down in the case of *St. Mary's Church*, 7 *Serg. and Rawle*, to which I have already referred, pages 538, 543–4. In that case each of the judges gave a separate opinion, and all agreed upon this point. To it as a touch-stone every such difficulty must sooner or later come. Here the majority must at last conquer, must at last govern. In the case of *Field* v. *Field*, 9 *Wendell*, 394, the same doctrine is established, and various authorities cited. It is there declared to be the unequivocal doctrine of the common law, that the majority must always rule. This principle runs through every part of the case. The Quakers, indeed, do not call for the ayes and noes upon any question, and thus avoid all danger of an "Aye!" like that which Dr. Hill has told us was such a scandal—was so indecently and offensively loud. To avoid this scandal it is the business of their clerk to gather what he perceives to be the sense of the meeting, and put it on record. Even if our opponents gain a temporary advantage, it must be short lived. With all their artifices, and appeals to prejudice, their triumph must come to an end. All of them will regret schemes so disastrous to themselves; they must inevitably feel, if the fact be so, that they are in the minority. In our government, and among our people, numbers will ultimately prevail, and the sooner the minority submit to the majority the better.

Were the exscinding resolutions of 1837 the violation of a contract, or an interference with the rights of property, or a condemnation without a hearing? These points I shall now proceed to examine, though the first I have anticipated. I have before asked, who were the parties to this pretended contract; but now I beg leave to put the same question again. We find, on referring to the Assembly's Digest, page 297—*Vid. ante*, *p.* 48—how the "Plan of Union" was adopted.

"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"—You will observe what is a little curious, that this plan is called, in the act itself, a system of *regulations*—no other name is given—"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."

I ask, then, who were the parties to this contract, if it be one? It is signed by nobody, nor could it be signed but by the Moderator, or clerk. We find that it was, "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;"—here was no such thing as a contract—"and that if it should be approved by them, it go into immediate operation." It is a system of regulations—mere regulations; and it would be just the same—no more and no less—if intended for missionaries in foreign lands—in Ceylon, or the Sandwich Islands. It wants a consideration, something moving from one party to the other: the only consideration here was the gratification of a desire to spread the Gospel. We are told that money has been contributed by the four Synods to the Church funds, but it has been candidly confessed, that this fact, if so proved, would show nothing more than the recognition of these bodies by the General Assembly. If money was contributed at all, it was certainly long after "the Plan of Union" was established, and therefore could not be esteemed the consideration of the agreement. I say, then, that no consideration has been, or can be proved to have passed between the parties, whoever they were. The "Plan" had its origin in motives of Christian kindness and charity. Presbyterians have sometimes been charged with an ambition of extending widely their limits, and making themselves the Universal Church. Certainly, if motives of ambition led them to adopt this plan, if they hoped thereby to extend their particular doctrines and forms of worship, they have been sadly disappointed. Those admitted by the plan have been brought up under a different kind of worship and of doctrine. Though the result may have verified an anticipation that the kingdom of the Redeemer would be extended, certainly the plan has not extended their own Church. If intended as a contract, it was without competent parties, without a legal consideration, was entered into without power on either side. It was a plan analogous to those which the Presbyterian Church has formed for evangelizing the heathen, and distributing funds in charity; and at most was intended but for temporary purposes.

Court adjourned.

FRIDAY MORNING, March 22d—10 o'clock.

With submission to your Honour—Gentlemen of the Jury—A part of yesterday I occupied in an examination of the character of the proceedings of abrogation, and endeavoured to show that the "Plan of Union" had no properties which rendered those proceedings illegal or void. That it was not a contract, for various reasons which I offered; that there were no parties able and willing to contract, and who actually did contract; that it was a mere system of regulations, similar, for instance, to the arrangements which have been made by different governments, independently of treaties, for the suppression of the slave-trade, an object of interest to all humanity; which arrangements, however, are not indissoluble, but may at any time be abrogated. The General Assembly has no power without its constitution, and the General Association of Connecticut no power at all; and this was distinctly asserted on the face of the resolutions themselves. But our antagonists, though they have thus had notice of our reasons for the abrogation, for two years, have not produced any evidence to show the insufficiency of those reasons; and more than all this, neither of the supposed parties to the agreement, who alone could be interested in its fulfilment, have entered any complaint or

remonstrance against our proceedings. Where do we find our opponents asserting that the Connecticut Association, or the Congregational Church has remonstrated against what they call the violation of a contract? No; the parties, and the only parties, who object, are, as they themselves allege, Presbyterians—the ministers of the New-school. Are they the champions appointed to defend the rights of either the Association of Connecticut, or the Congregational Church? To all such, I answer,

Non tali auxilio, haud defensoribus istis—

not by such assistance, are these acts to be overturned, when the parties themselves do not declare them void, or raise their hands against them.

The next great principle which I would submit is, that no relation merely human is indissoluble. Take a familiar instance: suppose a partnership formed, with no limit as to time; either partner may dissolve the connexion at pleasure, only giving notice to third parties that they may not suffer loss. I take this illustration because it is familiar. If in such case, a partner see that the connexion is likely to prove disastrous, or that his companion has violated his pledge, he may abrogate the union just when he chooses, taking care however that the rights of strangers are not prejudiced. Take another example—Where no time is fixed for the president of a college or a professor to continue in office, the mutual bond is mutually dissolvable. There may be some question whether this principle always extends to the case of a pastor and his congregation. But certainly if there is not infused into the agreement a contract, either express or implied, that the relation is to exist for life, he has a right to leave you, and you to exclude him: I do not know, where you will find a reciprocal relation of this sort which is not dissoluble at the pleasure of either party, if no wrong be done thereby to third persons. Here the duration of the agreement, or so-called contract, was entirely vague, and indefinite—no term was fixed.

Shall I enter upon a broader sphere of illustration, and one more becoming the present subject? Take the case which has been proposed, of the state of Pennsylvania. Suppose that she should declare herself the ally of a foreign power at war with this country, and opposed to all intercourse with the other states. This would indeed be treasonable in the individual citizens, but an actual separation might be effected. The state of the honourable gentleman who preceded me, South Carolina, once threatened a separation from the Union. Might she not in an evil hour have carried the alleged plan into execution? Mr. Meredith has asked you whether the Common Councils of this city could cut off four of the wards? Does he not know that two of them were actually cut off, and now belong to the county. His illustration, however, was inapplicable in one respect: he supposed that the city councils should make the attempt, when they have no authority whatever over the subject, and their action in such a case would be like that of an inferior judicatory—a Presbytery. But when the Assembly of Pennsylvania said, that for a particular purpose two wards should segregate themselves, and be attached to the county, they were obliged to acquiesce, though they complained of the act of excision. The only question then was, as it is the only question now, where was the power to exscind vested? It must be vested

somewhere; and with whatever branch of the government it may be lodged, by that may it be exercised. I know of no law which may not be repealed. For an authority on this point I refer your honour to 4 *Coke's Rep.* 43. And especially is this the case when the party protected by the law has violated it; when that party has voluntarily thrown off its protection. Vattel says—*Law of Nat. B. I. Ch. XVI.* § 197—"The law is the same with respect to the two contracting parties: if the protected does not fulfil his engagements with fidelity, the protector is discharged from his; he may afterwards refuse the protection, and declare the treaty broken in case the situation of his affairs renders such a step most to his advantage."

The "Plan of Union," however, as I have before remarked was but temporary, intended only for the new settlements, a semi-barbarous frontier, which was not yet ready to receive the discipline and doctrine of the Presbyterian Church. This exigency passed away, and the "Plan" should have passed away with it. But it was unconstitutional and void from the commencement. It contravened the fundamental law and the principles of the charter, *Hobart's Rep.* 87. On this point I cheerfully meet our opponents. It is going much too far, to say, that if this act was void, every thing done by the Assembly since 1801, must have been also irregular and void. Usurpation of power does not always invalidate acts done under the reign of such usurpation. If the sheriff wrongfully returns certain persons as duly elected members of Congress, they take their seats, and hold them until it is suggested that their commissions are invalid, when a committee reports upon their case, and the house decides. Yet all the acts of Congress passed in the mean time are not void. I will recur to the illustration afforded by the case of a government. All the governmental acts performed during the Protectorship of Cromwell, were acknowledged as legally valid, after his usurpation had passed away like a shadow. Some government was absolutely necessary, and his was the government *de facto;* therefore on the restoration, its acts were not all declared nugatory. One of the best men in England—Sir Matthew Hale—was the first to sit upon the bench under the Protectorate. Shall we now doubt whether his judicial acts were valid? Almost the whole eastern world was revolutionized by the arch-usurper Napoleon. But after all the shadowy sovereignties, offspring of usurpation, which he established, had faded away, the restored governments held themselves responsible for all the wrongs committed by the usurper, and have done justice to the sufferers. Millions upon millions have been paid by France, Spain, and Naples, as an indemnity for those wrongs: they have redeemed them all. This doctrine in regard to the acts of a *de facto* government is perfectly well understood.

The "Plan of Union" I say then was unconstitutional—that is, contrary to the Constitution of the Presbyterian Church—and opposed to the law of Pennsylvania. It was totally inconsistent with the essential principles of the system of Presbyterianism. It admitted into the Church materials radically distinct from those of which it was originally constituted. Let us not confound this "Plan of Union" with occasional and temporary unions of a different kind—unions not extending to a participation in the powers of government. The history of the Presbyterian Church is not wanting in instances of this latter sort of connexion. I

find that in the first century after the Reformation, Presbyterians united with Episcopal Churches. Congregations of them were placed under the protection of the most orthodox Bishops. Synods composed of Presbyterians invited and received the co-operation of English divines deputed by the Church of England. Presbyterian ministers were actually instituted to English benefices without being Episcopally ordained. Bishop Heber thought that he might consistently with his principles commune with a Patriarch of the Greek Church. On the wreck of the unhappy Pulaski, when all were awaiting, in dreadful suspense, the moment that should end their lives, all, doubtless, united in a cordial aspiration to their common God. These were moments of emergency? But the "Plan of Union" was a different thing. It was a plain violation of the fundamental principles of Presbyterianism.

The Constitution expressly provides that every church shall have a bench of ruling elders appointed for life, and forming with the pastor, what is called a church-session. The General Assembly, according to the same authority, is to be composed of ministers and elders and none else. But by the "Plan of Union" were admitted into the Assembly representatives of a totally foreign constituency, who were neither ministers nor elders. That is, Congregationalists have been represented in that body by committee-men. And not only so, but as all the Presbyterian ministers belonging to a Presbytery, whether pastors or not, are entitled to representation, and as Presbyterian churches alone are so entitled, Presbyterian ministers being allowed to preach to Congregational churches, the due proportion between ministers and elders is destroyed: there may be twenty-four ministers without a single elder in a Presbytery: all the ministers may be either without charge, or be preaching to Congregational churches. Under the operation of this plan a Presbytery may be formed not embracing a single Presbyterian church, the ministers all representing colleges or churches of a different denomination. Thus in the Presbytery of Newburyport, the statistics of which were read to you the other day, you remember there were only two Presbyterian churches, while there were eight pastors of Congregational churches. Of course the representative character of that Presbytery is nearly destroyed.

Let us look at this "Plan of Union," not relying entirely upon the mere title, and compare it with our charter of incorporation.

Here Mr. Ingersoll read the Plan.—*Vide ante, p.* 48.

Now compare this with the charter. The latter is styled "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." The franchise extends no farther than to the ministers and elders; but the Union of 1801, incorporated Congregationalists and committee-men with them. The same thing appears in the preamble of the act and in every part of it.

"Whereas the *ministers and elders* forming the General Assembly of the Presbyterian Church of 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 monies 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, Be it enacted, &c." And such is the phraseology used throughout the act, as appears especially from section sixth, the most important part of it.

Mr. Ingersoll here read section sixth.—*Vid. ante, p.* 21. The ministers and elders represented in the Assembly, choose the trustees and instruct them how to act in every important particular. An union therefore with the constituency of that body, of persons who are neither ministers or elders, is a palpable violation of the act of the legislature. It is as great a violation of it, to admit Congregationalists, as to admit individuals of a sect totally different from Presbyterians in doctrine and worship. Baptists and Episcopalians might as well be suffered to partake of the benefits of the franchise, as Congregationalists. If they had chosen to admit an association of Mussulmen, would they not violate the charter? In the case already cited from 7 *Serg. & Rawle*, Chief Justice Tilghman took especial care to vindicate the integrity of the Roman Catholic system, to pronounce unlawful any thing tending to sap the foundations of that particular Church, any attempt to divert the bounty of its founders; watching jealously the rights of the original parties, and declaring all acts destructive of them, by the introduction into the Church of heterogeneous materials, entirely void.

Some doubts have been expressed, whether any of the churches within the bounds of the four Synods, came in under the "Plan of Union." I shall not trouble you with a lengthened exposition on this point. The evidence of the fact is already before you, and I shall merely advert to it in a cursory manner. You recollect that the resolution by which the "Plan" was abrogated, denies the authority of the Connecticut Association to enter into such an agreement. The following is the language of one of the protests entered by the members of the New-school against this measure:

Here Mr. Ingersoll read a section of the protest referred to.—*Vid. ante, p.* 157.

And with this testimony, that given by Mr. Squier exactly corresponds. He told us that there were churches in the region embraced by the four Synods, in a sort of initiative stage, which he described, that had not yet formed elderships; as if a small church might not just as well have ruling elders as a larger one. In the answer to this protest, the following language is used:

"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."

It formed an unprecedented, ill-digested and uncomfortable system. We are told that it is only while the congregations are in an initiative state that they do not conform to the Presbyterian government and appoint elders. But how long is this initiative stage to continue? They

seem never to get beyond it: it is likely to last until the end of time; and until they choose to consider their initiation consummate and act upon it accordingly, though still Congregationalists, they may exercise a controlling influence over the judicatories of our Church.

But passing lightly over the ground of the constitutionality of the "Plan,"—on it they do not lay very great stress—our opponents endeavour to escape to a more popular ground. They say that if the union of 1801, were originally illegal, it has since been legalized by the acquiescence of all parties concerned during a space of thirty-six years. We are told that both the old patriarchs and the young have acquiesced in its provisions. I think I have shown that it was unconstitutional. Let us now see whether any length of acquiescence could make it good. A constitution is the fundamental law which legislation and acquiescence combined cannot subvert. The true doctrine on this point I will lay down in the language of a celebrated judge of this court, to be found in the case of *Vanhorne* vs. *Dorrance*, 2 *Dallas' Rep.* 308.

"What is a Constitution? It is the form of government, delineated by the mighty hand of the people, in which certain first principles of fundamental laws are established. The Constitution is certain and fixed; it contains the permanent will of the people, and is the supreme law of the land; it is paramount to the power of the Legislature, and can be revoked or altered only by the authority that made it. The life-giving principle and the death-doing stroke must proceed from the same hand. What are Legislatures? Creatures of the Constitution; they owe their existence to the Constitution: they derive their powers from the Constitution: It is their commission; and therefore all their acts must be conformable to it, or else they will be void. The Constitution is the work or will of the people themselves, in their original, sovereign, and unlimited capacity. Law is the work or will of the Legislature in their derivative and subordinate capacity. The one is the work of the creator, and the other of the creature. The Constitution fixes limits to the exercise of legislative authority, and prescribes the orbit within which it must move. In short, gentlemen, the Constitution is the sun of the political system, around which all legislative, executive, and judicial bodies must revolve. Whatever may be the case in other countries, yet in this there can be no doubt, that every act of the Legislature, repugnant to the Constitution, is absolutely void."

Then on the next page he remarks, "The Constitution of a State is stable and permanent, not to be worked upon by the temper of the times, nor to rise and fall with the tide of events: notwithstanding the competition of opposing interests, and the violence of contending parties, it remains firm and immoveable, as a mountain against the strife of storms, or a rock in the ocean amidst the raging of the waves. I take it to be a clear position; that if a legislative act oppugns a constitutional principle, the former must give way, and be rejected on the score of repugnance. I hold it to be a position equally clear and sound, that, in such case, it will be the duty of the court to adhere to the Constitution, and to declare the act null and void. The Constitution is the basis of legislative authority; it lies at the foundation of all law, and is a rule and commission by which both legislators and judges are to proceed. It is an important

principle, which in the discussion of questions of the present kind, ought never to be lost sight of, that the judiciary in this country is not a subordinate, but co-ordinate, branch of the government."

Standing then on substantial ground, and borne out by the language of this distinguished and eloquent judge, I assert that no length of time, no acquiescence, can make valid an act originally unconstitutional. Long as it may continue in existence, it is still void, and no one can be compelled to comply with its provisions. If therefore it be decided—and I believe the gentlemen of the New-school concede this point—that the "Plan of Union" was at the beginning illegal and void, it is impossible that it should now be otherwise than illegal. What effect can mere acquiescence have in regard to matters of conscience, or of faith? Where persons have ignorantly contracted an incestuous marriage, though they are guilty of no crime, the marriage is null, and was so from the beginning. Where a man has illegally married a second wife, while his first was living, the contract is utterly void, except in cases for which the law has especially provided; and though he may have lived half a century with her, it is still as utterly void as at the first. It is impossible that any length of acquiescence can do away with the rules of conscience, or contravene the fundamental laws of the land. Acquiescence in such a case can make no impression. It is no more than waves dashing against a rock, or wolves baying at the moon. It is a well established rule of the common law that a bad custom must be abolished, and that no lapse of time can make good what is originally bad. *Quod ab initio non valet, tractu temporis non convalescit.* In a case reported in 8 *Cranch's Rep.* 1, Chief Justice Marshall decided that letters of administration granted when an executor was present and capable of acting, were utterly void, and that no length of time could make them any thing else than void. Our own courts have established the same doctrine, and your honour has led the way. You are all familiar with the history of that beautiful square in this city, a part of which for a hundred years had seemingly belonged to a German congregation, who held it under a regular title, having paid for it and obtained a warrant and patent. It was nevertheless decided that their title was contrary to the fundamental law which established the city, and therefore invalid. I could mention many similar cases. Who can for a moment suppose that any lapse of time, any length of acquiescence, can give sanctity to error, or confirmation to wrong?

This nation is thought to stand on the verge of war, from its just determination to disregard an alleged acquiescence of half a century in the asserted boundary line of its North Eastern Commonwealth. We began our political existence, by breaking the fetters of a long course of submissive acquiescence in oppressions and tyrannical proceedings, an enumeration of which swells the Declaration of Independence. Every change of government, every advancement of freedom, every improvement in the condition of a people, proceeds from the exercise of the right to put an end to long continued acquiescence in abuses until they have become too burthensome to be borne.

With the change of times and circumstances, the "Plan of Union," if ever beneficial and proper, has become unnecessary. Those for whose

assistance and protection it was formed no longer call for aid. Chief Justice Tilghman, in the case which I have already referred to more than once, comments on this very subject, remarking that laws which suit the exigencies of one period, are not suited to another; that therefore every law is liable to alteration. For the same opinion I would also refer to *Hargrave's Law Tracts*, 269. With the vicissitudes of human existence, all human enactments must undergo continual change; especially those that regard expediencies only. Constitutional law on the other hand is permanent. It is irreversible unless by the same sovereign power that first called it into operation.

The resolutions of 1837 can be said to violate rights of property with as little reason as they can be called the violation of a contract. Evidence of contributions in the four Synods has been admitted, but only for a special purpose. When we attempted to give counteracting testimony, it was ruled out, his Honour deciding, what the learned counsel themselves admitted, that their evidence went to show merely the recognition of these Synods by the General Assembly. This is not a question about property. Our opponents do not sue for any particular fund. We should have been delighted to enter into an account with them; but our proof on this point, offered to meet a supposed contingency, was considered inapplicable and rejected—rejected, as we think, very properly. We maintain that all ideas of property are foreign to the present suit; that there is no question of property before you for decision. We assert, however, that if the account between us were balanced, it would appear conclusively, that they had been great gainers by the connexion, in a pecuniary point of view. But such details have been rejected by the court; and you, gentlemen, must recollect, that the evidence given by our opponents upon this point, is to have no weight, farther than as it may go to prove the recognition of the four Synods. Suppose they have been thus recognised, and we do not deny that they have been, what does that prove? Their admission in the first place was illegal, and we have shown that even acquiescence could not make it good. So far from our having defrauded them of their rights, they have requited our benevolence only by acts of ingratitude. Under our protection they have gathered strength, which has been constantly exercised in opposition to our interests. It was absolutely necessary to put an end to the connexion, yet the final measures taken to effect that purpose were adopted reluctantly, and only after every other expedient had failed. No question as to property can affect the issue before you. If we have taken any portion of their money, and it has not been restored, and if we promised to retain it only so long as they might be members of the Church, they have a perfect right to call upon us for it. We do not wish to disown them, and retain their funds: there can be no just pretence that we do. No right of property has been violated. We have always professed a readiness to give up every cent which in the strictest spirit of equity we can owe them. But, gentlemen, you must remember that no question of property is involved in the present issue.

Least of all have we condemned these men without a hearing. The Assembly of 1837, in the first place passed a mere abstract resolution, and this was followed simply by a declaration of its consequences. The act

of abrogation was a mere abstract proceeding, and not at all a personal one: the "Plan" was abrogated in the same way that it had been enacted. One reason given for this act was, that the "Plan" had not been sent down to the Presbyteries for their sanction. Now if there is any force in the objection that the Assembly itself had a right to create this plan, certainly it had an equal right to destroy it. I say that the first resolution complained of was a mere abstract measure, and that the others were not acts of positive legislation, but only declarative of the consequences of the former. The Assembly did not try any body, but merely declared that the plan of 1801, however good in theory was bad in practice, unconstitutional, and therefore void from the beginning. Then ensued as a corollary from this proposition, the declaration, that in consequence and by virtue of the abrogation, first, the Synod of the Western Reserve, and, then, the Synods of Utica, Geneva, and Genesee, were no longer component parts of the Presbyterian Church. This was a mere consequence of the abrogation. There could be no such thing as a trial. The Assembly had no jurisdiction in the case. That body has no power to try Congregationalists, or to punish them for being such. It is begging the whole question to talk of a trial. If they were good Presbyterians there was nothing to try them for: if they were Congregationalists we had no jurisdiction over them. In fact a trial, if it could have been had, would have been supererogatory. Why should we try them? Let them merely come to us and assert their innocence, and all difficulty ceases. Let them only come and say that they are Presbyterians, and they shall be restored to our communion if they are separated from it. To talk of a trial is to insist upon their having been charged with crime, when none was alleged against them.

It is said that the Assembly has formed alliances with other sects equally incongruous. If so, the sooner they are dissolved the better. But two wrongs can never make a right, either in evidence or argument. If we have incorporated with us any but Presbyterians, the union was improper, and let us get rid of them as quickly as possible. Indeed we have already gotten rid of some such associations, if indeed the connexion to which I refer is to be considered analogous to those alluded to by our opponents, and this by an act of the very Assembly that passed the disowing acts. By that Assembly it was,

"*Resolved*, That while we desire that no body of Christian men of other denominations should be prevented from choosing their own plans of doing good—and while we claim no right to complain should they exceed us in energy and zeal—we believe, that facts too familiar to need refutation here, warrant us in affirming, that the organization and operations of the so called American Home Missionary Society, and American Education Society, and its branches, of whatever name, are exceedingly injurious to the peace and purity of the Presbyterian Church. We recommend, accordingly, that they should cease to operate within any of our churches. *Minutes*, 1837, *p.* 442.

The power of the General Assembly to pass such a resolution will not I presume be doubted; but its connexion with the Congregational Church was of a different kind, and was harder to be gotten rid of. We find, however, that a formal protest was entered against this, by the same in-

dividuals who protested against the other resolutions. They tell us that we have formed numerous unions as obnoxious to the charge of unconstitutionality as that of 1801, and yet when we attempt to abrogate them, uniformly protest against the measure. Though all unconstitutional, they are to stand supported by one another. How was it with the other plans of union formed by the Assembly? Why they were changed and abrogated at its own pleasure. At one time the delegates were allowed to vote: at another the privilege of voting was taken away.

But the union with the Associate Reformed Church in 1822 has been held up to view in a particular manner, and Mr. Meredith has dwelt emphatically on one little phrase which he finds in the constitution of that Church—the words "in substance," occurring in the act of adoption of its form of government, passed by the Synod in 1799, as if the identification were of a limited character. The Synod approved of this form absolutely "as being, in substance, the only form of government which the Lord Jesus has prescribed to his church"—a very different thing from an individual's adopting or subscribing it in a qualified sense. You find moreover that this comprehensive reference to a divine origin is employed only as to government, and not in regard to doctrine. In the same year, 1799, on the 31st of May, the Associate Reformed Synod adopted the Westminster Confession of Faith and Catechisms, by the following act, in good faith and without reserve.

"The Westminster Confession of Faith, with the Catechisms, Larger and Shorter, having been formerly received by this Synod, with a reservation for future discussion of the doctrine respecting the power of the civil magistrate in matters of religion; and the said doctrine being now modified in a manner more agreeable to the word of God, to the nature of the Christian Church, and to the principles of civil society, the Synod do explicitly receive the aforesaid Confession and Catechisms, with the doctrine concerning the civil magistrate, as now stated in the twentieth, twenty-third, and thirty-first chapters of the Confession, as the system of doctrine which is built upon the foundation of the apostles and prophets, Jesus Christ himself being the chief corner stone. And the Synod do hereby declare, that the aforesaid Confession and Catechisms, as herein received, contain the true and genuine doctrine of the Associate Reformed Church; and that no tenet contrary thereto, or to any part thereof, shall be countenanced in this Church." *Const. of Assoc. Ref. Church, (Sword's Edit. New York,* 1799,) *p.* 8. In the first place, then, the qualification of the approval of the form of government is a very different thing from what the counsel seemed to suppose. In the second place, there is no such qualifying phrase in the act adopting the Confession and Catechisms, which some of our New-school brethren receive "for substance" only; And, thirdly, in the interrogatories addressed to ministers and other church-officers, at the time of their ordination, there are no qualifying words. You see that the Westminister Confession of Faith is the great polar star of the Associate Reformed, as it is also of the Presbyterian Church: they both receive the whole, entire, as the system of doctrine taught in the Bible. But if the Synod had at that time adopted this Confession "for substance" only, the adoption was a very old affair. It took place in 1799; and the union with the Presbyterian Church was

not formed till many years after. At the latter period the books of both sects were the same, and it was required to assent to both without qualification.

But let me explain this matter of the union with the Associate Reformed Church still farther.

Here Mr. Ingersoll read an extract from the Minutes, containing the articles of agreement between the two churches.—*Vid. ante. pp.* 126–7.

Such was this plan of union, intended completely to amalgamate the two Churches, as being both strictly Presbyterian, the distinct organization of each, however, still being preserved. All the property of the Associate Reformed Church was transferred to the General Assembly; but late decrees have decided, that those who did not come in under this contract were not affected by it. By a judgment of the Chancellor of New Jersey, the library mentioned in the articles which I have read, has been lately restored to the Associate Reformed Synod. *Appendix to Min.* (*Old-school*) 1838, *p.* 60. Reference has been made to the case of *Duncan* vs. *The Ninth Presbyterian Church.* This was a case, where the Associate Reformed Church claimed a Presbyterian house of worship, and it turned upon the construction of the will of a certain Mrs. Margaret Duncan, by whom the property had been bequeathed. Many of the members of the Associate Reformed Church have never joined the Presbyterians, and it has been decided that their rights could not be affected by the agreement. As to those who have united with us, they are firmly and proudly Presbyterians; but they had no right to carry away with them the funds belonging to all.

I have before me, now, the "*Formula of Questions for Ministers at their Ordination,*" prescribed in the Associate-Reformed Constitution. Nothing can be more explicit.

"Do you receive the doctrine of this church, contained in the Confession and Catechisms, as founded on the word of God, and as the expression of your own faith? And do you resolve to adhere thereto, in opposition to all Deistical, Popish, Arian, Socinian, Arminian, Neonomian, and Sectarian errors, and all other opinions which are contrary to sound doctrine and the power of Godliness?

"Do you approve the form of Presbyterial Church Government, and the Directories for worship, received by this church, as agreeable to, and founded on, the word of God? And do you resolve to maintain and observe them accordingly?"—p. 502.

Passing by the charge that we have admitted other foreign materials, besides Congregationalists, into the composition of our Church, I will occupy your attention for a moment, with a few words of explanation in regard to this statistical table which I hold in my hand, and which has already been adverted to by the opposite counsel. The statistics of the Presbytery of Newburyport belonging to the Synod of Albany, have been read to show that there was a long list of licentiates candidly reported as connected with Congregational churches, and then the statistics of certain Presbyteries within the Synod of the Western Reserve, or some one of the four disowned Synods, to show that there no such cases were reported: yet says the argument, the General Assembly did not exscind the Synod of Albany: it still continues in good standing. We may answer this objection in various ways. There are but two churches

of a Presbyterian character in the Presbytery of Newburyport, while a long list of ministers who preach to Congregational churches is exhibited. There is no reason why our ministers should not preach to Congregationalists. They may preach to the heathen, as St. Paul did to the Gentiles. This does not interfere with their Christian duties, or vitiate the representation of the Church in the Assembly. The Presbyterian minister may wade through blood and slaughter to carry the Gospel to those who have it not, or he may preach from the canopied pulpit of a church establishment, and, at most, he is to be considered in the light merely of a minister without any charge. This connexion may have received no sanction; it may perhaps indicate merely what he considers right. Not a single one of the Congregational churches enumerated on this list is, or can be, represented in Presbytery, or in the General Assembly. In the second column you will find the list of churches which are represented, and there but two names are given—only two, and those are Presbyterian churches—they have ruling elders. The rest—eight or ten—are not represented at all. Now let us turn to the other Synods—here is the Synod of the Western Reserve. Is there not more error in that than in the Synod of Albany? We are not bound to show that there is. Though there is the clearest proof of the existence of a Congregational church at Middlesex, while this is one of the churches returned by its Presbytery as Presbyterian. Mr. Squier told you that it was Congregational; yet nothing at all of this appears in the report. I mention the circumstance, however, without intending to dwell upon it, for his Honour has made a decision excluding such testimony. I have alluded to the matter only because my learned friend has pushed it upon us, notwithstanding his Honour's judgment. If the General Assembly had the power to pass the resolutions of 1837, you have nothing to do with their reasons for the act—good as we believe them to be. The only question before you is whether the Assembly had the power: if it had, it is no matter, so far as the present suit is concerned, whether it was exercised with good reason, or from sheer caprice. Still when the opposite counsel choose to go aside from the real matter in dispute, and introduce an entirely foreign matter—the Synod of Albany—to your consideration, we answer them as I do now. Recollect, gentlemen, that a Presbyterian minister may either have a charge, or have none, and he still retains his right to a seat in the Presbytery, unless, indeed, he enters into ecclesiastical connexion with some other sect. He may preach to any church, live without or within the bounds of the Presbytery, sojourn any where, live any where, and still not lose his Presbyterial standing. It is with him as with a citizen of a particular country, who is considered a resident there until he fixes his domicil elsewhere. He is at perfect liberty to traverse land or water, and until he takes up his permanent abode in some new home, his original domicil, the place of his birth, still remains his residence. So it is with these ministers. Each belongs to some Presbytery, and his connexion with it continues until he is dismissed to another, whether he has any charge or not, whether he lives within or without its bounds. The fact, therefore, of his preaching to a Congregational church cannot affect his Presbyterial standing, or interfere with the proper constitution of the General Assembly.

If you will turn to page 452 of the Minutes of 1837, you will find it

stated, that according to the acknowledgment of the commissioners from the Synod of the Western Reserve, of the one hundred and thirty-nine churches composing that Synod, there were but twenty-five Presbyterian churches.

Mr. Wood. I would beg leave to ask whether this is evidence.

Mr. Hubbell. It was read in evidence by Mr. Randall.

Judge Rogers. I understand that it was given in evidence; but it is undoubtedly immaterial.

Mr. Wood. I thought your Honour had overruled all testimony upon that point.

Judge Rogers. The case certainly does not depend upon these facts.

Mr. Ingersoll. I am bound in courtesy to pay some deference to the opinion of my learned friend on the other side. I do not myself think the evidence material, but it has been forced upon us, and we were perfectly willing to meet our opponents on this ground. This testimony, which is said to have been given by the commissioners from the Synod of the Western Reserve themselves—and they do not deny the allegation—was, I suppose, a part of that elicited from them by the catechetical course of inquiry of which they complain in the protest, to which the paper referred to for this fact was an answer. And the testimony is, in part, confirmed by Mr. Squier. He told us that the church of Middlesex was a mixed or Congregational church.

Mr. Wood. That was another Middlesex; not the one in the Synod of the Western Reserve.

Mr. Ingersoll. That is possible—no doubt it is the fact if you say so. But still I contend for the statement read by Mr. Randall himself in evidence: that of one hundred and thirty-nine churches within the Synod of the Western Reserve, there are but twenty-five Presbyterian; while here in this statistical table, as Mr. Meredith has said, all of them, without exception, are returned as Presbyterian! But I admit that the cause does not turn upon this point. Such matters could be determined only by the General Assembly itself, and all have agreed to abide by its decision in regard to them. His Honour has said that this testimony has nothing to do with the case; that it is no matter whether the Assembly decided right or wrong, if it had a right to decide the point at all. Yet I have thought it necessary to say what I have said in regard to it, to avoid the effect of a collateral argument unnecessarily drawn into the case. Remember, gentlemen, that if the act was within the jurisdiction of the Assembly, you cannot inquire whether the power was duly exercised.

Then, as we have shown, that the act abrogating the "Plan of Union" was within the jurisdiction of the Assembly, and that the cessation of the Synod of the Western Reserve and of the three others, to be parts of the Church, was a mere consequence of the abrogation, and followed from it, as a matter of course, the claim of the relators to be trustees cannot have a particle of foundation; they cannot lawfully demand their seats. But suppose that the act of abrogation was wrong. Say that our antagonists have proved the Assembly of 1837 to have been in error; that it had no power to abrogate the "Plan," nor to declare the consequences of the abrogation: they have not yet proved one-half of what is necessary to their case: their task is not half completed. The relators still would not be the rightful trustees, though we had failed to show that the proceed-

ings of 1837 were good. For the sake of the argument, I might concede that those proceedings were utterly null and void. Then they must show that *their* proceedings in 1838 were perfectly justifiable, and their election of trustees valid. Undoubtedly this is the most essential part of the case, though not the part requiring the greatest length of argument. The question is, whether Judge Todd and the other relators were elected to the office of trustees by a proper General Assembly. They do not pretend to have been chosen in 1837, nor in 1838, until a portion of the Assembly, separated from the rest, and holding its sessions in the church on Washington Square, there elected them. Until they have shown that this proceeding was right, and the election regular, the chief burden of the case still rests on their shoulders.

In approaching this part of the argument, I could wish that I were possessed of a glossary or key to the phrases that have been used by the plaintiff's counsel. He seems to have argued this branch of his case with his Ovid in his hand, and influenced alike by the humour and the powers of metamorphosis of the Roman poet, he has turned almost every thing into the contrary of what it is, and what he has not so treated, he has turned into a joke. Ministers and elders, in solemn and devout assembly, have been represented as piquet guards in martial array—churches have become castles—black coats are turned into red coats—pacific doctors are made knights templars or hospitallers; and thread bare parsons are converted into grim visaged warriors, and mounted on barbed steeds, to fright the souls of fearful adversaries. While my learned friend himself, like the gallant hero of La Mancha, couches his lance, and fiercely attacks the windmills, which have become giants, in his excited imagination. Above all, he discovers a phrase of the mildest and most inoffensive character, addressed by the chair proper to a speaker improper, and he begrimes it into a denunciation the most bitter and awful that the fancy can conceive. It is almost impossible to find the case, so lost is it in the imagery of my learned friend; but I will endeavour to disengage it, and present to you its bare facts and merits.

Until a very recent day, there had been no dispute about the guardianship of the Church funds. For fifty years, all had been content that the venerable gentleman, who has been so frequently mentioned, should have a share of the control over them: all had been united in placing the most unreserved confidence in his integrity, piety, and good judgment. It was left for our opponents, in times of turbulence and strife, to quarrel with him, as they had with every act and every individual of the friends of order; to take the funds out of the hands of the fathers of the Church; to turn out from their places its sages, and degrade them, as totally unfit for office. Could any good come out of such proceedings? Of all the scandals which of late years the Church has known, none is to be compared to that which had its origin in the scenes of the 17th of May, 1838. We have seen two Christian assemblies sitting at the same moment, each claiming to be exclusively the General Assembly, each denouncing the pretensions of the other, asserting itself to be in the right, and its opponent in the wrong, and mingling secular disputes with their religious exercises. Your business is to determine which of these was the genuine body, and I am happy that we all agree in considering this as the essential question in the cause.

When the Assembly of 1838 first met, Dr. Elliott was certainly the rightful Moderator, and Mr. Krebs and Dr. M'Dowell the rightful clerks. These gentlemen, with the rest of the Old-school brethren, are supposed, indeed, to have conspired to usurp the best places, the poets' corner, because they went to the house in due season. Mr. Preston and myself could hardly get into the court room, this morning, but we have not yet thought of charging any of the auditors previously assembled with the guilt of conspirators. There was a moment certainly, on that third Thursday of May, when we were all, without doubt, in our right places. This was at the outset of the proceedings. That, the argument of our opponents must admit. We were, at one period of its session, a part of the genuine body—there can be no doubt of it: we had all been duly summoned twelve months before, according to the requirement of the Constitution, and attended upon that solemn call.

"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.—*Form of Gov. Chap. XII. Sect.* 8.

The members of the Assembly of 1837 went in peace. Some little question has been suggested as to the effect of the termination of the one body upon the assembling of the second, though I do not consider this a material point. The termination is not an adjournment but resembles rather a dissolution, though not for all purposes. The Moderator of the last Assembly, acting under its authority, always takes the chair at the opening of the new session. The former, by anticipation, gives life to the latter. A like thing may be seen in the succession of our national assemblies. Each House of Representatives is dissolved at the end of its short or second session; yet another house is called into existence; a vital, germinating principle is left to vivify the new body; rules are established for its organization, to avoid the disorder incident to a chaotic assembly, governed by no laws. The commissioners to the Assembly of 1838, after being duly summoned, duly appeared, with authentic vouchers from their respective Presbyteries. These are the component parts as regards the Assembly. In its formation the Synods are entirely overlooked, though as church councils they are an intermediation between the General Assembly and the Presbyteries. These commissioners came duly selected and authorized; they assembled at the appointed time and place; and as the constitution requires, their meeting was opened by the appropriate religious exercises, and admonitions, and by a solemn address to the throne of grace. These preparative steps having been completed, there ought to have succeeded—it was hoped that there would succeed—a harmonious organization. Thus far all had gone on smoothly: the body convened in the Seventh Church, was the true General Assembly, at least until the reorganization to which our opponents resorted upon the advice of counsel learned in the law—as Dr. Fisher tells us, by the advice of many different counsel. They seemed to have believed that in

the variety as well as the multitude of counsel there was safety. Like Medea they put into the enchanted kettle a mixture of different ingredients—clerical and lay. They advised with others and acted for themselves. A great mistake: they had better have trusted either to the law or the Gospel alone, and not have attempted to unite the two. This effort to mingle things so incongruous produced a ripple in the current of proceedings, and threw all into confusion. The late Chief Justice Tilghman once mentioned the not inappropriate circumstance of a gentleman, who desirous of having professional assistance in preparing his will, and yet reluctant to reveal his intentions to any one, inquired as to the law and then undertook to apply it for himself. The consequence was that the substance was spoiled, and the form left imperfect: the object which he intended to accomplish was defeated.

We have now reached the dividing line between the two organizations. I have brought the proceedings down to the point, when the sermon having been delivered, and the constituting prayer offered, the Assembly was ready for business. What was the first business to be done? The rules of the Assembly are clear upon this point, and you will find the proper order of proceedings exemplified, if you will take up any of the minutes of previous years. Here are the minutes of 1837, the first that I have happened to lay my hands upon.

"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."

Then follow the names of the commissioners.

"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.*"

Here are the minutes of 1832.

"After public worship, the Assembly was constituted with prayer; and then had a recess until four o'clock, P. M.

"At four o'clock, P. M., the Assembly met.

"The Standing Committee of Commissions reported, that the following persons present, have been duly appointed commissioners to this General Assembly."

Then follow the names as before.

"The committee further reported, that Mr. Samuel Bayard, a ruling elder from the Presbytery of New Brunswick, has informed them, that he was appointed a commissioner, but had not his commission with him; and, also, that Mr. William Maxwell, a ruling elder from the Presbytery of East Hanover, has informed them, that he was appointed a commissioner, but had not received his commission.

"*Dr. Alexander, Dr. Hill, and Mr. Bliss, were appointed a Committee of Elections, and these cases were referred to them.*"

I don't care what General Assembly you refer to, the opening minute will be found the same. Our own good sense, independently of the testimony of fact, will tell us that such must be the course of proceeding. Such it has been in the organization of every Assembly—every one literally, excepting that of 1835, and there the process was substantially the same. Dr. Miller had been written to by the Moderator of the last year, who was prevented from attending, and he preached the sermon. Then Dr. Beman took the chair, but afterwards another was put in his place, and the business proceeded as if the difficulty had never arisen. Still the Minutes of 1835 show that the appointment of a Committee of Elections preceded all other business. It must be so in every Assembly. They show, that, after things had been restored to their natural state by Dr. McDowell's taking the chair, in the place of Dr. Beman, "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." Dr. Hill's testimony was perfectly consistent with this. He said that formerly the commissions were all read in the Assembly; but that the body became too large for this to be done without great consumption of time, and that therefore a Committee of Commissions had always of late years been appointed, who met on the morning of the Assembly's coming together, or on the day before, and in cases where there was no doubt reported the commissions as regular; but that all doubtful commissions were laid aside for subsequent examination and consideration. In 1829 the rule was adopted which refers all the commissions, in the first place, to the clerks. They, however, have no absolute authority in cases of doubt: the rule orders that all doubtful cases be referred to a select committee. How could the matter be otherwise ordered? If the appointment of this committee were not the first business, what infinite wrong might be done. The clerks may be capricious in their rejection, though we shall show that there was no caprice in their conduct in 1838. The proper time then for the examination of doubtful cases, is before any other business is transacted: then the claimants who have been rejected by the clerks have a right to be heard: the decision of the matter cannot be postponed. The appointment of a Committee of Elections must precede every thing. Common sense, the necessity and propriety of the case, independently of all rules and of established usage, must so determine.

The clerks compose the preliminary committee—the Committee of Commissions; and some undisputed members of the house compose the Committee of Elections. If the former reject any commissioner, an appeal lies to the latter. What was the condition of Mr. Samuel Bayard in 1832, who, as appears from the minute I read a moment ago, had left his commission at home by mistake? The clerks say to him, "We can't help that: we have no choice. A rule is prescribed for us, and we must obey. We are obliged to refuse your application, but we refer you to the house." Suppose Mr. Bayard respectfully informs them, that he is very anxious to be admitted immediately; still the clerks dare not overlook the rule: if they could do so, they might as partizans, commit great injustice. He must come before the house, through the report of the Committee of Elections. If the clerks report but fourteen members—the number which the Constitution requires for the transaction of busi-

ness, which Dr. Fisher, the Moderator of the New-school Assembly did not happen to know—if the clerks report but fourteen, these are sufficient to appoint the Committee of Elections. There is at present no danger that a majority will not be convened; but when the number requisite for a quorum was fixed at fourteen, the body was much smaller than now. If only fourteen of the commissioners are reported as having regular commissions, and there are ten times fourteen who are not reported, or whose commissions are reported doubtful, the latter can have access to their seats only through the Committee of Elections, specially appointed for the very purpose of taking their cases into consideration.

We have come then to the most important stage of the organization of the Assembly of 1838—the period when the regular and ordinary course of proceeding was interrupted by the measures of the New-school party. Dr. Elliott was perfectly acquainted with the law and practice, but the interference of these gentlemen prevented for a time his putting the law in execution, and on their heads must rest the blame. I shall not here repeat what has been so well said by my much abler colleague. I shall not attempt to follow him in a path which he has so profusely strown with flowers. The interference of which I speak, is certainly to be laid to the charge of the New-school party: this they readily acknowledge. Indeed, the plan had been carefully arranged before-hand—not only before the meeting, but a long time before. It had its origin in the "advice of counsel learned in the law"—words which rung in the ear of every witness, and through the witnesses have rung in ours. They began to consult with counsel before they left their homes. They had done better, had they relied upon the dictates of their own consciences. Dr. Patton laid great stress on his being particularly desirous that his motion should be acted upon at that time. It was important that he should be allowed to make it just then; that it should be wedged in between the parts of a single act. He said twice, that he was particularly anxious that the measure should be considered at that precise period—he urged the Moderator to entertain his resolutions immediately. That was the opportune moment—the moment, which, as Mr. Cleaveland afterwards explained, had been selected under the advice of counsel learned in the law. The whole proceeding of the New-school was premeditated. For this, I would merely appeal to Dr. Hill as authority. Though not a neutral, he says that during the preliminary discussions on the subject, he had unequivocally condemned the measures then proposed and afterwards carried out. I suppose this was when they met, as they say, in open convocation. There was no harm in a preliminary meeting. The members of every body are accustomed to meet in private caucus. Where all concur, all assemble together: where there are two or more parties, each party holds its own meeting of arrangement. I cannot see any great harm in this. These gentlemen had all, as it seems, been consulting lawyers in regard to the measures proper to be adopted, and in the preliminary meeting for consultation, each came forward and laid the fruits of his inquiry upon the altar. But, however that may be, Dr. Hill says that he opposed the measure. And why was this? He feared just what we complain of—a great scandal, a riot! Exactly what happened, Dr. Hill tells us he anticipated. They come now into court, and charge us with noise and riot, when they came to that house prepared to perpetrate an act, which one of their own

party declares, threatened and was calculated to produce it all. Dr. Hill expected a riot, and therefore was greatly excited: he feared that the proceeding might bring disgrace upon the Church. He was so excited, that he listened most eagerly to catch every sound; and says that the burst of ayes was indecently and offensively loud. He goes further, and says that he was surprised, that, as the Old-school did not vote down the measure, there were any noes at all, adding, very significantly, that at least they did not seem to be very well trained, or drilled—perhaps drilled was the word: it certainly suits Mr. Meredith's picture of the Old-school party drawn up in military array. There were, it seems, a parcel of noes—just enough to contradict the assertion made upon the New-school Minutes, that the vote was unanimous, and to show that we at least had not been prepared by any great degree of drilling. A further elucidation of this matter is given by Dr. Fisher, who was the Moderator of the Assembly that met in the church on Washington Square. He says that the gentlemen of the Old-school appeared to be in a state of utter astonishment—as if they did not know what was going on. It is said that there is no man so brave, but that he may be alarmed by a sudden and unaccustomed danger. The Old-school sat still in mute astonishment; and those few individuals who cried "No!" were not well drilled! Yet Mr. Meredith styles his friends the "unsuspecting brethren!" They had come together with their brief prepared, and with learned counsel at their elbows; they had carefully arranged a course of proceedings; yet they are quite unsuspecting; they are taken by surprise, and entirely disconcerted! In their preliminary meeting, they determine to organize the Assembly in their own way, at that particular time and place; but, to their utter surprise, they find that Dr. Elliott don't concur in their views. These "unsuspecting brethren" are brought at last to the confession, that they came determined to break up the Assembly at all events.

We are told that Dr. Elliott refused to do his duty; that Dr. Patton had a right to rise, and make a motion; that his motion was not received, nor his appeal regarded; that Dr. Mason in like manner had a right to do what he did; and then Mr. Cleaveland to rise, pronouncing the conduct of the Moderator wrong, propose a new organization, and finally walk off surrounded by his New-school friends. But they certainly never anticipated Dr. Elliott's decision. All that they say became necessary must have become so accidentally; for Dr. Elliott, who produced the actual crisis, was not in the secret. They now rest their proceedings upon the refusal of the Moderator to put an appeal—a thing that Dr. Fisher, and several of the witnesses have told you was entirely unprecedented, and could not have been anticipated. Yet their determination had clearly been formed; the paper which Mr. Cleaveland read had been carefully prepared, and they plainly had come determined to break up our Assembly at all hazards. Their proceedings were altogether independent of the refusal of Dr. Elliott to put an appeal. This was a mere afterthought. They were entirely disconcerted by this refusal, as we shall see in a single moment. Dr. Patton, the person appointed to deal the first blow, when told that his appeal is out of order, sits down without a word—is put out and yields. Dr. Mason, the next actor in the drama, in like manner sits down utterly disappointed, and unprepared for the emergency. Mr. Cleaveland does not rise immediately. These three were in

a pew together, united in one purpose closely and firmly as fate. No doubt it had been fixed beforehand that they should rise in order; but Dr. Elliott's refusal had disconcerted their plans: they had wished and expected the *Assembly* to decide against the commissioners from the disowned Synods: no such decision being made by the Assembly, there was no colour for withdrawing. Mr. Cleaveland then does not rise immediately upon the discomfiture of Dr. Mason. A man on the outside of the ranks, where nobody was at hand to pull him down if he was wrong, next arose. This was poor Mr. Squier. Like the donkey in the fable, who had seen the lap-dog fawning upon his master, he thought he had a right to get up too. His Honour will tell you he had no right; and Dr. Elliott told him the same and nothing more, when he said, "we don't know you, sir." Mr. Squier rises, however, at the wrong time, and spoils the whole proceeding.

Next rises Mr. Cleaveland and reads his paper. Mr. Cleaveland and Dr. Beman, the most prominent actors in the scene, are not here. Even their depositions which were taken have not been read. How do we know the fact that these depositions have been taken; that they have been from the first in the hands of the counsel, and yet not communicated to the jury? These were the only men that could have settled conclusively all dispute about the reversal of the question; they alone know certainly whether they were or were not reversed. They can say positively, "we did," or "we did not, reverse the questions." The other witnesses can only tell us that they did, or did not, hear the reversal. Yet these men are not produced; and their depositions, though here in court, are not exhibited. How, I ask, do we know this? why Dr. Patton told us so. Otherwise we would not have been at liberty to mention the fact. Dr. Patton was asked by my colleague, Mr. Hubbell, "Have you read the depositions of Dr. Beman and Mr. Cleveland?" Dr. Patton is evidently a non-committal man, and he answered, "I have *seen* them." "But seeing is not reading. Have you *read* them?" "Yes, I have read them." You know then, gentlemen, that these depositions have been taken, and that what the other witnesses could know but imperfectly, Dr. Beman and Mr. Cleaveland could have settled conclusively. Here were their depositions in the hands of the opposite counsel, or circulating among their clients. Dr. Patton read them, and so I suppose did all the New-school witnesses; yet by the New-school party they are withheld, though you certainly had a right to see them. The other side had no right to keep these back, and substitute the evidence of other witnesses. It is a well established maxim of the law, that the best evidence of which the case admits must be given. What was the best evidence here? Plainly the evidence of the men who themselves did the things in question. Why was not this offered in the shape of the depositions taken? The opposite counsel have tried to get out of the difficulty, by asking witnesses where these persons are. Certain it is that they are not here to pass through the crucible of a cross-examination. It appears only that one has gone on a sea voyage, quite recently; and that the other, Mr. Cleveland, is at Detroit; though it has not been said—the counsel well knew it was not so—that their testimony was therefore inaccessible. Nothing is more common than to take the depositions of witnesses that are going abroad; and we send even to China to take them there, and to

almost every part of the globe. You know, however, that in this case depositions were actually taken—that they have been from the first in the possession of the opposite party. Mr. Cleaveland read a paper too, upon the language of which the whole case may eventually turn; but this paper we have not yet seen. As to some of the phrases which it contained all are agreed; as to others the witnesses differ; the whole, nobody has been able to communicate. If Mr. Cleaveland had been examined we should know certainly whether the paper could or could not be produced. But the withholding of this testimony must redound to their own mischief. While going to do a wrong, they fall into the very pit prepared for others. May I here be allowed to apply the language of Sternhold and Hopkins, in one of their psalms?

"He digs a ditch, and delves it deep,
In hope to hurt his brother;
But he shall fall into the pit,
That he digged up for other.

"Thus wrong returneth to the hurt
Of him in whom it bred;
And all the mischief that he wrought,
Shall fall upon his head."

The first measure of importance that took place was the call made by the Moderator. For what? It is said there were some differences in the statements of the different witnesses. These were not material. But there is a gentleman able to enlighten us, and his testimony, I believe, was given with propriety and candour. That gentleman was Dr. Mason. Our opponents themselves raised this point, and vouched Dr. Mason as a witness. What sort of commissions had the Moderator called for, when those which had been already presented to the clerks and rejected, were offered in professed answer to the call? Dr. Mason certainly knows best how he understood the call, to which his offer is said to have been a response, and his understanding of it shall be taken. He says that the Moderator stated, that if there were any commissioners in the house whose commissions *had not been presented*, now was the time to present them. That this was the object of the call cannot be doubted, when it is considered that the commissions to be presented in accordance with it were to be referred to the Committee of Commissions, and not to the Committee of Elections, unless after the former had reported unfavorably upon them. It was intended for gentlemen coming in after the session had commenced. You recollect that one such was examined as a witness for the other side. He arrived at the last moment, and not knowing the plans of the New-school really voted, no, on the first question put by Mr. Cleaveland. Like Sir Francis Wronghead, who doubted that he had cried, no, when he ought to have cried, aye. He was a country member and had not been properly drilled. There were others dropping in in like manner, and the Moderator's call was intended for such—those who had not had an opportunity of presenting their commissions *to the clerks*. I am perfectly content to take Dr. Mason's testimony. Mr. Hubbell reminds me that Mr. Meredith was mistaken as to Dr. Elliott's testimony upon this point. Dr. Elliott agrees with Dr. Mason in regard to the language of his call: there is no

material difference between the two witnesses. But we have from Dr. Mason a candid acknowledgment that he did not consider his offer a response to the call of the Moderator; that he understood that call to be for commissions which had not yet been presented.

There is another thing which it is necessary that you should recollect. It seems that there was at least one individual the Rev. Mr. Moore, who came forward, upon the call of the Moderator, to present his commission, which he had not before had an opportunity to present. I refer you for an explanation of this matter to the testimony of Dr. Elliott and Mr. Krebs. It seems that Mr. Moore came in at a late hour, and upon the call's being made, rose and walked forward to the clerks' table, but he found that his commission had in his haste been left behind. He went back to his lodgings for it, and actually presented it at a subsequent stage of the proceedings. *He* rose to respond to Dr. Elliott's call, and he certainly had a right by virtue of the rules of the Assembly, to demand that his name should be enrolled at that moment, and before any other measure was adopted. But at the same moment Dr. Mason rises and interposes his offer and resolution.

(Here the jury were allowed a recess of ten minutes.)

I hold in my hand the rules adopted in 1826, to which Dr. Hill in his testimony referred.

Mr. Ingersoll read the rules.—*Vid. ante. p.* 156.

The appointment of this Committee of Elections was the thing in order. It was prevented by the proceedings of the New-school, which assumed the principle that all the commissioners present had a right to vote, in the first instance, whether their commissions had been examined by the clerks or not. Now suppose two persons came to the Assembly both claiming the same seat. There are a principal and alternate named in each commission: suppose that in some case, these two, travelling by different roads had arrived in Philadelphia, and on the usual question being put to them, each should claim a place. Of course the matter must be referred to a committee—the Committee of Elections. This is the case in every deliberative assembly. And the committee though it may be immediately appointed cannot always immediately report: for obvious reasons considerable time is sometimes consumed in the examination of the case. In Congress, frequently, half a session passes while the right to a seat is under dispute, and in the mean time the individual holding the formal commission, keeps the place to the exclusion of his antagonist, though the latter may eventually prove himself entitled to it. The circumstance of the committee's not being able to report immediately, though it may be a great inconvenience and hardship to the rightful claimant, certainly will not justify his rising upon the floor and demanding his seat, or seizing upon it before the committee has decided. Always, since the adoption of the rules which I have read, until the year 1838, the appointment of a Committee of Elections has been the very first business after the doubtful commissions have been reported by the clerks and laid upon the table: there never before had been an attempt made to set aside the established order.

While Mr. Moore was thus walking forward to present his commis sion, another gentleman rose and offered a bundle of commissions, which

he knew perfectly well were not of the kind for which the Moderator had called; for he has sworn that he understood that call to be for commissions that had not yet been presented. Dr. Mason rises, and presents certain commissions. He knew very well that he and his coadjutors were engaged in an attempt at revolution: they meant to violate the established order. He deliberately trampled on the rights of every commissioner in the house, who had not had an opportunity of presenting his commission to the clerks. All the witnesses who have testified as to this point, agree, that there was at least one such—Mr. Moore—and that is sufficient for our argument. Dr. Mason himself says the Moderator called for one sort of commissions, and that he immediately rose and presented a hat full of another sort. Then he clearly violated his duty, unless his duty was to make a revolution. He was called to order, and told that his motion was out of time. When a man is on the floor, and another rises saying, "I rise to order," instantly the former must take his seat, and await the decision of the question of order. Nothing will justify a disregard of this rule; in enforcing it the Moderator is a mere organ of the house: it is not his law but the law of the house. When king Charles I. in the course of those proceedings which at length brought his head to the block, entered the House of Commons and took the Speaker's chair, all the members sat dumb; and when he asked, "Is'nt there a quorum present?" "May it please your majesty," replied the Speaker, "I have no eyes or ears until I take the Speaker's place."

The Moderator had no choice: he was bound to enforce the law prescribed by the house, of which he was the mere servant—the eyes, the ears, and the hands. Dr. Mason appealed from his decision, that appeal also was declared out of order; he then acquiesced, and instead of raising a question of privilege, took his seat. He had got through the A B C of his instructions, and could go no farther, an unexpected difficulty having risen. Thus two of the confederates had been disposed of. Mr. Squier came next, and then the proceedings by which our opponents say Dr. Elliott was turned out of office. There is a curious case, reported in Croke Charles, 181, which happens only to be the converse of the present. It was the case of an information against Sir John Elliot, Denzell Hollis, and Benjamin Valentine, not for attempting to put the speaker out of the chair, but for conspiring to keep him in the chair. Professor Maclean will be amused with the latin of the reporter, which is something like that of one of the witnesses who could not recollect the "very *ipsissima* words" of Dr. Elliott.

"AN INFORMATION was exhibited against the defendants by THE ATTORNEY GENERAL, reciting, 'That a Parliament was summoned to be held at WESTMINSTER, *decimo septimo* MARTII, *tertio* CAROLI *regis ibid. inchoat.* and that SIR JOHN ELLIOT was duly elected, and returned knight for the county of *Cornwall*, and the other two burgesses of parliament for other places, and *Sir John Finch* chosen speaker; that SIR JOHN ELLIOT, '*machinans et intendens, omnibus viis et modis seminare et excitare*, discord, evil will, murmurings, and seditions as well *versus regem, magnates, prælatos, proceres, et justiciarios suos, quam inter magnates, proceres, et justiciarios, et reliquos subditos regis, et totaliter deprivare et avertere regimen et gubernationem regni* ANGLIAE *tam in domino rege quam in consiliariis et min-*

istris suis cujuscunque generis, et introducere tumultum et confusionem in all estates and parts, *et ad intentionem* that all the king's subjects should withdraw their affections from the king, the twenty-third of FEBRUARY, *anno quarto* CAROLI, in the parliament and hearing of the Commons, *falso, malitiosè, et seditiosè*, used these words, 'The king's privy council, his judges, and his counsel learned, have conspired together to trample under their feet the liberties of the subjects of this realm and the liberties of this house.' And afterward, upon the second of *March, anno quarto* aforesaid, the king appointed the parliament to be adjourned until the tenth of *March* next following, and so signified his pleasure to the house of commons; and that the three defendants, the said second day of *March*, 4 *Car.* 1, *malitiosè* agreed, and amongst themselves conspired to disturb and distract the commons, that they should not adjourn themselves according to the king's pleasure before signified; and that the said SIR JOHN ELLIOT, according to the conspiracy and agreement aforesaid, had maliciously, *in propositum et intentionem prædict.* in the house of commons aforesaid, spoken these false, malicious, pernicious, and seditious words precedent, &c.; and that the said *Denzell Hollis*, according to the agreement and conspiracy aforesaid between him and the other defendants, then and there *falso, malitiosè, et seditiosè* uttered *hæc falsa, malitiosa, et scandalosa verba præcedentia, &c.;* and that the said DENZELL HOLLIS and BENJAMIN VALENTINE, *secundum agreamentum et conspirationem prædict. et ad intentionem, et propositum prædict.* uttered these words upon the second day of *March* after the signifying the King's pleasure to adjourn; and the said *Sir John Finch* the speaker endeavouring to get out of the chair according to the king's command, they *vi et armis, manu forti et illicito*, assaulted, evil intreated, and forcibly detained him in the chair; and afterwards, he being out of the chair, they assaulted him in the house and evil intreated him, *et violenter manu forti et illicito* drew him to the chair and thrust him into it, whereupon there was great tumult and commotion in the house, to the great terror of the commons there assembled, against their allegiance, *in maximum contemptum*, and to the disherison of the king, his crown and dignity: for which, &c."

This was something like the course pursued in the church in Ranstead Court, except, as I have said, that the conspirators attempted to keep Sir John Finch in the chair, instead of putting him out. The consequences too were a little different. While the New-school men got off without suffering any penalty, hear what became of Sir John Elliot and his friends.

"Afterwards divers rules being given them to plead, and they refusing judgment was given against them, *viz:* against *Sir John Elliot*, that he should be committed to THE TOWER, and should pay two thousand pounds fine, and upon his enlargement should find sureties for his good behaviour and against *Hollis* that he should pay a thousand marks, and should be imprisoned and find sureties, &c.; and against *Valentine*, that he should pay five hundred pounds fine, be imprisoned, and find sureties."

Now, if Dr. Beman and Mr. Cleaveland had suffered such punishment, that would be some reason for their not being here to testify; though it would hardly account for the absence of their depositions.

A word, and but a word, in regard to another matter; for I shall not repeat what my colleague has already so ably said. I want to know,

gentlemen, what language could have been more kind, decent and forbearing, then the language of the Moderator to Mr. Squier. He did not tell him to sit down, or to begone from the place to which he had no shadow of a claim. He says simply "We do not know you, sir"—evidently meaning, "You are not a recognised member." He did not mean to utter that terrible denunciation imputed to him by Mr. Meredith. The addition of the word "sir," to which most of the witnesses swear, removes all difficulty in interpreting the language. Mr. Meredith endeavours to make a goat of Mr. Squier, but certainly, Dr. Elliott, with all his courtesy, would not in addressing a goat, have treated him so entirely like a gentleman.

These gentlemen come like shadows, so depart. You see that I am only gleaning: the harvest has been already reaped. Next came Mr. Cleaveland's turn, and he was guilty of a flagrant violation of order in not addressing the Moderator. That rule every body understands: if he had been a mere novice in the parliamentary school, he must have been aware that on rising he should address himself to the presiding officer. In the House of Representatives, in each state legislature, in almost all parliamentary bodies, this rule prevails. The speaker of any of them will not listen to a member or give him the floor, if he does not preface his remarks by "Mr. Speaker." I will read the rule of the Assembly upon this subject.

"Every member when speaking shall address himself to the moderator, and shall treat his fellow members, and especially the moderator with decorum and respect." *Append. to Const. R.* 21.

Now, Mr. Cleaveland did not obey this law: all the witnesses concur upon that point. Dr. Fisher, especially, gives distinct testimony that he did not address the Moderator; who therefore was bound to pay no attention to him: he never had the floor; he never made a motion at all. What the others did, he did not: he don't pretend that he did it. The act of Mr. Cleaveland was the great act of the drama: he struck the first decisive blow; and if that was improperly directed, nothing at all was accomplished. If the initiatory proceeding was out of order, the whole was of the same character. If Mr. Cleaveland did not address the Moderator—and that he did not mean to address him is evident; for though he at first looked towards him, he soon turned his face away to the west side of the house—he no more had the floor than a boy who had been sent to carry a glass of water to a member, or than the serjeant-at-arms when proceeding to make an arrest. There is one well known exception to the general rule. In the British House of Lords, a speaker on rising addresses his assembled peers, and not the Lord Chancellor who presides. In almost every other deliberative body the presiding officer is addressed. But farther, it is in evidence that Mr. Cleaveland said, that it was no matter in what part of the house the organization should take place. They had been advised by counsel that it must take place then and there—they acknowledge the necessity, and yet practically disregard it.

The next position which I take is, that the question proposed by Mr. Cleaveland was an impracticable question. He not only had not the floor, or the right to put any question at all, but that which he did put was utterly impracticable. I do not intend now to discuss the position of the chair—whether that was in the middle or at the head of the aisle—or

whether it was moved that Dr. Beman should be Moderator, or that he should take the chair. But there is certainly no doubt that there cannot be two presiding officers in the same Assembly at the same moment. When it is moved that Dr. Beman shall take the chair, while Dr. Elliott, whose removal is contemplated, is still in it, the natural question is that of king Richard, "Is the chair empty?" "Is the throne deserted?" "Is the king dead?" You may first degrade a monarch, and then seize his sceptre. Cromwell did not usurp the sovereign power, until Charles I. had been brought to the block. Usurpation *followed* the dethronement of Louis XVI. It is impossible that two persons should occupy the same place at the same moment. There cannot be two Presidents of the United States in office at once. Two stars hold not their motion in one sphere. Mr. Cleaveland could not attain any practical result at a single leap: he must proceed by certain regular steps. In the first place, the old Moderator was to be removed. This having been done, the chair would have been empty, and a motion to put Dr. Beman in it in order, though the question could have been put only by the clerk. The motion made, therefore, was perfectly impracticable and premature.

But they proceed to induct the new Moderator into office without the necessary preliminaries which the rules prescribe. This point I shall allude to in very general terms: it is of great importance that it should not be altogether overlooked. Whenever a new Moderator is chosen, no matter under what circumstances, the former Moderator must instruct him in his duty of submission to the rules of the Assembly, without this, he is no Moderator at all.

"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 in the records of this Assembly; which I doubt not will be carefully observed by both, in conducting the business that may come before you." *Assem. Dig. p.* 17.

Then comes a long string of rules, occupying three pages in the Digest, every page, line, and letter of which are to be read to every new Moderator. Then the former Moderator is to say,

"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."

Now, how long would it take to read these three pages of rules to a new Moderator, however rapidly it might be done. Here were two new Moderators, as it is alleged—Dr. Beman first and Dr. Fisher second; but to neither of them was one word of the rules read. Dr. Fisher says, "Dr. Beman told me that my conduct was to be governed by the rules thereafter adopted;" but Dr. Fisher did not know how many members made a quorum. No man could be acquainted with the regulations of any house without time and attention—close and re-invigorated attention.

Dr. Fisher seems to have known nothing about them. The provision for thus having them read to each new Moderator, supposes such a deficiency of knowledge: they are to be brought before each, line upon line, precept upon precept: in this case, they were all omitted. In every such proceeding there must be a connected chain, and each link must be firm and secure, or the whole falls to pieces. Our opponents must show that their revolution was regularly and legally effected, since they choose to claim for revolution the sanction of law.

Next, it is at least a matter of doubt, whether, in point of fact, the various questions were reversed. I do not consider this a very important matter, but the opposite counsel seem to rest much upon it. I say, it is at least doubtful whether the questions were reversed; and we certainly are not to be ousted upon a doubt. The testimony against the fact of reversal is not merely negative, as my learned friend would have you believe: this is a great mistake. Mr. Lowrie, who has been long actively engaged in legislative bodies, who was eleven years secretary of the United States' Senate, tells us that he is confident the question was not reversed, for there was not sufficient time for the reversal. Here then are two positive contradictory assertions, though I feel sure that there is no perjury on either side. One says that the question was reversed: another, that there was not time for the negative to be put. We are told, that when sounds become familiar, they do not impress the recollection; that when a sound is expected, as a thing of course, it is apt to pass unheeded; and the striking of the clock above us is given in example. Permit me to observe, that the philosophy and theory of sound are not as has been stated. It is the monotony of a sound which produces the effect described. A monotonous sound tranquillizes and lulls to sleep, as, for example, the pattering of rain, or the noise of the sea dashing against the shore, or against a ship. It is on account of this monotony and regularity that the hourly striking of the clock fails to arrest attention. This fact was exemplified the other day, when my colleague was speaking. The whole house were listening to him with wrapt attention, charmed by the force and beauty of his eloquence; when, suddenly, the very bell that tells unheeded the passing hours, sounded, in a different tone, the alarm of fire, and all heard it in a moment. We heard the first unusual stroke of the familiar bell, and many flocked down from the court-room. On the same principle, it is said, that during some of the continental wars, the life of a sentinel, who was charged with sleeping on his post, was saved by a distant clock's having struck at midnight thirteen, instead of twelve. His annunciation of this unusual fact proved his watchfulness, while the ordinary tolling of the midnight bell would probably have escaped his notice.

There are two persons whose testimony would conclusively settle this question of the reversal—would place the matter beyond dispute. They alone who put the motions in the affirmative, and in the negative—if indeed they were put in the negative at all—can satisfactorily establish the fact. But unfortunately they are both absent.

Gentlemen, there is one point in regard to which I have no doubt all of you will agree. Whether the several questions were reversed may be doubtful, but whether a fundamental right of the members of every deliberate body—the right of debate, was extended to the members of the Assembly in this instance, is not at all dubious. No opportunity was

given to debate these most extraordinary motions: no one of the witnesses has sworn that such opportunity was afforded. They followed each other in such quick succession, that a gentlemen skilled in legislative proceedings says there was not time for the reverse to be put: of course there was no time allowed for debate. Yet that every member of such a body has a right to debate questions like these, no one can for a moment doubt. Those who murmur because in 1837 the discussion of certain resolutions was closed by the previous question, after days of deliberation, would not allow us hours—no, not even minutes or seconds, to deliberate upon these all important subjects. If the questions were reversed, they were reversed instantaneously. Mr. Cleaveland did not give time for debate, or ask, "Are you ready for the question?" or receive a call for the question, and put it distinctly, first in the affirmative, and then in the negative. In direct violation of the rights of the members to whom it is said to have been addressed, all opportunity for debate was denied—debate which is the very essence of deliberation. If no opportunity was given for debate, the Assembly ceased, for the time, to be a deliberative body.

A word or two upon a point which has been already urged by my colleague: supposing the question to have been, in point of fact, reversed—did those who must have voted in the negative, if they had voted at all, *hear* the negative put, or *know* that it was put? Make an inquiry of a sleeping man, and there will be no answer; of a paralysed man, and there will be no answer; above all of a dead man—you will receive no answer. Every one of these men might as well have been dead, so far as regards hearing these questions. All who, as we may suppose, were to vote in the negative, and who, undoubtedly, were a large majority—all of them whom we have examined, say, "We did not hear the question reversed: we could not have voted if we had desired." The witnesses on the other side say indeed that they heard; but are you to put the hearing of A for the hearing of B? Besides, the New-school party were near Mr. Cleaveland and Dr. Beman—immediately surrounding them. Dr. Hill says that he was near enough to Mr. Cleaveland to have put his hand upon his shoulder. The little clique that was collected round the main actors may, naturally enough, have heard and seen what was not perceived by individuals, sitting, as most of the Old-school party were, at a distance. There is not any discrepance in the testimony of the Old-school upon this point: all of them, to a man, have declared that they did not hear. What has been said about Dr. McDowell's not giving testimony on this point is completely answered, when we show that he was not a member of the Assembly—only a clerk. For when the question is whether a motion or reversal was distinct enough for an intelligent vote by the whole house, we need only ask those entitled to vote whether they heard it. Dr. McDowell's testimony, whatever it might have been, would not have reached this substantive point: he had no right to vote. The fact, however, was that the inquiry had been before pushed to satiety; his honour the judge seemed to fear that the case would be interminable; therefore scarcely any witness was allowed to go over the whole ground. A doubt as to this matter were enough; but there can be no doubt that a great number of those who were entitled to vote, had no power to exercise their right. One fact can hardly be dwelt upon with too much emphasis. Every man of the Old-school party in the

house, who has been examined, says that he did not know until the afternoon, or the next day, that Dr. Fisher had been appointed Moderator. How is it possible to presume the acquiescence of these gentlemen, in the measures of the New-school, when, to a man, they come and tell you, that they did not know that fact, until they learned it from their friends or the newspapers next morning. I agree that if they would not hear, it was another matter, that if they had put cotton in their ears, or were slumbering at their posts, they could not complain; but such was not the case. All tried to hear. Who then is responsible for the riot and disturbance which prevented them from hearing? Suppose that each party made a noise, which was the *primum mobile*—the first cause? Were not those who caused the disorder at least as guilty as the others? A case of riot is applicable here as an illustration. A quiet and orderly set of men had been assaulted and beaten by another set; but it was decided that the procession of the former was calculated to provoke disturbance, and though it did not excuse those who struck the blow, made all rioters together. If then, the New-school caused the disorder and noise, they have no right to complain of it, and still less are they to be allowed to derive any advantage therefrom. But not a single person, if I have read the evidence aright, charges a particle of disorder upon the Old-school. This may seem a bold position; yet I feel confident that I shall be able to substantiate it. Not a single act of disorder has been brought home to one of them. There were to be sure cries of order from some of the Old-school; but I have yet to learn that calls for order can be disorderly. There is a story that stamping, scraping, and hissing were heard to proceed from the south-western part of the house; but several persons who sat in that neighbourhood say that there was nothing of the kind. Who made this noise? I don't know, and I am sure you do not. I will not pretend to charge it upon the New-school, but I deny that it proceeded from members of the Old-school, till it is brought home to some of them. Was it made by Mr. Boardman—Mr. Breckinridge—Dr. Miller? They all were in the accused neighbourhood and declare that they made no such noise, and knew no one that did. Dr. Miller, in the course of the cross-examination denied emphatically any participation in it. Mr. Breckinridge rose and said, that the business of the Assembly had better be suspended until the disturbance had passed over, as the Moderator had before tried in vain to restore order. These all have entirely exculpated themselves. There has not one single act been proved against a single individual of the Old-school, that tended to disorder, or was improper.

I say, farther, that there was much disturbance on the other side. Disorderly acts could be fixed upon many, but I select only a single instance—that of Mr. Duffield. A young gentleman, who, I believe, was unexpectedly examined, and who declared positively that he knew Mr. Duffield, having seen him on various occasions, testifies that he saw him, at the time of which we are speaking, commit several acts of gross disorder, with a cane that he held in his hand. He declares that he plainly saw the cane, and acts of extreme disorder. The opposite counsel eagerly inquired, where this witness lived, and I was called on to be responsible for his appearance next day. He was told to come back next morning and was here accordingly, but was not brought to the stand. The counsel, however, brought forward Mr. Elmes to state, that Mr. Duffield had

once lodged at his house, and that he did not usually carry a cane. I might, in the same way, prove that Dr. Elliott was not in the habit of holding a hammer in his hand; but this would not disprove the evidence that he had a hammer when presiding as Moderator.

The New-school party meant to create a disorder. They resorted to measures of revolution, more or less violent—the consummation of all disorders. They alone, therefore, were criminal: we are clear of guilt. Whether Mr. Duffield carried a cane or not, it is proved that he voted, which in him was an act of disorder. The ayes, says Dr. Hill, rang a peal indecently and offensively loud; but if the gentlemanly Mr. Duffield, voted in the stillest, smallest voice; if he augmented the general flood by only a single drop, he was just as disorderly, as if he had made use of his cane in the way described, or stood up on the back of a pew. All questions about the cane may be dispensed with. It is proved conclusively that he voted—this—in him a gross disorder—is fastened upon him, and that he was disorderly is sufficient for our purpose.

A host of witnesses—all of the Old-school, and most of the New, testify that they heard noises of every kind misbecoming such an Assembly—stamping, scraping, hissing, and ayes very loud and offensive; that they saw some persons standing even on the tops of the pews, others moving down the aisle, and a number at the invitation of their ringleader retiring in a mass to a distant part of the house. All this made the proceedings void. Where will you find scenes of such disturbance and confusion, accompanied by effective action, in legislative bodies? Not in all the wildest disorders of our own House of Representatives, at Washington, or of the British Parliament. Yet they are mere political assemblies, not purified and sublimated by spiritual influences.

There is still another point with which I will venture to trouble you. How was the transition to be made from the religious assembly to the regularly organized deliberative body? The clerks were in the first place to make out the roll. The rules of 1826 require that the Committee of Commissions should prepare it, upon examination of all the commissions presented. The rule of 1829 merely appoints the clerks a standing Committee of Commissions. Now, who were the clerks of the pseudo Assembly? Dr. Mason and Mr. Gilbert. Did they ever examine all the commissions? They never in the world made a roll. It must be made out on actual inspection: the clerks cannot take the mere declarations of the members themselves. But neither of these gentlemen inspected even a majority of the commissions. Mr. Gilbert says, that he formed his roll by correcting a list which he had before made out, by Mr. Krebs', and by joining this list to another containing the names of the commissioners from the four Western Synods; that he had made no examination of commissions, or had examined very few. Dr. Fisher says, "We acted upon the principle that we had superseded the Moderator and clerks, and were going on under another organization." Remember that this was a deliberative Assembly, and the highest tribunal of the Church, created for the purpose "of reproving, warning, or bearing testimony against error in doctrine, or immorality in practice;" "of superintending the concerns of the whole Church"—I am speaking the language of the Form of Government—"of suppressing schismatical contentions and disputations; and, in general, of recommending and

attempting reformation of manners, and the promotion of charity, truth, and holiness." Yet we find a body claiming to be this august Assembly, disregarding all rules of order, every sort of principle, and overturning their whole code of laws in a single moment. How disgraceful is such strife among brethren—the *fratrum ira* which the heathens regarded with so great abhorrence. Anger is carried to the extent of treason to their faith. Yells of "Aye!" clapping, and hissing are all heard sounding loudly above the general murmur of the tumult. What valid measures could be adopted in the midst of that scene of disorder and confusion? Nothing could be regularly done. *Inter arma silent leges.* During this season of violence there was no *deliberative* Assembly in that church. All law was trampled upon and set at defiance. The decency of the house of prayer was forgotten, and it was converted into the likeness of a den of thieves. Uproar and riot had taken the place of that grave deportment, that Christian order, which the laws of God, as well as all human laws, enjoined.

Suppose that this disturbance came alone from the gallery: what would have been the course adopted in any other Assembly? The galleries would instantly have been cleared, the intruders turned out. You have probably seen such interruptions even in courts of justice. Perhaps a drunken man comes in, and for a moment puts every thing into confusion. The proceedings are stayed until he is taken into custody and removed. There is no difficulty in giving true interpretation and effect to the condition of a deliberative body thus disturbed. Its proceedings are suspended. Its existence is for the moment annihilated. It stands still, as it would do during a brief recess for the purpose of refreshment or repose. A few rebellious spirits cannot at such an interval combine for any effectual purposes of mischief, in the absence or without the sufficient knowledge of their well disposed associates and fellow members. Their doings are merely void. Otherwise gross injustice would prevail. Certain armed soldiers were once introduced into the Roman forum, under whose influence the spirit of Cicero quailed, and Justice dropped her sword and her scales together. When in an earlier period of the same classic history, the Gauls broke into the senate house, and plucked a conscript father by the beard, deliberation rested, while the hoary headed patriot struck the insolent intruder to the earth. These were secular assemblies, which met in Pagan times. Yet the effect of their interruption was such as I have described. In a religious convocation—in an age of refinement, which boasts the influence of a Christian spirit—in an Assembly devoted to the cause of peace, bowing habitually its knees in prayer—bending its bodies to the cross, such a state of things as has been described was perfectly incompatible with any measure of validity. It matters not who were the loudest of the rioters—bystanders, or applicants for admission, or admitted members—partizans of one side or partizans of the other. Riotous proceedings are brought home to the Assembly. Tumultuous disturbances of the peace occurred in the midst of the legislative hall. All were affected by the results, although many may have been innocent of the misdeed. The irregularities of a minority in the Assembly invited the greater irregularities of bystanders, who were tempted, instigated and led on by the evil precedent and example of these reverend but misjudging and misguided brethren.

The question submitted is, whether these partial disorders are to give success to the designs of those who create them, or whether they are merely to pass off like vapours and leave the renovated atmosphere unaffected by their brief existence. According to the decision of it will the one or the other of the parties prevail. Should the plaintiffs fail to convince you of their claims, little inconvenience and no loss can be sustained. They will voluntarily meet in '39, as they voluntarily met in '38, a separate body, without the scandal of discord and strife which prevailed when the two parties met together. In future years they will continue to maintain the position which they have selected, undisturbed by any of those from whom they have chosen to depart. If they are disposed at any time to return to the ancient Church with amended allegiance, they will be received with open arms. If in the mean time they desire to be merry in their separation, they will always find in the fertility of our friend who has so ably advocated their cause, a jest suited to their wants.

Should the defendants lose their cause, in which their interest is deep and lasting, the consequence to them will be widely different. Dearer to them than life is the Church of their affections. Closer to them than the ties of nature are the systems to which they became devoted in their infancy, which they believe to be connected with their immortal hopes. Every thing, they are persuaded, most valuable to them on earth, will be affected by the decision of this cause. If they are declared to be no longer members of the Presbyterian Church, and its balmy influences have indeed been withdrawn from them, the iron will enter deep into their souls. Their future days will be filled with sorrowing for what they have irrevocally lost. They can only hang their harps upon the willows, and weep, like Rachel, for that which cannot be restored.

Court adjourned.

MR. WOOD'S ARGUMENT.

SATURDAY MORNING, March 23d—10 o'clock.

Gentlemen of the Jury—After having floated for several days in the upper regions of air, in following the learned counsel on the other side, in their flights of fancy and of oratory, you may find it difficult to come down again to the earth; but I assure you that you will be under the necessity of coming down, for I shall not attempt to follow them in their airy flights: I am not accustomed to being perpetually upon the wing. I shall confine myself to a plain statement of facts and arguments, and shall condense my remarks as much as possible, saying nothing more than suffices for the ellucidation of the case, and the discharge of my duty to my clients. This is incumbent on me, in consequence, not only of your already exhausted patience, but also of my own indisposition, which renders it almost impossible for me to proceed at all.

A variety of matters have been introduced here, which are, in my opinion, in a great measure irrelevant to the real question which you are to decide. A great mass of testimony has been introduced which might have been dispensed with. The learned counsel on the other side, in claiming a majority of clients, have seemed to think it necessary to have a majority of witnesses. Why, gentlemen, we could have gone on to examine witnesses for months, but our object was to save time, and we therefore dispensed even with the cross-examination of their witnesses, in order to bring the case within reasonable limits. The opposite counsel have relied much upon the fact that the testimony of Dr. Beman and Mr. Cleaveland was not introduced. They are absent, but, as the learned gentleman has stated, their depositions were taken. Why have not these been read? Why was not Dr. Nott's deposition read? You recollect that all these were taken before the controversy here commenced, and they do not touch the precise points which have been since started by our opponents. When I came here I did not dream that the case would be made to turn upon these nice minutiæ of order and parliamentary discipline. The depositions were taken on other topics: we could not possibly anticipate the course into which the proceedings would fall. This was the reason why Dr. Nott's deposition was withheld.

Mr. Ingersoll. We refused to offer that in a mutilated form, after a part had been rejected.

Mr. Wood. I say that this was the reason why Dr. Nott's deposition was not read, and I will show that it was. His Honour rejected all that part which was extraneous to the issue, and the rest the counsel considered too trifling to be offered. We might as well infer, that Dr. Nott testifies that Mr. Cleaveland's motion was reversed, as they, that Mr. Cleaveland swears to the contrary—the two suppositions rest on the same footing. I think that we have given evidence enough; but if Dr. Beman and Mr. Cleaveland had been here on the stand, as Dr. McDowell was, and had not

been examined, then the fair inference might be, that we knew their testimony would prove unfavourable.

In the next place, it is said that the Old-school party have not sought litigation; that they have not willingly come into court; that this proceeding is wholly chargeable upon us. This may be so. I have never known a body of men, conscious of being in the wrong, to seek a court of justice. That is the place, which above all others they desire to avoid. The party injured usually resorts thither, seeking, however, not litigation, but redress. We are told that we have asked the advice of counsel learned in the law. Is that very extraordinary, after one or two hundred thousand persons had been cut off from the Presbyterian Church, without trial? Extraordinary that we should resort to gentlemen of the bar, to take advice upon the measures that would enable us to obtain that redress, which our ecclesiastical brethren had denied us? Certainly there is in this nothing that can prejudice the cause of my clients.

These preliminary matters having been disposed of, I come directly to the main question in dispute, which I beg leave to present distinctly to your view. Was that Assembly, which in 1838 elected the relators trustees, the General Assembly contemplated by the charter of incorporation granted in 1799? The issue joined is whether the relators were duly chosen trustees, which will appear from the solution of the former question; for that the mode of election was proper is not disputed. I therefore call your attention to the point, was the Assembly that elected the relators a true and lawful Assembly?

The General Assembly is what is called a *quasi* corporation. This admits of no proof; yet some remarks upon the point will serve to give a true idea of the nature of the rights of which our opponents have attempted to deprive us. First, the Assembly is a *quasi* corporation under the doctrine of public trusts and charitable uses. Even where the whole ecclesiastical system of a religious society is voluntary throughout, the civil courts will interfere to prevent the diversion of charitable funds from their true object. *Witman v. Lex*, 17 *Serg. and Rawle*, 90. *Moggridge v. Thackwell*, 7 *Vesey's Ch. Rep.* 36. In England the Court of King's Bench, has in repeated instances, by means of the writs of *mandamus* restored preachers who had been deposed, where the religious societies to which they belonged were purely voluntary, looking at membership in institutions not incorporated as a right in both law and equity. But the General Assembly may come here, and all its members may come, for protection in the exercise of rights secured by a charter. It has even been admitted on the other side that the Assembly is to be regarded as a corporation, which perhaps is going a little too far; but certainly the trustees who form the body actually incorporated are a mere agency.

Judge Rogers. I have no difficulty on that point.

Mr. Wood. I presumed that it was a point on which there could be no difficulty; still I would beg leave to dwell upon it for a moment. We find that to this General Assembly, as it existed in 1799, possessed of certain rights and privileges, resting under certain obligations, and embodying the beneficence of the whole Presbyterian Church, was granted a charter incorporating its trustees. In order to find out what that charter meant, and what the trustees were to do, we must inquire into the nature of the Assembly, and of the objects which its plan of action embraced,

at the time of the incorporation. We find that at that time it was the chief judicatory of the Presbyterian Church, indeed, but of a Presbyterian Church in alliance with Congregational Churches, as appears from the following provisions of a treaty proffered by the General Assembly to the General Association of Connecticut, in 1794.—*Assem. Dig. pp.* 295–6.

"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 General Assembly."

Then on the same page is found the response of the General Association:

"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 in all questions decided in those bodies respectively, was taken into consideration; and after discussion, the General Association voted a compliance with the said proposal."

We find then, that in 1799, at the time when the charter of incorporation was granted, there was thought to be no inconsistence between the rules regulating the doctrine and order of the Presbyterian Church, which were, if you please, of divine right, and an alliance formed with Congregationalists, although that alliance was not merely one of correspondence, but allowed delegates from the General Association of Connecticut both to sit and vote in the councils of the Church, and this even in the highest council, that which rules over all the others, dispensing its benefits and blessings to the whole Church. I need scarcely refer to the great principle, that the consideration of cotemporaneous usage is always of vast importance in determining the true bearing of a charter. Finding corporate powers granted by the legislature for the benefit of the ministers and elders of the Presbyterian Church, we must ascertain the existence, nature, and character of that Church, at the time of the grant. Then it was a Church allied with another Church; and therefore casual alliances between it and other denominations of a similar character are not contrary to the charter. One of the learned counsel has spoken of the evidence contained in ecclesiastical history, that such unions were formerly allowed in England even between Presbyterians and Episcopalians. He might have gone farther, and told you that at the time Presbyterianism was introduced here, this species of union was there tolerated. The Presbyterians of the United States came from England; and, when they came, brought with them a familiarity with such ecclesiastical alliances; and we find their taste for them soon manifested in their new settlement. But certainly, when this sort of alliance existed at the very time when the charter was granted, all that has been said about a violation of that charter, and of the principles of Presbyterianism, must be regarded as without weight. These plans of union were schemes for enlarging the reign of peace and harmony, and are not to be declaimed against at the present day, and put down as unconstitutional, and subversive of church order and pure doctrine.

These subordinate institutions are all subject to the laws of the land. We have been told that ecclesiastical judicatories are independent of the law. That is not true. So long as they keep within the sphere of their legitimate powers they may exercise them uncontrolled by the civil authority; but they are bound to keep within that sphere: if they go beyond it, disregarding those fundamental rules and principles which the law has provided for them all, for the protection of their members the minority as well as the majority, they become amenable to the common tribunals of the country. The very cases which have been referred to by the opposite counsel prove this. The case of *Field* v. *Field*, 9 *Wendell*, 400, was that of a religious society split into two parts. Did the majority there find that they were above the courts of justice? The minority sought their rights in court, and the application met with a ready response.

There has been much ado about our attempt to disfranchise Dr. Green, and we have had *oyer* and *view* of the reverend gentleman day after day. But what has been said on this subject has seemed as if addressed to feeling and not to judgment. No man respects Dr. Green more than I do, but surely these are mawkish, crocodile lamentations that are made on his account. He suffers but the loss of an office which is of no profit or honour to him, but rather a burden. We do not impeach his character; we do not make a personal attack upon him. Your decision in regard to this collateral matter, however made, cannot prejudice him in either his character or his pocket. I therefore dismiss all the remarks concerning him with this passing notice.

There can be no doubt that the Assembly, which elected these trustees, was an organized body and purported to be the General Assembly of the Presbyterian Church. Nor can there be any doubt that it was first organized. And you will remark that, if it was properly organized; if there was no radical defect in its constitution, there could be no farther or other organization. If ours was substantially correct, a mere petty irregularity could not vitiate it: if it had no radical defect, that organization must prevail. It was the duty of every commissioner to come into it, and those who had an opportunity of doing this which they did not improve, cannot now complain. Take the case of the Common Council of this city. Suppose, that after a quorum have met and organized themselves, another set meet and pretend to organize the Council anew. Can the latter exercise the functions of the true body? Can there be as many distinct bodies as there are quorums, each possessing the powers of the whole? And a mere petty irregularity, if there were any, did not vitiate our organization. Such an irregularity occurred in 1835. There is a sort of usage in the Assembly, that when the Moderator does not appear to take his seat, the last Moderator present presides. At the opening of the session of 1835, the regular Moderator was absent, and Dr. Beman, who was not the last present took the chair. The last it seems was not a member, and a question arose, whether the rule did not mean the last Moderator present who was also a member. Dr. Beman, however, sat for some time, and a variety of business was transacted, before the propriety of his holding the seat was questioned, and finally by a vote of the body Dr. McDowell was put in his place. It may appear singular that so much difficulty should have been made about such a mat-

ter, but with that we have nothing to do. The case shows plainly that a defect of that kind is not sufficient to vitiate the organization. When Dr. McDowell took the chair, they did not go back over all the business which had been before transacted. This was not considered necessary. They just went on, after displacing Dr. Beman: instead of forming a new organization, they merely continued that already commenced. Although a confessed irregularity had occurred, yet the business done before the error was rectified was well done, and under a new Moderator the initiative organization was consummated.

It is important, gentlemen, in every controversy to ascertain how far the parties agree, and on what points they differ. No, there is no difference here as to the fact that the process of organization of the General Assembly was going on up to the period when Mr. Cleaveland made his motion. This fact both admit; both, however, contending that the organization was proceeding in an irregular and defective manner, though differing as to the nature of the irregularity. We say that the Old-school were attempting an unlawful organization, and that the object of Mr. Cleaveland's motion was to secure a lawful organization, which should include all entitled to seats. They assert that our attempt to introduce the commissioners from the exscinded districts was disorderly. Defects therefore are alleged on both sides; but both agree that up to a certain time the Assembly was in the process of being organized. From that point, the moment when Mr. Cleaveland rose, we take our departure in different directions. We are charged with there attempting a new organization, a wrongful and illegal succession. On the other hand, we contend that it is not so, that the Assembly displaced a Moderator and two clerks, who had refused to perform their duty; that we had a right to remove them—a right which belongs to every such Assembly where officers refuse to do their duty—and that after thus disposing of these officers, we proceeded with the regular business of the judicatory. Are we correct in this position? That is the question which you are to solve.

This leads us to the consideration of Mr. Cleaveland's motion. I say that the cause of that motion was a deliberate design to exclude, in the organization, from the Assembly, a large number of commissioners, by the Moderator and clerks, backed by a portion of the Old-school party, commencing in 1837, and carried on up to that time—an attempt to create an unlawful Assembly; and I mean to show from both general principles, and the Assembly's own rules in conformity with them, that this attempt to create an unlawful Assembly, commencing in 1837, and carried out by the Moderator and clerks, aided by a clique of the Old-school party, down to the time of Mr. Cleaveland's motion, gave us the right to displace those officers and substitute others for them. The consideration of this matter carries us back to the exscinding resolutions of 1837. They are the first subject for our consideration—the first as to importance and as to time. To the learned counsel on the other side they may well seem like mere trifles, mere preliminaries—portico-work—only the turning out of doors of some two hundred thousand stated worshippers, sixty thousand communicants, and six hundred ministers of the gospel! If this be the portico, what must be the magnitude of the great temple itself? You have heard a grave discussion of various petty questions of parliamentary order. Whether the new Moderator should have taken the chair or

might stand in the aisle; whether the motion to displace the old officers might be made by a member, or must be put by one of the clerks, who had also refused to do their duty; and whether one side or the other side of the house was the proper place of organization. These are the great questions which are to occupy and agitate every breast, while the exclusion from church privileges of two hundred thousand persons is mere portico-work! I thank the learned counsel for the case of *Field* v. *Field* which he has cited. What were the circumstances of that case? A large majority of an ecclesiastical judicatory attempted to organize the body in their own way, preventing the clerk from taking any part in the organization. But the minority, with the clerk, proceeded to organize themselves on the outside of the house, amid all the confusion of an out-door assembly, and the noise of by-standers. And what said the Supreme Court of New York? That inasmuch as the majority had prevented an organization in the regular way, and had attempted to create an unlawful assembly, therefore the organization of the minority, though effected under circumstances of disadvantage, outside of the church, in the open air, was the true assembly. What was the case here? A resolution of the trustees had been obtained and was put into our hands, declaring that we should not occupy that church; that no Assembly should be organized there unless under the old Moderator; that unless we would submit to these mere ministerial officers, who had been sent down to us from the Assembly of the previous year, and who had conspired to cut off from the Church two hundred thousand souls, we should not use that house. But in this case, instead of going into the street, as we might have done, we did actually organize in the church, notwithstanding the embarrassment of our situation. The new Moderator indeed had not the chair nor the hammer: the former one would not give them up; but if the minority had gone into the street to organize the body, theirs would have been the lawful Assembly and as such sustained, if they had truly been attempting to prevent an unlawful Assembly's being organized by the Moderator and clerks, borne out by a clique of the Old-school.

To state clearly my object, I propose, gentlemen, to show in the first place, that the exscinding resolutions of 1837 were void in law and of no effect; that they did not impair or destroy in the slightest degree the just and lawful rights of a single Presbyterian; in the second place, that there was an attempt commencing with these resolutions in 1837, and followed out by the Moderator, the clerks, and a portion of the Old-school, to effect an organization of the Assembly of 1838, to the exclusion of all the commissioners from the Presbyteries within the infected districts; and, in the third place, that this was an unlawful attempt to effect a fraudulent organization; that any organization not including all entitled to seats was illegal, and ought to have been resisted by all fair means. If I succeed in demonstrating these three points, I think they must put an end to the defendants' case.

The exscinding resolutions it is unnecessary here to read again. Their effect was to cut off from the Church all the Presbyterian ministers belonging to various judicatories, and all the members of Presbyterian churches residing within an extensive district, comprising a large portion of New York and Ohio. Now, whom does the charter of 1799 incorporate? The trustees of all the ministers and elders of the Presbyterian

Church. Where? Those only who reside in Pennsylvania? No, but all who live between the Delaware and the Mississippi, as my learned friend has told you; all in the United States, which the broad canopy of heaven covers. That charter secures to every Presbyterian in America certain rights, resulting from the right to continue in the communion of the Presbyterian Church, unless excluded by a regular and lawful process. How were the Presbyteries within the infected district cut off? At a single blow; without notice, without trial, without any complaint or specification of charges being made, without the least warning. They who performed the act were themselves mere delegates, deriving their whole power from the Presbyteries; yet at one fell swoop they sacrificed all Presbyterial rights. What was the effect of the excision, as it is called, supposing it to have had any effect? It was utterly to banish Presbyterianism from a large district of country. Cast your eyes over the map, and look at the region thus tabooed, made infected ground. In New York alone, it extends three hundred miles, between Albany or Utica on the one hand, and Buffalo on the other—a district as extensive as three or four or five of the smaller states of the Union. This large district was in fact made a Presbyterian desert, without a single oasis, a single spot of verdure. The excision completely banished all Presbyterianism from its borders. And what are the modifications or qualifying provisions of the act of excision? Here it will be necessary to take up the resolutions for a moment. They tell the excluded portion of the Church,

"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." And suppose it was not, was this the way to treat their brethren? They ought to have rectified the evil, to have made provision to regulate the thing in future. With what reason could they cut off whole Presbyteries and Synods because the "Plan of Union" had not been consistently carried into effect? We are told that great disorders were ascertained to have existed. Was there any trial, any hearing given to these judicatories? Were they allowed an opportunity of meeting such charges to show that they had no foundation in fact? Next, it is said, "That the 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." What mockery? They do not wish to affect any one's ministerial standing, or pastoral relation? What are the rights of that standing and relation? Are they not the right of connexion with Presbyteries, Synods, and the General Assembly; the right of resorting thither for the redress of grievances and the settlement of disputes; the right of having a voice in the control of church funds? And have not these men been cut off from all such rights? Have they not been shut out from all the benefits of their ecclesiastical standing and relations? It is idle to talk thus. One of the counsel has observed—he told you of the fact with an appearance of some satisfac-

tion—that no Presbyterians in Pennsylvania had been cut off. True, Pennsylvania has not been touched; but the intimation conveyed a meaning, which could not have been designed by the learned gentleman, and which was certainly unworthy of him. You will make no such invidious distinctions; you will not make a difference between Presbyterians in Pennsylvania, and those in New York. Besides, if you sustain the conduct of our opponents, you know not how soon Pennsylvania may suffer in a like way. If you establish the legality of this measure of excision, an accidental majority may, on pretence of difference in doctrine, soon cut off a portion of the Church in Pennsylvania—perhaps the Synod of Philadelphia. And then Dr. Green, about whose removal from the office of trustee there has been so much factitious distress, will lose not only his office, but also the whole of his ecclesiastical privileges.

It is a mockery of justice thus to tell the members of the four Synods, that although they have been cut off, means have been taken to guard against the effects of the excision. But what are these means?

Here Mr. Wood read the third and fourth resolutions.—*Vid. ante, p.* 46.

This is the provision made to guard against the injurious effects of the previous resolution. Any Presbytery within the infected district, being strictly Presbyterian in doctrine and order may apply for admission to the General Assembly. But such Presbytery is not to be at once admitted: it must come and apply to the General Assembly, and they will *take order* on the application. Bear in mind, gentlemen, that it was clearly shown by the plans adopted in 1837, and '38, that it was never meant that any one of these Presbyteries should be re-admitted without a special act of the General Assembly. It was intended to organize the body in 1838 to the exclusion of all the commissioners from them, and then when they came to supplicate for admission, they would have been at the mercy of the same majority by whom they had been exscinded. In this mode they were to come in; thus to regain the rights secured to them by the charter. And as to the individual members who were cut off—what were they to do? Look at page 429, of the Minutes of 1837.

"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."

This is the way in which the individuals applying for admission were to be received. A clergyman like Dr. Richards, born in the Church, who has spent all his days in its communion, and has dispensed the benefits of religious teaching year after year to a portion of its worshippers, in the decline of life, is cut off from the Church, tabooed; and in order to get back again, must travel some hundred miles—the whole district is three hundred miles in extent—must go beyond the utmost verge of this region, before he reaches a spot on which the benefits of Presbyterianism are shed. Then, before he can join any Presbytery, he must submit to an

examination, and I suppose a cross-examination, on experimental religion! At one blow all these men were cut off, being allowed no hearing, no trial—men as good as Dr. Green himself, or any who have gone before him; and in order to be restored they must travel perhaps two or three hundred miles, then submit to an examination on experimental religion, and then—what? Still they cannot go up immediately as members to the Assembly of 1838, but must apply to it for admission after its organization. They must travel out of the region in which they reside, in order that they may be examined on experimental religion—men who have spent their whole lives in experimenting on religion, and spreading its practical benefits over the whole land—and then cannot be admitted until the General Assembly choose to take order on their case. Have I not made good my words, that this was a mere mockery?

As judicial acts, it cannot be pretended that the exscinding resolutions are not entirely void, inasmuch as there was no trial or even notice; and this not only by the law of the land, but by the books of the Presbyterian Church itself. My position is established by true Presbyterian doctrines, by rules all made before these acts of tyranny were contemplated. In 1793, by the Assembly,

"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."—*Assem. Dig. p.* 323.

Now this is not only the Presbyterian law, and a clear principle of common justice: it is also the law of the land. I refer for proof to Angell and Ames on Corporations, 244, where is laid down the same doctriue with that found in the Digest.

"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. * * * 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 party supposed to be in default. * * * * * * *

"It does not appear necessary that the summons or notice should particularize the charges; though some intimation should be given of them, that the accused may have an opporunity of vindicating himself."

Here there was not only no notice of trial, but not even an intimation of a charge given. The commissioners from the exscinded Presbyteries come up as if to an ordinary Assembly: they expect only ordinary business. Having received no notice, or citation to trial, and without having been heard in self defence, they find not only themselves, but all their constituency, residing in a country of three hundred miles extent in New York, and one hundred miles in Ohio, banished entirely from the Assembly and the Church, while the region in which they live is looked upon, for all Presbyterian purposes, as an infected region. But you are told that it is a constitutional practice to dissolve these judicatories. True, the Assembly may dissolve Synods and Presbyteries, but that is a very different thing from cutting them off, from stripping them of all their ecclesiastical rights and privileges, from declaring them no longer part or par cel of the Church. Look at the cases referred to on this subject.

"*Resolved,* That at and after the meeting of the Synod of Philadel-

phia in October next, the Synod of Delaware shall be dissolved, and the Presbyteries constituting the same shall be then and thereafter annexed to the Synod of Philadelphia: and that the Synod of Philadelphia thus constituted by the union aforesaid shall take such order concerning the organization of its several Presbyteries as may be deemed expedient and constitutional:—And that said Synod, if it shall deem it desirable, make application to the next General Assembly for such a division of the Synod as may best suit the convenience of all its Presbyteries, and promote the glory of God."—*Min.* 1835, *p.* 29.

In 1834 the Synod of Chesapeake was dissolved, the same provision being made for all its component parts.—*Min. p.* 37. It was not disowned or cut off, but there was merely a change made in the ecclesiastical connexion of the Presbyteries. Keeping them within certain local bounds, they put them under the jurisdiction of superior judicatories to which strictly defined physical limits were fixed.

"The Committee to whom was referred Overture No. 8, viz: An application to have the Synod of the Chesapeake dissolved; and also applications from the Presbyteries of Lewes, Wilmington, and Philadelphia 2d, as constituted by the Assembly, to be constituted into a new Synod, made a report, which was accepted and laid on the table.

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"The report on Overture No. 8, and the petitions for the erection of a new Synod, was taken up and adopted, and is as follows, viz: *Resolved*,

"1. That the Synod of the Chesapeake be, and the same is hereby dissolved.

"2. That the Presbytery of East Hanover be, and the same is hereby restored to the Synod of Virginia.

"3. That the Presbyteries of Baltimore and the District of Columbia be, and the same are hereby restored to the Synod of Philadelphia.

"4. That the Second Presbytery of Philadelphia, and the Presbyteries of Wilmington and Lewes be, and the same are hereby erected into a new Synod, to be called the Synod of Delaware, &c."

So here the Synod merely was dissolved, the Presbyteries being attached to other specified Synods, the jurisdiction of which was extended over them; or, as regards some of the Presbyteries, the name merely of their Synod being in effect changed. No instance previous to that of 1837 can be produced, in which the Assembly has pretended to cut off a Synod and all its constituent Presbyteries from the Church, without notice and without trial, as was done by the exscinding resolutions.

Now, what warrant was claimed for this most extraordinary measure which deprived such a multitude of Presbyterians of all their ecclesiastical rights? It is said that the Assembly had previously, at the same session, abrogated the plan of union of 1801. That having done this, they were authorized to pass the exscinding resolutions; that they were a legislative measure warranted by the abrogation. Our opponents tells us that the said plan of union was unconstitutional; and that therefore they were justified in cutting off the whole of the large district embraced within the limits of the four Synods. Let us look at this plan of union, and see whether its abrogation warranted the subsequent proceedings. It is found in the Assembly's Digest, page 297. Now it must be manifest to any one who will look at it, that this alliance was not one whit stronger

and more intimate, than that between the General Assembly and the Association of Connecticut, which existed in 1799, at the time when the charter was granted. And indeed the former was not as objectionable as the latter in point of bringing into the judicatories of the Presbyterian Church members of another denomination; for the provision of 1794 permitted delegates from the Congregational Association, not only to sit, but also to deliberate and vote, and the first proposition for this arrangement came, not from the Association, but from the General Assembly itself. The provision was in force when the charter was passed—that charter which formed and moulded this Assembly for all purposes of law. And, gentlemen, these measures of alliance, in their origin, received the support of not only Dr. Green, but all the leading members of the Presbyterian Church—men whose names stand at the head of their order; men never to be forgotten so long as this Church shall last. There was the Rev. Dr. Witherspoon, not only a distinguished divine, but also an able statesman. He was not a mere closet metaphysician: he had a mind able to embrace the most comprehensive views of the great advantage which society at large, in its religious, moral, and political character, would derive from such harmonious connexions. He saw that they were calculated to foster union and peace: as a statesman he knew the importance of these, as well to religious as to political institutions. Such alliances were calculated to do great good, and in forming them every good man might with propriety engage. In the early settlements of this new country, they were to the pious like the lever of Archimedes: by them could be raised a moral world. The objection that the "Plan of Union" brings Congregationalists into the body of the Church is not true in the sense in which the other side represent the matter. Look at this plan.

Mr. Wood here read the second and third sections of the "Plan."—*Vid. ante, p.* 49.

Now I say it is not true, that either of these provisions brings in a single Congregationalist. The members of Congregational churches cannot come in under it, nor can Congregational ministers come in, or enter any Presbyterian judicatory, from the lowest to the highest. In nothing can Congregationalists be identified with the Presbyterian Church. The act, so far, simply authorizes, what is very natural and proper, that ministers may preach to people who confessedly agree with them in all the essential articles of faith. Is not this allowed in the Presbyterian Church at this very hour? Does not that Church send ministers of the gospel as missionaries, to preach to infidels, pagans, and unbelievers of every class; to endeavour to convert those who do not believe in Christianity at all? And do not these ministers preach to such without being assisted in their ministrations by a single elder? They must first convert them to the faith before they can form any ecclesiastical organization. Is it true that our opponents have arrived at such a state of intolerance, of religious spite, that they are prepared to denounce this plan of union, when it is accordant with the plans in existence at the time when the charter was granted, and with the plans adopted by the Presbyterian Church in England? Have they come to that state of intolerance, that while they preach to infidels, they are opposed to the principles of a union of this kind, adopted by the patriots of the Church and of the State? Will they

say, "You may preach to infidels and Pagans, but not to Congregationalists: they are infected, and you cannot be allowed to approach them?"

There is one remaining provision of this plan to which I request your attention—that which authorizes the formation of mixed churches, partly Presbyterian and partly Congregational. Let me here say, that the difference between these two sects, to a practical man, to any one who is not a mere closet metaphysician, is no greater than that between tweedledum and tweedle-dee.

Here Mr. Wood read the fourth section.—*Vid. ante, p.* 49.

This is the only part of the act which gives foundation to the slightest pretence that it brings in Congregationalists. The standing-committee here spoken of, is to be appointed only in those churches composed partly of Presbyterians and partly of Congregationalists. But shall this provision destroy the character of a plan of union, the benefits of which are such as I have described? Is there any thing more improper in this alliance, than in those of a like kind which existed at the time the charter was granted? Why at that time, delegates from the Association of Connecticut sat in the Assembly, which also sent delegates to the Association; and these were allowed not only to sit and deliberate, but also to vote; this too in the highest judicatory of the Church—that which is placed over all the others. Here, in the Presbytery alone, a member of a standing committee of a church partly Presbyterian and partly Congregational, is allowed to sit and act as if a ruling elder. Which of these interferes most with Presbyterian order and government? When we show that at the time the act of the legislature was passed, unions of the former kind were in being, are you prepared to say that this plan of union, founded on the same principles, but not carrying them out so far, was a violation of Presbyterian institutions; that, after it had been in operation for thirty-six years, dispensing widely its benefits, it was to be cried down as unconstitutional and void? These gentlemen have gotten wise too late: the men of 1801 were perhaps as wise as the men of the present day. Dr. Green probably had as much wisdom then as he has now. It was too late to make such a discovery after the lapse of thirty-six years. The act had been in existence that long, when, all at once, like a flash of lightning, or those flashes of genius with which we have been instructed and amused, it was announced that it was unconstitutional and void. And not only must the plan itself be abrogated, but its effects have been such, that all the ecclesiastical institutions of a large district which it has infected, must be broken up and destroyed.

But we are told that the "Plan of Union" was not sent down to the Presbyteries, for their ratification, and that therefore it was void. But what required that it should be sent down? Have not the counsel on the opposite side spent day after day in endeavouring to show that the Assembly has plenary legislative power, citing passage after passage from the Constitution, to support this doctrine? But suppose that it ought to have been referred to the Presbyteries, of what consequence is that at the present day? If it was requisite, in order to make it of binding force at first, to send it down to them, and it was not sent down, yet I ask you as men of common sense, whether an uninterrupted usage of thirty-six years, the acquiescence of the Presbyteries during all that time, does not amount to a ratification, does not cure the original defect. If any principle of law

is well settled, it is, that a usage of thirty years will remedy every such defect, in the case of both individuals and all these inferior institutions. By consulting Mathews on Presumptive Evidence, or any other writer on that subject, you will find repeated instances of long usage amounting to a ratification under similar circumstances. The gentlemen on the other side have referred for parallels to political history, to cases of political revolution. But the two things are entirely different. These subordinate institutions, especially those of a religious character, whether incorporated or not, if entrusted with charitable funds, are subject to the municipal law of the land, are all governed by the usages and principles which regulate the conduct of individuals.

Another circumstance of vast importance in this part of the case is, that in 1821 the present constitution of the Presbyterian Church was formed and ratified by every Presbytery then in existence; among others, by a large part of those which now belong to the four exscinded Synods. It was not merely amended, but the whole as it now stands, excepting such parts as have been since altered, was formally adopted as the constitution of the Church; so that we may consider it an entirely new constitution. I say that all the Presbyteries participated in its formation. These very ones, the establishment of which, as it is alleged, grew out of the "Plan of Union," and was therefore unconstitutional and void, were parties to this constitution, just as much as the Presbytery of Philadelphia, to which Dr. Green, who has been made so conspicuous here, belongs. I ask whether you are prepared to say, that these Presbyteries which met upon the same platform, in the formation of the constitution of 1821, may now be told that they are no part of the Church, that they are entitled to no share in its benefits and blessings; may now, at one fell swoop, be cut off from all their ecclesiastical rights and privileges.

The next objection made against the "Plan of Union"—the next constitutional objection—is that it was a violation of the charter, which granted a franchise, as it is said, only to the *ministers and elders of the Presbyterian Church:* it is discovered at this late day, that the General Assembly is not to be considered the one designated by the legislature, when in alliance with a Congregational Association. I should like either one of the learned counsel to put down his finger on a single point of time, since the Assembly was first constituted, when some such alliance has not existed. We have read a long string of plans of union, formed with various associations and Churches. One was formed with the Association of Vermont, another with the Association of Massachusetts, another with the Reformed Dutch Church, but now forsooth a mere alliance of the same kind is to break up the whole ecclesiastical system of four Synods. Such is the discovery made in this enlightened age, by the Old-school, who have also introduced sundry other like modern improvements. But I have shown that the "Plan of Union" has brought in none that are not Presbyterians; and if any committee-men had in any way been admitted, the evil might easily have been avoided for the future. But in 1837, after a lapse of thirty-six years, several other unions having in the mean time been formed, that of 1801 is suddenly found so unconstitutional, that it is abrogated, and then the instant effect of the abrogation is declared to be the cutting off of all the Presbyterian churches,

ministers, and people, within a region three or four hundred miles in length!

I do not mean to stop here, to inqure whether the Assembly had a right to abrogate the "Plan of Union." I think they had the right. The "Plan" was not a compact. It was merely the adoption of a course of measures having certain practical consequences; but while it might be abrogated, all acquired rights should have been preserved. Suppose that at the time of the abrogation, a Presbyterian pastor has entered into connexion with a Congregational church; has formed relations which, perhaps, are to continue for his life. You cannot by such an act as this break up those relations, and destroy his acquired rights. The Assembly ought to have abrogated the plan of 1801, if it must be abrogated, paying a due regard to them. I may mention a familiar case in illustration. It is the practice in some of the states to allow aliens, after they have resided in the country a certain period, to purchase lands; but do you think that by the repeal of such a law the rights intermediately acquired may be broken down? All that could be done in that case, by abrogating the statute, would be to prevent its future operation. Any connexion actually existing at the time of the abrogation, any acquired rights, must be carefully preserved. Here they have not only not preserved the rights of the Congregationalists, who, it is said, have been admitted under the "Plan," but have also cut off whole Presbyteries of undoubted Presbyterians; telling them indeed that such as are considered the real Simon Pure, may apply for admission, and that then the Assembly will take order upon their cases. But as for those Presbyteries which contain Congregational churches, they cannot return even in that manner. These are told, "You, indeed, participated in the formation of the constitution of 1821; by you among the rest it was ratified; but now we exscind you, leaving no provision for your rejoining the Assembly in any way." Could any act be fraught with more monstrous injustice? Could a deliberative assembly commit a more flagrant enormity?

But the learned counsel have undertaken to justify not only the abrogation, but also the excision, by reference to the conduct of the New-school in 1837. This they represent as most outrageous, and amply sufficient to warrant all the measures of their opponents. You observe, that in 1838, first, certain measures were resorted to, the Old-school happening to have a majority, to bring up for trial all judicatories charged by common fame with irregularity, citing them to the bar of the next General Assembly.

Mr. Wood read the first two resolutions.—*Vid. ante, p.* 38.

Then here's the rub: "That, as citations on the foregoing plan are the commencement of a process involving the right of membership in the Assembly; therefore, resolved, that agreeably to a principle laid down, Chapter V. Section 9th of the 'Book of Discipline,' the members of said judicatories be excluded from a seat in the next Assembly, until their cases shall be decided." There is work for you. On what were to be founded these proceedings, which were in the nature of a criminal prosecution? On common fame. But those provisions of the Constitution which permit common fame to be the basis of accusations are very strict.

"In order to render an offence proper for the cognizance of a judicatory, on this ground," (where the individual is accused by *common fame*

or *rumour*,) "the rumour must specify some particular sin or sins; it must be general, or widely spread; it must not be transient, but permanent, and rather gaining strength than declining: and it must be accompanied with strong presumption of truth. Taking up charges on this ground, of course, requires great caution, and the exercise of much Christian prudence."—*Book of Discipline, Chapter III, Section 5.*

The rumour must "specify some particular sin or sins," must be gaining ground, growing stronger, and must be listened to only with great caution. Now it might have been supposed, that in resorting to such a measure, the Assembly would, at least, have attended to the requirements of these wholesome and charitable provisions of the Constitution, which are in strict accordance with the whole system of rules established for the ecclesiastical administration of justice. The particular sin is required to be set forth. Here they had not ascertained even the charge—not even the judicatories that were to be cited! The discovery of these things was left to a committee vested with full powers. Then it is provided, that the commissioners to the next Assembly from every judicatory cited by that committee shall be excluded from their seats, until their cases are adjudged. Now, it may be a very proper provision, that if the Synod of Albany is accused of irregularities by common fame, and is brought to the bar of the Assembly for trial, none of its members shall sit during such trial. But suppose the Synod of Albany is charged with one offence, and the Presbytery of Buffalo with a second, and the Synod of New Jersey with a third; are all these to be excluded from a representation in the Assembly, each, not only while its own case is under consideration, but while the rest are on trial? Here all are thus excluded, according to the principles of the exscinding resolutions. It is a well known maxim, that common fame is a common liar; yet the Assembly decrees, that one judicatory, charged by common fame with irregularities, shall not be represented, until similar but distinct charges against several other judicatories shall have been investigated and decided upon. But these resolutions had a still more radical defect in that they made no specific accusations, but left the preparation of charges to a committee. If that committee had chosen to designate six Synods, whether they were guilty or innocent, their representatives must be left out of the next Assembly, until the cases of all had been decided. Yet because the members from the four Synods would not vote for such resolutions, they are malecontents, that do not belong to the Church, and instead of being cited and tried, they must be exscinded.

Next, they tell us that these men were opposed to the measure of abrogation and therefore were cut off. What? has it come to this? If I am a member of a corporate body, am I, because I don't choose to vote for a measure that has been introduced, to be stripped of all my corporate privileges? Suppose these men didn't choose to assent to the abrogation. They may have thought as Dr. Witherspoon and Dr. Green did, when the "Plan of Union" was formed, that it was calculated to promote harmony and peace, and to prevent alienation; that the evils which had been exhibited or complained of, had not grown out of that plan. Yet, because they voted against its abrogation, was it to be declared that they had no part or lot in the Presbyterian Church? They had very good reason for objecting to the measure. The resolution offered, rested on

the ground that the "Plan of Union" was unconstitutional and void. But they were not willing to subscribe to such a doctrine, and therefore would have opposed the resolution, even if in favor of the abrogation.

But, next, the New-school were opposed to a division of the Church, and rejected various propositions or protocols on this subject which were laid before them. Here are the grounds on which they acted: "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."—*Vid. ante. p.* 40.

"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 recognised in every form as consistent with the Confession of Faith and the unity of the spirit in the bonds of peace, became the occasion 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."—*Past. Let. Vid. ante. p.* 190.

And again, the second proposition made by the committee of the minority to the committee of the majority: "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 the Form of Government of both bodies, until it shall be constitutionally changed and altered by either, in the manner prescribed therein."—*Vid. ante. p.* 41.

You see that the New-school were disposed to adopt the same confession of faith, or articles of belief, and the same form of government with the opposite party, but considered that the slight shades of difference that existed ought not to be regarded. And why did they yield this opinion, and attempt to negotiate articles of separation? Because their brethren desired it; and all which was said by the committee of the minority, in regard to the expediency of division, was in acccordance with the views of the Old-school, and not with their own views. If I present a claim against a man for five hundred dollars, and we compromise it for two hundred and fifty, the compromise is not an admission on my part that the whole amount of the claim is not justly due, nor on his a denial of his indebtedness for the full sum charged. When the New-school were greatly pressed and urged in 1837, they said that there was no occasion for a division of the Church; that there existed but slight differences of opinion among its members; that all still adhered to the same confession of faith and form of government. What the real differences were, I leave to the subtlety of some nice closet metaphysician to determine. Yet the New-school were willing, for peace's sake to come into the plans of the opposite party, and to agree to the expediency of division. On what points did they split? I think them immaterial, but let us refer for a moment to the leading ones. The Old-school demanded not only the old name, but also the succession—in fact that they should continue to be that identical General Assembly. They wished moreover that

the division should be made at once, while the New-school said that it could not be effected immediately, as the Assembly was a mere delegated body, and not having been instructed as to this matter, had no power to act definitively therein. And does not their book say the same thing?

"No delegated body has a right to transmit its powers, or any part thereof, unless express provision is in its constitution.

"This Assembly is a delegated body, and no such provision is in its constitution."—*Assem. Dig. p.* 29.

This was their law. Now the New-school say, "We are members of a mere delegated body: we have no such power as the measure urged upon us supposes. We are willing to come into your plan for a division, but it must first be ratified by the Presbyteries before it can go into effect." But, the Old-school reply, "Now is the time for the division to be effected. You must give us the name and the succession: we must remain under the broad canopy of the charter; and we must separate at once." What would have been the consequence of acquiesence in this proposal? Why the New-school must have been regarded as seceders. Can you say then that this would have been a fair and proper compromise? If the Assembly had effected a division without referring the matter to the Presbyteries it would have been unlawful. In point of law the two parts would yet have been connected. Any minister, church, or Presbytery yet choosing to cling to the name and the succession, might have claimed all the rights and privileges of membership, being still an adherent to the Presbyterian constitution. These two features of the plan of division proposed must at once damn it in all honourable minds. It was an artifice, which if completely carried out, would have cheated every one of those who agreed thus to secede out of all their ecclesiastical rights, and left them perfectly defenceless. Every minority in Presbyteries and Synods might have claimed the whole judicatory as its own, because it still adhered to the true General Assembly. But no alternative was to be allowed. The Old-school party happened in 1837 to be a majority, and they go to their brethren, and holding a knife to their throats, say, "Come, divide at once. We will have nothing to do with the Presbyteries. If you do not agree to our proposal, we will exscind you, cut you off for ever from all the benefits and blessings of the Church."

I think I have satisfied you that our opponents cannot justify the excision as an act of judicial power. I think I have satisfied you that it did not follow as a legitimate consequence from the abrogation of the "Plan of Union." What then is left? It resolves itself into an act of mere *political revolutionary power:* it can be regarded as nothing else. I wont stop to prove that it was not a lawful exercise of legislative authority. Tell me that a body even of acknowledged legislative powers, may cut off a portion of its members and strip them of all their rights! Tell me that in a municipal corporation which has more power than is claimed for the General Assembly, that in the Common Council of this city, one portion of the members may cut off another portion, when they don't like their speeches or their votes, merely because they have legislative power—are authorized to make by-laws! This would not be an exercise of legislative power, but of a political power, which is be-

hind all legislation. Such acts sap the foundations of society. When a legislature cuts off a part of its constituency, it must do so by an exertion of brute force alone: this every jurist will tell you. I had selected a passage from Puffendorf on this subject, but as it has not been before referred to, I shall not trouble you with it. When a nation severs one of its own limbs, it is by an exercise of mere violence, which there happens to be no superior power to control. For nations are all equal: they acknowledge no sovereign. But it is not so with our subordinate institutions, civil and ecclesiastical: they are all under the protection and superintendence of the courts. If a nation attempt to cut off a portion of itself, which has power to resist, civil war is the result: the God of battles presides over the conflict, and awards the victory. Where is this to end, if the power of cutting off be once established, and is allowed to prevail? If the inhabitants of a region three hundred miles in extent, in New York, and of a large part of Ohio, are now to be stripped of all their Presbyterial rights, in 1840 the Presbyterians of Philadelphia, or of the whole of Pennsylvania, may be in like manner exscinded. If every other ecclesiastical, and every civil body, can exercise the same power, it must involve the whole country in confusion and discord, and carry revolution and anarchy throughout all the institutions of the land. There must be continual divisions in both Church and State. Whenever there is a difference or difficulty in a public body, and the majority cannot get the minority to agree to their terms for an amicable division, the latter will be exscinded and thrust out. Once establish the doctrine that the majority may at pleasure cut off the minority and strip them of all their rights, and if civil war does not ensue, at least there will be continual tumult and bloodshed: enormities will be practised, of which it is impossible to anticipate the result.

I say, then, that it is a clear position, that the power of depriving any one of rights of membership, which are recognised by the law, is a judicial power, and can never be exercised without a sufficient charge, notice, and a trial. I might here refer to the controlling authority which the Court of King's Bench exercises over such inferior institutions as the Assembly; but the principle in all cases is the same. A power to disfranchise must be kept within reasonable bounds; and courts will always say what was determined in the case of an African Methodist Church; that a by-law which made the penalty of vilifying a member of the society, disfranchisement, was unreasonable and therefore void. Any rule which prescribes that punishment to a petty offence must so be declared. The offence committed must be sufficient to justify the disfranchising act, in the eye of the civil law; must be such as a court will say warrants excision; and then there must be notice and a trial. Here again I would refer to Angell and Ames on Corporations, 244.

"Where the rules of a religious society inflicted the penalty of expulsion on any member who should commence a suit at law against another member, 'except the case were of such a nature as to require and justify a process at law,' a return to a mandamus to restore a member to his standing, which set forth the rule, and also that the expelled member had commenced a suit against another, (without averring that the case was not of such of a nature as to require and justify a process at law,) was held to be insufficient.

"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. * * * 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."

Now this doctrine becomes infinitely stronger, when you consider the nature of the General Assembly, and how it is constituted. It is a mere delegated body, and has no right to transfer any portion of its powers. And, on whatever principle of delegation it may be formed, it has no powers but those expressly granted. These principles the Assembly acted out, before such times of excitement and party spirit as the present were known. "No delegated body," it was said, "has a right to transfer its powers, or any part thereof, unless express provision is in its constitution. This Assembly is a delegated body, and no such provision is in its constitution." (*Assemb. Dig. p.* 29.) Is not that doctrine applicable to all institutions of a delegated character? Do you not say, that if no power to exscind has been given to the General Assembly, it has it not; and that where the power has been given, it can be exercised only by judicial process, after notice, and upon trial? Here again I refer to the Assembly's Digest.

"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." p. 323.

Now, with these doctrines staring us in the face, every heart must respond, that by the extraordinary proceedings of 1837, all the principles of law, and justice, and common sense, were wilfully trampled upon. By their own brethren, all professing to bear the same character, with a word and a blow, were these men cut off from the rights and benefits of the Church; from every one of those privileges, which by the charter of incorporation are extended to Presbyterians throughout the whole extent of the United States.

Gentlemen, it is unnecessary for me to make any farther remarks upon this branch of the subject. Of the consequences of the excision you are already aware. There is no analogy between them and the consequences of such a dissolution of an ecclesiastical judicatory as has been adverted to. The Assembly in 1837, cut off from all connexion whatever with the Presbyterian Church, upwards of fifty thousand communicants. Without any notice or warning, this great mass of people were stripped of all their ecclesiastical rights. Are we told this was no punishment, no wrong. The law says otherwise. It will not allow the members of any subordinate institution to be excluded from the exercise of their rights, without the commission of any offence, without any trial. Yet here were more than fifty thousand persons, at once, at a single blow, deprived of all the advantages of their religious connexions. If any thing is a punishment to a pious man, who loves religion, and values ecclesiastical privileges above every thing else, it is to cut him off in an instant from the communion of the Church. When the Jews, in exile from their own land, hung their harps upon the willows, they mourned, indeed, the loss of friends and country, but more than all, their distance from Mount

Zion—the loss of institutions established by the God of their fathers, of Abraham, of Isaac, and of Jacob. When a venerable old man like Dr. Richards found himself without trial, and not conscious of having committed any offence, suddenly cut off from the communion of the Church, and deprived of all the advantages of its institutions, what must have been his feelings? What the feelings of those other venerable men, who at one fell swoop, were excluded from their religious rights and privileges?

There is one farther view of this matter which I may here take. Suppose the alliance formed by the "Plan of Union" was so objectionable, why did not the Assembly, when that plan was abrogated, adopt the measure of dissolution, which would have allowed time for the evil to have passed off gradually, and would have been perfectly easy. We have proved conclusively, that in every Presbytery within the bounds of the four exscinded Synods, there was a sufficient number of churches and ministers purely Presbyterian, to form a constitutional judicatory. For this I refer to the testimony of Mr. Squier.

Mr. Hubbell. We offered to bring testimony to disprove that fact, but it was rejected.

Mr. Wood. The counsel offered to prove only that Congregationalists and Presbyterians were mixed up in those Synods, and we don't dispute that, but only that Congregationalists predominated. If some irregularities had occurred, if some improper persons had been admitted to seats in the higher judicatories—why such irregularities are incident to every human tribunal. There is not an institution in our country—and there is no other country so filled with corporations—in which irregularities do not often occur. It is the duty of such an institution to amend itself, to cure or heal the disorder; not to cut off that portion of its members which are thought to offend, without trial, without any hearing.

I think then that the court will say with no hesitation, that the exscinding resolutions were void, and in no way to be regarded. One idea farther, in regard to the position, that the Assembly has a right to judge of the qualifications of its own members. It may judge in the first instance, but all these subordinate institutions must judge rightly, or they form an unlawful assembly, and the civil courts will decide their acts to be void. There are certain higher institutions which are in all such cases the last resort. Such are both houses of Parliament, our House of Representatives and Senate, and the different state legislatures. But on what principle does their power to judge of the qualification of members rest? They exercise a sovereign authority; that is, they partake of a sovereign nature, and the courts of justice cannot reach them at all. But it is not so with inferior institutions, which are under the entire control of the law. If they cut off any portion of their members who are justly entitled to seats, and strip them of their privileges, the court will tell them that their proceedings are void and illegal; that they will not be allowed to deprive members of their just rights. I hope there is no court in this country, which would hesitate to say, when men have been cut off as these have, when they have been stripped of all their powers and privileges as members of such an institution, that the act was absolutely null and void.

May it please your Honour, I am labouring under considerable indisposition, and must beg for a short recess.

Judge Rogers. We will adjourn until Monday, if you would prefer it.

Mr. Wood. I had rather go on a little farther, after a short intermission.

(Here the jury were allowed a recess of ten minutes.)

Mr. Ingersoll. If I understood the learned counsel correctly, he has made a mistake in regard to an important fact. I understood him to say, that the fourth of the resolutions in regard to the four Synods, requires that the individual ministers and churches, wishing to be restored, must make application to the General Assembly. If this was his meaning the facts do not bear it out.

Mr. Wood. I think there is no danger of misunderstanding on this point. (Here he read the fourth resolution.—*Vid. ante. p.* 46.) I will read in connexion with this the other resolution before alluded to, to be found in the Minutes of 1837, page 429. "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."—*Vid. ante. p.* 404.

Now the effect of these various measures, was to require any individual who had been turned out, and was strictly Presbyterian, to go beyond the infected district, two or three hundred miles, and make application to be re-admitted. And "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." Taking the whole in connexion, and examining all its parts, it is manifest that this plan, if carried out, would have prevented any member of any of the four Synods from participating in the organization of the Assembly, unless he had been admitted in the mode appointed, having first travelled out of his own region, and applied for admission to some inferior judicatory, having been examined on experimental religion, and having then been restored on application to the General Assembly. This is the whole process. In order to get back at all, he must be purely Presbyterian; then if he resided in Buffalo, he must travel some hundred miles to the nearest Presbytery, and seek admission; and then his case would be referred to the General Assembly of 1838. And in addition to this, the Presbytery to which he applied must examine him on experimental religion. How do these provisions tally with that found in the Form of Government Chap. x. Sect. 2.—"A Presbytery consists of all the ministers, and one ruling elder from each congregation within a certain district." The members of the four Synods were told that no judicatories could exist within the infected region, that they must leave the ground where these bodies had taken root and flourished; that it was not Presbyterian ground; and that they must travel beyond it before any one of them could come up to the Assembly of 1838. And then, that they must not come with their commissions in their pockets, to be referred, in the first instance, to the Committee of Commissions, and if necessary, through

them to the Committee of Elections, but the Assembly having been organized without them, that they should go down upon their knees, and show that they had completed all that the resolutions require; that they had travelled out of the infected region, been examined, though some of them among the oldest men in the Church, on experimental religion, and found purely, and strictly Presbyterian, and now laid their cases before the General Assembly, begging that it would condescend to take order thereon. And even then they might not be instantly admitted: the matter might be deferred for further consideration.

I was remarking, gentlemen, upon the distinction between such inferior and subordinate institutions, as the Assembly, which are all under the cognizance and control of the courts of law, and those higher bodies of a sovereign character, like the British House of Commons, or those like our own House of Representatives and Senate, and our various state legislatures, which partake of the attributes of sovereignty. The latter do not allow any court to interfere with their judgment on the rights of membership. But this is not the case with the former, the subordinate institutions. If in any one of them a dispute arise as to the formality of a commission, first, *ex necessitate rei*, it must pass on the case, must determine the question. But whenever it undertakes to cut off a part of its constituency, to strip them of their rights, the act is void in law; and if the admitted members of the body, choose to consider this as a disputed question, and endeavour to prevent the participation of the representatives from the part exscinded in the organization of the body, or in its deliberations afterwards, they do an unlawful act, they form an unlawful assembly, and it is the duty of those excluded to resist the attempt, and to organize the Assembly lawfully. I think no one will hesitate to say that this is sound law. In the heat of party excitement, to which all institutions are liable, much injustice is often done. I might refer to the case of the British House of Commons, where for a long period back, the excitement resulting from contested elections having been found injurious and productive of great wrong, these have been referred to a committee for decision. It is thought that a claim of membership should not be considered a mere party question. There is a striking instance of a sovereign body, which has a perfect right to judge in all such matters, and which no court of justice can reach, perfectly aware of the difficulty, and labouring to remove it. The House of Commons, high and sovereign as it is, and possessed of every kind of talent, considers a regulation of this sort necessary for its own government. In our subordinate institutions where the same amount of talent does not exist, the right of deciding on the qualifications of members is strictly controlled: the courts of law exercise a superintending authority over their decisions; and that they should, is the dictate of sound wisdom.

At an earlier stage of the argument the proposition was advanced, that any assembly of one of these inferior bodies, constituted in such a way, as that full opportunity is not given to every member to come in and exercise his rights, is an unlawful assembly. And every one entitled to a seat must have the opportunity not only of attending but also of acting. I mean to show, first, that this is the law of the land, and then that the Presbyterian book bears out the civil law. I refer to *Ang. & Ames*, 276—9.

"Although when a day is periodically appointed for one particular business, no notice is necessary when that alone is to be transacted, or the mere ordinary affairs of the corportion; yet when the intention is to do other acts of importance, a notice is required. The election or amotion of an officer, a by-law, or any act of similar importance, on any day not expressly set apart for that particular transaction, is illegal and void. When a particular notice is required, it must be given to every member who has a right to vote, whether the act is to be done by a body consisting of all the definite classes, or of one of them only." And this law is not confined, in its application to municipal corporations. It is all the stronger in the case of private institutions, by so much as it is to be presumed that they have less knowledge of the regular manner of transacting business. "In the Supreme Court of Connecticut, in a case in which it was insisted that a meeting of the Middletown Manufacturing Company was illegal, Dagett, J., who gave the opinion of the court, observed—'It is very clear that a meeting of the stockholders, constituted as this was, could do no acts binding on the company. Though a meeting regularly warned, would be competent to do any act within their chartered powers, by a bare majority; yet if not thus warned the act must be void. If no particular mode of notifying the stockholders be provided, either in the charter or in any by-law, yet personal notice must be given; and this in such a case would be indispensable,' * * * to support the validity of corporate acts, each member must be actually summoned.

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"It is unnecessary, that the notice should be in writing; and it seems that if the members are fully informed by a parol, or any other warning, that there is to be a meeting, it is enough. * * *

"In general, the notice should state the time at which the members are to assemble, and also the place, if different from the place where meetings are usually held. It is not generally deemed necessary, however, to state what business is to be transacted, when it relates only to the ordinary affairs of the corporation. But if there is to be an election, or amotion, or the passage of a by-law, or a disposition of property, some intimation should be given; for such members as may not think their attendance necessary for the usual routine of business, will, perhaps, feel it their duty to attend upon such occasions, in order to preserve the interest and good order of the body corporate, and the fundamental principles of its institution. * * * * * * *

"If the members be duly assembled, they may unanimously agree to waive the necessity of notice, and proceed to business; but if any one person having a right to vote is absent, or refuses his consent, all extraordinary proceedings are illegal. But if the charter requires a special notice, it cannot be dispensed with, even by unanimous consent. When some of those who have a right to vote, are assembled upon due notice, and all the others who have a right to notice, attend without it, and agree to enter upon the proceedings, it is a legal waiver of the notice, and the act of the assembly cannot be impeached for the omission of it."

In the notes it is said, that the ringing of a bell has been determined not to be reasonable notice, even after long usage, if the district in which the members live is so large, that some of them are beyond hearing of the bell. These passages establish beyond a doubt, the doctrine, that in

order to constitute a lawful assembly, every member who has a right to act, must also have an opportunity to exercise that right. Every attempt to shut out any lawfully entitled member, is an attempt to create an unlawful assembly. It is not necessary to give notice, in order to hold a stated meeting, for it is presumed that all know of that, and have the means of attending. Therefore, if at such a meeting, a sufficient number to form a quorum is present, they are enough to transact ordinary business. But, we find that all these institutions are subject to the same law, from municipal corporations to private manufacturing companies: as to the latter, Judge Dagett's opinion is express. Each member must have notice of the time of meeting; and where any business of importance is to be transacted, out of the ordinary routine of duties, notice of the particular business to be done must also be given. The same doctrine is laid down in 6 *Viner's Abridgment*, 269, *Sect.* 11. And the same doctrine by the Presbyterian Church; or a doctrine that amounts to the same thing. The passage to which I refer, has been already read on the other side. It is found in the rules adopted by the Assembly in 1826:

"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.

"The committee of commissions shall, in the afternoon, report the names of all whose commissions appear to be regular and constitutional; and the persons whose names shall be thus reported, shall immediately take their seats, and proceed to business."—*Vid. ante, p.* 156.

In this, you see the Assembly acting out the very principle for which I am contending. If commissions are informal and irregular, the body must be organized without them, and they must be passed upon at a subsequent period; but it is the duty of the clerks to carry out the same principle in each case. Each member has a right to require that his commission shall be reported on by the clerks.

Now, if the exscinding resolutions were as utterly void as I think I have shown them to be, they should have been utterly disregarded. They were precisely similar to an act of the Common Councils of Philadelphia, cutting off four of the city wards, without notice, or accusation. No court would hesitate to say, that an excision of the latter kind was void, and that the exscinded wards had a right of representation in the subsequent Council. And so it is here. It has been proved, that every one of those who came to the Assembly of 1838, from the four exscinded Synods, had a regular and strictly formal commission. Their due election being then beyond dispute, what was there to keep them out? Nothing but a void act. An unlawful deed performed in 1837—I cannot say a deed without a name, for it has gotten the name of excision. An act which this court will tell you was entirely void. If I am right in this, then fairly carrying out the plain principle of the law of the land, that you cannot constitute a lawful assembly without giving every member an opportunity to come in, to its necessary result, it is evident that the General Assembly could not be rightfully organized, without giving every regularly elected commissioner an opportunity to take his seat at once. And any Assembly which it was attempted to organize in 1838, to the exclusion of the commissioners from the four Synods, exscinded in 1837 by a void act, the law cannot for a moment sanction. They all

stood on a platform as broad and strong as that which supported Dr. Green. It is a fact not to be disputed, that none of the commissions rejected in 1838, were irregular or informal; that there was no case of contested election; in short, that there was no difficulty about either the fact or manner of the election of a single commissioner from within the bounds of the four Synods. According, then, to the doctrine of their own book, it was the duty of the Committee of Commissions to put their names upon the roll, in order to enable them to participate, as members, in the organization.

I now proceed to the next branch of the subject, having satisfied you, as I think, that the act of excision was void, and the commissions of the commissioners from the Presbyteries belonging to the four Synods, valid. Each of these commissioners, then, had a right to take his seat in the Assembly of 1838. And any organization of that body, in violation of their rights, was an unlawful organization, and not the true Assembly. Now there was a concerted plan commencing in 1837, and followed up by the Moderator and clerks of that year, and by a majority of the Old-school, to carry out the acts of excision, by preventing any organization in 1838, which should embrace the commissioners from the exscinded Synods. In other words, there was a determined purpose, commencing in 1837, and carried out in 1838, to form an unlawful Assembly. This effort of the Old-school was a most extraordinary one. In fact they passed several very extraordinary acts: they would probably have done better, had they too consulted counsel learned in the law. But they knew perfectly well that such counsel would have told them that each General Assembly was independent of every other. The doctrine advanced by the opening counsel on the other side, in regard to the effect of such a void act, upon the body by which it is passed, is not true in all the extent to which he carried it. The act of excision did not destroy and dismember the Assembly of 1837, and make all its subsequent acts void. It still continued to be the Assembly *de facto*, so long as there was no other, its acts were all liable to be set aside. But each body is independent of the rest, and therefore the acts of one could not affect any other. The institution itself is permanent and cannot be destroyed. Each House of Commons or House of Representatives is independent of every other, and an attempt by one house to destroy or vitiate the subsequent one would be idle and void. The institutions must exist as long as their respective countries.

It is very evident that in all their subsequent measures the Old-school were endeavouring to act out the exscinding resolutions. After passing them, the first thing done was to pass an act, providing, as they say, the means, by which alone those who had been excluded could get back again into the Church. They were, as stated, to travel out of the infected region to neighbouring Presbyteries, to submit to examination, and then to apply to the Assembly. This was the only mode of restoration. The Old-school seem to have had a squinting of the fact that their measures were not good in law; but seem likewise to have thought, that as they had not consulted counsel, they were above all law—entirely independent of it. Supposing, at any rate, after provision had been made for restoring such as chose to come back, that they might proceed with impunity, being exempt from all liability, they determined to infuse the conse-

quences of the acts of 1837 into the Assembly of 1838. Shortly after the exscinding resolutions were adopted, it seems to have suggested itself, that the trustees might be the sticking point, and therefore an act of indemnity was passed. (*Vid. ante, p.* 47.) It was hoped that they would assist in carrying out the measures of excision, but the Assembly anticipating that those who had been cut off would not remain quiet, promised to indemnify the trustees. They knew perfectly well, that under the rules of the house, their clerks and Moderator would have something to do in the organization of the next Assembly. The learned counsel has been pleased to regard these officers as a sort of germ of the new body. A very singular doctrine; for if a germ be destroyed there can be no growth; but the loss of the officers of the Assembly may be supplied. In the organization of any Assembly, the Moderator and clerks are mere officers of the body and nothing else. The only object of continuing them in office is, the saving of trouble in choosing others; but they have no greater powers than if they had been chosen for the purpose of organizing the house. In order to infuse the acts of 1837 into the Assembly of 1838, to carry out the exscinding resolutions, it is proposed to require a pledge from the clerks, who consequently say that a pledge is unnecessary, that they already feel bound to act in accordance with those resolutions. "Oh, but they gave no pledge," says the learned counsel. What was this but a pledge? If it was not one, it was so near like it, that it would be very difficult to distinguish the difference between the two. To be sure they did not use the word pledge, but what was the object of their explanations at that critical time? Why did they give assurances to the Assembly of 1837, that they would act out its void resolutions? Their object manifestly was to make a formal pledge unnecessary, by engagements equivalent thereto, though couched in different terms. And in consequence of the assurance thus given, a pledge was not exacted. We find, then, the old Assembly of 1837, though admitted to be independent of every other Assembly, precedent and subsequent, attempting to carry out its illegal measures by pledging the clerks. It is a little singular that neither Mr. Ewing's resolution, calling for a pledge, nor the statement of the clerks, nor the consequent withdrawal of the former, appear at all upon the Minutes. Why not? I can see no other reason for the omission, than that Dr. McDowell didn't like to let these things appear, because he saw that he had done wrong. In 1838, he said to the rejected commissioners, "I can't receive your commissions, but I don't think the decision of the Assembly right. My own private views are so and so." On account of his declaration in 1837—call it a pledge, or what you will—he felt bound to refuse the commissions, though he believed that the exscinded acts were void, and ought to be disregarded. We can imagine some excuse for his neglecting to put these proceedings upon the Minutes. The recording angel is represented as sometimes dropping a tear to blot out a memorial of human weakness. I doubt not that Dr. McDowell was willing to drop a similar tear.

I have now done with the Assembly of 1837. I have shown that the acts of excision passed were void; but that nevertheless after passing them, the Old-school, labouring under the influence of strong excitement, attempted, by all the means in their power, by an offer of indemnity to the trustees, and by pledging the clerks, to infuse these acts into the

organization of the Assembly of 1838. Now then we come to the Assembly of 1838, and there we find the same parties acting out these very measures. First, the Old-school commissioners, secondly, the clerks, and thirdly, the Moderator. In the first place the Old-school commissioners—this prior to the organization of the Assembly.

In a preliminary convention of the members to the Assembly of 1838—for all were invited to attend—the following proposal was sent to the Old-school commissioners, convened in another place.

Here Mr. Wood read the proposal, with the reply of the Old-school. *Vid. ante, p.* 191.

Now there you have full and complete evidence, that the Old-school were, in 1838, acting out the resolutions, and were determined to organize the Assembly upon the principles, of 1837. They say distinctly, "We will stand by the measures of 1837: we cannot acknowledge any connexion with the commissioners from the four Synods." Or, in other words, "We mean to organize the Assembly of 1838, to the entire exclusion of the representatives from all the Presbyteries within the exscinded district, with this exception: that those that have travelled out of that district, been examined, and admitted, may come before the Assembly and present their cases; and then if that body chooses it may restore them. You see here a determined plan, clearly expressed in their own published resolutions, to organize the Assembly of 1838, to the exclusion of certain commissioners. It is plain that they meant to exclude every commissioner coming from the infected region, unless such as were sent by Presbyteries which had complied with the specified terms of restoration. They were not to apply as members, but were to come begging for relief, which was to be extended to them, after examination, if they should prove purely Presbyterian in doctrine and order. Now we are certainly warranted, after a protocol of this kind, to say, that the design of those members of the Old-school, who had clustered around the Moderator at such an early hour, and of the clerks, who had locked the door, a thing which, notwithstanding all that has been said by the learned gentleman (*Mr. Preston*) who told the story so lugubriously, had never been done before—that their design was to organize the new body on the plan of exclusion, and to carry out the resolutions of the previous year. We are warranted in saying, that those who clustered around the Moderator, and the paraphernalia of office, were determined to proceed on the principles of 1837, to organize an unlawful Assembly.

Now we come to the conduct of the clerks, and we find them, in precisely the same manner, attempting to act out the exscinding resolutions. Their powers and duties are fully enjoined in the rule which has already been read. "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." *Ante, p.* 156. And it is also the duty of the clerks to report the informal or doubtful commissions, and lay them before the Assembly, to be referred to the Committee of Elections. But what did the clerks do? They acted upon the same principles as the Old-school commissioners. The commissions from the exscinded Presbyteries were laid before them. Were they examined? Not one of them. The answer to the commissioners

was, "We can't receive them: we don't know you: you can't come in." If I am right in saying that the acts of 1837 were void in law, the clerks ought to have disregarded them entirely. Suppose the judgment of a court of justice is void, it don't justify the sheriff who serves an execution issued upon it. Are we told that these exscinding acts, completely disfranchising two hundred thousand souls, and stripping them of all their rights, were to be carried out by mere clerks, or by a Moderator; and that the Assembly organized to the exclusion of the representatives of this great body of people, was a valid and lawful body?

Now for the Moderator. We find him, in conjunction with the Old-school, entirely ready to act out the whole of the measures of 1837. In the first place, let us look at Dr. Patton's resolution. What was his object? To get the names of the commissioners who had been rejected, on the roll. He was called to order by the Moderator. He appealed from the decision, but the appeal was not allowed to go to the house: it also was pronounced out of order. I do not care whether the Moderator said, simply, "You are out of order;" or, "You are out of order at this time." I will show clearly what he was doing—that he was acting out the exscinding resolutions; and was determined to exclude all the commissioners from the four Synods, excepting those admitted in the mode pointed out in 1837; those who should come in and submit to an examination. The roll which had been made up by the clerks, was then called for and reported, when Dr. Mason rose: his object also being to get upon the roll, the names of about sixty commissioners, who had been rejected. He wished to lay their commissions before the house—sixty commissions, all formal and regular: that they were not so, has not been pretended. It was perfectly plain, that there had been a gross violation of duty on the part of the clerks, under the rules of the house; yet the Moderator, in the plenitude of his assumed power; in violation of the rules of law; in violation of the rule of the Church, which I before read from the Digest;—that no one shall be disfranchised without notice and a hearing; in violation of the rules of 1826; though the commissions presented were all formal and regular; says to Dr. Mason, "We can't receive them: they are out of order"—"out of order *at this time*," if you please. Well, next Mr. Squier presents his case. He comes with his commission in his hand; says that he had gone before the clerks and presented it; that it is a valid commission, but has been rejected by them; and he demands his seat. It seems, that pretty much about the same time, Mr. Moore, who hasn't yet presented his commission at all, goes up to the clerks to present it. Why was not Mr. Squier admitted? Because, as we have before shown, the Moderator was acting out the resolutions of 1837. We have shown that the Old-school party were doing this; then, that the clerks were doing it; and now it appears that the Moderator was engaged in the same plan. What did Dr. Elliott reply to Mr. Squier's application? He asked where he was from. From such a Presbytery, was the answer. Where is that Presbytery? It is within the bounds of such a Synod. "We don't know you." Why not? The Synod from which he came, had been cut off; and he was not to get back, unless by going out of the infected district, submitting to an examination on experimental religion, and then presenting his case to the Assembly, that they might take order upon it. Now, let us suppose a case. Suppose that the clerks had chosen

to leave off of the roll, the names of fifty Old-school commissioners, and had not reported their commissions as informal, but left them out all together. Do you believe that any Old-school Moderator would have said to these, when they demanded their seats, or desired to lay their commissions before the house, "We don't know you?" An Old-school Moderator was presiding at that time; and he had himself called for commissions, which had not been presented to the clerks and enrolled. This we have shown by his own testimony.

Mr. Hubbell. That was not his testimony. It was Mr. Plumer's.

Mr. Wood. Dr. Elliott said, that he called for commissions which had not been presented and enrolled. But, suppose he called only for those which had not been presented, and fifty Old-school commissions perfectly regular and formal, but which had been presented already, had been offered, do you believe he would have rejected them? Not a man of the whole number. He would have received them, because he wished to receive them. If it was the duty of the clerks to report all the commissions, both formal and informal, and if they had violated that duty, it was not enough to say, that the Assembly could remedy the evil, and heal the breach that had been made. On this doctrine, the clerks could shut out nearly the whole of the commissioners—two or three hundred—all but fourteen, enough to form a quorum. They might cut, and carve, and mould the Assembly just as they pleased. Here, then, was a gross violation of duty—the rejection of these men, in furtherance of a void and unconstitutional measure. Here was a Moderator, a mere ministerial officer of the house, not chosen by the body itself, decreeing, in the plenitude of usurped power, that that was not the proper time for these commissions to be received. And when would the proper time have come? This was just on the eve of the organization's being completed. Was the right time after the appointment of a Committee of Elections? All the books show that they are appointed to pass judgment on informal commissions. "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.

"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."—*Vid. ante, p.* 156.

Now you observe that this *Committee of Elections* is to be appointed after the house is organized. And what is the duty of the committee? The commissions which the clerks have decided to be informal or irregular, are to go to the Committee of Elections: those are the only ones which the clerks are to exclude from the roll. Yet it is contended on the other side, that they had power to shut out from the Assembly some whose commissions were entirely regular, and that the Moderator had a right to carry out their act, and prevent the Assembly from passing on the subject. You perceive that when the Moderator had refused to entertain Dr. Mason's motion, he appealed, and his appeal was seconded; but that Dr. Elliott refused to allow even the appeal to be put to the house. If our opponents attempt to shelter themselves under the idea that these commissions should have been referred to the Committee of

Elections, I say that that committee was to be appointed so as to suit the purposes of the Old-school, to execute their determined plan. But they didn't mean that they should go before the committee: only those reported by the clerks as irregular go to them. What was Dr. Mason's object? It was to bring the matter before the house. If it was designed to admit these commissioners, so that a lawful Assembly might be formed, that was the last point of time at which it could be done. If it was really the object of the Moderator to get them in, that was the only chance of accomplishing his plan. But he takes upon himself the responsibility of rejecting them, and not only refuses to put a motion, but farther, when an appeal is taken, refuses to put the appeal. He would not suffer the rejected commissions even to be laid on the clerks' table, to be considered as before the house at all.

But some difficulty has been made in regard to the precise words of the Moderator. In order to show his meaning, which is my only object, and that he was plainly acting out the void resolutions of 1837, I refer to the Old-school Minutes of 1838. I read their own minute of the transaction, verified by Dr. Elliott himself, who says that although it does not narrate all that happened, it is true so far as it goes. When Dr. Mason offered the commissions, "The Moderator inquired if they were from Presbyteries belonging to the Assembly, at the close of the sessions of last year." Why did he make this inquiry if his object was to know merely whether they had been presented to the clerks or not? If his object was to exclude a certain class of commissions, it was very proper to ask Dr. Mason, whether they were from Presbyteries in connexion with the Church, at the close of the Assembly of the last year. "Dr. Mason replied that they were from Presbyteries belonging to the Synods of Utica, Geneva, Genesee, 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"—did what? Does he mean to refer them to the Committee of Elections?—"and repeated the call for commissions from Presbyteries in connexion with the Assembly." *Vid. ante, p.* 220. He did not consider the exscinded Synods as in connexion with the Assembly at all. The refusal was not for that time alone. His language was, "I am acting as Moderator of the Assembly of 1837, and intend to carry out the measures of that body. I'll join the clerks in the attempt to shut you out entirely. If you make a motion even to lay these commissions on the table, I'll refuse to entertain it, I'll pronounce it out of order;" then he goes on to call for commissions coming from Presbyteries in connexion with the General Assembly, and if any are presented inquire whether they are from such Presbyteries. Does not all this show as plainly as day, that the object of the Moderator was to shut out these men both before and after the organization; that he did not intend them to come in through the Committee of Elections, nor in any other way, unless according to the resolutions of 1837, by submitting to examination, after applying to the adjoining Presbyteries, and then presenting themselves before the Assembly for that body to take order upon their cases? His reply to Mr. Squier was of the same cast—I do not intend to speak of it as a denunciation. Although personally he knew Mr. Squier, as Moderator he did not know him when he came to demand a

seat. How could he say he did not know him, unless he was acting out the exscinding resolutions? He knew that the Presbytery from which Mr. Squier was sent had once been recognised as a part of the Church; why then did he know it no longer? It is plain I say, that he meant to act out the measures of 1837. If he did add, "at this time," his only meaning was, "They can't come into the organization; their commissions cannot be laid upon the table, cannot be referred to the Committee of Elections. They are no part or parcel of the Assembly. We don't know them." They were to come in only according to the resolutions of 1837, which had been adopted by the Old-school convention in 1838; only by making application in the way already described.

But, gentlemen, on what possible grounds could the Moderator refuse to put Dr. Mason's appeal to the house? According to his own principles the body was then sufficiently organized to proceed to business, the roll having been reported; for the next step he said was for *the house* to appoint a Committee of Elections. But the clerks had failed to report all the commissions, and the object of the motion was to make them do their duty. "No," says Dr. Elliott; "the first act of the Assembly must be the appointment of a Committee of Elections." If Dr. Mason had suffered that time to pass, and the house to be completely organized, he could not have got the commissions which he offered before that committee at all. Afterwards the application must have been to the organized body. He could have demanded admission for the excluded members only from the Assembly of 1838, the Old-school Assembly. They had been before told thus to apply, but they could not agree to a proposition which said, "You are no part or parcel of the Church, and have nothing to do with the organization. You must adopt the method pointed out in the resolution: you must come in on your knees, after an examination on experimental religion." If I find any position clearly laid down in the Presbyterian book, it is, that it is the duty of a Moderator always to put an appeal. You will see this regulation among the general rules for judicatories, and in several other places.

"If any member consider himself as aggrieved by a decision of the moderator, it shall be his privilege to appeal to the judicatory; and the question on such appeal shall be taken without debate."—*Append. to Const. R.* 29.

The Moderator must allow the appeal to go to the house. I don't care whether these rules are in force in any Assembly before it expressly adopts them. If they are, the one which I have read makes it imperative to put an appeal; if they are not, still it is an inherent right of a member of any deliberative body, to have an appeal from any decision of the chair put to the house. The Moderator was bound to put the appeal. In refusing, he made himself a supreme dictator, a judge in the last resort. I have always understood the right of appeal to be inherent in every organized assembly. If I am right in this view of the matter, I think I have shown that the Moderator and clerks had concerted a plan for organizing the body to the exclusion of certain rightful members, of forming an unlawful Assembly; that the refusal of the clerks to receive the commissions of those members was a direct violation of their duty; that the refusal of the Moderator to put an appeal was a violation also of his duty, as it would have been a violation of the duty of any presiding

officer. You have then the case of a Moderator and two clerks, mere ministerial officers, who have refused to do their duty. In the next place I will endeavour to show that this refusal justified their removal from office.

Now, may it please your Honour, I should be glad of an adjournment.

Court adjourned.

MONDAY MORNING, March 25th—10 o'clock.

I find, gentlemen of the jury, on looking again at the exscinding resolutions, that I have made a slight mistake in regard to the bearing of a particular part—that which provides the mode in which Presbyteries may come in again.

Here Mr. Wood read the fourth resolution.—*Vid. ante, p.* 46.

It would appear that the design of the resolution was this: that all the ministers and members of churches belonging to Presbyteries within the bounds of the four Synods, which were not strictly Presbyterian in doctrine and order, should travel out of those bounds, apply to adjoining Presbyteries, and be admitted on examination; but that those Presbyteries which were purely Presbyterian should come before the Assembly and apply there for restoration; and the Assembly was to take order thereon. It seems to be implied that such Presbyteries should go directly to the General Assembly. But the mistake is of little importance. If they come to the Assembly, they must first recognise the excision as valid: they must apply as persons without, seeking to be admitted into the body, thus acknowledging that they are in the situation of aliens. I do not see how any commissioner could be sent to the next Assembly from these Presbyteries, for in order to appoint representatives they must be connected with the Church. If any should be appointed, they must come, not to claim seats, but to sue for admission. What was meant by a Presbytery strictly Presbyterian in doctrine and order? Look at the views of those who passed the act of excision and you will discover. Any Presbytery which had in connexion with it a single Congregational church, according to the terms of the alliance of 1801, was not considered strictly Presbyterian. Consequently as to the great body of the Presbyteries—the whole number, with very few exceptions—this mode was impracticable. The great mass of one or two hundred thousand worshippers exscinded, would have been obliged to travel two or three hundred miles to adjoining Presbyteries, there to undergo the examination of which I have before spoken. This manner of a Presbytery's coming in is a complete anomaly, a gross irregularity: it disarranges the whole Presbyterian plan of government. The Assembly cut off the four Synods—did not dissolve but destroyed them, declaring them no part or parcel of the Church. What was the consequence? Suppose a Presbytery, recognising the validity of the exscinding acts, had sent up a committee to the General Assembly, to apply for its readmission, and to show that it was strictly Presbyterian in doctrine and government. Suppose that this committee should have demanded the restoration of the Presbytery; should have said, "Come, examine our case, and admit the body that we represent." What spectacle would have been presented? The entire prostration of the whole Presbyterian

system, for that requires a regular gradation of authority; from the General Assembly to the Synod, from the Synod to the Presbytery, and from the Presbytery to the Session. The records of a Presbytery are to be examined by the Synod, and those of a Synod by the General Assembly. If this order is of divine right, the course proposed would be counter to the law of heaven. I do not go to the length of saying that it is of divine right. There is nothing in the Confession of Faith requiring such a belief. But according to constitutional right, there must be a regular gradation of authority from the General Assembly to the Synod, from that to the Presbytery, and so on. If you cut out the Synods, you have nothing but Presbyteries to come in; and according to the terms of the resolution, they are to apply directly to the General Assembly. It is a great point of the case, that they are treated as out of the Church; that they are directed, not merely to send commissioners, but to come praying for admission, and to submit to examination in regard to doctrine and order; after which the Assembly is to exercise its own discretion about admitting them.

I undertook to show on Saturday, that the exscinding resolutions were void; that they were not justifiable on any principles of judicial proceeding, because there was no notice, no trial or hearing; nor yet as legislative acts, because such a subordinate institution cannot pretend to the power to disfranchise a portion of its members by mere legislation. Farther, those resolutions were not good, as partaking of the nature of political revolution. The four Synods could not be severed as a nation may sever a portion of itself. It is idle to say that the Assembly could resort to such an extreme measure, when it is governed by law in the exercise of its jurisdiction; when it is completely subject to the laws of the land. And I undertook to show, not only that the act of excision was void, but also that there was a concerted plan formed to carry out that act; that the Old-school convention had passed a resolution approving and adopting it; that the clerks, in furtherance of the same scheme, had rejected altogether the commissions from the Presbyteries belonging to the four Synods; that the Moderator was endeavouring to follow out the plan of exclusion; and that the whole process of organization was proceeding on this exclusive principle, and was therefore defective, up to the time when Mr. Cleaveland rose. It yet remains to be shown that the Old-school General Assembly itself did afterwards carry out the doctrine of excision in their own organization. After their Moderator had been displaced by Mr. Cleaveland's motion, and the true Assembly had left the church in Ranstead Court, they who remained went on and organized an Assembly according to their own principles, shutting out all those who came from the infected district. Now this body, in every thing that it did and did not do, in 1838, manifested a determined purpose to exclude the exscinded commissioners from the organization: this purpose appeared in all their proceedings. They commenced in the wrong way, and they ended as they commenced: so I suppose they will go on to the end of life. First, they did not repeal the exscinding resolutions, but declared them still in force. Next, in the statistical table appended to their Minutes, which contains a list of the Synods and Presbyteries, the four Western Synods are omitted, evidently being considered no part or parcel of the Church. Again on page 34

of these Minutes, you have the views of the Old-school Assembly carried out to their full extent.

Mr. Hubbell. That part of those Minutes is not in evidence. Mr. Meredith offered them for two purposes only—First, for the preliminary minute of the organization; and, secondly, for the statistical table.

Judge Rogers. But if offered for one purpose only, they are in evidence for all purposes.

Mr. Hubbell. This part was never read at all.

Mr. Wood. The whole I thought was offered.

Mr. Hubbell. I asked Mr. Meredith distinctly for what purpose he offered these Minutes. He replied, for two purposes—those which I have mentioned. We were prepared with evidence upon this point.

Judge Rogers. What can be the objection to his reading the part to which he refers?

Mr. Hubbell. Why, may it please your Honour, we have had no opportunity to explain it, or to give counter testimony. It is an entirely new matter.

Judge Rogers. Mr. Wood, you may go on.

Mr. Hubbell. Will your Honour please to note an exception?

Mr. Wood. The Old-school Assembly of 1838, for the purpose of carrying out the measures of 1837, passed three acts. It is from the first of these that I read.

"Section 2. In case the majority of any Presbytery, whose Commissioners have acted as aforesaid, shall take proper order touching their conduct in the premises, and are willing, upon the basis of the Assemblies of 1837 and 1838, to adhere to the Presbyterian Church in the United States, then and in that case the act of their said Commissioners, in advising, creating, or uniting with said Secession, or in refusing to attend on this Assembly, as the case may be, shall not prejudice the rights or interests, or affect the integrity of said Presbytery, or its union with the Presbyterian Church in the United States of America, as an integral portion thereof.

"Section 3. In case the majority of any Presbytery shall refuse or neglect to take the proper order in regard to its seceding Commissioners, or shall approve their conduct, or adhere to the new sect they have created, or shall decline or fail to adhere to the Presbyterian Church in the United States of America, upon the said basis of 1837 and 1838, for the reform of the Church, then and in that case the minority of said Presbytery shall be held and considered to be the true Presbytery, and shall continue the succession of the Presbytery by its name and style, and from the rendition of the erroneous and schismatical decision, which is the test in the case, be the Presbytery; and if sufficiently numerous to perform Presbyterial acts, shall go forward with all the proper acts and functions of the Presbytery."

Now then you see, that the Old-school, not only in the organization of the Assembly, so far as it had gone when those who had first organized themselves left the house, but also in the organization which they afterwards effected, in the form which they considered the true one, when the others had retired, were carrying out the principles of 1837, regarding them as the right basis of organization, and declaring that the minority in every subordinate judicatory of the Church, which adhered to the

Assembly formed on that basis, where the majority acted differently, adhering to the Assembly constituted on the principle of admitting all the members to their seats—that such minority should be considered the rightful successor of the judicatory. On what principle then could the Old-school invite these commissioners to wait until the organization had been perfected, and then apply to the Assembly for relief? Is it not manifest that they were acting out the exscinding resolutions? They declare that they are the true basis of the Church, and provide that any minority who adhere to the Church as founded on that basis shall be considered as the true branch of the Assembly; and the same doctrine is carried out in the statistical table, to the very end of the Minutes.

On what principle then, are we told, that those who have been excluded will be received, whenever they choose to come back? The fatted calf might indeed be killed, but they alone, who having cut off their brethren, have persisted in the attempt to keep them out, would feed on the banquet. What parallel is there between the picture presented in that beautiful passage, to which the learned gentleman has referred—the picture of the most touching parental solicitude, and of filial affection, warming the heart of the prodigal, even in all his devious wanderings—what parallel between that picture and the scenes of 1837—brethren turned out of doors, without a hearing; without notice of any complaint. The gentlemen on the other side had better take, as the polar star of their course, the land of Kosciusko, dismembered by ruthless despots, and its inhabitants driven out from the homes of their ancestors.

Having made good my position as to this part of the case, I now proceed to the consideration of certain other questions relating to the organization of 1838, which has thus been brought down to the time of Mr. Cleaveland's motion. My first remark is, that the gentlemen on the other side are entirely wrong, in speaking of ours as a new organization. It is not true that it was so. All that we did was, to continue that already commenced: which, however, was proceeding irregularly in the course marked out for it by the Moderator and clerks. In any body, whether in the process of organization, or completely organized, if the Moderator or clerks refuse to do their duty, they may be displaced, and new ones put in their stead, and yet no new organization be effected. Other officers being substituted for them, every thing goes on in regular course: the proceedings are merely continued from the point where they were interrupted or broken off. Suppose a clerk, a Moderator, or a Chairman be taken suddenly sick, and a new one be appointed in his place: is such appointment a new organization of the body? No; the subsequent acts are engrafted on the original proceedings. The old body is not dismembered by a mere change of a ministerial officer. It is perfectly immaterial, as to the effect, whether the removal and substitution are occasioned by misdemeanor in office, or by disability, arising from sickness. In either case, the subsequent proceedings are a mere continuation of the business: the officers having been changed, the regular business goes on. One of the learned gentlemen told you, that though he had knocked down Mr. Cleaveland, he would yet give him a few more blows. This was certainly very ungallant conduct towards a prostrate foe, in a gentleman of his lofty and noble bearing. But I will endeavour to vindicate his character from the aspersions which he himself has tried to cast upon it,

by showing that he did not strike Mr. Cleaveland, after knocking him down, because he has not yet knocked him down: Mr. Cleaveland still remains upon his legs. Under the next head, I shall inquire, first, whether a refusal of an officer of the Assembly to perform his duty, or misconduct tantamount to such a refusal, will justify the body in removing him, and substituting another in his place; and, secondly, whether the refusal of the clerks to enroll the exscinded commissioners, and of Dr. Elliott to put an appeal, was a refusal to do their duty, or was tantamount thereto. The affirmative of both these propositions, I shall endeavour to establish.

First, as to the power of the body to remove an officer. Why, gentlemen, this is a power so essentially inherent in every body, that one would think there could be no dispute about it. If an officer of any deliberative assembly, refuses to do his duty, as for example, if clerks refuse to observe the rule which makes it their duty to put all regular commissions presented on the roll; and if the Moderator, when the commissioners thus rejected are attempting to get their places, to have the error of the clerks rectified, and for this purpose make a motion, refuses to put that motion, and an appeal being taken from his decision, refuses also to put the appeal, what is to be done? You must either allow these officers to turn dictators, or you must say that there is in the body an inherent right to displace them. But we find the law on this point so clearly laid down, that there can be no doubt respecting it. In Jefferson's Manual it is expressly declared, that the Speaker of the House of Representatives, and the Speaker of the British House of Commons, though they are essential officers, though nothing can be done without them, may be displaced for a refusal to perform their duty. The same principle is found in *Angell and Ames*, 247.

"A distinction is made between such persons as hold a *ministerial* office, and such as hold an office *of the essence of the corporation*. A mere ministerial officer, appointed *durante bene placito*, may be removed without any other cause, than that the pleasure of those who appointed him, is determined; and a formal amotion for the appointment of another to the office is sufficient, without resorting to notice. In these cases, says Mr. Wilcock, the right to amove is, of course, incidental to the right of appointment. And a ministerial officer may be so amoved, when appointed *durante bene placito*, where the power of appointment is 'for life,' or 'during pleasure.' Of this class is a town clerk or recorder; that is, it seems, where the recorder is a mere counsel to advise, and not one who has a corporate office and voice in the common council. But there cannot be a custom to amove at pleasure from an office of the essence of the corporation; such for example as an alderman; for he has a franchise in his office."

The author then goes on to state the grounds on which a person who has a franchise in his office may be amoved, and the proper manner of removal. Then on page 252 he remarks,

"An amotion from one office does not of course the least impair the title of the person amoved to another office; and much less is it a disfranchisement from his right as a mere member of the corporation."

You observe that there are some officers who are of the essence of the corporation; as in a municipal corporation, like that of Philadelphia, the mayor and recorder. Such an officer has a franchise in his office, and

cannot be removed by the body, unless for sufficient cause shown, and in the manner pointed out by their charter. But a mere ministerial officer may be removed at any time: if he holds merely during pleasure, this is unquestionable. Now, by the Constitution, the old Moderator is to continue in office only until a new one is appointed, which regulation shows clearly, that the Assembly may appoint another. In the case before cited, *Field* v. *Field*, 9 *Wendell*, 403, it is decided that such an officer may be amoved, if he does not perform his duty. The court say that the majority of the assembly, instead of keeping the minority out of the house, because the presiding officer had violated his duty, ought to have amoved that officer; thus clearly showing that they had the power of amotion.

Now, in the next place—and no doubt all that I have said on the first point has been a mere waste of time—was there sufficient cause for our removing the officers of the General Assembly, in 1838? Here I take for granted that for good cause they might be removed, and ask merely, had we good cause for our proceedings? This was not a case of petty irregularity, of a sudden sally of bad temper, of temporary excitement producing a moment's excess. There was a deep, settled, and deadly purpose to do wrong. None of you have ever before heard of such an instance. The report of this trial must hereafter always be looked to as a leading case. You have here the workings of a grand machine—a new infernal machine, or a species of guillotine, for cutting off at a single fall of the hatchet, two hundred thousand souls, without any notice or warning. It is an entirely isolated case, wrapped up in its own gloomy grandeur. I challenge any man to produce another instance of the kind from the whole history, civil and ecclesiastical, of this country. There is none like it. It should be a matter of pride and pleasure to us all as Americans, that in this land no such attempt has ever before been made. It was to redress wrongs of the character which I have described, that these officers were removed. They were determined to carry out the plan which had been concerted in direct violation of their plain duty. The Moderator refused even to put an appeal: if he had put this, the decision would have been a direct test of the strength of the boasted Old-school majority. How do our opponents attempt to justify the proceedings of the Moderator? They say that he could not be removed, because there was no house to remove him; that at the time of Mr. Cleaveland's motion, the Moderator and clerks were every thing; that they were as yet the sole powers in the Assembly, which only after its complete organization was in a condition to act. Is this the doctrine of any organized body? I ask you as men of common sense, and I may add, as men of business, for you have each, no doubt, contributed to the organization of some sort of deliberative body, how is an Assembly newly convened constituted? Is it not by the members coming together by mutual consent and exhibiting to one another their vouchers of membership? At this stage of the business, the body is not organized, but is in the process of organization. Such is precisely the case with the General Assembly. Is it said that the body is not in existence until after a Committee of Elections has been appointed? As soon as the constituting prayer has been offered, its existence commences. Ransack the whole of the Minutes and you will find that the Assembly is always constituted by prayer.

Who appoints the Committee of Commissions? At first, the house itself; but latterly the old clerks have formed a standing committee. To whom do these clerks, or this committee report, if there is no house in existence, at the time of making their report? How can a committee report when there is no house to report to? The very idea of a report in such a case involves an absurdity. If the commissioners were a parcel of sheep congregated together, they would need a herdsman; but I apprehend that only rational men are sent to the Assembly, and that they require no clerk or Moderator to act in a herdsman's capacity. They may always come together, and mutually exhibit their vouchers. They are then the Assembly in its incipient state, and have power to appoint a Moderator or chairman, and clerks, in order that those officers may make out the roll. Suppose that in a particular case there should be no Moderator in attendance, and that the clerk too was absent or sick. What could be done? Why, according to the doctrine of our opponents, the General Assembly would in that case be the poorest, most wretched and miserable body in existence. The commissioners, having no Moderator or clerk to assist them in their organization, would have to pocket their commissions and go home. To plain, practical men, of common sense, there would be no difficulty at all; but to theological metaphysicians, a Moderator and clerk would be absolutely necessary: they could never organize themselves without them.

Suppose another case—that the two clerks should positively refuse to perform the necessary duties of the organization; that they should refuse to put down the names of any commissioners, or should make a roll of only ten—not enough to form a quorum: what could be done then. Is the power of the clerks to be absolute? No house is in existence, to perform any act, until a Committee of Elections has been appointed, say the gentlemen on the other side. But what if the old clerks refuse to assist in forming any house, and pocket all the commissions which have been presented? Any body of men could organize themselves, under such circumstances, without difficulty. They know one another, and that is enough for the incipient stage of the organization, enough to empower them to choose a chairman. Any member rises, and moves that A take the chair, and that B and C be clerks. The gentlemen appointed on such motion take their seats. Then the clerks as a Committee of Commissions can examine those presented, and receiving all that are regular for enrolment, lay aside the irregular and informal commissions for after consideration. The only difference between this method of proceeding and that usual in the Assembly, is that here, to prevent difficulty, the old Moderator, and according to a recent rule, the old clerks, are continued in office to assist in the organization; the Moderator, according to the express words of the provision, only until a new one is chosen. If these officers are not in attendance, the common sense of every man tells him that others must be appointed by the commissioners present. Thus thousands of deliberative bodies in our own country are organized. There is no country in the world where the organization of societies for the various purposes of business, amusement, and instruction, is so common. There can be no difficulty about organizing such a body as the General Assembly. In this case, it is true, the old Moderator attended and entered upon the duties of his office; but it is equally true,

that he refused to perform those duties, or did acts tantamount to a positive refusal. The emergency was in every respect equal to that happening in the case of his sudden sickness.

It was the duty of the clerks, according to the rules of 1826, (*ante. p.* 156,) to put on the roll the names of all who presented regular commissions. This they were bound to do, yet certain regular commissions they refused to receive. Then the Moderator violated his duty also. When the clerks refused to put the names of the exscinded members on the roll, that was a breach of their part of the duty of organization. There was a defect in the proceedings according to both their own rules, and the general principles of law, which establish beyond a doubt, the position, that no assembly can be lawfully constituted without allowing all entitled to seats to participate. An effort was made to compel a compliance with this rule, but the Moderator refused to put a motion for that purpose; and likewise, when his decision was appealed from, refused to let the appeal go before the house; being fully determined to act as a dictator in the organization; and to carry out to their consummation the void measures of 1837, in desperate defiance of the house, which had an undoubted right to organize itself, or to compel a lawful organization.

I say then, that all these officers had refused to perform their respective parts of the duty imposed upon them. But they had done something more. Here was a concert, a collusion, a contrivance to effect an illegal organization of the Assembly. We have already seen the Old-school acting out the resolutions of the Assembly of 1837, the clerks pledged to pursue the same course, and both clerks and Moderator in 1838, attempted to organize the Assembly on the basis of these resolutions. Here then I say was a concert, a collusion, between the Moderator, the clerks, and a portion of the commissioners, to constitute an unlawful Assembly. What was this but fraud—a conspiracy, supposing, as I have shown, that they had no right to shut out these members? On any just principles of law, fraud annuls every thing that it touches. Here it was tantamount to a refusal to perform prescribed duties, and the Assembly was crumbling under its influence. In speaking thus, I do not intend to impeach any body's motives. These gentlemen were labouring under strong excitement, or they never could have brought themselves thus to cut off their brethren by thousands and tens of thousands. But if their measures were unlawful and unconstitutional; if they deprived multitudes of all those rights secured to them under the charter; and if these measures were the result of a concert to carry out acts that were unconstitutional and void; in law they were guilty of gross fraud, no matter whether they acted conscientiously or not. Suppose a man embarrassed in his circumstances, in order to secure the means for future exertion, whereby he may finally clear off his debts, or for the support of his family, transfers a portion of his property to a friend, to be held for his use. The transfer is wrongful, illegal, and void. The law will treat it as a fraud, however conscientious the man may have been. If I am right in this, then the concert which I have shown to have existed, was, in the eye of the law, a fraudulent conspiracy, not only to destroy the rights of certain portions of the Church, but to perpetuate their destruction; to prevent those who had been exscinded from ever getting in

again, unless according to certain prescribed principles of admission, which involved an acknowledgment that they had been fairly excluded.

The next objection made to the validity of our organization is, that when Mr. Cleaveland rose to speak, he was called to order by the Moderator. That call, it is alleged, ought to have stayed for the time all farther proceedings. I can understand, that when a speaker is addressing a body regularly constituted, and engaged in the regular transaction of its business, if he is called to order by the Moderator, it is proper that he should stop, until the question of order has been settled. But here was a very different case. Here the presiding officer had refused to do his duty, and this warranted his being displaced. A member rises and makes a motion for his removal. Now, on what principle can it be contended that when he tries to make this motion, the Moderator may interrupt him by rapping with his hammer and calls to order? If Dr. Elliott had the power thus to stop Mr. Cleaveland, the organization could not have proceeded one inch without his permission: he became at once a complete dictator. By such an extraordinary application of a rule of order, he would have been secure in his place, no matter how grossly he had violated every law. Then a mere chairman of an assembly may refuse to put a question, may refuse to put an appeal, and though it is perfectly plain, that he is attempting to carry out mere party views, may proceed in defiance of the house, and organize it in an unlawful way. For if any one rises and moves that he be displaced, all that he has to do to put down the speaker, is to hammer, to pound away upon his desk: the latter must instantly stop. What would be the consequence of this? Why the Moderator would retain his seat as long as he felt disposed. But another answer to the objection is, that the question raised by Mr. Cleaveland's application to displace the Moderator, was, from the very nature of the case, a privileged question, one which interrupted the ordinary routine of business.

The learned gentlemen tell us, that the rules of 1826 prescribe the course of proceeding which should have been pursued in this case.

"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.

"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."—*Vid. ante, p.* 156.

Now, according to this course of proceeding, it is manifest, that you must first have before the house a full report of all the commissioners who present formal and constitutional commissions, and that when the names of all these are on the roll, then if there be any informal commissions a Committee of Elections must be appointed, to whom the latter may be referred. That is the course which the rule prescribes. Had such been the course here? Did the rules which I have read justify the Moderator's proceeding, when the object of Dr. Mason's motion was to secure a place on the roll for every commissioner who had a regular and constitutional commission? We answer that the names of all whose commis-

sions were regular and constitutional were not yet upon the roll; that the clerks had refused to insert a number of such names; and that therefore according to their own showing, the next business in order was not the appointment of a Committee of Elections: that was to be done after *all* the names of those whose commissions were regular and constitutional had been enrolled. If it be true that more than fifty such commissioners had not yet been enrolled, it follows, I say, that the next business was not the appointment of a Committee of Elections; that the next business was, from the necessity of the case, the completion of the roll, which the clerks had refused to perfect; the putting upon it the names of all whose commissions were formal and regular, as the rules imperatively require. The efforts then made by Mr. Squier, Dr. Mason, and Dr. Patton, were all efforts to complete a roll, which the very rules quoted on the other side required to be complete, before a Committee of Elections was chosen.

The gentlemen of the opposite party tell us, that previously to Mr. Cleaveland's rising, another motion had been made, which had a prior right. I believe that there is a slight mistake here. That motion was not made previously to his rising, but during the course of his proceedings. For proof of this, I take their own minute of the transaction, as verified by Dr. Elliott, one of the committee who drew it up. "Mr. Cleaveland," says that minute, "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 called to order, took his seat, &c."—*Vid. ante, p.* 220.

You observe, then, that the motion for the appointment of a Committee of Elections was made after Mr. Cleaveland had commenced his remarks. And the object of it was simply to appoint a committee, to whom might be referred half-a-dozen informal commissions, according to the rule of 1826. But how stood the case before? Why here were sixty commissioners who had not been enrolled, though it was the duty of the clerks to put them on the roll. The Committee of Commissions had not before put on the roll, the names of all whose commissions were regular and constitutional; and Dr. Mason rises, to have those whom they had rejected, enrolled. The Moderator refuses to receive his motion, and also refuses to put an appeal which Dr. Mason takes from his decision. Then, after this refusal, Mr. Cleaveland rises and makes a motion to appoint a new Moderator. How then can it be said, that another motion was previously pending? And, if it had been pending, what of that? Why, according to this doctrine, the principles of parliamentary order were to prevent entirely the grossest errors on the part of the clerks from being corrected. They and the Moderator, effectually sheltered from punishment by rules of order, must have been allowed to do just as they pleased. They might have shut out any commissioner whom they did

not like, and it would have been impossible to rectify the error. A routine of business is fixed: this must come first, and this next, and this next; and though the officers are not organizing the Assembly on its regular basis, though they have excluded the names of half the commissioners from the roll, it is not in the power of the house to set them right, or punish the misdemeanor! If this be true, then were the acts of 1837 fastened upon us completely: no commissioner from the exscinded district could hope for restoration.

I must request your particular attention to the various positions taken in regard to the remarks and motion of Mr. Cleaveland, which I shall examine as briefly as I can, endeavouring to point out the errors into which the opposite counsel have fallen. One object of this motion of Mr. Cleaveland—his chief design in making it, was, to have a portion of the house admitted to participate in its acts and deliberations, whom the Old-school portion meant to exclude entirely. I refer you to the language of Mr. Cleaveland. He said, that as the clerks and Moderator had refused to do their duty, as a large number of commissioners had been excluded from their seats, as they had been advised by counsel learned in the law, that that was the proper time and place to effect a constitutional organization, he hoped it would not be considered discourteous, if they should proceed to organize the Assembly, which they would do with as little delay as possible. In the first place it is objected that he uses the word *we*, by which he manifestly means the New-school, and not the General Assembly at large. "*We* had been advised by counsel"—"if *we* now proceed to organize, &c." If there be any position which the whole evidence places beyond a doubt, it is, that the great design of those whom I represent was to secure a general, full and entire organization of the body, which should embrace every commissioner from all the Presbyteries connected with the Assembly, at the commencement of its sessions in 1837, which object had been but partially accomplished. The object I say of Mr. Cleaveland's motion was to effect an organization which should embrace the whole. Look at the negociations that took place between the two conventions prior to the meeting of the Assembly: see the New-school plainly stating their purpose to be, to secure the admission of all the members. The reply to their proposition is, that the opposite side can recognise no principle of organization, but that having for its basis the exscinding acts of 1837. But say the learned counsel, that *we* speaks volumes. It occurs in the Pastoral Letter which has been read in evidence. But in what sense? Are they not speaking in that pastoral letter as the General Assembly; as a body embracing every part and parcel of the Church? Their organization included all, both Old-school and New, without any distinction. They knew no party; they sought to preserve the unity of the entire Church; their object was to break down an exclusive organization, which had been attempted, and was in progress. When they use the word *we*, they mean, *we*, the *General Assembly*, as opposed to a part, or clique of the body, which had endeavoured to cut off a large limb, which they chose to say they did not consider a portion of it. But, in the convention, the New-school used the word *we*. Do they consider the members of that convention to have intended the exclusion of any portion of the Church? The gentlemen on the other side were told over and over

again, that we wished the entire Church to be brought in; that there should not be a partial organization, but a complete one, embracing all the commissioners; that we were opposed to the exclusive principles of the Assembly of 1837, which did not admit all. I would refer you to the advertisement of this convention, or meeting for consultation.

"Whereas, the state of the Presbyterian Church 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." *Vid. ante, p.* 56.

All the delegates were invited to attend; and for what purpose? To effect a partial organization of the Assembly? No, but a general organization; one which should embrace the representatives of the entire Church. Some of the Old-school did attend this meeting for consultation; and as to those who did not, it was their own fault; for they had been invited. The convention treats of itself as a convention of the whole number of commissioners: that is the sense in which they use the word *we*. Mr. Cleaveland used it in the same sense. He meant the whole house thus addressed—all the members of it who wished to form a constitutional Assembly—not excluding any portion, which was the object of the opposite party.

The next objection to our proceedings is, that the old Moderator and clerks were not expressly displaced; that is, that Mr. Cleaveland moved, that Dr. Beman should be Moderator, and did not, in so many words, move that Dr. Elliott should be put out of the chair. Gentlemen, the design of the motion was perfectly manifest. It was addressed to the Assembly, but Mr. Cleaveland wished to do as little violence as possible to the feelings of Dr. Elliott. When he first rises, his face is towards him, but he gradually turns it toward the entire body of the members: his motion was not, from the very nature of it, made to the Moderator. It was his object to do nothing discourteous, only to secure an impartial and complete organization; therefore he moves merely that Dr. Beman shall be Moderator. Does not this substitution displace the old Moderator, without any express amotion? Take the language of the Constitution itself: the old Moderator is to preside until another is chosen. Of course when another is chosen the former cannot remain in office. You will find the principle of the law on this subject laid down in *Wilcock on Corporations*, 246.

"If the charter give the 'mayor for the time being,' power to appoint a town clerk, he has power to amove the town clerk appointed by his predecessor without any notice or formality, and may exercise it by simply appointing another."

There is the case of an officer appointed by a predecessor, just as the old Moderator was appointed by the Assembly of 1837, and he may be removed by the simple appointment of another. The case of the Moderator is still stronger, for he, according to the Constitution, is to remain in office only until another is chosen. Now, was the great object of the New-school, their endeavour to effect an organization of the entire Assembly, a portion of the members of which had been unconstitutionally deprived of their ecclesiastical rights, to secure the equal representation of the whole Church, leaving both Dr. Green and Dr. Barnes in precisely the same situation in which they stood before the passage of the exscinding resolutions, to be utterly defeated by mere quibbles and quirks of this kind?

But we are told that Mr. Cleaveland remarked that every thing would be done with as much expedition as possible. That is not wonderful. Look at the situation in which he, and those who aided him in endeavouring to secure his object, stood. In every thing they were governed by the circumstances in which they acted. You observe that the trustees of the church had taken measures to exclude from it any body attempting to organize itself, unless under the old Moderator, and a paper stating their resolution had been put into Dr. Beman's hands. I say that this notice would have justified Mr. Cleaveland in rising and saying, that as they were not at liberty to use that church to organize the Assembly otherwise than as the old Moderator and clerks choose, and as it was evident that they were attempting an unlawful organization, he called on all those who desired to secure a lawful Assembly to retire. He had a right to call upon them to retire, and they a right to organize themselves even in the street, relying upon the authority of the case which has been furnished by the opposite counsel, from 9 *Wendell*, 400. In that case, a portion of a religious assembly had undertaken to organize themselves to the exclusion of another portion, the latter having the presiding officer with them. No force or violence was employed, but the latter were given to understand that they could not have the use of the church; and the Supreme Court of New-York, decided that they were justified in organizing the assembly in the open air, and sustained the organization which was so effected. True, the learned counsel on the opposite side relies on this case for support, because the party that he represents resembles that whose organization was thus sustained, in having the presiding officer with them; but he is too familiar with the use of cases not to know that that little circumstance is of no importance. He cannot have suffered it to lead him astray so far, that he has entirely lost sight of the great principle of the case. What is that principle? That the portion who were endeavouring to effect a complete organization were the lawful, and the other portion an unlawful assembly. The Supreme Court say, that the latter ought to have allowed all to take their seats, and if they did not like the conduct of the presiding officer, amoved him; that the principle on which they were attempting to organize the body was unlawful, and the organization of those who had been excluded lawful. They say, that those who wished to secure a lawful organization would have had a right to retire into the open air, to have constituted their meeting *sub dio*, and that such an assembly would have been sustained. And I hope every tribunal in the country would have decided in the same way. Here Dr. Mason and

Mr. Cleaveland, while one portion of the Assembly were insisting on effecting in a peculiar way to the exclusion of a part of the members an unlawful organization, with another portion were attempting to effect a lawful organization, which should bring in the entire body. An effort was made in that case to exclude the presiding officer; in this to exclude the representatives of a large portion of the Church, who still had a right to their seats, having never been constitutionally removed—as substantial a right as that of any member. In both cases the principle is the same. In each the party attempting an unlawful organization had a right to the use of the church. There the other party, going into the open street organized themselves, and that organization was sustained. Here, if Mr. Cleaveland had chosen to do the same thing, inasmuch as they were denied the use of that house, as it was the determination of the trustees, that only those should use it who were willing to organize themselves under the old officers, self-constituted dictators, a triumvirate who were to be permitted to do as they pleased, when he found these officers persisting in an attempt to create an unlawful assembly, he had a perfect right to call upon those who were opposed to an exclusive organization to retire to an adjoining open place, to Washington square, if he had liked, and I trust that if they had chosen to obey the call, their organization in the open air would have been borne out in any court in Pennsylvania. Instead of that, however, in order to give the Old-school a full opportunity to come into the lawful assembly, and to secure an organization of the entire body, the New-school remained, and under all the embarrassments of their situation effected their object.

What did Dr. Fisher say was the reason he did not try to take the chair, when elected Moderator? That he knew such an attempt would create confusion and disturbance: that he was afraid Dr. Elliott would not give up the chair. Did not the remarks of Mr. Cleaveland suppose a determination on the part of Dr. Elliott to prevent, if possible, every effort to secure a lawful organization? Why, when Mr. Cleaveland uttered the simple words, "counsel learned in the law," the hammer of the Moderator and his calls to order, sounded with redoubled strength; and the clique around him called loudly to order. If Dr. Fisher or Dr. Beman had advanced towards the chair, those sounds would have burst forth with ten fold violence; they would have drowned every other. Look at the difficulties by which these men were surrounded: they did every thing in the way which they thought best calculated to quiet the trustees. Dr. Fisher says, that they were appprehensive that the trustees might interfere, and resort to force. Therefore they did nothing which could by possibility be considered discourteous: their object, as they had plainly told their Old-school brethren a few hours before, was simply to effect a lawful organization, to bring in the entire Church; and to avoid all difficulty with the trustees, they effected this in as short a time as possible. Now, gentlemen, this is the question which arises, in applying the principles of the case cited, on which that portion of the Assembly that remained in the church rely. The other portion having taken the advice of counsel, had been told that the exclusion of a part of the members was wrongful, and they wished to effect an organization which should include all of both parties. Now, they might have retired into the open air to accomplish this end; but, instead of that, saying that they hoped what

they did would not be considered discourteous, and that they would endeavour to be as expeditious as possible, they organized the Assembly in the house. Was not that organization as good, as if they had effected it after going out into the street, or into a public square? Unquestionably it was.

But, next, say our opponents, your proceeding was unlawful, because you did not put in the room of Dr. Elliott the last Moderator before him, who was present. It seems that there were one or two gentlemen present, who had been Moderators subsequently to Dr. Beman. In the first place, I answer, that the rule does not apply at all to such a case. It amounts only to this. To facilitate the transaction of business, and prevent unnecessary trouble and embarrassment, the Constitution orders that the Moderator of the previous year shall continue in office until another is chosen. And, then, to carry out the principle a little farther, the Assembly has adopted a regulation, that if the old Moderator is not present, the next before him shall preside. But I say, the old Moderator was present, and had taken the chair, but he performed certain acts in the organization, which amounted to a refusal to do his duty: this was a case to which the rule referred to, did not apply at all; and therefore the Assembly, acting under their constitutional powers, had a right to choose any one to preside; and, moreover, as they were here acting under another power—their power to secure a lawful organization, they had a right to put in the chair one who would do his duty: the selection was a matter for their own judgment. In passing, I may remark, that all who had been Moderators subsequently to Dr. Beman, and who were present, seem to have been of the Old-school party, and therefore in concert with the Moderator and clerks; still, I am willing to rely here upon the right of the body to choose their own Moderator. But, suppose that they ought to have taken the next in order—I believe that was Dr. Witherspoon—suppose they ought to have put him in the chair, and did'nt do it: this was a violation of a mere rule of the house; and certainly the house itself could dispense with a rule of the house. At least, no man of common sense will say, that the error vitiated the organization. So the Assembly themselves decided in another case—in 1835. At the commencement of the session of that year, Dr. Beman presided, in the absence of the old Moderator, though he was not the last one present. Well, the business proceeded regularly under his presidency, the clerks made their report, and the commissions afterwards handed in were received, before the irregularity was discovered. But did it vitiate these proceedings? Was the organization destroyed? Not at all. When Dr. Beman had retired, and Dr. M'Dowell taken his place, did they go back, as if every thing done was void, and do it over again? No; they simply took up the business where it was, when interrupted by the discussion in regard to the Moderator. This precedent confirms my views, showing that the removal of an officer is not a revolution, and does not make necessary a complete re-organization of the Assembly. That the subsequent proceedings may properly be a mere continuation of the previous business, taken up where it was temporarily dropped.

I now come to a point very much relied upon by our opponents. They say that they were really the majority of the whole body; that our attempt is to oust them by a mere intendment of law: this they repeat over and over again as the chief burden of their song. Now, in the

first place, how are you to ascertain when a question is put, on which side the majority are, unless by the vote? His Honour has already decided that that is the only mode, that the majority of voices is to be taken as the majority of the body. If some don't choose to vote you can't make them vote: but if any are present, and prefer to say nothing, they cannot expect to be counted. I refer on this point to *Angell & Ames*, 67.

"After an election has been properly proposed, whoever has a majority of those who vote, the Assembly being sufficient, is elected, although a majority of the entire Assembly altogether abstain from voting; because their presence suffices to constitute the elective body, and if they neglect to vote it is their own fault, and shall not invalidate the act of the others, but be construed an assent to the determination of the majority of those who do vote. And such an election is valid, though the majority of those whose presence is necessary to the Assembly, protest against any election at that time, or even the election of the individual who has the majority of votes; the only manner in which they can effectually prevent his election is by voting for some other qualified person."

If I thought it possible to make this doctrine plainer, I could cite numerous cases which show beyond a doubt, that where a majority refuse, when all have opportunity, to vote, they are not to be counted; that the majority of the actual voters decide the question.

Judge Rogers. I have no doubt on that point.

Mr. Wood. If your Honour will indulge me for a moment, I will show here, what I proved on Saturday to exist in other cases, a remarkable coincidence between the laws of the land, and the rules of this venerable institution, the Presbyterian Church. You have already seen this in a variety of instances. You have seen the good practical sense of the Assembly before it was frittered away in these proceedings.

"Members 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."—*Append. to Const. R.* 30.

As the object of all the remarks which have been made in regard to this so called intendment of law, has been to create prejudice in the minds of the jury, on the subject of the majority, I would beg to be indulged, while I make a few farther remarks upon it. Our opponents seem to rely upon the power of a majority to disregard all right, and to force through the Assembly any measures that please them, no matter how prejudicial to the interests of others. In the case already cited, 9 *Wendell*, 402, the Supreme Court of New York established a very different doctrine. In that case, as here, the objection was pressed, that the part who remained were the majority; which seems to mean that they who have a majority may do what they like, simply because they have a majority. But this is not the principle of law there laid down. The minority which withdrew was sustained, was declared the true Assembly. The others could not avail themselves of the principle of a majority, because the Constitution did not require a majority to form a quorum. Only a small minority withdrew, but the only question to be asked relative to numbers was, had they a constitutional quorum? This

principle you meet with on the page of 9 *Wendell*, next to that which I have just referred to. The counsel for the majority had objected that the presence of a majority was necessary to form the true body; but the court, adverting to this objection, say, that the society of Friends do not act upon the principle of majorities; that if but a minority organize the meeting, that minority being a quorum, it is a lawful organization; but that if the minority did not constitute a quorum, and the others proceeded to form the assembly in an unlawful manner, both assemblies would be unlawful. The majority principle however they decided, did not apply in that case; and that if the body organized in the open air, had a quorum, they must be sustained. There is then no difficulty as to this point in the present case, since in the General Assembly fourteen are a quorum.

This doctrine of a majority is, I am afraid, too often understood to mean, that a majority is without the pale and controul of law. But, gentlemen, you must recollect that in a country of law, a majority has no power to do wrong. Suppose three persons own a ship in equal shares, can two resolve to exclude their companion, and take the ship wholly into their possession? This is about the amount of the majority doctrine for which these gentlemen contend. But what is the law on this point? That where one portion, though a majority exclude another portion, they form an unlawful assembly. I have read page after page to show, and have I think clearly demonstrated, that every rightful member of the body must have an opportunity to come in, or the organization is unlawful. Every one must know of the meeting. Suppose a special notice be given to a majority of the members: is that sufficient? No; the meeting convened on such notice would be illegal. Every member, even the least, must be allowed to participate; and this especially in the case of a delegated body. How, will you constitute a representative assembly, without giving full opportunity to all entitled to take seats? But I do not leave this matter here. How have our opponents found out that they had a majority in that body—a majority ready to carry out the exscinding resolutions; a majority approving of the work of this ecclesiastical guillotine, cutting off thousands without mercy or warning? How could they know certainly any thing about the matter without a a vote's being taken? Has it not been shown that they might have been mistaken in their men? It seems that even all of the Old-school party of 1838 had not been gotten up to the sticking point. Mr. Phelps, who says that he has taken great pains to ascertain the facts on this subject, tells us that there were enough Old-school men opposed to carrying out the principles of the excision, to have secured the admission of the rejected commissioners, had the question been fairly presented. But it never was allowed to come before them. He says that there would have been a hundred and forty in favour, and but one hundred and thirty-six against, Dr. Mason's resolutions; and where is there a witness who has contradicted this statement? There is not one.

But the other side rely upon the number remaining with the Old-school, after the other party had retired. But what does that show. Not at all what they would say. It shows only how many sympathized with the Old-school, after the two portions had separated. It is not strange that after the organization, some who disapproved of the excision, chose to

remain with the Old-school, merely from temporary prudential considerations, inasmuch as they had in their hands the books, papers, seminaries, and all the property of the Church. Thus may have been gained an apparent majority in numbers. But does the fact of a majority's remaining prove, that a majority were ready to carry out the exscinding acts; that they approved of cutting off the rejected members, or of leaving them out in the organization? No such thing. How was it with Dr. McDowell? He declared, when examined on the stand, both what his language as clerk was, and what was his private opinion; that as clerk he felt bound to obey the mandate, which he was pledged—I can call it nothing but a pledge—pledged to obey; but that his private opinion was against the measures of 1837. Here was his mistake: he thought that as a ministerial officer he could not consider those measures unconstitutional and void, and lay them entirely out of the question. If he had gone into the house, and the question had been put whether they would assist in securing a lawful organization, would he, as a member, have voted with the Old-school? Then, he would have been acting as a member of the house, and not as a mere clerk. Has Mr. Phelps' testimony on this point been contradicted? How can the gentleman on the other side undertake to say, when no actual vote was given, that Dr. Mason's motion, if the question had been put, would have been voted down? There is strong evidence the other way, and evidence entirely uncontradicted. A word farther on this subject. It seems that in 1837 and '38, the Old-school were so proud of being in the majority, that they could hardly use any other word of designation. They cannot speak of themselves and their brethren, but as the *majority* and *minority*.

Mr. Hubbell. I beg to remind Mr. Wood, that Dr. McDowell was not a member of the Assembly of 1838.

Mr. Wood. Well, if he was not a member, he is an Old-school man; and we show his opinion as such. Mr. Phelps' testimony, as I said, is uncontradicted.

Gentlemen, on this subject of majorities and minorities, as claimed by the respective parties, I will read the language of the Old-school themselves from the Minutes of 1837, page 499. They are speaking of the Old-school and New-school, and here is their own opinion in regard to the comparative strength of the two.

"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.—*Past. Let. Append. to Min.* 1837, *p.* 499.

Here they come forward and claim the power to carry through any measure; to cut off any number of their brethren on the ground that they are a majority. This assertion is not true: it was impossible to tell how the parties would have been divided on the subject of Dr. Mason's motion; but more than all, this court will never recognise and sanction the principle, that a majority may trample under foot the rights of a minority.

The next objection made to Mr. Cleaveland's proceeding is, that in rising to make his motion he should have addressed the chair. It appears that he did not do so. This is a most extraordinary objection. What? when the Moderator refuses to do his duty, refuses to put an appeal to the house, manifests a fixed determination to proceed in a course of illegal measures, despite the wishes of the house; and a member, in consequence of this misconduct, rises, and moves that another Moderator be appointed, and that the old one shall be displaced, he is bound to address that old Moderator? This apppears to me like the grossest absurdity. I venture to say that such a method of proceeding would have been contrary to all usage. Never, in any deliberative body is a question which affects the presiding officer put by himself. Even a question in regard to a mere matter of compliment must be put by some one else. But when Mr. Cleaveland made a motion to displace Dr. Elliott, and the latter was trying in every way to prevent him from offering it, will you say that Mr. Cleaveland ought to have addressed him? Should have addressed him when he was calling to order, and endeavouring to prevent the question from being put? Why this suggestion is so extraordinary that I hardly know how to argue it. When Mr. Cleaveland was making his remarks, the Moderator was strenuously endeavouring to prevent him from proceeding: if under these circumstances, he had addressed his motion to the Moderator, I should have thought him fit only for the cells of an hospital. No man in his senses can decide that such a motion was out of order because not addressed to the Moderator.

But, say the gentlemen on the other side, this is the practice. Let us see whether it is so. Look at the Assembly's Digest, 332. Here is a resolution passed by the Assembly in 1792.

"Resolved, That no minister belonging to the Synod of Philadelphia, nor elder who was a member of the judicature when the vote appealed from took place, shall vote in the decision thereof by this Assembly. The Moderator, being a member of the Synod of Philadelphia, withdrew, and Dr. McKnight took the chair."

You will find by looking at the cases cited in Grey's Parliamentary Practice, that since a very early period, motions regarding the Speaker personally, have not been put by him; and that such a motion may be put by any member rising and making it. It is the universal usage in this country, that a member should put the question upon every matter in which the presiding officer is personally concerned; and in such case the member cannot properly address that officer. But in the present instance the Moderator never would have put the question: it would have been perfectly ridiculous to have addressed it to him. Then it is said, one of the clerks should have put it. But the clerks were in precisely the same predicament as the Moderator: they had combined with him to carry out the same plan which he was striving to execute. Mr. Cleaveland addressed the body of commissioners. The Moderator had already refused to do his duty: it was on that ground that he made his motion. The second motion—that for the appointment of clerks—was addressed to Dr. Beman. Would it not have been perfectly idle to have requested the clerks to put the question, when they as well as the Moderator were endeavouring to carry out the void acts of 1837? Why, from the very nature of the case, it was necessary that the member making the motion

should also put it. In all deliberative bodies, a member may rise and put a question during the incipient stages of the organization. You will excuse my going over these various minute points: if I should leave them untouched, I might not satisfy the expectations of my clients.

Next, it is objected, that Mr. Cleaveland's motion was for Dr. Beman to take the chair, and not to appoint him Moderator. I will venture to say, that four-fifths of the witnesses have said that he moved that Dr. Beman should be Moderator; but could it make any difference, if he moved that he should take the chair? When Mr. Cleaveland rises, he says, "The Moderator having refused to do his duty, and it being extremely desirable to secure a constitutional organization, I move that Dr. Beman take the chair." Was not this the same thing as if he had moved that he should be Moderator? He grounds his motion on the idea that the Moderator, who was in the chair, having refused to do his duty, was unfit for the place, and moves that Dr. Beman shall take the chair. Was not this substantially the same thing as if he had used the other form of expression? Could any member have the least difficulty in understanding him to mean, that Dr. Beman should be Moderator, in the place of Dr. Elliott, who had refused to do his duty.

In the next place, it is said, that the organization of the Assembly by the party desiring a complete organization, was wrong, because after displacing Dr. Elliott, putting Dr. Beman in his place, and choosing new clerks, they did not immediately proceed to do what they wanted the other party to do at first; they did not go on and dispose of the motion that Dr. Mason had offered. The only answer which I shall make to this—and it must have struck you already—is, that the great object of those who set on foot these measures, was to secure a general organization of the entire Assembly. All of their proceedings were based upon the idea of the Moderator and clerks refusing to put the names of certain commissioners on the roll. When Dr. Mason had made a motion to have them put upon the roll, the Moderator had refused to entertain it. When he had appealed from his decision that that motion was out of order, the Moderator had refused to put the question on his appeal; but the only object of all his efforts was to have the names enrolled. Well, Dr. Mason and Mr. Gilbert tell us, that they did put them on; that they had a list made out as nearly as possible, with all the names on the roll of Mr. Krebs' and Dr. McDowell, which they had taken as the basis of theirs, having previously drawn it up as well as they could, and then corrected it while Mr. Krebs read; and that to this they afterwards added the names of the exscinded commissioners. "Oh, but did you actually attach the two lists together?" "No, but I held them both in my hand, and considered them both as one roll." "But they were not the roll merely because you considered them so." And pray how did Mr. Krebs' list become a roll? Was it not by his considering it so, as soon as it had been made out? Cannot a list be a roll unless it is all on one sheet? If not, Mr. Krebs' was not a roll. You will say that the object of the New-school was to put all upon the roll; and that when their clerks had lists of all in their hands, they had enrolled all. Look at the case which has been brought forward on the other side—the case of Mr. Moore, whom the Old-school clerks put on the roll. There was no motion made for his admission. How was he received? Mr. Krebs put down his name,

and then considered it as enrolled. He simply put it on the list; no motion was necessary. Their own conduct in the case of Mr. Moore warrants the proceedings of our clerks.

Oh, but all this was a revolution; and the new clerks and Moderator could not have any roll, without having the commissions in their hands and examining them. This is a most extraordinary objection. It was no revolution at all. We merely displaced a Moderator and two clerks. Was there a revolution or a new organization in 1835? I believe not. There the roll had been reported under a wrong Moderator; but when the right was substituted did they go back and make out a new roll? No; they merely went on with the business; merely continued the proceedings, taking them up where they had been interrupted, by the motion to displace the wrong presiding officer. But it is sufficient for us to say, that we could not get the commissions from the old clerks: we knew from the first, what was subsequently shown when a formal application was made, that they would not give them over into our hands. Are you prepared to say, that when a house has been organized, and a clerk refusing to do his duty, displaced, another clerk being appointed, the house cannot go on with business, because the old officer declines to give up the commissions? Will its proceedings be invalid, unless the new clerk seizes the old one by the shoulders, and forcibly takes from him the papers? Dr. Mason and Mr. Gilbert endeavoured to get them. They called on Mr. Krebs and Dr. McDowell, but those gentlemen, as was to be expected, refused to give them up. Unless the clerks and Moderator were to be allowed to act the part of dictators, to usurp all power, their holding the commissions and refusing to surrender them certainly could not destroy the Assembly. The circumstance then of the new clerks' having so few of these vouchers actually in their possession, cannot at all affect our case.

Next, it is alleged that Mr. Cleaveland's motion was entirely out of order, because the first business after the report of the Committee of Commissions had been read, was the appointment of a Committee of Elections. This is a very fine doctrine indeed for the Old-school brethren. It suited them that every thing should go on in a regular track; that first the roll should be reported, and that then the Moderator should call for commissions from Presbyteries in connexion with the Church, and refuse those from Presbyteries which he did not choose to consider in connexion therewith. The doctrine is this: "No motion must be made to compel the clerks and Moderator to do their duty, for the next business in order is the appointment of a Committee of Elections; and then when that committee has been appointed we have got you fast. Then you are out, and cannot get in again but by begging for admission on your knees. If you come thus, and supplicate for mercy, the Assembly will take order on your cases." What is this order which is to be taken? It is to be determined whether the applicants are purely Presbyterian. To this end they are to be examined on experimental religion. Then indeed they would have effectually secured us. All this is only saying to us, "It is no matter what efforts you make, or how you proceed; you can accomplish nothing before the organization is effected," and when that was secured our only chance was gone. We could never be restored, unless those who had excluded us, chose in their high mighti-

ness to think proper to take order on our case. But we have an easy answer at hand. The next thing to be done, after the clerks have read their report of all the regular and constitutional commissions, is the appointment of a Committee of Elections. But was such a report read—a report containing all the names, excepting of those whose commissions were informal, the duty of preparing which the rules that have been read imposed upon the clerks? Are we to be told—and here I address myself to the feelings of every honest man—that the exscinding resolutions were regular and constitutional; that they were consistent with the principles of the law of the land, by which all these subordinate institutions are controlled, and with just notions of civil liberty; were not a mere revolutionary proceeding; and that therefore the commissions of the exscinded commissioners were invalid? If not, then it follows, that the next business in order was not the appointment of a Committee of Elections; that the time for that appointment had not yet arrived, because all the regular and constitutional commissions had not been received and enrolled. But besides, every house has the inherent power to organize itself lawfully; has a right to depose a presiding officer, who, supported by a clique of the members, is endeavouring to carry out an illegal and void measure, to the disfranchisement of a portion of the body. The only way to rectify the gross error; to resist the attempt to shut out a large number of rightful members, was, by moving the house to displace the officers thus undertaking to prevent a lawful organization. To satisfy some people, gentlemen, it is necessary to present the converse of every proposition. You all know the old saying, that where you want a man to understand that his bull has gored another man's ox, you must reverse the proposition, making it appear that his ox has been gored by another man's bull. So, to make these gentlemen understand the case, I will reverse it, and suppose that sixty Old-school commissioners had been rejected by the clerks. I ask you, can you believe for a moment that Dr. Elliott would have persisted in rejecting them? Suppose that Mr. Cleaveland, like Mr. Moore, had been an Old-school man, and had come forward and offered these commissions; and go farther, and suppose that the clerks who had rejected them were of the New-school—suppose that Mr. Cleaveland had said to the Moderator, "Here are some commissions which are perfectly formal and regular from the Presbyteries belonging to the Synod of New Jersey. They were presented to the clerks, but they have refused them, being determined to affect a partial organization of the Assembly. They are resolved to secure the preponderance of the New-school party; and certain measures calculated to accomplish that object, they are resolved to carry out. They have declared that it is their intention to shut out all these Old-school members, notwithstanding that they bring regular and constitutional commissions, unless they will come on their knees, and on the ground that the Synod of New Jersey has been exscinded, and stripped of all its Presbyterial rights, acknowledge that they are not lawfully entitled to seats." What answer would Dr. Elliott have made to this application? Would he have replied, "You are out of order, Sir: the next business of the Assembly is the appointment of a *Committee of Elections*, as is provided in the fifth section of certain rules enacted by the Assembly some ten or twelve years ago. That section says, '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.'"—Would that have been his language? No; he would have seen directly that the previous requirements of the rule had not been complied with. The appointment of a Committee of Elections was, it is true, the next business, when a certain stage had been reached; but to that stage the proceedings had not yet advanced. "The first act of the Assembly, when thus ready for business, shall be the appointment of a *Committee of Elections*"—When thus ready; but if it was the duty of the clerks previously to put on the roll the names of all whose commissions were formal and constitutional, and they had not done this, the house was not yet ready for any other business. The gross and wilful error of the clerks must first be rectified. It is sometimes necessary thus to change the form of the proposition—to put the bull for the ox, in order to make people comprehend the rights of others.

In the next place, it is said, that the house did nothing wrong, even if the clerks and Moderator did, and that therefore we had no right to organize the Assembly and go off, leaving a majority behind. We don't pretend that the house did any thing wrong. We say that the clerks and Moderator violated their duty, and that the house displaced them on that account. The question on their amotion was put and passed by an undoubted majority. How it would have gone, had all voted, I cannot venture to say; but some, though a full opportunity was given, did not choose to vote; therefore the majority of those actually voting must be considered the house. If it were necessary, I would go farther and say, that if the majority of the whole were determined to exclude a portion of their brethren, they were determined to organize the body in an unlawful manner; and that therefore the remaining portion, though a minority, and though the others had voted them down, if there were only a sufficient number to form a quorum, had a perfect right to withdraw from the house, and on the outside organize the Assembly, on the principle of admitting every member of the entire body to his place. I say that when one portion of the commissioners insisted on forming a lawful organization, and another portion—a majority if you please—insisted on forming an unlawful one, those desiring the lawful organization, would have had a right, if they could not accomplish their object in the house, to have retired to the next convenient spot, and there organized the body, excluding none of their brethren, but admitting all to the seats to which they were entitled. I say that this is an inherent right; a right which is indispensable to the protection of the minority. Will you tell me that in a delegated body, a mere majority may organize themselves to the exclusion of a large part of the members; and that the minority are completely manacled, are bound to submit, and thus go on with the transaction of business? I never would submit to such an usurpation and abuse of power. The doctrine is directly counter to that laid down by the Supreme Court of New York, and I think that no tribunal in this country can possibly give it their sanction. The consequence of the Assembly's being unlawfully constituted is not that all its acts are absolutely void. It may still be the Assembly *de facto*, and its acts may be valid until set aside by the proper tribunal. Therefore the body, though illegally organized, may go on and transact its regular business. Every act

not impeached by a *mandamus* or *quo warranto*, may take effect, because it is enacted by a *de facto* body. I beg that you will understand me thoroughly upon this subject. I do not mean to say, that whenever a portion of the members of an assembly are excluded, they must proceed to organize the body in a lawful manner, going upon the basis of admitting all to their seats, but that every member is bound to resist an unlawful organization. Suppose that after we had organized ourselves, the Old-school had come in, according to the suggestion of one of the opposite counsel, and voted us down. Well, if they had done so, they would have been exercising an undoubted right: they had a right to vote us down, but not to shut us out. The latter they could not do, unless the law of the land goes to the length of saying, that a majority may always do as they please, and may trample upon the most sacred rights of the minority. But that question does not properly arise here: the Old-school could not have got a majority to agree in carrying out the illegal and void measures of 1837; therefore the task of carrying them through to their consummation was allotted to the Moderator and clerks. No one has ventured to deny the testimony of Mr. Phelps upon this point. The officers of 1837, and a clique of the Old-school, then, were endeavouring to drive these measures through, in despite of a majority of the house. Therefore the Moderator refused to put an appeal from his decision; and therefore, when a motion was made to displace him, he and the clique with whom he was in concert, endeavoured by their noise to prevent its being put. They had assumed the sovereign authority of dictators, and sought to control the entire action of the house.

(Here the jury were allowed a recess of ten minutes.)

The next point which I shall notice is the objection that the question on Mr. Cleaveland's motion was not reversed. It is said that Mr. Cleaveland and Dr. Beman ought to have been examined on this subject; and great reliance is placed upon the fact that we did not read their depositions. To this I answer only, that if those depositions had contained any thing favourable to the defence, the opposite counsel would unquestionably have read them. I am warranted in saying, though not at liberty to tell you what the depositions do contain, that they would have read them, as they might have done, if they could have found in them aught favourable to their cause. These depositions, as I said yesterday, were taken before any of these petty questions of order were started, and were taken, just like Dr. Nott's, on other points. I am fully warranted in saying that the latter was withheld, after his Honour had overruled certain parts, for the same reason which induced us to omit reading the two others. But the counsel tell us, that Mr. Cleaveland had of course peculiar knowledge of the remarks which he made before introducing his motion; and we are asked to produce the paper from which he read. There is nothing at all in this. He did not read from any paper; that is, he did not confine himself to the paper that he held in his hand. The testimony shows that the few remarks which he made were chiefly extemporaneous. Now a man who makes a few such remarks in a case entirely out of the ordinary course of business, and who, as I presume Mr. Cleaveland was—indeed several of the witnesses have told us so—is a good deal agitated, is not more likely to remember them, than those who saw and heard him at the time, and were more collected. As he did not confine

himself to the paper there was no reason for preserving it. What he actually said was afterwards embodied in the minute of the transaction: there can be no difficulty at all as to what his remarks were. It would be a waste of time to go over the evidence on the subject of the reversal of the question. I shall examine the testimony of but two of the witnesses on this point. Many swear directly, and put it beyond the possibility of a doubt, that all of the questions were reversed. The fact that there were some negative votes shows the same thing conclusively. Dr. Elliott says that there were some negatives; and nearly all the witnesses who testify to the same fact, tell us that these negatives came from the south-west quarter of the house. Of course, then, they came from the Old-school, who alone occupied that quarter. Could they with any propriety have voted no, if the question was not reversed? But Dr. Hill's testimony must be conclusive upon this subject. He was not opposed to the measures of the New-school, as has been said; but he was agitated and in difficulty. He was afraid that the proceedings contemplated might lead to disturbance and uproar; and therefore had made up his mind to take no part in them. But he sat by, watching, as he tells us, with great anxiety, the progress of affairs. He says, positively, that the question was reversed; that he listened attentively to hear the reversal, because he had doubted which of two things would take place—whether the Old-school party would not vote at all, or whether they would vote it down. His testimony was very little different from that of Mr. Lathrop's, who recollected the reversal, so as to be able to swear positively to it, because he himself voted in the negative. Witness after witness has sworn, with almost equal positiveness, that the different questions were put in both the affirmative and negative: that there were some negative votes, all admit; and that there was, in each instance, a decided majority of the actual voters in favour of the question, is not disputed. I think, then, you can have no hesitation in deciding this point. I would here call your attention to a very obvious rule of evidence, and of common sense. The testimony of those who swear directly to a positive fact, is not to be overcome by evidence that another person merely did *not* hear or see the same thing. A man walks up Chesnut street, and the question arises, whether he had an umbrella in his hand. One swears that he saw it, his attention having been drawn to the circumstance, by the fact that it appeared about to rain. Another swears that he saw the man at the same time, but did not see any umbrella, and don't believe that he carried one. Which of these two are you to believe? The one who swears positively that he saw, or the one who did'nt see? I pass this matter by, without farther remark.

Next, it is said, that if the members of our Assembly had let the opposite party go on with their organization in their own way, however unlawful that might be, and had then applied for relief, it would have been granted. The first gentleman who addressed you on the other side, said that he had not the least doubt, that if we had let them go on, and organize the Assembly unlawfully, we should afterwards have been all let in, to partake of the fatted calf; should all have feasted on the delicious banquet. Why, gentlemen, when you find the Old-school taking one step towards carrying out the void acts of 1837, how can you believe that they will not take another? When you find them, afterwards, in their Assembly,

carrying out the same measures, acting upon the very same principles from first to last, from the opening minute to the end of the statistical table, what mockery does such language appear to be. In the heat and zeal excited by the present controversy—we all must admire the zeal which he has manifested—the learned counsel brings himself to believe, that now, if your verdict should sanction the unlawful organization of the Old-school, even now, those who have been excluded, may be received back, and partake of the fatted calf, prepared to be eaten by both. But, after the exscinding resolutions are passed in 1837, indemnity is promised to the trustees, and pledges are exacted from the clerks; after the convention in 1838, determines to carry out those resolutions, and declares them the only true basis of a legitimate organization of the Assembly; and, after the Moderator and clerks so fully redeem their pledges, and are so strongly supported by the great body of the Old-school, in their unlawful attempt—after all this, do you suppose that these same men, if backed by your verdict, will withdraw all their resolutions and proceedings, admit those who have been excluded, to the bosom of the Church, and spread before them a delicious feast? If they could make us believe a position of this kind, they might well exclaim,

> O Wisdom, thou hast fled to brutish beasts,
> And men have lost their reason!

The next ground taken by our opponents is, that there were two Moderators in nomination; that we were in fact voting for two candidates, and that therefore the division ought to have been made by calling the roll, and marking the yeas and nays. They say, that taking the question *viva voce* did not answer. Dr. Elliott in nomination! and the question to be put, which of the two should be Moderator! Was there any question of choosing Dr. Elliott? Why he was to be displaced: there was but one person in nomination. Dr. Elliott was the old Moderator, and, as I have shown, over and over again, was to continue in office only until another should be chosen. Another was named, and he was the only candidate. Then, according to the Assembly's own rules, the question need not be taken by calling the roll: indeed, it need not be reversed. It would have been contrary to all rule to have taken the yeas and nays in such a case, unless they were called for by some member.

But, it is said, that no opportunity was given for debate. Did any body want to debate? But the opportunity was in a great measure precluded by the whole proceeding's being carried on, as we had avowed it was our intention to carry it on, with as much expedition as possible. The apology that was made, was only to Dr. Elliott. He was told that no personal attack upon himself was intended, by the motion to displace him; that he was attempting a mal-organization, yet that he might believe all he was doing to be correct, and that we did not wish to give any personal offence; that we were aware that he was sustained by the trustees, but hoped that we should not be interrupted if we should attempt to organize the body in the way which we considered constitutional, and according to the views of legal counsel with whom we had advised; that our object was to include the entire body, and that if allowed to proceed we would do every thing with as much expedition as possible. If any one of the Old-

school had wished to debate, his rising to do so would have been considered a waver of all objection to our proceedings, on the part of the trustees; and he would have been allowed to discuss the question as long as he pleased. In every assembly, when it is supposed there is no intention to debate a question, it is put immediately; but after a resolution is carried, no member can say that it was all wrong, because he wanted to debate, and no opportunity was given. He ought to have risen and said that he wished to discuss the question, and thus, if the right had been denied him, he might with propriety complain. Did any person in this case offer to debate? Among all those, on the list of Old-school witnesses, which was so long that we grew sick of the repetition, and refrained even from cross examining them—among all of them was there one who said that he had wished to debate, but had been prevented? Not one. Yet, now, at this late hour, it is urged that our proceedings ought to be considered void, because these gentlemen had not an opportunity for debate, though they did not demand it at the time, and though the resolutions of the trustees put into our hands forced us either to proceed expeditiously, or submit to their dictation of an unlawful mode of organization under the old officers!

Next, it is objected, that when Dr. Fisher was appointed Moderator, the rules of the house were not read to him. You recollect what was done. Dr. Beman stated to him that he had been elected Moderator, and must observe the rules thereafter to be adopted by the General Assembly. I beg that you will here attend to one thing which is of some importance. Formerly it was not the practice to re-adopt the rules at each session of the Assembly, but they were considered permanent. When they were so considered, there was of course some propriety in the regulation, that they should be read to the Moderator on his election, or rather, through the Moderator, should be read to the house. In this proceeding there was then real good sense. The rules were thus indirectly made known to the Assembly, which was composed of members coming up with new commissions, many of whom had, perhaps, never before sat in the body. The propriety of such a regulation we can easily understand. But now a compliance with the old practice seems a little like nonsense; for the rules are no longer permanent, but each Assembly adopts its own. If therefore they are read to the new Moderator, they must be read before they have been adopted. It seems that the change of which I speak, was made on the suggestion of Mr. Breckinridge, when he was first a member of the body. There was then a perfect propriety in the language addressed by Dr. Beman to Dr. Fisher—that he should observe the rules thereafter to be adopted by the General Assembly. That was not the proper time to read the rules; when adopted they might properly be read. But it is idle to waste time in the refutation of such frivolous objections. What difference does it make whether the rules were read or not; whether the right Moderator was or was not at first selected; whether there was some noise made by this, that or the other person; or whether some were standing who ought to have been sitting. Suppose the rule had been that every body ought to rise, and some had been found sitting; that, though a disorder, would be no objection to the validity of resolutions regularly put and carried. Is an organization otherwise lawful to be vitiated by these petty irregularities?

The next objection, and the last that I shall trouble you to notice, is that the several motions were not put in an audible manner, so that they could be heard, and that the members could vote understandingly. My first proposition on this branch of the subject is, that they were all put and reversed in a loud distinct voice, which could be heard over the whole house. To this effect we have the testimony of a dozen witnesses at least, though I shall now refer to that of only two, Dr. Patton, and Mr. Gilbert. To the evidence given by Mr. Norris, the Episcopalian, I shall refer by-and-by. How the opposite counsel came to catch an Episcopalian, I don't know. The testimony of their Old-school witnesses suits them very well; but the moment they get hold of an Episcopalian, every thing goes wrong. He stood in the west door; it is rather a small church, for a city, but between Mr. Norris and the Moderator, you will recollect, there was a large stove. Not one of the witnesses has denied the fact that the questions were put in a loud and distinct voice: all of ours tell you that they could be heard throughout the house. The members who put them stood about the middle of the building, and that they could be distinctly heard in every part of it, is proved conclusively, when we bring witnesses who stood in every part, and swear that they all heard them. Such testimony at once puts an end to the question. I will call your attention to the respective positions of some of the witnesses. Mr. Gilbert, afterwards appointed clerk, who was in the south-east corner, when Mr. Cleaveland put the question on his first motion, says that he heard it distinctly put, voted upon, and carried. He heard every thing that Mr. Cleaveland said, and has repeated the substance of his remarks. He was in the south-east corner, among the Old-school. Mr. Elmes was standing in the south-west part of the house. He, as long as he attended, heard what was said, and also testifies that the questions were put audibly and distinctly. Mr. Gemmel—he was standing in the same neighbourhood, by one of the side pews, which was filled with brethren of the Old-school. He too says, that the questions were audibly put; and also that the Old-school brethren in the pew at his side, were scraping and stamping, and crying "Order!" so loudly, that he told them, that was singular conduct for ministers of the Gospel. His testimony is unimpeached, and though Dr. Phillips swears that he heard no such disturbance, that is not enough to overcome the evidence of this positive witness. The fact is established beyond the possibility of doubt. Then there is the testimony of Dr. Mason, who was nearer. He tells us that there were two pews of Old-school brethren between him and Mr. Cleaveland. Mr. Norris stood, as I have already mentioned, in the west door. Mr. Dingee was in the gallery, by the organ; and he tells us, that he heard every thing distinctly until the motion was made that Dr. Fisher should be Moderator: that he did not hear that motion, because, at the moment, he was coming down from the gallery. Now if witness after witness thus testifies that the questions were put distinctly, and so as to be heard over the whole house; and then others standing in the extreme parts of the house—north, south, east, and west, swear that they actually did hear them, the fact that they were audibly and distinctly put is established, and confirmed by the testimony of those who actually heard.

But we are now brought to the inquiry, could the various questions be

heard by the Old-school? We have called witnesses, who have proved, that there was a great noise in the part of the house which the Old-school occupied; that there were hissing, coughing, scraping, and calls to order. The Moderator rapped with his hammer, and some cried "Shame! shame!" One gentleman asked, "Can nothing be done to stop them?" The Moderator answered, "I have done every thing I could, but cannot stop them." All this is proved by the most respectable witnesses—by Dr. Patton, Dr. Fisher, and others on our side, and by a number of their own party. Mr. Lowrie says there was no legislative coughing; but there was scraping: that has been proved, and cannot be disproved. I don't pretend to blame Dr. Phillips, or to question his veracity. It was the most natural thing in the world that he should not hear the scraping. He has told us that he was very much agitated, and found himself involuntarily calling "Order! order!" in an under tone. Now is such evidence to overcome the positive testimony of a witness who did hear the scraping distinctly? The Old-school not only made a noise, but also undertook to transact business during the progress of our organization. What says their Minute of the transaction.

"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."—Now, it is true, that the testimony of Mr. Krebs differs from this, as to the time when Mr. Moore's commismission was presented; but, you will recollect, that this minute was drawn up at the time, and that Dr. Elliott was one of the committee appointed for that purpose. He says that the minute is entirely correct, so far as it goes. Then, there was another piece of business offered:—"It was then moved to appoint a Committee of Elections, to which the informal commissions might be referred."—Not those which Dr. Mason had presented, but the informal commissions reported by the clerks. This was all during the time that Mr. Cleaveland was on the floor.—"But the reading by Mr. Cleaveland still continuing, and the Moderator having in vain again called to order, took his seat, &c." And not only did the Old-school commissioners thus act, but even Dr. Miller, a man distinguished for amability and politeness, was carried so far beyond himself, by the spirit that prevailed around him, that he rose on the floor, though not a member of the body, and cried, "What a disgraceful scene!" Look for one moment at the mere business that was carried on, and you have at once ample means for accounting for the fact, that the Old-school did not hear the questions put, without supposing that they were not put in an audible voice, or that there was so much noise in the gallery, as to prevent their hearing. This business seems to have been twice interrupted by Mr. Breckinridge. Once he called upon the Moderator to stop the proceedings of the New-school; and then, when the Moderator replied, that he had done all he could to stop them, said: "Oh, let them go on." Dr. Miller cried, "What a disgraceful scene!" Another person, "Shame! shame!" In the meantime, the hammer of the Moderator was continually in motion, and he called loudly, "Order!" All this was to prevent the progress of

our organization. One member of the Old-school party, endeavoured to cast reproach on the whole proceeding, by repeating the pagan maxim—"Whom God wishes to destroy, he first makes mad." This heathen maxim he applies to his brethren, while they are making an effort to address the house, on subjects of the deepest interest to all present. What was Mr. Cleaveland's object? To create a disorder? No; he was as pacific and courteous as possible. He explained fully his intention, hoping that he might be allowed to accomplish what he desired, as he meant no discourtesy to any one. He begged that the Moderator would not consider him wanting in courtesy, and that the trustees would not interfere, promising that there should be as little delay as possible. And this explanation was an apology for endeavouring to bring into the Assembly the representatives of five hundred ministers, fifty thousand communicants, and two hundred thousand stated worshippers, that they might then and there exercise the rights secured to them by the law of the land, as he had been advised to do by their legal counsel. It was to men such as this, that the gentleman to whom I have referred, applied this pagan maxim. He meant to say, "Your God has determined to destroy you, and therefore has made you mad." To whom did he apply it? To pagans, or infidels? No, but to his brethren; those with whom he had sat and deliberated; those with whom he had worshipped, day after day, the God whose vengeance he was thus invoking upon their heads. Yet now, these gentlemen, with such language in their mouths, and after making such efforts to interrupt and hinder our proceedings, tell us that those proceedings were all wrong, because they couldn't hear the questions!

But there was another reason why they did not hear: they didn't want to hear; and they didn't mean to vote if they did hear. You all know the old saying, "There are none so blind as those who don't choose to see." You may also say, "There are none so deaf as those who don't choose to hear." Now we have Dr. Wilson, Mr. Mitchell, Mr. Breckinridge, and the Moderator, all testifying that *they* didn't try to hear, and should not have voted if they had heard. There is not a single witness of that school who has said that he would have voted or debated, if he had had an opportunity. There is no difficulty, gentlemen, in arranging and explaining the whole of this evidence. Why did not any of the Old-school hear, while all on our side heard distinctly? I shall not impeach the credit or the character of a single witness: it is only necessary to look at the different states of mind in which the two parties were, and the whole difficulty is removed. The Old-school looked at our proceedings as a disorder. They were acting out the measures of 1837, and thought that we had no right to interrupt them, and displace their Moderator; that we were creating an unlawful disturbance. What was more natural than that each party should attend to the things they were themselves doing? Here our opponents imagined that we were disorderly. They had no idea that the Moderator could be displaced; and their attention was naturally called to that part of the house where certain members of their own party were pretending to carry on some sort of business—the appointment of a Committee of Elections. How was it with the witnesses on the other side? Their attention also was directed by their sympathies: they wanted to hear, and they did hear. Go into any Assembly, where one set of men are conducting one piece of busi-

ness in this part of the house, and another set another piece in that: if you attend to the latter, you will not be able to hear the former. This accounts for the apparent discrepancies in the testimony, without our imputing a want of veracity to the witnesses on either side. The Old-school did not hear because they not only did not want to hear, but were occupied with other business. The New-school listened—they could and did hear; and their witnesses all say that the questions were put in a distinct and audible voice. Now, there can be no pretence that the New-school were disorderly. No witness has said that they were. All that they did—all that it is pretended they did, which could be considered in the least objectionable, was to vote in a very hearty and emphatic manner, and to rise, as a few persons did, in their seats, when the first motion was made. No one pretends that there was any disorder beyond what I have mentioned. Take the testimony of one of the witnesses for the defence, Professor Maclean. He tells you that there was no disorder among the New-school. The most of those that were particularly attending to their proceedings at the time, allege that there was not the least noise or disturbance. And there seems to have been none even in the galleries, except that some think that they *saw* a few clapping their hands, though they *heard* no sound. One of the witnesses, indeed, says that he was led to believe that the loud shrieking aye, which several of the Old-school have mentioned, came from the gallery. I understood Mr. Maclean to testify, that there was as little disorder as possible; as little as could have been expected under such circumstances. He thought, it is true, that the New-school were disorderly; but this disorder was the displacing the old Moderator in the way they did. Now suppose they were disorderly to the full extent to which they have been ever charged with disorder—why from the very circumstances of the case we might find an apology for them. They had demanded their seats, but the Moderator had refused to entertain any motion on the subject, or to put the question on an appeal. What then was left for them? Nothing but to take the other end of the church, and there put the question, remarking, as Mr. Cleaveland did, by way of explanation, that they desired to secure their object with as little disturbance as possible, and that they hoped their proceedings would not be considered discourteous. Now, if according to the principles laid down in the New York case, they had a right to retire and organize the Assembly in the street, I think you will say with no hesitation, that being prevented from remaining in the house by the resolution of the trustees put into their hands, and compelled to organize themselves at that time and in that manner, by the conduct of the old Moderator, much allowance must be made for them, and that theirs was the lawful organization. Suppose some did try to hear and could not; would that vitiate all the proceedings? Why I venture to say, that during the last sitting of the House of Representatives, nine-tenths of the business was transacted when, by reason of the conversation that was going on around them, a portion of the members did not hear. I think our opponents will agree with me in this belief. But did that vitiate the proceedings of the house? Certainly not. When during the transaction of business, any one is prevented from hearing by the conversation in his neighbourhood, he must call upon those who are making the disturbance to be silent, if he wants to hear, to debate, and to vote. If then the gentlemen

of the Old-school wished to hear, debate and vote, instead of attempting to put down Mr. Cleaveland, Dr. Beman, and Dr. Fisher, they should have endeavoured to hear, and should have claimed the privilege of having opportunity to act. If this had been denied them, there might now be some reason for the objection urged; but they did not make the demand, and therefore cannot say that our proceedings were unlawful and void, because the opportunity was not granted.

Gentlemen, I shall bring my argument to a close, after a single word in reply to the remarks made in regard to the other suits that have been commenced, which it is said ought to have been tried instead of this. Those are but private suits, and if individuals who felt themselves aggrieved, have brought them, to recover their individual rights, we have nothing to do with that. This proceeding involves directly the great question on which depends the settlement of the entire controversy. We go for the whole matter in dispute: we say that we are the true and constitutional General Assembly of the Presbyterian Church in the United States—the Church as it existed at the commencement of the session of the Assembly of 1837. We organized ourselves in 1838 upon that principle. Now the question for you to decide is, whether the whole Church, such as it was at the commencement of the session of 1837, and every part of it, are still entitled to the right of being fully represented in the Assembly. The other side contend that they are not; that the inhabitants of a certain large district do not belong to the United States at all, so far forth as Presbyterianism is concerned. That great question could be tried only in this way. Was the appointment of trustees, by a body purporting to be composed of the commissioners to the Assembly from the entire Church—the Church such as it was in 1835, '36, and until a certain period of the sessions of the Assembly of 1837, valid; or was it invalid, and were those parts of the Church exscinded in 1837 lawfully cut off? This suit, I say, embraces the entire question. Suppose one of those instituted by an individual had been tried—then the same cry would have been raised—why did we not bring up the entire subject, the whole question, at once? One of the counsel has told us that a *mandamus* might have been issued, or an action of *trover* commenced—that either of these would have been sufficient to decide the matter. I should like him to tell me how an action of *trover* could lie in this case. I believe it could not. A *mandamus* might indeed be issued, but it could not have restored these members the year they were excluded: before the question could be determined, the Assembly would have been dissolved, and a new one called; and it does not appear that the same men were elected as commissioners to the Assembly of 1838. What then could a *mandamus* do? In the case of any office of such a short duration, a *mandamus* cannot reach the difficulty. Our only effectual remedy was the organization of a lawful Assembly, and the appointment of the relators as trustees. We intended no personal injury to Dr. Green, though his personal claims have been so largely brought before you. Those claims certainly ought not to be allowed to make any impression upon your feelings. This is the whole question—and you ought to keep it distinctly in view: Is the true General Assembly composed of delegates from the entire Church, as it stood before the excision, or of delegates from those parts of it only, which the Old-school choose to consider in connexion with them? If we are right,

the organization brings in all parties. It leaves the Old-school just where they stood before—Dr. Green just where he stood—all of them secure in their ecclesiastical rights, as members of their respective judicatories, and as entitled to a representation in the Assembly. In the temporal office of which Dr. Green will in that case be deprived, there is nothing, which, if indeed it might not better be committed to lay hand, he, at least, can covet, at his advanced period of life. But our organization brings both him and Dr. Barnes into the same situation as before the excision. I desire that this great question should now be settled, that we may see whether these inferior and subordinate institutions, civil or ecclesiastical, may wantonly trample under foot the most sacred rights—whether one portion of the members of such an institution may exclude another portion—may cut off their brethren, and strip them of their dearest privileges, without notice, and without a hearing. And when I remember that I stand in the State of Pennsylvania, the citizens of which are distinguished by their respect for good order, while its laws are wise and equitable; when I know that I address an impartial and intelligent jury, a judge learned in the law, and firm to apply its principles, I can have no hesitation as to the character of your decision.

On the conclusion of Mr. Wood's argument, the usual time for the court to adjourn not having arrived, Judge Rogers signified his readiness to charge the jury immediately. One of the jurymen, however, being anxious to go home, on account of the sickness of a member of his family, his Honour consented to an adjournment, and announced that he would deliver the charge next morning.

Court adjourned.

TUESDAY MORNING, March 26th.—10 o'clock.

JUDGE ROGERS' CHARGE.

In the course of my remarks, gentlemen, so far as lies in my power, I shall instruct you positively, clearly, and directly, upon the different points of law involved in this case. My observations will be brief, and discarding all collateral matter, I shall direct your attention to the very points which I think material. If I err in my instructions to you, by a resort to a higher tribunal, the error may be corrected. I now request your careful attention.

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 Synods 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 Genesee, Geneva, and Utica, have been formed.

The Synod of Pittsburg has been also erected, out of which the Synod of the Western Reserve has been formed.

These constitute the four exscinded Synods, viz., the Synods of Genesee, 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, prepared 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 twenty-four ministers, sends one minister and one elder; and each Presbytery consisting of more than twenty-four ministers, sends two ministers and two elders; and in the like proportion for every twenty-four 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 exscinded 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.

The 28th March, 1799, the Legislature of Pennsylvania declared Ashbel Green and seventeen 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 eighteen 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 a 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. It is, however, sufficient for us, gentlemen, to know that in this case we have that right.

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 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 Schools. 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 sympathize, (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 of Albany in 1802, and with the Reformed Dutch Church, and the Associate Reformed 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 right 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. First, 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 do 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 overtures or regulations 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 recognised 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 Genesse, 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 final 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 exscinding 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 recognises 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 her judgment the exigencies of the Church might demand.

Accordingly we find that the four Synods, and all the Presbyteries 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 exscinded. They have been established since, but this is no evidence that the four exscinded 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 Presbyterians, 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 a 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 exscinding 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 parties concerned, at least ten days before the meeting of the judicatory. The accused is informed of the names of all the witnesses to be adduced against him. 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, were 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 insist then, that the resolutions of the General Assembly exscinding the four Synods of Utica, Geneva, Genesee, 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 sages 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 such case. But if it were so, this is an excuse, but it is no justification of the exscinding resolutions.

Offenders, according to the rules of the Church, may be brought before a judicatory by common fame. But I perceive no power 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, may 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 their 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 in contravention 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 exscinding 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 proceedings 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 had 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 exscinding 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, 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. McDowell, 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 that

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 comissioners from the exscinded 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 exscinded 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 cases referred to the committee on elections, on whose report only would it 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 exscinded 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 concur that the Moderator declared Dr. Mason out of order. Dr. Mason said, that with great respect to 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 would have decided that

the original motion was out of order. They might have thought that the matter was properly referrable 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 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 a 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 four Synods, twenty-eight Presbyteries, five hundred and nine ministers, and near sixty thousand 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 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 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, stept 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 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's 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 the 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 the 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 act 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 might have led to disorder. Mr. Cleaveland put the question to the house, which, under certain circumstances, 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 referrable to the Committee on Elections, and farther, 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 precipitancy 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 became a question of privilege, which over-rides 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 act 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 recollect, 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. McDowell, 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 non-observance 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 exscinded 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 relator's case. The Moderator, Dr. Elliott, proceeded to organize the house. The clerks, Mr. Krebs and Dr. McDowell, 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 exscinded 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 were 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 plaintiff's 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 respondents' right of action. You, gentlemen, will in the first place, inquire whether there was a majority of affirmative voices of members entitled to 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 farther 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 election made by 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 recognised by your legislature, and by the people, as the supreme law of the land. This, gentlemen, has been stigmatised 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 recognised 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 apportunity to debate, to vote, if they desire it, and for this reason it was, 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 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 believed 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.

After receiving the charge of the Court, the jury retired, and in about an hour returned, bringing in *a verdict for the plaintiff*.

SUPREME COURT

FOR THE EASTERN DISTRICT OF PENNSYLVANIA.

MARCH TERM—1839.

The Commonwealth at the suggestion of James Todd, and others, *vs.* Ashbel Green and others.	*July Term*, 1838. No. 60.

On motion of F. W. Hubbell for the defendants, the court grant a rule to show cause why a new trial should not be granted.

Specifications of points on which 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. His honour, the judge, erred 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. His honour, the judge, erred in not charging the jury, upon certain points, submitted to him in writing, by the defendants' counsel; the points so submitted, are hereto annexed.

4. His honour, the judge, erred 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. His honour, the judge, erred 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. His honour, the judge, erred 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. His honour, the judge, erred 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. His honour, the judge, erred in rejecting the deposition of Dr. Eli-

phalet Nott, except such part merely as narrated the transactions that took place at the organization of the General Assembly of 1838.

9. His honour, the judge, erred 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, Genesee, 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. His honour, the judge, erred in charging the jury that the Plan of Union (so called) of 1801, was constitutional.

11. His honour, the judge, erred 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:

First. Because they were important standing rules, and adopted without being submitted to the Presbyteries.

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.

12. His honour, the judge, erred 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. His honour, the judge, erred 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. His honour, the judge, erred in charging the jury, "That that part of the agreement, (Plan of Union) that the standing committee of the Congregational Churches, consisting partly of Presbyterians, and partly of Congregationalists, may or shall attend the Presbytery, &c., 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. His honour, the judge, erred 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. His honour, the judge, erred 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. His honour, the judge, erred 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. His honour, the judge, erred 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 recognised 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. His honour, the judge, erred 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. His honour, the judge, erred 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. His honour, the judge, erred 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. His honour, the judge, erred 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. His honour, the judge, erred 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. His honour, the judge, erred 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. His honour, the judge, erred 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. His honour, the judge, erred in charging the jury that the proceedings of the General Assembly of 1837, in regard to four Synods, were not, nor was any part of them, conclusive in this collateral inquiry.

27. His honour, the judge, erred in charging the jury that to effect the objects proposed by the disowning resolution of 1837, it was necessary that citations should have issued to the Presbyteries within the bounds of these Synods; and that all the other judicial process prescribed in the book of discipline, should have been resorted to.

28. His honour, the judge, erred in charging the jury that the disowning of these Synods, was depriving electors of the 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. His honour, the judge, erred 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. His honour, the judge, erred 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. His honour, the judge, erred 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 contravention 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. His honour, the judge, erred 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, unlike legislative bodies, their decision is the subject of revision; and that ecclesiastical judicatories are subject to the control of the law.

33. His honour, the judge, erred 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. His honour, the judge, erred 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. His honour, the judge, erred 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. His honour, the judge, erred 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. His honour, the judge, erred 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. His honour, the judge, erred in repeatedly stating to the jury, "That sixty thousand communicants had been cut off from the body of the Presbyterian Church," there not being any evidence to that effect.

39. His honour, the judge, erred 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. His honour, the judge, erred 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. His honour, the judge, erred 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. His honour, the judge, erred 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. Elliot, 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. His honour, the judge, erred 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 proceeded against him for a breach of privilege, or they might depose him on the ground of partiality and injustice."

44. His honour, the judge, erred 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. His honour, the judge, erred 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 privileged questions, such as the appointment of a Committee of Elections, might give way. The cry, therefore, of "Order!" from the Moderator, or from any member whatever, under such circumstances, would be disorderly."

46. His honour, the judge, erred 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. His honour, the judge, erred 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. His honour, the judge, erred 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. His honour, the judge, erred in charging the jury, "that the roll of members reported by Mr. Krebs, and Dr. McDowell 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. His Honour, the judge, erred in charging the jury, "that the existence of a house competent to perform all the functions of the General Assembly, does not depend upon the observance or non-observance, of the standing orders of the house. You must take this opinion with qualifications, &c."

51. His honour, the judge, erred in charging the jury, "in application to this case, that affirmative testimony is more to be relied on, than negative testimony."

52. His honour, the judge, erred 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 Assembly 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. His honour, the judge, erred 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.

Additional Specifications of Points, on which the Defendants will rely on the motion for a new trial.

1. 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.

2. The language of the moderator in the preliminary Assembly of 1837, in addressing the Rev. Mr. Squier, was not precisely or even substantially the language quoted by the judge.

3. 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.

4. 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.

5. 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 a suspension of effectual measures, and that any thing which occurred at such a juncture was without operation or effect.

6. 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 recognised, &c.; yet he refused to permit evidence to be given by the defendants of the circum-

stances that attended that organization, and of the intention of the "New-school" party, as manifested by their preliminary acts and declarations.

7. 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.

8. 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.*

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, Genesee, 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 intregal 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 powers 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 this 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 guaranteed 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 commissions, 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, recognise 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 Mr. 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 for 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 resolution readmitting 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.*

On Friday, March 29th, on motion of the defendants' counsel, the court granted a rule to show cause why a new trial should not be allowed, and the above reasons, or specification of points on which the defendants intended to rely, were filed.

On Monday, April 8th, the court fixed Wednesday, April 17th, for the argument on the motion for a new trial, a motion having previously been made by the defendants' counsel, that a day might be named, and the court having taken time to consider the subject.

WEDNESDAY MORNING, April 17th.—10 o'clock.

Agreeably to the appointment of the court, the argument on the motion for a new trial was commenced by Mr. Hubbell, on the part of the respondents. On the bench were their Honours John Bannister Gibson, Chief Justice, and Molton C. Rogers, Charles Huston, and Thomas Kennedy, Associate Judges. These sat during the whole argument. Chief Justice Gibson had previously announced that his Honour Thomas Sergeant, the other Associate Judge, would not sit in the case, because as one of the trustees of the First Presbyterian Church, (Mr. Barnes') he had participated in transactions arising out of the controversy between the Old and New School parties, and because his feelings were otherwise interested in the result of the cause.

MR. HUBBELL'S ARGUMENT.

The case involves directly about $175,000, and interests of a different kind to an incalculable amount. This, alone, is a reason why the opportunity of another investigation should be given.

The case made by the relators falls under two heads: the acts of the Assembly of 1837; and the organization of the Assembly of 1838. The first division but ancillary to the other, or explanatory of it, and so considered by Judge Rogers. The relators contend that the exclusion of certain commissioners in 1838, was the result of a conspiracy between the Moderator, clerks, and a portion of the Old-school, to carry out certain acts of 1837, which were illegal and void.

They admit that those acts did not destroy the Assembly in 1837, and that an Assembly, with full capacity to act, might have been organized in accordance therewith in 1838; but contend that the exclusion in 1838, consequent upon the acts of 1837, justified their measures, which they now say were merely the removal of the Moderator and clerks for their misconduct.

They allege that the Assembly had a right to remove, and did remove those officers; that, though in fact a majority of the Assembly took no part in the proceeding, considering and treating it as a disorder, their silence, when the vote was put, must be construed into acquiescence. Their whole cause depends on the proposition, that the majority, by intendment of law said, 'Yes,' when they did not say any thing, because

they did not consider the question put to them, and when it is clearly in proof that if they had said any thing, they would have said, 'No.'

If the Assembly had a right to remove their officers, and did remove them, the majority acquiescing in the act, why give any reason for the removal? Why bring forward the acts of 1837?—unless to prejudice the mind. If it was proper to bring in those acts at all, they could justly come in only as offered in justification of our conduct.

No doubt the Old-school had a majority in the Assembly of 1838, even taking into account the rejected commissioners. *Mr. Krebs' test. ante*, 164. *Dr. McDowell*—210. *Dr. Patton*—55. *Dr. Mason*—93. They also had a majority in 1837. These Assemblies were a fair index of the comparative numerical strength of the two parties. In 1837, a great struggle, between the two systems of theology known to exist in the Church, was anticipated. No doubt the system of the Old-school, who adhere strictly to the standards, is orthodox, and that of the New-school, if that party, the individuals of which depart in very different degrees from the standards, can be said to have a system, is heretical. Testimony in regard to this difference of creed overruled by Judge Rogers. *Ante*, 193. To the General Assembly it belongs to decide in all controversies about doctrine. *Ante*, 31. From it there can be no appeal. *Ante*, 188.

All milder measures were tried by the Old-school in 1837, before resorting to those complained of. *Ante*, 37–45. But the terms proposed by the other side were inadmissible. I now come to the consideration of the acts of 1837, improperly called "acts of excision," viz. the declaration that the four Synods of Utica, Geneva, Genesee, and the Western Reserve, were no part of the Presbyterian Church.

The chief source of difficulty in that Church had, before 1837, been discovered to be the "Plan of Union" of 1801, by which Congregationalists were admitted to partake of the benefits of Presbyterianism, without joining our Church, and to exert an influence in our judicatories, though not submitting to their authority. Their admission was a violation of the principles of Presbyterianism, and had greatly disturbed the order and affected the purity of the Church.

The essence of Presbyterianism is Calvinistic doctrine, and government by ruling elders. A church deficient in either is not a Presbyterian church. A Congregational church has no ruling elders, but is governed by the body of its male members. There are other important differences between the two Churches.

The "Plan of Union" (*ante* 49) marred the Presbyterian structure, introducing disorders widely into its system. It was unconstitutional; for it introduced into the Church congregations without ruling elders; it permitted unordained lay delegates to sit in the Presbytery; and was in other points opposed to Presbyterian principles. *Form of Gov. Chaps.* VIII. IX. X. &c. *Ante* 23, 4, 155.

It cannot be regarded as an alteration of the Constitution, for it was never submitted to the Presbyteries. *Form of Gov. Chap.* XII. *Sect.* 6. *Ante*, 136. And no such change could have been made, even with the concurrence of the Presbyteries, because a violation of the charter granted in 1799. *Ante* 21. Of course then the Presbyteries could not by acquiescence make it good; though length of time is no proof of their acquiescence, unless knowledge and opportunity sufficient to have abrogated it

be shown to have existed. There is clear proof that the facts of the case were disguised and misrepresented by the Presbyteries within the four Synods, in their reports. At any rate the question of acquiescence was a question of fact, yet Judge Rogers took it from the jury. *Ante*, 465.

The "Plan of Union" was grossly abused; but the whole of the mischiefs growing out of it were not disclosed until from 1835 to 1837, chiefly because of the misrepresentations of the Presbyteries formed under it themselves. In 1837, of the one hundred and thirty-nine churches in the Synod of the Western Reserve, one hundred and nine were either Congregational or mixed; and two-fifths of those in the other three disowned Synods were of the same character. Yet these all, under the guise of Presbyterian churches, were represented in Presbytery and in the Assembly. This we offered to prove at the trial, and are therefore entitled to take it for granted. *Ante*, 182, 3. The general operation of the system, and some of its abuses are in evidence. *Mr. Squier—ante*, 71, 2. *Ante*, 27, 8. *Min.* 1837, 521, 3.

The "Plan of Union" was plainly not a contract: it wanted both competent parties and consideration; and it was clearly a mere temporary arrangement. Judge Rogers decided that either party had a right to abrogate it. *Ante*, 465.

The impugned acts of 1837 were the abrogation of the "Plan of Union," and the declaration, that, in consequence thereof, four Synods were not a part of the Presbyterian Church. *Ante*, 37, 44, 46.

A majority of the Assembly of 1837, and a still greater majority of the Assembly of 1838, were Old-school. This shows the sense of the Church in regard to the measures of 1837.

A great deal has been said about the funds contributed by the Presbyteries belonging to the four Synods. See the propositions of the New-school in regard to funds. *Ante*, 42. We offered to prove that those Presbyteries had received far more than they had ever contributed. *Ante*, 185.

It is said we ought to have proceeded judicially against the Synods; and Judge Rogers, by mistake, says that this was attempted and *abandoned*. *Ante*, 38, 468. For what could they have been tried? For being Congregational? That was no crime. It was impossible to proceed criminally against such bodies. How could the process prescribed in the Constitution be applied to them? *Ante* 28, *et seq.* There is no provision for the case of a judicatory, excepting a process in the nature of a *mandamus*. *B. of Discipl. Chap. VII. Sec.* 1. *Nos.* 5, 6.

The "acts of excision," as they are called, were nothing more than a dissolution of the four Synods and some of their Presbyteries. The only persons excluded are Congregationalists. The Assembly has the power to erect Synods and Presbyteries. *Form of Gov. Chap. XII. Sect.* 5. *Ante*, 347. The power to dissolve them is consequent upon this, and has been frequently exercised. *Ante*, 47, 347, 405–6. See opinion of Mr. Squier—*Ante*, 159. See *Assem. Dig.* 55, *et seq.* This is a legislative and not a judicial power. The acts of 1837 may be justified, as an exercise of the power of the Assembly to judge of the qualifications of its own members, and of their electors.

Court adjourned.

THURSDAY MORNING, April 18th—10 o'clock.

The so-called excision was but a dissolution. The rights of all Presbyterians were saved by the fourth resolution. *Ante*, 46. We could not get this properly before the jury. Judge Rogers gave them only a part of it—that relating to the restoration of Presbyteries. *Ante*, 467. That the Assembly has legislative power, is proved by its whole history.

By the operation of the "Plan of Union," Congregationalism had become so intimately blended with Presbyterianism, in the four Synods, that their dissolution was the only effectual mode of purging them.

We have been compelled to go into the consideration of the acts of 1837, though we do not consider them material to the issue. We next take up the second part of the case—the organization of the Assembly of 1838.

Even supposing the acts of 1837 void, they did not destroy the Assembly of that year, as was acknowledged by the opposite party, by their organizing themselves in 1838, at the time and place fixed by that body on the last day of its session; and by their recognising the validity of an election of trustees made after the Synod of the Western Reserve had been exscinded. *Ante*, 45.

Each Assembly is dissolved at the end of its session, and a new one summoned. *Ante*, 141, 155. So the Assembly of 1837 was dissolved. *Ante*, 141. Each Assembly is independent of every other, except that the Moderator and clerks of each are continued in office to organize the succeeding body. *Ante*, 156, 7.

No member of the Assembly can vote until his name has been enrolled. *Ante*, 155.

In 1826, certain rules for the organization of the Assembly were adopted, to go into effect, if a proposed change in the Constitution should be approved by the Presbyteries, and were sent down to the latter with the recommendation of the constitutional amendment. The Presbyteries returned the whole with their approval. These rules, then, though not a part of the Constitution, were concurred in by the Presbyteries. According to them, as subsequently amended, the process of organization involves,

1st. The duty of the Moderator: To constitute the Assembly by prayer. By a rule above referred to, he is to preside and keep order until a new Moderator be chosen.

2d. The duty of the Committee of Commissions, or clerks: To receive the commissions, enroll the names from those which are constitutional and regular, and report the roll to the Assembly. It has been the practice also to report on a separate list, the names of those whose commissions were otherwise.

3d. The duty of the house: To appoint, as its first act, a *Committee of Elections*, whose duty it is to report on all informal and unconstitutional commissions, as soon as practicable. *Ante*, 155, 6.

The clerks being a standing Committee of Commissions, they receive the commissions before the meeting of the body. In 1838, the commissioners presented their commissions; and, in accordance with the acts of 1837, the clerks rejected those from the exscinded Synods. *Ante*, 158, *et seq.* Their doing so was not the result of any pledge, (*Ante*, 65, *et*

seq.) though, if the contrary could be shown, it would make no difference. As mere ministerial officers, they were bound to regard the acts of the Assembly as valid. They therefore did not violate their duty.

Did the Moderator violate his? The first application on the part of the rejected commissioners was made through Dr. Patton. This was before the report of the roll—before there was any house. Judge Rogers decided that the Moderator was right in his decision respecting Dr. Patton. *Ante*, 473.

Dr. Mason's motion was out of order. 1st. Because it interfered with a compliance with the Moderator's call for commissions not yet presented, and was not itself responsive to that call. *Dr. Mason*, 88; *also ante*, 111, 161, 176, 178, 179, *Dr. Elliott*, 197. Compare *Minutes* (*Old-school*) 1838—*Ante*, 220, with Dr. Elliott's explanation—*Ante*, 200, 1. Mr. Joshua Moore was actually coming forward at the time in obedience to the call. 2d. Because the report on the roll was not complete, until those to whom the Moderator's call was made, had the opportunity of being enrolled. 3d. Because the first act of the house must be the appointment of a Committee of Elections.

The Moderator of course had a right to decide the question of order. The present constitution gives no right of appeal from his decision, though the former constitution did. *Ed.* 1806 *p.* 426. There is no right of appeal where none is given. *Jeff. Man.* (*Sutherland's*) 116. An appeal is given by the constitution when the house is acting in a judicial capacity. *Book of Discip. Chap. IV. Sec.* 22.

There was as yet no house completely organized, to which any question, on either a motion or appeal, could be put. If one had been put, Mr. Moore's privilege, and the privilege of all similarly situated, would have been violated. Dr. Mason acquiesced in the decision. He sat down without complaint.

Mr. Squier's application intervened between Dr. Mason's motion and Mr. Cleaveland's. He was clearly out of order: so Judge Rogers decided. No person not enrolled is a member, and none but members can speak. *Ante*, 155, 474.

Suppose the Moderator wrong in his decision as to Dr. Mason—suppose it was a breach of privilege—that does not make Mr. Cleaveland right. The opposite party now say, that Mr. Cleaveland's motion contemplated only the deposition of one Moderator and the appointment of another, by the vote of the whole house; and that this change was so effected. We contend that it contemplated a new and separate organization, to be afterwards set up as the true General Assembly, but which should be effected without our concurrence, or any regard to our votes. That Mr. Cleaveland's purpose supposed the rejection of the exscinded commissioners by the house, itself.

If we can establish this position it puts an end to their case; for then it appears that our opponents did not mean to do, what they say they did; that they did not put to us the question on which they say we voted aye, by our silence; while they had no reason for doing what they really did, as the *house*, even on their own showing, had done nothing wrong: indeed Mr. Phelps says the *house* would have admitted the rejected commissioners. *Ante*, 119.

Court adjourned.

FRIDAY MORNING, April 19th—10 o'clock.

The Old-school had a large majority in the body. At the time of Mr. Cleaveland's motion, we had 145, and the opposite party about 119, counting the 50 commissioners from the exscinded bodies, and 4 from the dissolved Third Presbytery of Philadelphia. Our number afterwards increased to 159, and theirs to between 120 and 130. *Ante*, 54, 84, 93, 164, 210.

The proof that the New-school intended a new and separate organization is as follows:

Their plan was preconcerted: it was formed before the misconduct of the Moderator was known. *Ante*, 55, 190, 191. Mr. Cleaveland's paper was prepared before-hand. All the New-school members seem to have considered every one present who had a commission entitled to vote, and accordingly, it appears that the rejected commissioners did vote; which was an evident disregard of the partial organization already effected. *Ante*, 92, 215. Mr. Cleaveland's use of the word *we*, proves that he addressed his motion to the New-school only. *Ante*, 223. See also the same manner of expression in the Pastoral Letter of the New-school. *Ante*, 190, 1. All Mr. Cleaveland's introductory remarks prove the same thing. He did not say a word about the misconduct of the officers; nor a word about displacing Dr. Elliott; nor a word about the breach of Dr. Mason's privilege. The New-school minute contains only a part of his remarks: other parts given by different witnesses, are still more conclusive as to this point. *Ante*, 101, 173, 174. If the Old-school had voted against the motion, their votes would have been disregarded. To show this we asked Mr. Gilbert a question; but it was overruled by the court. *Ante*, 87.

But suppose the object of Mr. Cleaveland's motion to have been what is now contended, still the whole proceeding was disorderly, and no valid result was attained. This for the following among many reasons.

1st. According to a standing rule or order of the house, the first business was the appointment of a Committee of Elections. As to the force of standing orders, see 2 *Hatsell*, 113.

2d. The question was not put as a question of breach of privilege, nor so understood; nor was any mention made of the misconduct of Dr. Elliott, nor was his deposition proposed. The Old-school thought they had nothing to do with the proceedings. If the object of the motion was what it is said to have been, that object was not clearly made known to us: the motion was deceptive and fraudulent.

3d. Mr. Cleaveland did not address the Moderator, nor was the question put by the Moderator. *Form of Gov. Chap.* XIX. *Sect.* 2. *Ante*. 150.

4th. If it was improper that the Moderator should put it, it ought to have been put by the clerks. *Ante*, 78. 2 *Hatsell*, 211, 212, *with note*. 6 *Grey*, 406, 448. *Jeff. Man.* (*Sutherl.*) 104. *Sutherl. Man.* 71, 2.

5th. Instead of choosing Dr. Beman to preside, they should have chosen the person who had been Moderator last before Dr. Elliott, and

who was present. This rule was adhered to in 1835. *Ante*, 105, 151. Though Dr. Elliott was not absent, yet the chair was treated as vacant.

6th. No opportunity was given for debate. We were taken by surprise, and every thing hurried through with unprecedented despatch.

7th. Mr. Cleaveland was repeatedly called to order, not only by the Moderator, but also by the members.

8th. All the witnesses have agreed that there was great noise and disorder; and nearly all the Old-school witnesses, that they were not able to hear, and did not know what was going on. In order to take advantage of the principle that silence is acquiescence, since the question was put at an unusual time and by an unusual person, it is necessary to prove that we could hear, and had full opportunity to act.

Mr. Hubbell then proceeded to read the specification of points which had been filed. *Ante*, 483. The consideration of most of these had been involved in the previous argument: a synopsis of his remarks on the more important of the others we here give.

1, 2. *Ante*, 86, 87. We did not contend that the New-school meant "to effect an *ex-parte* organization, with a view to a peaceable separation of the Church," (*Ante*, 480) but that they intended, *by their own votes*, to organize an Assembly, to be afterwards set up as the true General Assembly.

6. *Ante*, 201, 2.

7. Here Judge Rogers said, that his recollection was, that the whole of the Minutes (O. S.) of 1838, had been given in evidence; and this statement corroborated by that of the counsel for the relators, was taken by the court. *Ante*, 221, 430.

8. That part of Dr. Nott's deposition which was excluded, related to certain communications with the New-school commissioners, assembled in their caucus, or meeting for consultation, and would have shown conclusively that they intended an *ex-parte* organization.

25. Something farther was done, for the committee appointed reported, that in their judgment, the subsequent action of the Assembly had made it inexpedient for them to cite any inferior judicatories, and this report was accepted. *Min.* 1837, 496.

36. A pure question of law referred to the jury.

38. Mr. Randall showed that this was a mistake; that the numbers cut off had been given in evidence. *Ante*. 36.

45. A question of fact taken from the jury. *Ante*, 477.

53, 54. Chief Justice Gibson said in regard to these two points, that he was surprised to find them urged; that he had supposed the object of asking a new trial, was, that the great principles involved in the case might be settled; that it was under his direction the verdict had been so entered, and, if necessary, he would order its form to be amended, Mr. Hubbell replied, that as counsel for the respondents he had not felt at liberty to overlook the objection.

Court adjourned.

MR. MEREDITH'S ARGUMENT.

MONDAY MORNING, April 22d—10 o'clock.

It has been said, that the amount of property in dispute is upwards of one hundred and seventy thousand dollars; but this, it will be remembered, is not to be taken away from any individual: no one will suffer in pocket, be your judgment what it may. From all control over this large amount of property, we have been excluded.

The final decision of the case, however, will, in its effects, go much farther than we might be led to suppose, by this estimation of the amount directly in question. It may affect rights of property in every individual church throughout the land: for in each church, the issue here presented, must in some way be tried and decided.

This is a motion for a new trial: the questions which it involves, must be determined by a reference to the law of corporations. In the whole course of the argument on the other side, not one single case or authority has been quoted, which gives any precedent for the most extraordinary conduct of the opposite party, in cutting off a large portion of their brethren.

The great question on which the decision of this case must depend, is, Was Dr. Beman duly and lawfully elected Moderator of the General Assembly of 1838? The solution of that question will solve the whole difficulty.

We allege,

1st. That at the commencement of the sessions of the General Assembly of 1837, there were twenty-eight Presbyteries within the bounds of the four Synods of Utica, Geneva, Genesee, and the Western Reserve, known as the exscinded Synods; which Presbyteries were regularly constituted, and were in full connexion with the General Assembly; their commissioners being received, and they themselves recognised in a variety of ways. They were not constituted under the operation of any plan of union whatever, but were regularly created or admitted, in the ordinary manner, as all other Presbyteries are created or admitted, according to the constitution and laws of the Presbyterian Church.

2d. That the Assembly of 1837 attempted to disfranchise all these Presbyteries by certain acts, called the exscinding acts, which were unconstitutional and void.

3d. That the clerks of the Assembly of 1837, who were continued in office to assist in the organization of the Assembly of 1838, violated their duty, in attempting to carry into effect these unconstitutional and void acts of 1837.

4th. That the Moderator of 1837, continued in office for the same purpose, united with the clerks in this illegal attempt, and thus violated his duty.

5th. That the Moderator was thereupon regularly removed from office, by a vote of the body, lawfully taken.

In 1799, when the charter was granted, the Assembly was composed in part of members of Congregational Associations, who both sat and voted. The plans of union by which this was allowed, were certainly

more objectionable, according to the doctrines of the other side, than the plan of 1801. This last is to be regarded only as a relaxation of discipline; and the judicatories of the Church are at liberty to allow of such relaxations. *Form of Gov. Chap. X. Sect.* 8—*Notes. As to the authority of these notes, see Assem. Dig.* 126.

1st. These Presbyteries were constituted in the regular and ordinary manner: some of them by the General Assembly, and others by different Synods. *Assemb. Dig.* 57, 8. There is no evidence that one of them came in under any plan of union. Fourteen of them were parties to the new Constitution formed in 1821: their rights, therefore, were similar to those of the thirteen old states.

2d. In 1837, the Assembly attempted to disfranchise these Presbyteries by certain resolutions, which were null and void. The resolutions *profess* to exclude them entirely from the Church. After being excluded, they were indeed told that in a certain way, and on certain conditions, they might be restored, but even this provision was deceptive.

They were excluded without trial, though the reason of their exclusion was their being charged with an offence, for which they were not liable to punishment, until regularly tried and convicted. This is the principle of all law. If they were put out without reason, the act was void; if for sufficient cause, that cause must have been some offence against the Church. Indeed, they were distinctly charged with gross irregularities. The want of ruling elders was certainly an ecclesiastical offence. It is said that it is no offence to be a Congregationalist; but it is an offence: as regards the Presbyterian Church, it is *heresy*. The Form of Government provides for the trial of offences, and secures the right of trial to the meanest individual: if it did not, the common law requires a trial in every such case. *Assemb. Dig.* 324, 5.

We deny the right of the General Assembly to dissolve a Presbytery. The constitution, even if it gives power to erect, gives no power to destroy them.

The Assembly did take measures to cite these Presbyteries before them. They had rights in the nature of a franchise, and could not be excluded or disfranchised without citation. *Bagg's case*, 11 *Coke's Rep.* 99. *Commonwealth, v. St. Patrick Soc.* 2 *Binney's Rep.* 448. *Commonwealth v. Guard. of Poor*, 6 *Serg. & Rawle's Rep.* 496. *Symmes v. Regem, Cowper's Rep.* 489, 507.

The exclusion was founded on a false pretence; and even if the reason given had been the true one, it would not have been sufficient. The Presbyteries did not, and could not, come in under the act of 1801. That authorized standing-committee men to sit in Presbytery only in a certain specified case—that of an appeal.

The commissioners from the exscinded Presbyteries could not be restored by *mandamus*. A *mandamus* could not be directed to the Assembly.

3d. The clerks of the Assembly of 1837 violated their duty in attempting to carry out the void acts of that body. It was their duty according to the rules of the Assembly, (*Ante*, 156) to put the names of all whose commissions were regular on the roll; and according to uniform practice, they were bound to report all whose commissions were irregular on a separate list. On one of these lists every commission presented

should have been reported. It was the duty of the clerks to put the names of the exscinded commissioners at least upon the roll of irregular commissions.

4th. The Moderator also violated his duty. He united with the clerks in an attempt to carry into effect the unconstitutional resolutions of 1837. His very text (*Ante*, 222) showed his intention. He was guilty of misconduct, 1st, in not admitting the rejected commissioners to their seats; 2d, in refusing to put the question on either Dr. Mason's motion or appeal.

Dr. Mason's offer was in response to his call, which was for commissions not yet enrolled. That this was the meaning of the call is testified by the Old-school Minutes, (*Ante*, 220) by Dr. Elliott himself, (*Ante*, 197) and by Dr. Plumer, (*Ante*, 195.)

The rule for the appointment of a Committee of Elections is not such a standing order as may be enforced by any member's merely rising and calling for its enforcement. It could be not enforced without a motion; and a motion made might be negatived. A question of breach of privilege has precedence of all others. 2 *Hatsell*, 113, 4. 4 *Cobbett's Parl. Hist.* 460, 591. In Parliament when a member appears to take the oaths, all business whatever is suspended until he is sworn. 2 *Hatsell*, 85. The right of a member to sit is always a question of privilege; and Dr. Mason's was therefore such a question.

Dr. Mason had undoubtedly a right of appeal. It has been said that he had not. Under the old constitution it was expressly given. See the Digest, 24, where by a rule of the Assembly an appeal is allowed. The practice of the Assembly is conclusive on this point. *Min.* 1837, 441—*Ante*, 45.

Court adjourned.

TUESDAY MORNING, April 23d—10 o'clock.

A motion made to admit members to their seats must be received even while another question is pending: a question of privilege is entitled to precedence at all times; it is preferred even to a call for the orders of the day, which may be made while a question is pending. 2 *Hatsell*, 108, 113, 4, 200.

5th. The Moderator was lawfully removed by a regular vote of the body. Mr. Cleaveland's motion was heard. For this I refer to the testimony of the witnesses on the other side. *Dr. Phillips*—*Ante*, 167; *Dr. Harris*, 170; *Dr. Miller*, 173; *Mr. Brown*, 175; *Mr. White*, 176; *Dr. Elliott*, 199. There can be no doubt whether the Moderator could be removed: he is the mere servant of the house, not its master.

The house was not taken by surprise: it sanctioned the censure cast upon Dr. Elliott, the clerks, and the small clique of the Old-school party by which they were supported.

The motion was lawfully *made*, *put*, and *carried*. The Moderator had already refused to do his duty; had refused to put a motion designed to effect the same object. Besides the motion proposed his own deposition. The clerk cannot put a question unless by order of the house. 2 *Hatsell*, 201, 237, 207, 227. 4 *Cobbett*, 589, 1002. In 1835, (*Ante*,

78.) Dr. Ely put the question, not as Stated Clerk, but as a member of the Assembly.

The question was lawfully carried. Those who were silent acquiesced. Only those who actually voted can be counted; and of those who voted in 1838, no doubt there were a majority for Dr. Beman. *Oldknow v. Wainwright,* 2 *Burrowes' Rep.* 1017, 1020. *Claridge v. Evelyn,* 5 *Barn. and Adolph, Rep.* 86. *Rex v. Monday, Cowper's Rep.* 530. *Rex. v. Parry,* 14 *East's Rep.* 559, *in notes* 561. *Rex. v. Hawkins,* 10 *East,* 214.

The following authorities also cited: 2 *Cobbett,* 487, 488, 504, 552, 585, 694. 4 *Cobbett,* 898, 925, 929, 1092.

It is to be hoped that your decision will, by confirming the verdict of the jury, produce the happy effect of restoring peace and unity to this divided Church. I would beg leave to recommend to the notice of the reverend gentleman who is to preach at the opening of the next Old-school Assembly, this appropriate text: "Finally, brethren, 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." *Philipp.* iv. 8.

MR. RANDALL'S ARGUMENT.

The question raised by the pleadings is, whether Dr. Green and his three co-defendants were trustees of the General Assembly of the Presbyterian Church in the United States of America, on the 24th of May, 1838. The verdict of the jury was that they were not. That this question should be tried again is now asked.

It involves two questions: the first in regard to the exscinding resolutions of 1837, and the second in regard to the deposition of Dr. Elliott from the office of Moderator, and the appointment of Dr. Beman in his place. This court has a right to examine both.

The first is the most important: the second but ancillary and subordinate.

To understand the former, it is necessary to understand the constitution of the Church. *Form of Gov. Chaps.* VIII. IX. X. &c. *Ante,* 23, 4, 155. A Presbytery may be composed of ministers alone; may exist without embracing a single church. *Chap.* X. *Sect.* 7—*Ante* 23. *Assem. Dig.* 53, 4. This shows that the existence of Congregational churches within the exscinded Synods does not vitiate their constitution.

It is evident from the history of the General Assembly for some years past, that the two parties are very nearly equal in strength: which side has the real majority is still undecided. The differences between the two are rather in words than any thing else.

The "Plan of Union" existed previously to the Revolution; and having been suspended during the war, was renewed by the invitation of the General Assembly, immediately on the passage of the act incorporating

that body. Similar arrangements had been proposed or entered into by the General Assembly, with the Associations of Vermont, Massachusetts, and New Hampshire, and with the Dutch Reformed and Associate Reformed Churches.

The objection, that the "Plan of Union" should have been sent down to the Presbyteries for approval, is of no force. The provision of the Constitution, that 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. The practice of the General Assembly has been uniform on this subject, in all instances. Resolutions, admitting delegates from corresponding bodies to sit and vote, have been adopted and repealed, without sending them down to the Presbyteries. The regulations admitting ordained ministers and elders from other Protestant churches, without re-ordination, have been adopted in the same manner, although the Assembly has for a series of years heretofore refused such admission. A considerable portion of the present church hold 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 several committees, appointed by the Assembly of 1837, (Dr. Junkin.) Dr. Green has declared, that the legality of the union with the Associate Reformed Church has never been denied. At all events, an acquiescence of thirty-six years removes all such objections. The amended constitution of 1821 incorporated all these materials, as a part of the Church. Every Presbytery in the Church has thus recognised the "Plan of Union," and this subsequent ratification amounts to the same thing as a previous consent.

What is the "Plan of Union?" It provides two things only, which are of any importance in the present inquiry: 1st. That a Presbyterian clergyman may preach to a Congregational church; or to a congregation partly Presbyterian and partly Congregational: 2d. That in the case of any difficulties arising between him and his people, or between a mixed church and one of its Presbyterian members, certain modes of arbitrament may be adopted by the parties, for an amicable settlement of their disputes; one of which, in the case of an appeal to the Presbytery, permits a member of the standing committee of a mixed church to sit and vote as an ordained elder.

A minister acquires his right to sit in Presbytery by his ordination; and that right is entirely independent of his being the pastor of any church. This is exemplified in the case of an evangelist who is ordained, without being set over any congregation, but may preach as a missionary to all, Congregationalists as well as Presbyterians, or even to infidels and pagans, still retaining his seat in Presbytery. A minister too, who resigns his charge, does not thereby lose his seat.

The exscinding resolutions take it for granted, that the five hundred and nine ministers, five hundred and ninety-nine churches, and sixty thousand communicants, all came in under the "Plan of Union;" but this is not so. Indeed, not a single minister could be admitted under it. It cannot be disputed, that all these five hundred and nine ministers, at least, are strictly Presbyterian. The exscinding resolutions, then, must stand on their own merits: they receive no support from the previous abrogation of the "Plan of Union." It has been said, that in the Synod

of the Western Reserve, containing, at the time of the excision, one hundred and thirty-nine churches, there were but thirty Presbyterian churches. This we deny: there is no proof of the fact.

Court adjourned.

WEDNESDAY MORNING, April 24th—10 o'clock.

By whatever name the exscinding resolutions may be called, their true character cannot be a matter of doubt. What was exscinded? Not only the four Synods, but all their component parts: all the Presbyteries, all the Presbyterian churches, and every individual Presbyterian within their limits.

They were cut off without accusation, proof, or trial. The few persons only who were present in the Assembly, as the representatives of the whole, had the least notice. The news of the actual excision was the first that reached the rest. Men born in the Church, patriarchs of seventy years, found themselves excluded, without having received any intimation that their rights were a subject of dispute.

The whole region embraced within the four Synods, was declared to be infected ground—was desecrated. Expulsion from the Church depended merely on the domicil of the individual. Had Dr. Green 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.

In the year 1799, before the adoption of the present constitution, the Presbytery of New York included twenty-one churches, of which eleven are among the number of exscinded churches. Some of these churches were in existence before any individual who voted for the exscinding resolutions was a member of the Church; and they have continued to exist without interruption, and have been recognised by the General Assembly without any regard to the "Plan of Union." The Assembly of 1837 admitted, that whole Presbyteries and churches within the proscribed and infected districts, were regular and in good standing; and provided also a mode for their re-admission into the Church. The exclusion for a day, a month, a year, or for life, was equally a violation of the rights of the exscinded bodies or individuals. The mode provided for regress into the Church is illusory, as to gain re-admission, it is necessary to undergo the same examination which persons undergo on their first application.

The Presbyteries within the exscinded Synods have contributed at least $200,000 to the different funds of the Church.

The excision is said to have been but a dissolution of the four Synods, and the Presbyteries attached to them. It is however a very different thing. Besides, we deny that the Assembly has the power to dissolve inferior judicatories, where intermediate rights have become vested. The power to create does not necessarily carry with it the power to destroy. Can Congress turn the State of Missouri out of the Union?

The second question—that in regard to the organization of 1838—is subordinate to the other, and involves no great principles.

The clerks of 1837 were pledged to carry out the acts of that year. The Minutes (Old-school) of 1838, speak of a pledge. *Ante*, 65. It

was their duty to disregard those acts and to put the exscinded commissioners on the roll. The refusal of the clerks either to enrol them or 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 into effect the unconstitutional resolutions of 1837.

The Moderator is the mere servant of the house: he can do no act but by the will of the majority. An appeal from his decision is the right of every member. *Jeff. Man.* (*Sutherland*) 122. Dr. Elliott's refusal to put the question on Dr. Mason's appeal was a breach of privilege, which authorized any member of the Assembly to move for his dismission from office.

The Moderator or Speaker of any deliberative Assembly may be removed. *Jeff. Man.* 105. The Moderator of the preceding Assembly, presiding over the organization of the new body is by no means exempt from liability to removal. He sits only until a new Moderator is chosen. *Ante*, 155. Mr. Cleaveland's motion was substantially a proceeding to remove Dr. Elliott from office for this breach of privilege. It was perfectly intelligible and sufficiently loud to be heard by all. Every member had therefore an opportunity to vote, and all, who under such circumstances were silent, must be presumed to have acquiesced.

According to parliamentary rules, when the commissions of the commissioners to the General Assembly of 1838, were referred to the Committee of Commissions, they could not be restored to the Assembly for its action, but by the report of that committee. Therefore the refusal of the clerks was a gross violation of duty.

The Moderator could not without absurdity, put the question for his own removal; nor did the duty under such circumstances devolve upon the clerks. They were *participes criminis*, and would not have put the motion if they had been required.

The New-school are opposed to all exclusions. They are ready to admit even those who like Haman of old have fallen into their own snare.

Absolute identity of opinion and belief throughout the Church is not to be expected. But unimportant differences should be overruled. Or, if the two parties must separate, let them do it amicably, according to the patriarchal advice—Genesis xiii. 9. "*Is* not the whole land before thee? Separate thyself, I pray thee, from me: if *thou wilt take* the left hand, then I will go the right; or if *thou depart* to the right hand, then I will go to the left."

MR. SERGEANT'S ARGUMENT.

May it please your Honours:—We can see but obscurely what is before us—I mean what is in our presence—and judge imperfectly of the past: as to that which is future—I do not pretend to be able to say what will be the probable conclusion of this matter. I shall not, therefore, accept the challenge given in the close of the argument on the other side, and venture to predict what would be the effect of your decision to support the verdict of the jury in this case. The counsel for the relators have told us, that such a decision would be productive of peace; that it would bring together again those who are now so widely separated. But that has been tried; they were together; and after all that has been disclosed in the course of the trial of this cause, I think every one ought to be very cautious in cherishing a desire to force them together again. If I understand the subject, this is the main ground of one portion of the objection made to the decision of the court and jury—that the rights and the powers of the General Assembly, the highest and the final judicatory of the Presbyterian Church, as well as of all its subordinate judicatories, are purely spiritual and moral. It so happens, that deeming these to be matters between every man and his own conscience, in which no human tribunal has the authority to interfere, we consider an attempt to force us into any religious connexion whatever, a direct violation of our most sacred rights. We suggest now, that such an attempt would be unconstitutional, and inconsistent with spiritual liberty; that it would strike at the root of the great principle of our institutions, namely, that spiritual concerns are not to be interfered with by the civil power. These parties can never come together but by consent—never in the world, but of their own free choice. The idea of forcing one mass of people to sit at the same spiritual table with another, implies, in the first place, the power of searching into the hearts of men; for, without it, who could tell the consequences of such an union? I take it, then, that the position of the learned counsel is not correct. I go for freedom—for no force from any quarter. We shall presently see whether, notwithstanding all that we have suffered in name and character, we are not the real champions of spiritual liberty. I believe we are. And at the same time it will appear, whether the effort of the minority is not to deprive us of that liberty, to force us into an association with those whom we do not choose to be with; whether their prominent object is not to compel us to abandon all our rights, or, what is equivalent, to give up the great right of choosing our associates. An effort in itself strongly repulsive.

This is the most dangerous power that a civil tribunal has ever been called upon to exercise. Your Honours have enough to do, enough of trouble and perplexity, in determining those cases upon which you must decide. What you are here called to do, is to open for the subjects of your inquiry and labour, a new source of conflict and litigation, of

unknown extent. None can define its limits, or control the spirit of discord which it will pour forth. We have warned our opponents—not threatened, as has been intimated—we have warned them of the litigation that would follow their proceedings; but it is for litigation that they seem to have sought. Every church, Presbytery, and Synod in the land, must decide this question for itself: that is as plain as it can be. Nay, every individual Presbyterian must engage in the contest. And how will you limit the violent spirit of litigation, if the law is once thrown open to these parties? Observe what effects it has already produced. The minority of the Assembly of 1838 have certainly done a great deal, if they have accomplished what the charge of his Honour Judge Rogers decides that they have accomplished. If the matter be not too serious to joke about, following the example of those who have preceded me, in some degree, though perhaps speaking more innocently, I would say, that the proceeding by which the minority in that Assembly claim to have manœuvred the majority out of doors, was one of the greatest practical hoaxes ever seen or heard of. I mean to say that no man can look seriously at the thing, uninfluenced by any respect to who shall succeed at last, but he must so regard it. I do not speak now of the decision of the *law:* so the *facts* strike me, and so I think they must strike every one. I say that these gentlemen, if they succeed here, will have accomplished a great deal; but the rest that they will have to do—what remains to be accomplished, they will find more difficult, weightier, more distracting. Let us tell them that much trouble and confusion would be avoided if the admonition—I will not quote Scripture—the admonition to let spiritual bodies decide on spiritual questions, were duly observed. I intend to show, before I have done with the case, that this is an attempt to strip the General Assembly of that power; to place it in the hands of the tribunals of the land; and so to place it in a manner which leads, I will not say to the shame of religion, but to the disparagement and disgrace of its ministers, so far as disparagement and disgrace can be brought upon those holy officers. What length of years, what venerable character, what stock of service and of merit, will ever serve as a shield? The very first act of power performed by the new body which met in the First Presbyterian Church, was to direct a bolt at the head of the only remaining trustee of those originally incorporated by the act of 1799. Their first act was an act of rough excision. The first exercise of their newly obtained power was aimed at him who had held his office from 1799 to 1838—forty years lacking one. Your Honours may see in this the spirit with which we are threatened: you may see it even in the argument of the cause in this court. All must grant that in my learned friend's remarks upon Dr. Elliott's text, and in his offer to furnish him with a more appropriate one, the same spirit is manifested, not originating in him, but within the compass of the supposed triumphant party, who, flushed by their fancied victory, begin immediately to claim cognizance of the conscience and the heart, and charge Dr. Elliott with having, while in the performance of a solemn religious service, in the very presence of his Maker, used that text from impure motives. From the beginning to the end of the trial of this case, I am sorry to say, but say it because I felt it—during the short time that I was able to be in court, I felt, and I am sure my colleagues felt—I hope my clients did not

feel—that we were in the midst of a pelting tempest, a torrent against which it seemed almost vain to make resistance. The same spirit, may it please your Honours, has been manifested in the course of this discussion, and if at last the Assembly of 1838, and the Old-school party are condemned, it will be not because of their acts, but because we have undertaken to know what is in their hearts, and judge that we have discovered there sinister motives and designs. We, I have said, are the true champions of spiritual liberty and of the rights of conscience. And however much we may have suffered, if our cause is just, it must prevail: all must come back to the plain ground of the constitution and laws, and leave such disputes as this, which cannot be adjusted by the civil power, to the tribunals of the Church, and to Him who shall be the final judge of all.

Now, may it please your Honours, the general question which is presented in this case is, whether we are not entitled to have a new trial. Great interests are confessedly involved in it. The question, as regards our country, is one of vast magnitude—in some aspects of it, none greater can arise; and certainly there can be none in which the respective champions of the two parties are entitled to greater consideration, as regards their motives, characters, and lives. The respect due to them, I mean not to violate. I do not mean to speak a single word of any member of the New-school party personally disparaging, or calculated to wound needlessly his feelings—I am not instructed so to speak, nor would I, if I were. I will endeavour, in my reply to the arguments which we have heard, to maintain this principle inviolate, treating with the utmost respect the opinions of our opponents, so far as it may be practicable, and with respect unlimited, the opinion of his Honour, Judge Rogers. Yea, more, I will in the beginning say, that the learned judge had a most difficult and arduous task to perform. Not on account of the mere novelty of the case, though this made it essential that there should be time and opportunity for cool discussion and careful consideration. Look at the great amount of evidence contained in this paper book, that has been laid before your Honours. He must search out and gather from all this mass, and from the contrarient statements of the bar, the precise facts of the case, to which the law was then to be applied. And what were his means for the performance of his remaining duty? Was he to turn to the common law? That could give him little aid; and our own statute law none at all. This case introduced an entirely new system of laws; and though thoroughly instructed in all the principles of the law of the land, his Honour was required to gather, from the scattered fragments suddenly laid before him, in the heat and hurry of the trial, the whole law of the Presbyterian Church—a Church which has a common law and a statute law of its own, and a complete form of government, not framed however like ours, in the exact distribution of distinct powers. One while a witness occupied the stand, and gave in his testimony; then a little was read from one pamphlet, and then a little from another; then a rule of order; and then an article from the Constitution. Here was thrown in the history of a Synod, and there a map containing the names of certain judicatories, without their boundary lines. Amid all this, his Honour must suddenly catch up just what was necessary to the case, undisturbed by the din and conflict below, so that he might at last instruct the jury as to the

law that was to govern their verdict. I will not say, may it please your Honours, that it was impossible for him to comprehend the matter to his own satisfaction, in the course of a single trial: I will not undertake to measure the utmost reach of human intellect; but I will undertake to say, that I trust and believe there is no judge on this bench, who would not desire the ground thus gone over to be reviewed; and that, if he has fallen into any error, it might be corrected. I do not doubt it; and therefore I now address his Honour as freely as I do any of his associates, under the perfect conviction, that if he should see any error, he will not be the last to correct it. Now, we desire the opportunity of another trial; and the grounds of our application have been already in some degree disclosed. We undertake to show, from the history of the cause, that several parts of our defence were not allowed to have that weight which should have been allowed them. I go farther and say, that when the case went to the jury, and even before it went to them, there was a manifest prejudice in their minds against us: from what source arising, it is not necessary for me to say. If the fact that the verdict was rendered by a jury so influenced and so prejudiced, be substantiated, that of itself will be a sufficient ground for demanding a new trial. I say also, that the whole investigation, so far as it has been conducted, and the decision, to the extent to which it has gone, is a manifest violation of our Constitution—I mean the Constitution of the Church—of spiritual liberty, and of the rights of conscience. I have already adverted to this point: for an illustration of which, I must thank Mr. Randall. He has told us, that the effect of your Honours' adding your sanction to the verdict of the jury, would be to force together the two parties in this controversy. Now, if I may be allowed a few more words in reply to this, I will endeavour to suggest some views of the subject, arising out of it, tending to show the propriety—in fact, the necessity, of a strict adherence to the constitutional principle to which I have referred.

In the first place—and this must already have suggested itself to your Honours' minds—there are great difficulties and embarrassments in the way of inquiries like that in which we are now engaged, as the present case must bear witness. Is it fit that this court should entertain an appeal from the General Assembly? I do not mean now to inquire whether it is fit that such an appellate jurisdiction, where it belongs to a civil court, should be exercised. If your jurisdiction be established, you must take cognizance of the appeal. I speak of the difficulty—nay, of the impossibility, of arriving at a right conclusion in such a case. Need I point out the grounds of difficulty? I will call your attention, for a moment, to the resolutions of the Assembly of 1837, which have given rise to this proceeding—to either one, that repealing the "Plan of Union," or that exscinding the four Synods, or to both. Why, if an appeal be taken, in regard to those acts, to this tribunal, your Honours must put yourselves in the place of the General Assembly itself, and decide what you would have done in a similar case; whether, under the same circumstances, you would have pursued the same course. In this investigation, the very first blow has been aimed at the intentions and motives which governed those whose acts are called in question. They are charged with pride, a lust for power, a desire to appropriate to themselves the funds of the Church: every thing opprobrious and vile has been heaped upon them; and if finally

our opponents effect their purpose, it can be only because those acts are to be considered as done, not honestly, but with some sinister design. How can your Honours undertake to decide this point?

Again, passing by the gross injustice which was done us in the outset, I come to another point; and here I mean to be explicit. His Honour, Judge Rogers, no doubt in the press and hurry of the proceeding, after distinctly admitting, that the act abrogating the "Plan of Union," was one which the Assembly had a right to perform, goes on to characterize that act as unjust. No doubt, in the discussion of the case at the bar, one side had maintained that it was an unjust act, and the other that it was just. This probably led his Honour to inquire, not only whether the act was lawful, but also as to the other point debated. Now, I mean to contend, and therefore have brought this view before you, that where an act is not unlawful, a court has no right to inquire into the motives which influenced that act. And, for this reason; that to decide as to a man's motives, you must place yourself exactly in his position, and take the same views of every thing that he does, else you cannot judge properly. If the General Assembly has a right to do any act, it is accountable to no human tribunal for the manner in which it may choose to exercise this right. It is a fundamental doctrine, that so long as any one keeps within the precincts of his legitimate powers, he cannot in law be affected by his thoughts, words, or deeds. Your Honours have seen, that in another part of the charge to the jury—that relating to the organization of the Assembly of 1838—the learned judge has in a like manner treated Dr. Elliott, the clerks, and a portion of the Old-school party; inquiring into their motives, characterizing acts otherwise right, from the motives with which they were performed, as a conspiracy. I do not know whether a conspiracy had been charged upon us, even in the discussion at the bar. Certainly such a charge could not be applicable, it being once decided, that our acts were lawful—such as we had a right to perform.

There is great cause here for the court to ponder deeply, and examine well the ground on which they stand; and another reason for this may be added to those already mentioned. Before your Honours arrive at the end of this case, I am persuaded you will find, that if these parties are left to themselves, the public at large, and the friends of religion will not have more cause to deplore the result, than has been furnished in the present investigation. They were in their own proper arena, two parties contending for what they considered their respective rights; one remained upon the ground, while the other betook themselves to another place. The latter have appealed to a court of law, and drawing their adversaries out of their ordinary and appropriate place, have compelled them to join in the conflict and strife of a mere temporal tribunal, where are commonly dealt with matters that engage the feelings and arouse the passions—there is no telling how far the inflammation may extend. Whatever may be the result or the influence of this proceeding, if hereafter it be found that it has brought scandal on religion—if indeed that be in the power of man, which I do not believe—or disparagement upon its professors and ministers, this cannot be imputed to us. Those who brought the case here are alone responsible for the issue. And if they have raised the shout of victory once, they may possibly yet see the time, as they advance in life, as the shadows of their closing day lengthen,

and the distance before them becomes contracted, when they may find occasion to mourn the events that have separated them entirely from these good men. In the course of the events of this world, those who are allowed to live to old age, must find coming after them many younger than themselves, of an active, bustling, and aspiring spirit, seeing places above them which are objects of their ambition; who if they can discover a good precedent to sustain them in cutting off their elders, will not fail to follow the example. Nor is that all. This spirit once abroad in the Church, who will allay its violence? I do not fear that any man will accomplish the destruction of the Church: it is, as I believe, founded upon a rock. But who can exorcise that spirit when it is once raised? Nobody. If it begin its domination in injustice—in the prostration of one of those venerable props which support the Church—a pillar on which it rests, and which has stood for half a century, no part of the building can ever be secure.

These are times of restless inquiry, of storm and struggle. And your Honours will see the spirit of the times clearly exemplified in every part of this controversy. What is likely to be the effect of its supremacy? Mark it, and mark it in connexion with the phrases which have fallen from the honourable gentlemen on the other side. The only remaining trustee of those appointed in 1799, he who had been respected amid all the changes of party, was the first object of attack. The body that assembled in the First Presbyterian Church has set us an excellent example, says Mr. Randall; they have appointed no minister of the Gospel a trustee. Here is exactly the thing of which I am speaking—that wisdom—that young but confident wisdom, which would exalt itself above all the experience of the past, above all other wisdom. These gentlemen have not only no respect for their predecessors—they may treat them as they please—but they have no respect for the law. That act of the legislature by which these trustees were incorporated, gives one third of the number ministers, and this arrangement has been made the pattern in all subsequent times, until the new light has burst upon us, showing all past wisdom to be folly. It seems that there is a concentration of right in this newly formed body; that the legislature were entirely wrong; their predecessors all wrong; and that they are to set every thing to rights; that is, in the first place, they are to set the minority above the majority, and then to exclude all ministers from the board of trustees. I do not, however, complain of this at all. It is our business now, merely to show why the verdict of the jury ought not to stand. My colleague has most faithfully discharged his duty: I could not have wished for the Church, when these most important interests were at stake, a friend of greater learning and ability. Indeed he has gone into the details of the case so fully and minutely, that all I am astonished at is, that it has not been almost painful to the court to be obliged to listen to them, instructive, and even essential as they are. Yet I should feel myself obliged to say as much—yea, perhaps more, if I thought, as the gentlemen on the other side seem to think, that this court was competent to go to such lengths in inquiries of this nature. In going over what my colleague has said, I do not see what could have been omitted; especially as the opening of the case devolved upon him.

I now proceed to examine the grounds on which we stand. And here

I shall not make particular reference to the arguments of the counsel who have preceded me, but shall confine myself principally to the charge of his Honour Judge Rogers, embodying as it does those views upon which the finding of the verdict rests. This finding was in exact conformity with the charge: according to it the jury were bound to go: I presume that upon it their verdict was founded. To that I shall therefore respectfully refer as an authority for the most correct views of the grounds on which the relators rest their attempt to turn out six of the present occupants of the office of trustee—one of them an individual appointed by the legislature itself, at the first passing of the law.

The first of these grounds is the proceeding of the Assembly of 1837, especially that which is termed the exscinding resolutions. They are characterized by his Honour as utterly unconstitutional and void. The argument which I have heard at the bar is, that these resolutions being unconstitutional, those who had been excluded by them were still entitled to their places, and that the Moderator and clerks, in attempting to carry out the void acts, committed, knowingly and intentionally, a gross outrage upon their rights. Then the proceedings of 1837 are of no consequence in themselves. His Honour says that they did not dismember the Assembly of that year; that there was a valid continuance of the body upon its dissolution; therefore they are material only as they bear upon the second subject of our inquiries, the proceedings of 1838; the conduct of the clerks and Moderator, and of a part of the body itself, when certain questions were put, as it is said, by Mr. Cleaveland, Dr. Beman, and Dr. Fisher, standing in the aisle, two-thirds of its length from the ordinary Moderator's chair, and behind two-thirds of the persons assembled. The proceedings of 1837 are thus the basis of the relators' claim. They contend that these were unconstitutional and void; that therefore the conduct of the Moderator and clerks was illegal; and that therefore they had a right to do what they have done, with all the effect in law which they claim for it.

Before I proceed to a particular examination of the acts of the Assembly of 1837, I request your attention to a view of the combined operation of all the causes which are here exhibited, each of them insufficient in itself to produce the desired effect, but all of them together, as it is contended, of strength adequate to accomplish wonders. Here we must first observe the remarkable fact, that the Moderator and clerks, to whom had been given in charge the organization of the Assembly of 1838, were not officers in the appointment of that Assembly at all; nay, that they were officers whom, as we shall show by-and-by, it had no right to remove, and no power to control. They had been appointed by the Assembly of 1837, and by the constitutional law of the Church continued in office to perform certain duties at the commencement of the session of the coming Assembly, and to perform those duties for a certain time. The object of their continuance is plain enough. Every one sees that it would never do to trust to the chances of a proper organization. Therefore a method has been provided for accomplishing this object; and it is never left to the commissioners who assemble to choose at the moment a gentleman to preside, because the presiding officer has duties to perform which he cannot prepare himself for so suddenly. In the first place he must preach a ser-

mon; then make the constituting prayer; the clerks, in the mean time, as a Committee of Commissions, being engaged in the preparation of their report of commissioners regularly appointed. This being done, and the names of all undisputed members having been put on the roll, the first act of the Assembly thus constituted, is to be the appointment of a Committee of Elections, to whom are referred all doubtful cases. Of course the election of a new Moderator does not take place until all these preliminaries have been attended to. Until the Committee of Elections has been appointed, the Moderator is Moderator by virtue of his commission from the previous Assembly. If, then, the Assembly has no power to remove him, he is not accountable to them for his conduct, and the same thing is true of the clerks.

At the trial, there was cited the case of the preparative meeting of the Friends. There the clerk puts no question and calls for no vote ; he does not determine by majorities and minorities, but declares the sense of the meeting, as collected from the discussion. Can that meeting remove their clerk by the vote of a majority ? No. But, why not? Because, by the rules of the Society of Friends, he is to decide just as your honours sitting on that bench. The meeting has no more power thus to remove him, than parties who are dissatisfied with your decision to remove a judge. So it is with the Moderator and clerks assisting in the organization of the new Assembly. So it was intended to be, so it has been and is, and so it must continue to be, unless some other rule is provided. Now, by these various parts combined, a great effect is sought to be produced. Each one is as important as any other—this by virtue of the connexion of the whole, and though it may in itself considered have no importance whatever. The state of the matter is this—the resolution of 1837 did not dissolve the Assembly; the acts of the Moderator would not have dissolved it ; the acts of the clerk would not have dissolved it. Neither of these would have been sufficient to produce the effect ; neither had any virtue of itself ; but a virtue which they have not themselves, they somehow impart to each other. The compound made up of ingredients all powerless and valueless, had the power to produce, and it is argued, to legalize those scenes of confusion, disorder, and riot, which have been here exhibited. But, I say, while it is natural enough that on the other side such a conclusion should be ascribed to this combination of circumstances, there can be no right to attribute it to things which in themselves, and taken singly, have it not; so that the majority of the members in that house assembled, who, the sermon having been preached and the constituting prayer offered, remained in their places, while a section of the body went off, shall in effect be deprived of the power and the character of the Assembly, and the minority thus gone off be all in all. No doubt this would be the result of allowing a factitious virtue to the combination of circumstances just mentioned. No doubt our opponents claim to have driven us out of doors. How, I will not now say; but unquestionably those who met in the church in Ranstead Court were the Old-school, and those who met in the First Presbyterian Church the New-school; those who remained were the majority, and those who went away the minority. The operation then of all these causes combined, each of which is in itself of no value, mere cyphers, their conjoint opera-

tion, according to the view taken of them by our adversaries, is to oblige us to confess that the majority are the minority, and the minority the majority. The majority must generally govern. No man of ordinary understanding, of intellect, uninfluenced by legal technicalities, can for a moment consider this a debateable question. Wherever the majority is, there is concentrated the power. I shall not here say a word in praise of this principle of majorities. It is the principle of our government, and that is sufficient for our present purpose. It is the principle of the Presbyterian Church, therefore, the majority of that Church must at last prevail. At an opposite conclusion it is very hard to arrive. The accomplishment of such an end as our opponents claim to have accomplished, if not impossible, must at least be against the testimony of our senses. When a person sees an organized house regularly met, and after a momentary scene of confusion, the majority remaining, and the minority going forth, as distinctly as when a formal division is made in the British House of Commons, it would be very hard to persuade him, that, in point of law, the majority has become the minority, and the minority the majority. Certainly, if in this instance you so determine, it will be the first in which such a thing has ever occurred.

I know that in the case of a corporation, if it is necessary to refer a question to all the members, all having an opportunity to vote will be considered as voting, whether they actually vote or not, and this whether the vote is taken by ballot or *viva voce*. Provided all are admonished of the question, and it is put by a proper person, and they are competent to decide it, the majority must decide. But where will you find the case in which ten, or twelve, or twenty of the members of a body have come forward and sworn that they did not hear the question, that they did not know what was done, as these say in regard to the appointment of Dr. Fisher, that there was a scene of wild disorder and confusion; when, in addition, the question was not in fact put from the usual place, or by any known officer of the house, by any one having under ordinary circumstances a right to put it—show me, I say, the case, that has ever occurred, up to the present time, in which such a question has been adjudged legally carried, when but a small minority have actually voted, and the majority are known to have been opposed. If a question be announced from the chair, all are bound to give it attention, and if a vote be taken upon it, the judges are not required to notice those who have not chosen to vote. He who votes a blank throws away his suffrage: those who vote without being qualified are not to be counted. To all this I agree; but the life of these rules is, that the question be put in such a way, and by such a person, that a fair opportunity of voting is given to all entitled to vote. I deny that the case can be produced, where it has been decided, that the members of a house were bound to pay attention to two presiding officers at the same time. Yet, as this case is exhibited, were there not here two presiding officers, at least while Dr. Elliott was in the chair, and Dr. Beman not yet elected? Well, then, in the first place, as a member of the body, I must decide, and decide instantly, in the hurry and confusion of a scene of unparalleled disorder, who, at the time when the question is put, is the real Moderator. And, having decided, as I am forced to do, and that in a moment, I ask, in the name of common sense, of common reason,

am I to be considered, by intendment of law, to have voted in the affirmative, because, thinking that the question was not put by the proper officer, I have not voted at all?

No, may it please your Honours, it is impossible that this wonderful efficiency should be given to these conjoint weaknesses. If the acts of the Assembly of 1837, are of themselves nothing, the conduct of the clerks nothing, the conduct of the Moderator nothing, can all these circumstances combined, and followed by occurrences of disorder and disorganization, setting every rule of order at defiance, and calculated to blind and mislead, defeat the operation of the fundamental laws of common right? Nay, if we had called upon every man in that Assembly, and all testified that they did not vote, that they did not hear the question put, that they did not know what was done, still must you have pronounced the question to have been legally carried? And that is not all the objection in this case. We do not know who voted: it could not be ascertained at that stage of the organization. We do not know that that loud "Aye!" on which the triumph of our opponents is built, which supports the banner of the minority, did not proceed entirely from persons who had no authority whatever to vote. Here I appeal to Judge Rogers' charge. His Honour says, that none but those on the roll had a right to vote. If the question had been put by the Moderator, he would have suffered none to vote, excepting those having a right, according to this decision. Now, it was put, not by the Moderator of either that Assembly, or the previous one, not by any person authorized to put it, no matter whether Mr. Cleaveland was a member or not; it was put behind a multitude of the members; and we do not know how many joined in that thundering "Aye!" There is no knowing but that it came from men having no shadow of a title to vote.

These things strike us at the first blush, when we regard the particulars which go to make up the mass—each becoming of vast importance, when, in their conjoint operation, they are made to form a lever, applied to the General Assembly, overturning and breaking it up, when in the process of organization, and scattering its fragments to the winds—a spectacle which began in the Assembly of 1837, has continued more or less visibly down to the present time, and is now continued in this court.

Court adjourned.

THURSDAY MORNING, April 25th—10 o'clock.

This matter, may it please your Honours, which has been adverted to, is one, with the more particular consideration of which I shall of course detain you hereafter—I mean the question of order, which, in fact, is one of the principal points, as it appears to me, in this controversy: one of those on which the case hinges. Before I proceed to the examination of the proceedings of 1837, allow me to say a single word more, in connexion with the remarks which I made yesterday, on a subject which it may prove important hereafter to have well understood. The General Assembly of 1837, on the last day of its meeting, terminated an actual and legal session, being until then the Assembly both *de facto* and *de jure*. For it is distinctly admitted—his honour so decides in his charge, and it is admitted by the argument at the bar—there is no dispute, that, whether

the proceedings of 1837 were right or wrong, they did not dissolve the body, or impair its capability. It is not disputed that the last exercise of power in that Assembly, the vote of dissolution, or the order of the Moderator, that it should be dissolved, and the summons of a new Assembly, to meet at a certain time and place (which time was the day in question, that on which our opponents build their organization, and on which all the commissioners assembled,) that all this was a valid proceeding. Further, it is admitted, that a portion of these commissioners were enrolled in 1838; that the names of those enrolled were duly reported; that the Moderator had taken the chair; that the clerks were at the desk; and that the body thus partially constituted was perfectly competent to conduct the process of organization to its completion. There again, then, we were in actual possession, the Assembly both *de facto* and *de jure*. All this is quite clear; we shall see how it is contended that we ceased to be such. I understand the argument on this point to be, that the Assembly thus actually and lawfully convened, deposed the Moderator who was in the chair, and elected another, who never took the chair, but stood up in the aisle, behind a considerable portion of the members, having no chair and no insignia of office, and there addressed to somebody, or some portion of the commissioners, a certain question; that this question was then put, to which we responded by virtue of an intendment of law; that while the former Moderator, lawfully appointed and actually in the chair, remained in his place, and the clerks, with a majority of the house, remained in theirs, those who had collected round the new Moderator in the aisle went away, carrying with them the whole power of the Assembly; and that all afterwards done by the body remaining in the church in Ranstead Court was a mistake. I have said that this case had no precedent: I have stated reasons why such a rule could not be established. At present I shall content myself, reserving this subject for more particular examination hereafter, with saying, as I did yesterday, that no doubt the body remaining did not so understand the proceedings; and further, that the rules of order of every deliberatve Assembly require, that every eye and ear should be directed to the chair as imperatively as it is required that ours should be directed to this court. I might as well entertain a motion, or give a judgment here, on the ground that all who were in court were bound to take notice, as might any member of a deliberate body usurp the authority of the presiding officer, and say that the members were bound to listen to him. I know of nothing like this even in fiction, unless it be in the Sam Slick story about the clock, which is going the rounds of the newspapers. I do not intend to relate it. The poor host was fixed in front of the clock, and as the pendulum moved he was to say "Here she goes: there she goes;" and accordingly, he began, "Here she goes: there she goes," and continued the repetition in spite of the remonstrances of his wife, but when the time was out, found that while his eye was fixed on the clock his two guests had gone off, as Mr. Duffield said, "as slick as a whistle," or "as slick as could be," carrying with them his valuable effects. Just so this Assembly, like every other deliberative body, had a Moderator and clerks, and these the members were bound to watch their movements. "Here they go: there they go," they were to repeat continually. But while their attention was thus occupied

with these officers, their rights were suddenly slipped away from them in the language of the witness, "as slick as could be," or, as one of the counsel thought the words were, "as slick as grease." I do not believe that the New-school party came to the church in Ranstead Court with any such intention, or that they had any such idea when they went away. And I do not see how any body there could be affected by an intention which they had not, or which, at least, they did not declare. I will not here say what might have been the effect of due notice of such an intention.

How do our opponents seek to accomplish their end? By going back to the proceedings of the Assembly of 1837, which did not dissolve that Assembly; which had no effect upon its rightful acts; and which, as we contended, could have no rightful effect upon the organization of 1838. What were these proceedings of 1837? Let us now examine that question. They consist of two parts—two essential parts: whether they had any connexion with the proceedings of 1838 I shall consider hereafter—I am satisfied that the manner in which the two have been thrown together was improper. But for the present let us confine our attention to the acts of Assembly of 1837, to see whether they are really unconstitutional and unjust.

The measures of that body which are here called in question are, first, the abrogation of the Plan of Union of 1801, and, secondly, what are called the exscinding resolutions, which were consequent upon the former, flowing directly from it, deriving from it their validity, and following it of necessity, in whatever capacity you chose to place them—whether they are considered as judicial or as legislative acts—at least so following it, in the judgment of those who passed them. That the ostensible grounds of those acts were the true grounds on which they were passed, I here mean to assume; and it is important to understand at the outset, whether we are to believe that these men sincerely, honestly, and *bona fide* meant what they declared—that their measures were really and truly intended for the good of the Church. I protest solemnly against the right of any body to question their motives. You cannot under the Constitution deny my position, that these are to be respected. Presently, I will read a part of the Constitution of Pennsylvania, bearing directly, as I think, upon this point, and which it is of infinite importance that we should rightly understand. This case, I believe, was lost before the jury, and, if we lose it here, will be lost finally, in a great measure because insincerity, a want of truth, the declaration of motives not real, has been imputed to my clients. On the trial—and the same thing is very manifest in the argument on this motion—the widest license was taken in commenting upon the character of the Assembly, and contradicting the assumption which I now make. I submit it, therefore, as a clear position, that at every tribunal of the commonwealth of Pennsylvania, a church, with each party in that church, is entitled to the clear concession that whatever it does within the spirit of its discipline, is done from the motives which are professed. If you do not believe this, you cannot believe it to be a church: only a set of hypocrites—sinners of the very worst kind. When, therefore, our opponents quote Scripture, for purposes to which we think it ought not to be applied, we challenge them to show their authority for casting the first stone at our motives: we do not con-

sent to be put on proof of these, excepting by those to whom we are accountable for them; and we are thus accountable only to the Church—to ourselves. The world does not, and cannot govern us in matters of faith and conscience. It is then of great consequence, that you consider these acts to have been performed honestly, sincerely, and conscientiously, for the good of the Church—as my clients believed. We do not claim infallibility for them, more than for any other men. Presently I shall point your Honours to the strongest evidence of the fact, that the true reasons for their acts were these on their face exhibited. But we are, at all events, entitled to assume it.

In entering upon the discussion of the acts of 1837, I have first to propound to this court a great question, which must be decided in the outset. To whom does it belong to determine, whether the proceedings of my clients were or were not for the good of the Church? I do not now speak of motives. That they were right, I have assumed; and that this should be believed, is secured to us by the fundamental principles of our government. None can call our motives in question, so long as we are careful in our observance of respect for the laws. Assuming this as undeniable, I respectfully demand, who is to decide whether the acts of 1837 were or were not for the good of the Church? Or, supposing a certain end confessedly desirable, who is to decide *how* that end should be reached? It has been argued, that in order to attain a certain object, we were bound to follow the course of a regular trial, to commence proceedings in an inferior judicatory, unless where the superior had original jurisdiction, and conduct them in regular judicial form. I do not know how this law is to be established. In the first place, we have the question, who is to decide whether the proposed *end* is for the good of the Church or not; and then, who is to decide *how* that end may best be attained? Can the civil tribunal prescribe the course of proceedings to be followed by the Church? No. Suppose we say, "We do not make any charge against our brethren, with whom, in time past, we have lived in unity: we do not mean to dismiss them with the mark of heresy or other criminality upon them. All that we allege is, that they do not live according to the discipline of our Church; that disorders may thence arise—that in our opinion, they have already arisen." And suppose too, that the act is performed by a competent tribunal, and involves nought but a separation of the parties. The question is, not whether our purpose is the best and wisest, but who is to judge whether it is or is not so?—the Church or a civil tribunal? If the latter can interfere at all, in such matters, you had better dissolve the whole system of church government from top to bottom. If we cannot follow our own judgment throughout, we had better not form any judgment. Suppose, farther, that we consider not only the *end*, but also the *means* proposed, to be essential: both *method* and *end*, we maintain, are then for the consideration of the Assembly, and for the Assembly alone. Whatever method they adopt, is sure to be protested against, by some person or other. But, suppose they select a certain method, and are conscientious in their choice, is the judgment of any body to interfere? That selection is as much a matter of conscience, as the final decision itself. The rights of conscience are as clearly invaded, by interfering with the one as the other. I am speaking of the proceedings of the Assembly of 1837. The consideration of them involves the

pure question, were they good or bad, constitutional or unconstitutional? This single question is now proposed: I go no farther at present. I maintain that no temporal tribunal can have cognizance of such an issue. I do not mean the question, which are the legal trustees, but the single one in regard to the acts of 1837; and I say that of it no civil court has cognizance; that it belongs exclusively to the jurisdiction of the Church.

I know, that in this part of the argument, I must encounter the denunciations of the opposite side. Why did you not institute regular process? Why did you not give us a trial and a hearing? Why did you not do this, that, or the other thing? Of course, we expected them to make objection and find fault; we took it for granted, they would think that any thing else would have been more acceptable than just what we did. We disregard this clamor. But, as I am well aware, we here meet a much more formidable obstacle—the opinion of Judge Rogers, made up at the trial, and propounded in his charge; which, of course, should be very seriously weighed—we should proceed with extreme caution, step by step, before arriving at a conclusion contrary to his. And I do not know that I have ever bestowed upon any single subject, more thought than I have upon this, to view it in every aspect, to understand its bearing in every particular, that I might not be led into a false track—to avoid error in judgment; and the more especially, because my opinion was contrary to that expressed in the charge. I will state the grounds of my conclusion, acknowledging, at the same time, that I am liable to error: possibly I am in error here. I think I am not. I am happy that his Honour, Judge Rogers, agrees with us in one important point. He says,

"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 in contravention 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." *Ante*, 470.

In another part of the charge, which I have not time to read, his Honour gives the opinion, that the act repealing the Plan of Union of 1801, was not liable to any legal objection, was entirely valid. His opinion therefore is in favour of the abrogation. Of this I am very glad, because the subject has been earnestly discussed, and the opposite counsel have pronounced the abrogation unconstitutional and void. And here is the key of the whole matter. From the assumption that it was unconstitutional and void, the proceedings of the New-school in 1838 derive all their virtue. Now let us endeavour soberly, seriously, and quietly, to look at this matter.

First, let us look at the *nature of the thing done*—that is to say, let us inquire whether it was a purely spiritual and moral act, or whether it had any touch or admixture of a civil nature. To determine this, I refer to the resolutions themselves. *Vid. ante, p.* 37. I need call your strict attention to the third only, but the whole should be taken in connexion; and should be taken—I cannot too often repeat this—every word spoken should be taken, as coming directly from the heart: you must consider

these gentlemen to have meant what they have here said; if you do not, we cannot proceed at all.

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

That is, in regard to the voluntary association hitherto existing; for I maintain, that whatever constitutes a voluntary association, this was one; and as such it is treated throughout these acts. In fact every religious association is voluntary.

"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 effort should be omitted to preserve a perfectly good understanding between these branches of the Church of Christ."

Here is exactly the spirit which I have before described. We wish to abrogate the "Plan of Union," but we are not going to denounce you as wanting in either doctrine and faith, or form of government and discipline—to assert that you are not a Church. By no means. We desire to live in peace with you, and not to quarrel. If you choose to maintain your own form of worship as before, we shall not on that account respect you the less. All that we say is, that Presbyterianism and Congregationalism are immiscible: when associated one destroys the discipline of the other: the union produces confusion and disorder." You see a specimen of this in Mr. Bissell's case, (*Vid. ante, p.* 77,) by which the Assembly was distracted to the length of a protest. He was neither an elder or committee-man, and yet claimed a seat in the Assembly, and was admitted. This was only one occurrence to be sure, yet it was, in itself, sufficient to condemn the "Plan of Union." That is no longer an Assembly of either Presbyterians or Congregationalists—an Assembly in which one man, coming through the channel of no Church, claims a seat, and all feel bound to admit him.

"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."

"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."

That plan was entirely voluntary from beginning to end. Now in the judgment of the Assembly, sufficient grounds for the abrogation existed, and none can say that they did not exist. It is asserted that the plan was originally unconstitutional—they don't say, however, that it was a constitutional regulation, nor what character precisely it bore; but speak only of certain "important standing rules"—whether constitutional rules or not is left undecided. It was a system of rules, and as such, not binding

unless sent down to the Presbyteries, and by them approved. Admit that it was unconstitutional, and no doubt the Assembly had a right to abrogate it; and besides being lawful, the abrogation was certainly expedient, if the plan had introduced disorders, and threatened others still more serious. My clients say that it had. This being alleged by the Assembly, it was clearly an adequate ground for their proceeding. What objections are urged against the abrogation of the "Plan of Union?" On the supposition that the plan was constitutional, it is contended that it was a compact; as if in agreements purely spiritual, there can be any consideration, by reason of which the compact can be enforced, though a party is desirous of rescinding it, because it is productive of mischief. When a contract or bargain is made between man and man, it is perfectly well understood that this is cognizable by the law: our constitution recognises such contracts, and you have a doctrine of consideration applicable to them. You may have a contract cognizable by the civil law, in which legal obligation mingles with that which is purely moral; but here you have no mixture, nothing whatever that is worldly: if binding at all, this agreement is binding only in conscience. Where you have nothing like a consideration, you can have no contract that can be enforced at law. You cannot keep joined by the sanction of law elements which have come together on the principle of voluntary association. How, then, is such an agreement to be determined? Evidently by the will of the majority. The majority on either side may resolve that its operation shall cease. The resolution then that I have read abrogated the plan of 1801, and it is abrogated: it ceases to have any force.

Next comes a series of resolutions, resting on the supposition that the "Plan of Union" was unconstitutional and void, which are merely administrative. I do not mean to say whether they are legislative or judicial, because we do not find the government of the Presbyterian Church divided, like our national government, into three distinct and well defined branches; but I call them simply administrative, as they were passed to carry into effect that which was already adopted. I might have referred to the protest against the other, but leave that for the present. Here is the first of the resolutions:

"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 Genesee, 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." *Ante*, 46.

On which resolution, the ayes and noes being called, it was carried by a majority of twenty-seven, one not voting. This, then, so far as I have gone, declares simply the practical effect of the abrogation. If such was its practical effect, all that the General Assembly did, in passing this resolution, was purely administrative. They made known to their own churches, and gave notice to those associated with them, what the effect of the abrogation was, and then adjudicated accordingly. What is the next resolution?

"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."

"It being made clear to us"—To whom else could it be made clear? Shall we bring the evidence of the fact before your Honours? Suppose we tell you, that these men who have come in under the "Plan of Union," are Baptists, or Episcopalians, Independents, or Roman Catholics, or Jews; your Honours will say, that you have no right to inquire into such matters. What business has any civil court to judge of a man's religious persuasion, to say that he is a disorderly member of a church? We are not a judicatory of the Presbyterian Church. We are not the Sanhedrin. We are not the representatives of any particular part of the Church, or the general representatives of the whole Church. An individual, or a Church, is deemed disorderly, because of a violation of the constitution of the Church. But such disorder cannot be presented to the sight of your Honours, acting under the law, because, in the eye of the law, every creed and every form of worship is fit and proper. How can a civil court resolve itself into a religious tribunal, and that the tribunal of a particular sect, to determine questions of doctrine and of conscience? I admit, that, in the case of trusts, your Honours must sometimes decide upon the identity of a Church. But, suppose you were called upon to make such a decision, what evidence could you have, that such persons were or were not, part of a denomination? Would not the judgment of the Church to which they professed to belong, owning or disowning them, be the best and only evidence? It must be so. Therefore, the statements made in the second resolution, must be taken as true: That the urgency of the Assembly is "greatly increased, by reason of the gross disorders which are ascertained to have prevailed; * * * 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"—As your Honours see in the case of a person admitted to the Assembly, who was not entitled to a seat in it, either one way or the other.

"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." The Synods themselves are laid down and dissolved, but none of the ministers, unless such as have been guilty of falsehood in alleging themselves Presbyterians, are affected. "Nor to disturb the pastoral relation in any church." How then can it be said that these pastors and people have been subjected to such difficulties and penalties as have been described? "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."

Then comes the fourth resolution: "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 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."

Now in that part of the charge which refers to this last resolution (*Ante* 467), there seems to be an error in the printing, which has crept in somehow or other, I cannot see exactly how. But certainly the paragraph appears to involve a contradiction. His Honour says, "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." His Honour, I suppose, means to say that the Assembly *might* receive them if strictly Presbyterian. Here then, in the next sentence, I think there is an error. "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." Now as I understood the meaning of this, it is, that the Assembly would have no right to refuse these Presbyteries if they were Presbyterians, which seems inconsistent with the previous sentence. Or, perhaps, the error is in the former part: certainly the Assembly never meant to refuse any strictly Presbyterian in doctrine and order.

Judge Rogers. They were to decide whether they were Presbyterian or not.

Mr. Sergeant. But they were to receive them if they were Presbyterian, and I say, according to this resolution, they will receive all such that apply. If any are not Presbyterian, of course they will not be admitted into the Presbyterian Church. Thus these resolutions save the rights of both ministers and people, pastors and their flocks, so far as possible, inviting all who hold the Presbyterian doctrines to come into the Church, the Assembly promising to receive them with open arms. Never up to this time has any thing been done in degradation of the rights of such. But the "Plan of Union" has been productive of disorder. The disorder is charged not upon individuals, but upon the "Plan." Now the question is, whether the Assembly had the power thus to remedy the disorder.

Consider next the nature of the body by which the act was done.

As to one point there will be no dispute: that the General Assembly is the highest tribunal of the Presbyterian Church. What are its precise powers I shall not now attempt to define. What constitutes a church, in

its scriptural sense as it was established from the beginning, and exists at the present day—I mean a Christian church? A body of men who profess sound doctrine, maintain good discipline, and enforce a right form of government. Each one of these is as essential as another: I do not suppose that a church was ever organized upon a different plan. I am aware that it is a very common thing to disregard doctrine, discipline, and government, to hold a rigid adherence to them as sectarism and bigotry, as an undue opposition to all other denominations. Exactly in proportion as zeal abounds are Christians charged with bigotry, with being zealots in an offensive sense—having too much zeal against their neighbours. If bigotry means a zeal for sound doctrine, and good discipline, I regret that we have not more of it. Sectarism was the very thing that the reformation sought and did accomplish—that those who thought alike should freely associate together. Is a character for zeal, attached to any sect, a reproach? If it engenders persecution it is to be deprecated: if it be only a deep conviction of the importance of sound doctrine, strict discipline and wise government, no matter how ardent it is: it will be ardent if it be sincere. Zeal is the very fuel of a pure and heart-dwelling religion. If a Church is without this fuel, it is without vital religion ; and not only the outer court, but the whole temple is a place for merchandize: the desecration is worse than that of the temple at Jerusalem. The pursuits of this world are constantly inviting every man away from the duties of religion. Few have time for thought and reflection upon these important subjects, with the exception of the small company of devoted men, who, whether their motives be good or bad, have voluntarily resigned themselves to poverty—for so it is with the clergy of this land—that they may be ever ready to sound an alarm in the ears of those who are constantly in danger of disregarding, fatally disregarding, the great truths which so deeply concern all mankind. Though some may hold doctrine to be immaterial, discipline of no consequence, and government a trifling matter, they are very far from being so. Religion was made for man; and in a most admirable book written by Mr. Wilberforce, it is very truly said, that man's religion is nought if it does not enlist his feelings, as well as his reason and understanding. He says truly, that religion was made for man; and man is what we find him, a creature of feeling, appetite, passion, reason, and conscience, all of which exist in some few persons in measurable harmony, but in most keep up perpetual conflict, the voice of reason being too often drowned in the clamour of her more noisy companions. Therefore, discipline and government are absolutely necessary in the Church.

"A particular church," says the Constitution, "consists of a number of professing Christians with their offspring, voluntarily associated together, for divine worship and godly living, agreeably to the Holy Scriptures; and submitting to a certain form of government."—*Form of Gov. Ch. II. Sec.* 4. Such is the Presbyterian definition, and the true definition of a church. There must be submission to a particular form of government. This is the description of a church in general: there can be no doubt that the Presbyterian Church corresponds with the requirement. Here are enumerated all the particulars necessary to that Church: it "consists of a number of professing Christians, with their offspring, *voluntarily* associated together, for divine worship and godly living, agreeably to the Holy

Scriptures; and submitting to a certain form of government." There can be no single church without these. No judicatory can exist which is not the representative of such churches. The highest judicatory represents all the churches of this kind which voluntarily submit to its jurisdiction. Then, does it not follow that a system of government is absolutely necessary?

Of what are the judicatories of the Presbyterian Church composed? I do not mean to assert that this is better than any other Church: that is not a lawful argument, under our Constitution. It is a voluntary association; and those who compose it, may stay or go, just as they please. The question of its merits, is not the question here: that is, for its own members, a matter of opinion; and all who do not like its particular form of government, may withdraw at their own pleasure. How are its councils composed? Of ordained ministers only? Not so; but of ministers and elders: by them representing the Church, in its various judicatories, beginning with the lowest, the church-session, its government is conducted. Any body has a perfect right to find fault with this arrangement. It is good for those who like it: *I* believe that it is good in itself. If the preservation of the altar and the sacred flame, require a peculiar care, it is well that those who devote their lives to this service, should declare by a public and solemn ceremony, that they do intend thus to devote them; giving the only pledge in their power, that they indeed mean assiduously to watch over the spiritual concerns of the Church. If any say that mere laymen can as well execute this holy office, I will not dispute with them, but I will claim to be of a different opinion. Is there here any mixture of civil right? There is a church, but the people may attend it or not, just as they please, and it may be open, though they do not choose to attend. It does not follow, that because they do not come, the minister and elders may not offer them the opportunity of religious improvement, of hearing the dispensation of the Gospel. As to the mere building, the pews, the church does not pretend to have any thing to do with them: it is independent of the civil corporation by which they are held. Any one may have a sitting, or a pew, who chooses to pay for it. So, at least, it is in many Churches: perhaps there is but one, where none that are not of the Church, are permitted to hold pews. This, then, is the definition of a Church: First, it is a voluntary association; secondly, established "for divine worship and godly living, agreeably to the Holy Scriptures;" and, thirdly, "submitting to a certain form of government." All these are material to its existence; and they are things which, as I understand the Constitution of Pennsylvania, are by it left entirely to the Church itself, and to every man's conscience. What says the Constitution? This part of it has undergone no change, in the recent revision: I wish I could say as much of the whole. The third section of the Declaration of Rights, guarantees certain religious rights, reserved out of those delegated to the government—not granted to the legislature, the judiciary, or the executive.

"All men have a natural and indefeasible right to worship Almighty God according to the dictates of their own consciences; no man can, of right, be compelled to attend, erect, or support any place of worship, or to maintain any ministry against his consent; no human authority can, in any case whatever, control or interfere with the rights of conscience; and

no preference shall ever be given, by law, to any religious establishments or modes of worship."

This provision is carefully, studiously, and redundantly written, with a view to fence round conscience, to fence round the Church, so that the civil authorities may not even look into them, unless to see that the peace of society is preserved; for all denominations are bound to obey the laws of the land, according to the precept of Christ, who inculcated every civil duty, the payment of every lawful tribute; but the conscience we hold sacred. What right has the civil power to interfere with conscience? If certain forms of government and discipline are part of the belief of a Church, conscience has as much to do in the maintenance of these, as in the preservation of sound doctrine. And it is my right of conscience to choose such form of religion as I may think best. If I do not like the denomination with which I am connected, at any moment I may depart: if the majority of the sect do not like me they may turn me out. I don't know of any other rule. I might be turned out of the Presbyterian Church because I did not submit to its government and discipline, but the wide world would be before me, and I at liberty to chose my associates. If I desired to join the Congregationalists I might do it: if I chose to attend as a hearer in a Presbyterian place of worship, I should not be excluded. It might be supposed from the argument which has been addressed to the court, that these men were turned out to starve—to starve for lack of spiritual food.

When a question arises in regard to any thing which in our judgment interferes with the proper administration of discipline, which produces disorder and confusion, and endangers sound doctrine, how is it to be settled? Here comes into operation the established principle of our republican constitution—for the government of the Presbyterian Church bears a close affinity to our national government. We may alter that constitution whenever we see fit. How is this to be done? By the vote of the majority. What rule will you establish other than that which prevails in the civil affairs of state—the rule that the majority shall govern? Whenever the majority decide any question it is finally settled, unless you have recourse to some other principle of government. But the power of the majority is annulled if their decision may be overborne, if it may be referred to another tribunal for correction. Look at the instance of these resolutions of the Assembly of 1837. How were they decided? By a majority—there can be no doubt of that. They concern discipline, government and doctrine. Then it was a rightful decision. The majority alone could decide in such matters. And more than this, the decision being according to conscience, it is not our right to interfere. If the Assembly is left to itself there is nothing to be apprehended: alien interposition must lead to trouble and difficulty. If evil results from their measures they alone are responsible for it. Now let us get back to the plain language of the Constitution; and where does it give to a civil court the right of interference in matters of conscience—the right of deciding on spiritual concerns? If the civil power claims authority to prescribe or modify our religious creed, this is manifestly wrong—an usurpation of authority; yet not more so than an interference with ecclesiastical government and discipline. Every church has a right to settle these matters for itself; and that any other power should inter-

pose to expound their creed, or to prescribe ecclesiastial laws, is destructive of spiritual liberty. It has become very much the fashion of late to speak against creeds. If a creed is to be enforced by any measure of compulsion, let it be admitted that our liberties would be in greater danger than if mere civil rights were attacked, our rights of property, our security of life and limb. But if a church establishes a certain creed, what right have I to go in among its members when I do not receive that creed? And what right to remain among them when I cease to believe in its doctrines? I may be right and they wrong, but still, I am no more at liberty to overturn the fundamental principles of their faith, because it does not agree with mine, than is a man to disturb the peace, because he does not like a republican government. The creed is but the agreed principle of association; the common faith, which is the ground of union. No man is bound to adopt the creed. But no man has a right to insist upon being a member of the society without adopting it, or to remain so after he has ceased to believe in it.

Now in the constitution of the Presbyterian Church we find the sanction of that authority which the Church exercises in all its branches. I read from the "Preliminary Principles" to the Form of Government, section eighth. "*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."

And again, chapter eighth of the Form of Government, section second: "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 scriptual 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 case; but the highest punishment to which their authority extends, is to exclude the contumacious and impenitent from the congregation of believers."

Here then is the whole sanction of the jurisdiction exercised by the Church—that moral or spiritual power which operates by means exclusively its own, and is not to be interfered with by the civil authority. How is the great frame work of the Presbyterian Church to be maintained in its established order? Here is that frame work. First, the congregation, governed by its own session; then the Presbytery; thirdly the Synod; and then a power above all the rest, the last object in the sight of a member of this Church, the ultimate tribunal to which he can appeal—beyond it he knows no appeal—the General Assembly; which is just as supreme in ecclesiastical matters, as this honourable court in civil affairs—the highest tribunal of the Commonwealth of Pennsylvania. As for judicial decisions no citizen looks beyond this court, so the Presbyterian

looks to no higher authority than the General Assembly. There his sight fails: he discovers no object beyond. In this body the whole Church is represented, and all the power of the Church collected and concentrated. I call upon the court to say, is there any thing within the whole circle of this jurisdiction with which you would deem it right to interfere? First, there is the church session. Suppose they exclude a communicant on grounds satisfactory to themselves; or suppose that the Presbytery refuses to receive a clergyman, or turns him out; or the same thing in the case of a Synod: will you in all cases where a church judicatory excludes any one issue a *mandamus* to restore him to his place? Will you not rather say, you must appeal to the Presbytery, to the Synod, or to the General Assembly? But the General Assembly has done me wrong, and there is no resort beyond! What then? This is a matter merely spiritual, and the court cannot entertain an appeal from one ecclesiastical body or council more than from another. But they have excluded me, and have not proceeded according to the form prescribed in their constitution. What is this to the civil tribunal? They are accountable for the manner in which they exercise their spiritual power, but not to this court. Unless the court say that they may decide an appeal from a church session, from a Presbytery, or a Synod; unless they preside over the affairs of the whole Church, they cannot exercise such a jurisdiction in any case.

But here is a terrible grievance. Five hundred churches, and as many ministers, and sixty thousand communicants—I find only fifty thousand and some odd—have been excluded, wantonly cut off! There is much more to be dreaded from the oppression of a single individual, than of such a body of men. What! five hundred ministers and as many congregations, comprising sixty thousand communicants—these men, in a free country, and afraid of persecution! I am afraid they are not of the old Presbyterian stock, or they would have no such fear. *They* have always been a hardy, resolute race. If Presbyterians have been charged with being sour; if a doggerel verse, written by one who ought not to have so written, has sent them in that character flowing down in a liquid line, certainly they have always been found on the side of liberty and independence. These five hundred ministers and congregations, cut off and oppressed! Instead of allowing them to enlist our sympathies, we should say to them, "You are strong enough to take care of yourselves—stronger than was the whole Presbyterian Church when the General Assembly was first formed." Fifty thousand strong in the four Synods of Utica, Geneva, Genesee, and the Western Reserve, surrounded by neighbours, friends, and associates—by whom and in what manner have they been oppressed? We say to them, "Go in peace. If any of you desire to come back to us you are entitled to do so. Come out from among your Congregational brethren, that it may be known whether you are Presbyterians, and if such, you shall be received." It is ridiculous to talk of persecution in such a case.

These bodies we have been speaking of, thus formed and constituted, are a law unto themselves. They owe no submission to any other tribunal. Is it lawful, is it consistent with spiritual liberty, that the Church should be carried out of its own sphere, before a tribunal where prevails a law that is not applicable to it; and this when the Constitution forbids the civil authority to interfere in any manner with the rights of conscience?

Talk of a violation of the constitution of the Church! What greater violation of it, in its essence, its life, its soul, can there be, than dragging it before a tribunal entirely alien, here to compel its members to prove facts, and to justify their own judgment upon those facts. Demand of any Presbyterian that he point out the place where he finds authority for this proceeding. Where does he find the liberty given to refuse to submit to the judicatories of the Church, and to refer his dispute to other tribunals? And how does he find that this is to be done? Is his appeal to be entertained thus—not by calling upon us to show our minutes, and prove that the question has already been decided by the Church, but without crediting our statements, putting no confidence in our sincerity, by summoning us, as if already convicted of an atrocious crime, to justify ourselves, or else suffer the penalty of being hunted down, as we have been? Where in the Presbyterian constitution will you find this? There is no such thing.

We are next to inquire into the nature of the act which has been done. The question here, is only as to the Church: the civil rights of the parties, involve a different question. For the present, I inquire only, are the resolutions of 1837 within the limits stated—the limits of moral and spiritual discipline? If they are, can any sanction be applied to them, which is not within the same limits? What is spiritual censure? Of what consequence can it be to us, so long as it is spiritual, in what manner it is pronounced? That is not a question that belongs to this tribunal. What was the nature of the power exercised in the present case? It was spiritual—purely so. Can that body which met in the church in Ranstead Court, justify their proceedings to this honourable court? I don't know whether they can or not. I do not see how they are to justify themselves before any such tribunal. I mean to say, that in any case it is impossible that they should, unless they can present to your Honours their own views, impart to you their habits of thought, and their feelings; unless your consciences have been subjected to the same training as theirs: all these are of great importance for the discovery of the truth. Where shall we find a proper tribunal? Shall the state erect such an one? The Constitution forbids it. Shall the Church? If the Church establish a tribunal above the General Assembly, we must submit to its decision; but that we should be drawn into other tribunals, those to which we are not accustomed—the civil courts—is forbidden, lest they should imbibe too much of the spirit of any one sect. They are to recognise no sect, except so far as to believe them all sincere. I do not know how to justify the Assembly. Indeed, though accustomed to the duties of an advocate, I here enter upon a new field of duty. Such matters ought not to be entrusted to us, who, except as individuals, each bound to take care of himself, though too apt in the noise and bustle of the world, to neglect spiritual concerns, cannot be expected to understand the laws of the Church. We are unfit for the duty; and this is an additional argument, why your Honours should not take cognizance of appeals from an ecclesiastical court.

What is the head and front of our offending? We have separated four Synods from their connexion with the Presbyterian Church. And what do you know about these four Synods, showing whether they are regularly constituted or not? Mr. Randall has gone over the Minutes, to prove that the Assembly did this, and did that, and finally has refused to

let these Synods remain in the Church. This, if it proved any thing, would only go to prove that there is no law to govern them; and it follows from hence, that there can be no appeal brought from their decisions. Well, but the Charleston Presbytery has Congregational churches within its limits. How does he know this? His Honour refused to admit testimony on that point. The Assembly has brought in the Associate Reformed Church, and Mr. Randall says that they are not Presbyterians. I say that they are: if they were brought in, they are Presbyterians. Another instance is mentioned, of like liberality: again, we challenge the learned counsel, how does he know it? Here they offer a little evidence, and there a little, and pouring in a flood of words about the monstrous enormities we have practised, crave the peculiar interposition of the court. But how, from these scattered fragments that are thrown in—how, from various instances of alleged irregularity and inconsistency, can a correct judgment be formed; especially, when little matters are presented for your consideration, which are not in evidence? There is one such, that has been offered, in regard to which I may say, that beside its not being in evidence, I believe that Mr. Randall will find his statement respecting it incorrect. The Assembly has been charged with enormous sums received from the four Synods, which, it is said, have not been repaid.

Mr. Randall—Here, in the statistical table, is a receipt for the sums mentioned.

Mr. Sergeant—I believe you will find that in 1837 they took out eighty dollars more than they brought in.

Mr. Randall—All that we have in evidence is here in the statistical table.

Mr. Sergeant—Well, may it please your Honours, I will undertake personally to promise, instead of going into a needless examination of this matter, that if they have not taken out as much as they brought in, they may have the difference whenever they choose to call for it. Here is a specimen of the condition into which the Assembly is brought by this discussion—the evidence of what sort of charges we are to vindicate it from.

I say that when the four Synods were disconnected, immediately their whole power ceased. Who can complain that four Synods are separated from a voluntary association? Even without any reason, the Assembly had a right to separate them, just as the Synods had a right to secede at pleasure. Whether they shall submit is not a question to be entertained here. I mean to contend for that doctrine to its whole extent; that it is not for this tribunal to look into the constitution of the Church and decide whether they have been rightfully excluded; that the question who is of the Church belongs exclusively to the Church to determine; and that when it has decided, the judgment is final. There was a time when the great mass of the property of the Methodist Church was held in trust; and according to the terms of the deeds, no one could be a trustee who was not a member of the Church. The trust, therefore, was incidentally subject to the power of the Church, for if a man were cut off from membership, he would cease to be a trustee. Now suppose the question to arise, whether a certain person was or was not entitled to the trust. This might depend upon various things; but suppose among other points a question should be raised whether the trustee was a member of the Church

or not. Suppose he had been cut off from the spiritual flock. No doubt the court would have a right to decide whether he was a rightful trustee, but would they allow an appeal from the previous decision of the Church; would they interfere with the functions of church government? Certainly not. They would not invade the spiritual dominion by enquiring whether he was rightfully cut off. So here, the court has an undoubted right to look into the question whether the defendants are or are not trustees; but cannot go back to the Assemby of 1837, and look into acts purely spiritual; and when that body has decided that certain persons do not belong to the church, decree that they do belong. That is a question for the Assembly: I contend that jurisdiction over this subject-matter belongs exclusively to the Church. Corporation or no corporation, trustees or no trustees, when it is asked whether certain persons are connected with the Church, the only question for the court to propound is, how have the judicatories of the Church decided? I may remark here, that Judge Rogers admits this exclusive jurisdiction to have belonged originally to the Church; but he seems to suppose that the court has now a right to interfere, because we have to do with a corporation, or with trustees. But I contend that the court now has no more right in this matter than it had before; and that whenever the question arises, who belongs to the Church? you must still go to the Church for its decision. And that decision must necessarily be final and conclusive of the question. It may happen to be combined with other questions properly of civil cognizance, but it will not on that account be the less a question exclusively of Church jurisdiction. The other questions may be decided by the court upon their appropriate grounds, this can be decided only by reference to the Church. If a man be in full communion, with the assent of the Church, he must be deemed to be a member. If he be excluded, he must be deemed not to be a member. So is it also of Synods and Presbyteries. Wherever, and whenever the question arises, it must be so disposed of, and whatever depends upon it must follow that decision. The body is the same as it was before the act of 1799 was passed, (which acknowledged it as an existing body)—its jurisdiction in spiritual matters is the same—the authority of its decisions is the same—and if a question arise about trustees, itself depending upon a question properly of Church cognizance, the decision by the Church of the latter, must necessarily be conclusive. Else, the boundary between spiritual and temporal jurisdiction would be entirely destroyed, and the rightful province of the spiritual authority, be invaded by the civil power, to the utter overthrow of religious freedom.

Within a day or two past I have received the manuscript notes of Chief Justice Johns, of a case formerly decided by the Supreme Court of Delaware.

Mr. Randall. We object to the introduction of this new matter.

Mr. Sergeant. The counsel on the opposite side may reply.

Mr. Randall. But the court has already been jaded by the length of the case.

C. J. Gibson. Oh, we are quite fresh yet.

Mr. Randall. Then your Honours have very little of the infirmity of human nature.

Mr. Sergeant. These notes were put into my hand several days ago,

but I had not time to look at them immediately and arrange them. Here are the notes of the argument, and of the opinion, with a copy of the affidavit filed, bearing date the 6th of November, 1812. So much it has seemed necessary to say in explanation: I will now either read a part of the case, or hand the manuscript to your Honours.

Mr. Randall. If it is the case of a pastor claiming to be restored to his pulpit, we have no objection to its being read.

Mr. Sergeant. It is not that: it was an application to be restored to the Presbytery. I will read the affidavit.

"In the Supreme Court of the State of Delaware, held at New Castle, for the county of New Castle, of the November Term, A. D. 1812.

"New Castle county, ss.

"Francis Hindman being duly sworn in open court, does depose and say, that on the first day of May in the year of our Lord one thousand eight hundred and eight, he was a member of 'The New Castle Presbytery' in full standing, and as such member duly admitted and received by them, entitled to all the rights, franchises, privileges and immunities of a member of the said New Castle Presbytery in full standing. And he further deposes and says, that on the same day and year aforesaid, he was a regular minister, duly ordained to preach the Holy Gospel, and to administer all its ordinances, according to the Rites and Ceremonies of the Presbyterian Church of the United States of America, received and admitted by the said New Castle Presbytery, and was in the regular exercise of his ministerial functions, and entitled to all the rights, franchises, perquisites, privileges and immunities of a regular Minister of the Presbyterian Church aforesaid. And he further deposes and says, that as a member of the said Presbytery, and a minister of the said Presbyterian Church under their jurisdiction, duly received and accredited by them, he has well and honestly behaved himself, and at all times and on all occasions performed the duties appertaining to the said situations respectively. Nevertheless, the said New Castle Presbytery proceeding on a vague, uncertain and unfounded accusation, contrary to their own rules and in violation of every principle of justice in the absence of this deponent, did depose him from the said New Castle Presbytery, and also deposed him from the office of minister of the Presbyterian Church aforesaid, and divested him of all his ministerial functions, without any just or legal grounds, to the serious injury and great damage of this deponent.

"Sworn and subscribed in open Court, November 6, 1812. } (Signed) FRANCIS HINDMAN.

"Attest, *Daniel Blaney*, Clk. Sup. Ct.

Mr. Sergeant. Here you see there were not fifty thousand disfranchised—only one.

C. J. Gibson. Was the Church incorporated?

Mr. Sergeant. The Presbytery was incorported, as appears from the argument of Mr. Rodney.

C. J. Gibson. It certainly must have been: else the court would not have taken cognizance of the application.

Mr. Sergeant. His Honour Judge Rogers I presume, has a copy of

the laws of Delaware. The act of incorporation was passed the 3d of February, 1808. Here is what has been handed to me as a draft of the opinion of Chief Justice Johns. In the course of the opinion he examines the affidavit, and says that it is not sufficient, in that while it declares the removal to have been determined in the absence of the deponent, it does not negative the fact that he had due notice and might have been present, as well as for other reasons. Then he comes to the general grounds which are discussed without reference to the sufficiency of the affidavit. The Chief Justice says,

" This is an application for a *Mandamus* to the New Castle Presbytery to restore Francis Hindman, 1st to his clerical office of a Preacher or Minister of the Presbyterian Church; and 2dly to his Membership of the civil New Castle Presbytery, on grounds contained in the applicant's affidavit, which it is contended shows an amotion or removal from both offices."

* * * * * * * *

" But supposing the affidavit not to be defective, and that we are to consider this to be a case of removal from the clerical office by the decision of an ecclesiastical tribunal having competent jurisdiction, but that it is an erroneous decision; then the question occurs—Is it conclusive, or can a civil tribunal interpose, review, and correct the error; and have we the power to controul the ecclesiastical tribunal and enforce obedience to our orders?

" These are important questions which touch the freedom of religious worship—It perhaps may not be *Holy Ground*, but it appears to be *Constitutional* Ground.

" The first section of the first article of the Constitution of Delaware provides, that ' *no power* shall or ought to be vested in or assumed by any magistrate, that shall *in any case* interfere with, or in any manner controul the rights of conscience, in the *free* exercise of religious worship.'—Your Honours perceive that it is not so strong as the provision made in our own Constitution.—' Courts are not to assume *such* power as may have this effect. This provision we are of opinion does secure to every sect of religion the exclusive right of exercising religious worship according to their will and pleasure, uncontrouled by civil authority. *Who* shall be authorized to preach is a matter proper to be regulated only by the religious society, and essentially concerns the right of freedom in the exercise of religious worship which was designed to be secured by the Constitution. To interpose the power of this court in the present case, we consider would be to assume the power which the Constitution forbids. The policy of our government and laws is not to blend the Church and State, but to keep them as separate and distinct, as may be consistent with the protection of religious rights; and we believe this to be sound policy. Once permit the civil authority to interfere with religion, particularly with the ordination and expulsion of ministers, and you create a powerful engine which may be used to introduce an established religion. Further it may produce discord, encourage faction, and destroy that harmony without which it is not to be expected religion can flourish, as it would if left to regulate itself.

"We, therefore, are of opinion that as to the clerical office this court has no power to interfere."*

Now, the principle of this decision applies equally here. The question before you, is one with which you have no power to deal. Where

* As no report of this case—*The State of Delaware* v. *The New Castle Presbytery*—appears to have been published, we shall here lay before the reader, what will no doubt prove very acceptable, the whole of the opinion of the court. The affidavit filed, has been already given at length. Upon this suggestion, after some argument, a rule to show cause why a *mandamus* should not issue, was granted; and notice thereof, in form as follows, served upon the Presbytery:

"The State of Delaware
v.
The New Castle Presbytery. } *Suggestion and Affidavit for a* MANDAMUS.

"And now, to wit, this eleventh day of November, in the year of our Lord one thousand eight hundred and twelve, on suggestion and affidavit filed, and on motion of counsel for Francis Hindman, in open Court: It is ordered by the Court, that the first Saturday of next term be given to the New Castle Presbytery, to show cause why a Mandamus should not issue, directed to them, requiring them to restore the said Francis Hindman as a member of the said civil New Castle Presbytery, and to his rights, privileges, franchises, perquisites, and the exercise of his clerical functions, as a minister of the Presbyterian Church of the United States of America, duly ordained to preach the Holy Gospel, and to administer all its ordinances, according to the rites and ceremonies of the said Presbyterian Church.

"And it is further ordered, that notice of this rule be given to the President and Secretary of the New Castle Presbytery."

In April, 1814, the case appears to have been continued by consent; and afterwards, it was again continued until April, 1815, when it was fully argued by Mr. K. Johns, jr. and Mr. G. Rodney, for the plaintiff; and by Mr. McLane, Mr. Broom, and Mr. Van Dyke, for the Presbytery. After time had to consider the application, the opinion of the Court was delivered, April, 1815, by

"Kensey Johns, C. J. This is an application for a Mandamus, to restore Francis Hindman, 1st, to his clerical office of a preacher or minister of the Presbyterian Church; and, 2dly, to his membership of the civil New Castle Presbytery, on grounds mentioned in the applicant's affidavit, which, it is contended, shows an amotion or removal from both offices. A variety of rules or principles, have been submitted, on both sides, as applicable to, and governing this case. All embarrassment or difficulty as to the bearing of those rules will vanish, upon a due consideration of the grounds of this application, which presents to view *two* distinct and different cases, governed by different rules. It may be, that some of the rules may apply to each case; but it is clear, many of them cannot apply to both. Therefore, to avoid embarrassment and difficulty, the two cases ought to be separately considered.

"The first case is an application for a Mandamus, to restore an expelled minister of the Gospel to his clerical functions.

"The second is to restore him to a right of membership in the civil New Castle Presbytery.

"Before we consider the rules particularly applicable to either of the cases, we shall notice some of the general rules and principles, for regulating the use of the remedial writ, called a Mandamus.

"1st. 1 Vol. D. L. (Delaware Laws,) 376. It is said, this act gives the Supreme Court the same powers as the King's Bench in England has. It does so; and the court have such power, except so far as the exercise of this power has been altered or restrained by subsequent laws, or the Constitution of the United States, or the State of Delaware.

"2dly. It is contended, that in England, the Mandamus is founded on Magna Charta, and in Delaware, on the seventh section of the first article of the Constitution, which provides, that no person shall be deprived of life, liberty, or *property*, unless by the judgment of his peers, or the law of the land; and that the Court of King's Bench and this court, have the power to issue this writ, and are bound to issue it, to restore an officer to his office, where there is a *right* and no other specified remedy, without regard to the nature of the office, if it draws after it temporal rights; and that the value of the matter, or the degree of importance to the public police, is not to be scrupulously weighed, but that this court ought liberally to interpose for the advancement of justice. On the other side, the general doctrine is not denied, but 'tis contended, that the general rules do not apply to spiritual offices, and that there are other exceptions.

"We consider the writ of Mandamus to be a writ of right, (3 *Burr. Rep.* 1267,) to the aid of which, every citizen is entitled, upon a *proper case* previously shown, to the satisfac-

mere civil rights are concerned, courts may interfere; but it does not belong to them to interpose their authority in matters merely spiritual, to decide spiritual questions. I feel greatly fortified by the opinion of the Supreme Court of Delaware, in the position for which I am contending.

tion of the court; and it ought to be used, where the law has established no specific remedy, and where, in justice and good government, there *ought* to be one; and if there be a right and no other specific remedy, it ought not to be denied. How this law applies to either of the cases, shall be considered; but first let us notice,

"3dly. That it is contended, that in the present stage of this business the court ought not to arrest the case by refusing to grant the writ, if there is *probable cause* shown, and that this is to be judged of from the affidavit alone; and, farther, that if doubtful 'tis sufficient. In opposition 'tis said this case depends on a question of jurisdiction, and the court ought not to exercise the power if doubtful.

"Exclude the question of jurisdiction, and the law is not to arrest the case in its present stage, if proper ground appears from the affidavit; as if there be a claim of right, though it is litigated, it may be sufficient, according to the case in 2 *Burr. Rep.* 1045. But then the court are not to be prevented from the consideration of the nature of the affidavit, and examining any matter to which the affidavit refers. And if the case turns on a question of jurisdiction, probable ground will not do; for we must believe that this court have the power to hear, try, and decide this case, before we can with propriety take cognizance of it; because it would be idle—nay, it would be, undoubtedly, wrong, for this court to issue a writ to bring a case into court, have a trial by jury, and afterwards dismiss it for want of jurisdiction.

"If we have not competent authority to apply the specific remedy, *i. e.* to restore to this clerical office, and our order would be nugatory, as the counsel for the Presbytery insist, it appears to us that this court ought not to inquire into the merits of the case, nor make a nugatory order to restore; and we were not a little surprised at the reply to this objection, and to hear it expressly *avowed*, that the great object of this proceeding is, to afford Mr. Hindman an opportunity of compelling his accusers to come into this court, and by legal proof to substantiate the charges on the ground of which he was removed, and that this court might examine the causes of his amotion and decide on their sufficiency.

"4thly. The supremacy of the law is relied on as an answer to the objection founded on the nature of spiritual and temporal tribunals in America, which it was contended stand on different grounds than those tribunals do in Great Britain. True, it was said, the Presbytery, Synod, and General Assembly, derive their authority by consent from the people possessing the Presbyterian religion, and not from any civil power. This we know to be true. And it was argued, that from the policy of our government and laws, those tribunals were separate and distinct; so that as to spiritual matters, comprehending the cases of ordination and expulsion, the ecclesiastical tribunal possessed exclusive jurisdiction; and that the civil tribunals could not interfere without violating the principles of the Constitution of the State of Delaware. But 'tis said religious institutions cannot control the civil authority, but must be amenable; that the civil authority is the only refuge and security against persecution. Farther, 'tis the protection even for our religious rights, and must be supreme; and the exclusive jurisdiction of the ecclesiastical tribunal, even in spiritual matters, is denied.

"The power of the civil authority to redress wrongs and to protect our rights, both civil and religious, cannot be denied; and if persons composing religious institutions do acts which violate our civil rights, no person doubts their amenability. And if they exercise the power of expelling a preacher, then the questions are, do these acts invade any civil rights? Is there any law of the land which vests a right in Francis Hindman to have and to hold the office of a preacher, or forbids his expulsion? Is there any rule even of the society which recognises the right after expulsion? And is not the power of judging its own members and officers an inherent power, necessarily vested in the tribunal constituted by the society? And ought not these tribunals have exclusive jurisdiction as to ordination and expulsion? Where then is the right which is invaded? Certainly, the existence of a right now to leave the office, must appear, before it can be said any right is violated, for which redress is to be obtained by the operating power of this *supreme* civil authority.

"We shall now consider the two cases comprehended in the present application for a Mandamus.

"The first is, to restore an expelled minister to his office of minister. Now let us examine the facts. First, the affidavit is to be taken according to its necessary import. Whatever is therein referred to must also be looked at, in order to understand the case. The affidavit of the applicant is in the following words:"—*Vid. Ante, p.* 535.

If there exist any doubt in your Honours' minds upon this point, as I trust there does not; if you are not prepared to go the whole length of the doctrine which I have thus endeavoured to illustrate and enforce; still, you must agree, that some respect is due to the acts of these Church

"This affidavit does show that the removal by the Presbytery was in the *absence* of Francis Hindman; but it does not show that it was a decision without notice, or giving him an opportunity of being heard; and in this respect is defective.

"The affidavit does show that the amotion from the clerical office was contrary to the rules of the New Castle Presbytery, at least so far as the belief of Mr. Hindman proves it; but it is defective in not specifying what rule or rules, that the court may judge, if they have the power of judging, whether such a rule was violated, as would substantially effect the merits of the case.

The affidavit, by referring to the rites and ceremonies of the Presbyterian Church, opens to our view the Constitution of that Church, by which we see two appelate tribunals provided; but it does not show that appeals were resorted to. 'Tis defective in this respect; for the removal is not fully impeached without a final decision.

"Therefore, if this court have jurisdiction, we are of opinion a proper case is not shown to warrant us in issuing the Mandimus to restore the clerical office."

Next comes the passage quoted by Mr. Sergeant. *Ante, p.* 536.

"The law in England, as to the use of this writ of Mandamus, we have considered; and if that law could govern us in this case, we are of opinion, the cases cited and relied on by the counsel for the applicant, do not show that even in England, the writ of Mandamus would be used to restore an expelled minister of the Gospel. We conceive there is a marked distinction between those cases and the present. The principal ground for controversy in this case, is the removal from the clerical office. In the leading cases cited, the existence of the clerical office is not questioned; and the inquiry is not, whether an expelled minister can be restored, but admitting him to be a minister, and as such he claims or has a right to another office in a particular church, by virtue of some grant, or contract, or statutory provision, and is ousted or deprived of it, such minister can be admitted or restored to the other office. In those cases, no question arises as to his being a minister: the power to decide, as to the first office, is not involved. The inquiry is, if being a minister, and having a right derived from law to another office, and he is deprived of it, the court will redress him by Mandamus. Here, the civil right to the other office, is a proper subject for civil power to act on, and a court will give redress. We think no such case in this, has or can be shown.

"Now, as to the principles of the cases relied on. 3 *Burr. Rep.* 1267, may be considered as the principal case, and does contain the general principles applicable to the writ of Mandamus. 1st. It is a writ of right, in proper cases—Admitted. 2dly. It ought to be used where the law has established no specific remedy, and where in *justice* and *good* government, there ought to be one—Admitted; but here, 1st, there can be no remedy: 2dly, it would be subversive of *good* government; 3dly, if there be a right and no other specific remedy, it ought not to be denied—Admitted; but then there must be a right, and this can only be understood to be a *legal* right. Now, here is no legal right; so that according to the principles of the case in Burrowes, this is not a case in which a Mandamus ought to issue; for it would be subversive of good government, and no right is invaded, and consequently there can be no wrong to be redressed.

"As to the American cases, we cannot see how they apply to the present case. The case of the *State* v. *The Trustees of the Presbyterian Church of the city of Philadelphia*, was to restore a minister to the *use* of the pulpit, in a certain church. Here was no question as to the preacher's office, but supposes him to be a minister; and the question it is to be presumed was, whether, being a preacher, he had the civil right of using that particular church.

"The case cited by Mr. Dallas, in Shippen's Trial, 234, only shows that the Mandamus is used here as in England; and there was no question as to the right to the office of a minister, but a dispute between two priests, who had the civil right to the Holy Trinity Church.

"The New York case," (*Case of Rev. Mr. Jones, pastor of Trinity Church*—1812,) "does not touch the writ of Mandamus, and seems to have been a dispute about the salary of a minister.

"2 *Binney's Rep.* 441, was to an incorporated charitable institution, to restore an expelled member. This expulsion was not in a case where the corporation possessed inherently the power, but depended on the validity of a by-law, which the court determined to be void. And farther, it is not like the case of expelling a minister, by a tribunal having competent authority to try and dismiss.

judicatories; that they are at least to be considered good, until the contrary has been shown. And the burden of proving that they are not good and valid, should of course rest upon the opposite party. But here this rule has been reversed: the burden of proof has been thrown upon

"The authorities cited, to show a variety of cases in which this writ of Mandamus has been denied, for reasons alleged to be applicable to this case, we do not consider to be necessary for us to notice.

"We shall now consider the second case, which is to restore Francis Hindman, as a member of the *civil* New Castle Presbytery, to his membership, on the ground of a removal.

"We must first ascertain what are the facts of the case, as it now appears before us. If the word "deposed," in the affidavit, is to be taken to import a removal from the civil New Castle Presbytery, by some act done by that body, acting in their corporate capacity, then the case is different, in point of fact, from the one which has been argued on, and perhaps does not present the real case which now exists.

"The applicant's counsel, in the argument of this case, consider the amotion from membership as consequential, or as the effect of expulsion from the office of a minister; and do not pretend that acts were done by the civil New Castle Presbytery, in their corporate capacity, for the purpose of removal, but contend that the acts of the ecclesiastical and civil New Castle Presbytery are not distinguishable, and even deny the legal *existence* of two New Castle Presbyteries. We are of a different opinion. It appears to us to be manifest, that there do *legally* exist two New Castle Presbyteries, having and exercising distinct and different powers: the one for the government of the Church, which is ecclesiastical, and founded on the consent of associated religious societies: the other for the management of temporal affairs pertaining to the Church, which is civil, and derived from legislative authority, by the act of incorporation passed on the 3d of February, 1808.

"1st. The right of creating religious institutions, without the aid of civil power, is recognised by the usage of our country.

"2dly. It is recognised by the preamble to the Constitution of the State of Delaware, and the first section of the first article.

"3dly. The act for incorporating the members of the New Castle Presbytery, does recognise the existence of a New Castle Presbytery at that time; and its subsequent existence is by that act, made *necessary* to perpetuate the corporation of the New Castle Presbytery. For the first section contemplates that the then and future members of the ecclesiastical Presbytery, shall be the members of the civil Presbytery. Therefore, the ecclesiastical Presbytery must then have existed, and it must continue to exist, or there can be no civil Presbytery; because, if it is admitted there are no members of that Presbytery, there can be no person legally qualified to be a member of the incorporated Presbytery, and consequently the corporation must be extinct.

"4thly. The counsel themselves in drawing up the rule to show cause in this case, have used the word 'civil' to designate the incorporated Presbytery, which would have been unnecessary if there was but one, as the corporate name would have been sufficient.

"But first we shall examine how the facts appear from the affidavit, independent of explanation from the argument of counsel. The facts are to be collected from the words of the affidavit, and the words according to their *necessary* import. We are not to be satisfied with conjecture, nor with the *opinion* of the applicant as to law, but his belief as to matter of fact in the present stage of this case is sufficient. He swears that the *said* New Castle Presbytery did *depose* him from the *said* New Castle Presbytery.

"1st. We are to ascertain whether it appears from which Presbytery he was deposed. It certainly is to be understood that the word 'said,' refers to the New Castle Presbytery before mentioned. But, as both Presbyteries are known by the same name, it is doubtful to which it refers; and this is not sufficient; it must appear that it was the incorporated New Castle Presbytery that deposed him. Now there is not one word in the whole affidavit to show that the incorporated Presbytery was intended; but there are some words, to wit, 'in full standing,' which seem to imply, that the New Castle Presbytery previously mentioned, is the ecclesiastical Presbytery. Then from the *necessary* import of the words it does not appear that the removal, in point of fact, was from the incorporated Presbytery.

"Next, we are to consider the import of the word 'deposed.' This word—deposed—may be understood to mean, a removal by a decision of the ecclesiastical Presbytery, or it may be understood to mean a removal from the incorporated Presbytery, if not taken in connexion with the word 'said.' Then *it* does not necessarily import removal from the civil Presbytery. Again, deposing may comprehend opinion as well as fact. The applicant may be of opinion that expulsion from the ecclesiastical Presbytery amounts to removal

us; and how this has operated, you have seen in the discussion respecting Dr. Elliott. For example, acting as Moderator, he decided that Dr. Patton's motion was out of order. Dr. Patton, very respectfully and properly, no doubt, said that he must appeal from the decision. Again, the Moderator pronounced him out of order: Dr. Patton acquiesced, and sat down. Well, his Honour told the jury, that Dr. Elliott had been right in this decision, on the ground that the Committee of Commissions had not yet reported, and therefore there was no house to which an appeal could be made. But then, he left it to the jury thus:

"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. *Ante*, 473.

"*The decision of the Moderator was correct, if the reason assigned*

from the civil Presbytery; but this is a question of law, and not of fact, depending on the legal effect of expulsion from the ecclesiastical Presbytery. The affidavit does not satisfactorily show that there was a removal from the incorporated Presbytery; and, therefore, we are of opinion that the question of removal from his membership of the incorporated Presbytery is not now before us.

"But suppose Francis Hindman to be expelled by the ecclesiastical Presbytery, does this, consequently, remove him from being a member of the incorporated Presbytery? And, if so, ought this court to restore him by Mandamus to his membership of the incorporated Presbytery? The first consideration is as to the effect of the expulsion on his corporate rights. The legal effect must depend on the constitution of the act of incorporation. Can any expelled Presbyter be a member of the corporation? If not, we certainly ought not to restore him to his membership *against* the law.

"See the act—4 *Del. Laws*, 233. It appears to us that the first section of this act ought not to be so constituted as to give a right of membership in the incorporated Presbytery to a person who has ceased to be a member of the ecclesiastical Presbytery; and therefore that we ought not to restore him because he has no right to be a member. But suppose the construction of this law should be according to the letter, and that as Mr. Hindman was a member of the ecclesiastical New Castle Presbytery, at the time of passing the act of incorporation, he is yet a member notwithstanding the decision of the ecclesiastical Presbytery to take away his clerical office. This decision could have no such effect, for it cannot repeal the law, which, if that is the true construction, declares him to be a member. There must be some act done by the civil New Castle Presbytery, acting in the corporate capacity, declaring his expulsion from the corporation; or some act must be done preventing Francis Hindman from exercising his corporate rights, before there can be sufficient ground to warrant this court to issue the Mandamus. And as no such acts appear to have been done, it is the opinion of this court, that a Mandamus ought not to issue, to restore him to his membership of the civil New Castle Presbytery.

There is one other point in this case to be considered—as to the emoluments attached to a membership of the civil New Castle Presbytery. It does not appear Mr. Hindman has been elected President, Trustee, or to any corporate office. If he is a member, we can perceive no other rights vested in him, but the right of voting for officers, and being elected to an office; and it does not appear to us that any temporal rights can be attached to the right of membership, which will entitle him to pecuniary emolument.

"It is said that a minister without a call is entitled to some stipend out of the general fund; but this cannot give any right to an expelled minister; so that we must again resort to the question whether he be a minister. And we consider the expulsion conclusive in this court, until reversed by the proper tribunal.

"For these reasons we are of opinion a Mandamus ought not to be issued, and therefore order that the rule be discharged."

was the true reason." Then, in regard to this particular, it went to the jury to find, whether the reason which Dr. Elliott gave, was really that upon which he acted. I am not now speaking of the substantial grounds of this opinion, nor objecting to the charge, though I might do so on this very account: I here wish merely to exemplify the position in which we have been placed, by the course which the argument has taken. The Moderator was confessedly right in his decision, yet the jury are called upon to judge, whether the reason that he gave at the time, was the true reason that influenced his conduct. I would ask his Honour, whether he or any other man, called upon to sit in judgment, could stand such an ordeal? Dr. Elliott was examined here as a witness, and notwithstanding his having preached from the text which has given so much offence, when to his reverend character as a preacher of the Gospel, was added the solemn sanction of an oath, he was certainly entitled to the fullest belief. Yet the jury were told to look into his heart, and say whether the reason given, was or was not the true reason. And the validity of his act, is thus made by the judge to depend upon what the jury may think of that question. If this principle be sustained by your Honours, the acts of the Church will hereafter be, not only of no authority, but not at all respected; and every religious denomination of our land must be exposed to the same danger. Think not that it will be confined in its operation to the Presbyterian Church. Both Old-school and New-school, High-church and Low-church—all must be amenable to this species of searching investigation. Who will consent to be Moderator of the Assembly, if the clerical character be found insufficient to protect him from the grossest suspicions and accusations? Every other presiding officer finds protection in the rules of the house over which he presides. They forbid that his motives should be inquired into or impugned. The only question is, whether his decision is right or wrong. But here, a Moderator engaged in the discharge of the ordinary duties of his office, is accused of conspiracy, and we are told to look into his heart, and there search for corrupt motives and unholy purposes. This is a persecution most refined and cruel, in comparison with which, the persecution of five hundred ministers and fifty thousand communicants, which has been talked of, is but as the light dust of the balance. What more harrowing trial could those engaged in the management of spiritual concerns, be subjected to? What more agonizing torture could be applied, than they might be made to suffer, in the progress of an investigation such as this? I am not now speaking of actual suffering: I do not speak of the feelings of my clients in the present case; but of the natural and inevitable consequence of the court's adding its sanction to such a course of investigation. They talk of disrobing ministers of the Gospel. When have they spared a rag of the raiment that covered us? What attempt has been omitted, which was calculated to wound the feelings of these reverend men, and shake the confidence reposed in them, by those to whom they administer the bread of life? The more the growth of this sort of spirit has been favoured, the more unrelenting it has naturally become, until at last we find that even one of the learned counsel, in the excitement of fancied triumph, could not forbear to offer Dr. Elliott the text from which he ought to preach, meaning the text which he ought to observe. Is it fit; is it conducive to the interests of either the Church or State, that such an inves-

tigation as this should be allowed, when gentlemen so correct as both of the learned counsel on the opposite side usually are, enter so deeply into the feeling of the contest, as to do what they doubtless must feel to have been unkind and most unwarrantable?

Mr. Randall. I am not aware that I said any thing to which Mr. Sergeant's remarks can apply. The charge is very serious, and embraces both of us.

Mr. Sergeant. I refer to the whole discussion, but more particularly to those passages which I have now cited. I do not suppose that they were meant to wound, or hurt any one's feelings or character: they were the mere sallies of the moment. But who can tell what injury they have done, or how deeply they have pierced? You can only judge of this by considering the delicacy of the character of ministers of the gospel before the world. It is as delicate as the character of those who are called to administer justice in a civil court. It, as little as any thing, can endure to be thus rudely handled. I have used, and intend to use, no harsh word against any member of the New-school, among whom there are many good men, who I sincerely wish were out of this cause. What I have said has been sufficient to illustrate the nature of such investigations, and to show that if sanctioned, they must end in the destruction of the clerical character and of the Church.

I will now endeavour to reply to a suggestion made by Mr. Randall yesterday: as it belongs to the relators' case it is necessary that I should notice it. Indeed, in the first instance, it bore something like the shape of an argument, and therefore may possibly embarrass the inquiry unless now disposed of. He suggested that these gentlemen who had been excluded were a portion of the body of electors of the trustees. He said, indeed, that the General Assembly was a *quasi* corporation. I think he said that it was to be treated as an incorporated body. By a *quasi* corporation is meant an imperfect corporation—one which has some, though not all the powers of a corporation, conferred by law; whereas the General Assembly has no civil or corporate powers whatever. It is not a *quasi* corporation, nor a corporation in any sense. But they are the electors of trustees, who are incorporated. Who are the electors? The General Assembly of the Presbyterian Church, such as it was in 1799, when the charter of incorporation was granted, and when there was certainly no corporate body at all. The act begins, "Whereas the ministers and elders forming the General Assembly of the Presbyterian Church of the United States of America, consisting of citizens of the state of Pennsylvania," &c.; and in the first section incorporates eighteen persons by name, of whom one third were clergymen. "John Rogers, Alexander McWhorter, Samuel Stanhope Smith, Ashbel Green, William M. Tennant, Patrick Allison,"—they all were clergymen. These eighteen and their successors are incorporated. Then the sixth section provides,

Mr. Sergeant read the sixth section.—*Vid. ante, p.* 21.

There is the act, and it directs that the trustees shall be appointed by the General Assembly. It speaks of the General Assembly as an existing body, of course a body possessing all the qualities, attributes, rights, and capacities which it had before the passage of the act, and none other. It was a known body then existing without any charter, and neither a corporation nor a *quasi* corporation. Now one of two things must follow.

The legislature either meant to continue the body the same as it had been theretofore, or as it then was; or they meant to change its nature or attributes. If we adopt the former supposition, that it was to continue such as it then was, the inevitable consequence is, that the plan of 1801 was entirely inadmissible, that it engrafted upon the Church an alien body, of a different form of government and discipline, and could not be beneficial to either sect, or to both. Did the legislature mean to alter the Church in any respect? They did not, or they would have said so. Did they mean to make it a body corporate? They did not, or they would have done it. Did the Church ask to be incorporated? No, the very reverse. Wherever churches, (that is the estate,) in this city are held by trustees, the church sessions are entirely different and independent bodies. So the General Assembly is quite separate from its board of trustees, who are only the ministers of its charities. The act of incorporation left the Assembly as it found it, making no alteration in its constitution, or in its capacity.

What power did it possess at the time the charter was given? If these four Synods had been cut off before the year 1799, as the Presbytery of Philadelphia was, what would have been their situation? Would any civil tribunal have looked at the act to determine whether it was right or wrong? At that time the part of the Constitution which I have read was in force. The principles of civil and religious liberty were well defined and deeply felt; the consideration of them had occupied the best minds in the world; they never were better understood, than when this act was passed. Do you think that the legislature intended, by the appointment of certain persons and their successors, to hold the bag in which the funds were deposited, to alter the fundamental principles of Presbyterianism, and to set the civil courts over the ecclesiastical; to refer to them the decision of matters, before belonging exclusively to the jurisdiction of the Church? If they had so meant they would have so said. But they have not said so. They have left the General Assembly exactly as they found it—responsible as it was before, and no further or otherwise—the supreme judicatory of the Presbyterian Church, having final jurisdiction in spiritual matters, and not amenable to any civil power. Now, may it please your Honours, there were certain trustees appointed in 1837—four I think—after the exscinding resolutions had passed, after the representatives from the Presbyteries belonging to the four Synods had ceased to be members; but does any one pretend that that election was therefore illegal? Yet if the doctrine advanced be true, that a civil court has a right to look into the validity of a decision made by the Assembly, the validity of this identical decision, the question may arise whether the subsequent election of trustees was good, when a part of the members had been excluded from voting. Nobody has ever thought of such a thing as this, even in the season of most embittered strife—has ever thought of calling in question the constitutionality of that appointment; though according to the doctrine of the opposite side, the legitimate effect of the exclusion would have been to invalidate the election of 1837. But this is not the subject of our present inquiry. Where the General Assembly has elected trustees, evidence being given of the existence of the body, the certificate of their election is sufficient proof of their having been duly chosen.

Nor is there any difficulty in regard to the disposition of the funds.

Whether the trustees of charitable funds are incorporated or not, at all events they are under the supervision and control of the law. A court of equity will in all cases see to the proper application of the fund, and compel the trustees, though not a corporation, to fulfil the intention of the donors. But to this end they will look, not into the acts of the General Assembly but into the original purpose of the giver. Such donations are of two descriptions: they are to be applied to specific objects to be directed by the General Assembly, or to specific objects under the control of a Court of Equity. If placed under the control of the Assembly, the only question to be decided is, which is the true General Assembly, and it is admitted that the Assembly of 1837, after the passage of the exscinding resolutions continued to be in full life, and as competent as any one that ever had existed.

I do not therefore think it necessary to this case to go into an examination of the acts of 1837; and his Honour will recollect that an objection was made at the trial, to the introduction, on the part of the plaintiffs, of any testimony respecting them. If that objection was well grounded in any respect, of course it will avail us now.

Judge Rogers. This reason was not given then.

Mr. Sergeant. If the reasons of objection were not as fully and satisfactorily stated as they might have been, I would suggest to your Honours that this was only one of the ordinary incidents of such a trial. The difficulty under which we all necessarily laboured in the trial of the issue, ought to reconcile the honorable judge who presided there to this review of his opinion. No question undergoes the same full and satisfactory discussion on a first trial, that it does after being brought before an appellate court. My learned friend in his opening and evidence introduced a new branch of law—matter entirely foreign to our ordinary subjects of study; and to grasp and master it, if any of us have done this, required much time and reflection. Those who have been acquainted with other cases know that it is so, in a greater or less degree, with all. Therefore it has seldom happened that new reasons—some additional arguments, have not been presented on the review of a case in the Supreme Court. A question is not examined with the same care, or the same clear understanding, on its first discussion, as when we come to rest attentively upon each point developed in a preliminary investigation. As the pilot, who looks steadily, with an intent gaze, along the horizon, at last discerns what a wandering eye would never have discovered; so the mind after being long and patiently fixed, discovers words and meaning, where at first it could see nothing—where all was perfectly blank. I remember a case, tried some years ago in the Circuit Court of the United States, in which Judge Washington presided and gave a clear opinion to the jury, who brought in a verdict accordingly. The case was removed into the Supreme Court, and after the opening counsel had concluded his argument, Judge Washington came up to me and said, "How could I have committed such a blunder?" and the opinion of the inferior court was reversed to the entire satisfaction of the learned judge himself. Upon the trial the case had not been argued as it was before the appellate tribunal; and very often a judge supposes, when his own decision comes up for review, that the question is presented in entirely a different aspect from that given to it in the court below.

But I do not mean to rest finally upon the arguments which I have thus offered, though I think them perfectly clear and satisfactory, in whatever way you look at them. I propose now to examine into the acts of the Assembly of 1837, upon their own footing, as if the court had the power to examine them. For if it can take cognizance of the acts of this and all other ecclesiastical bodies, we must submit, though we should like to be more thoroughly persuaded of its right of jurisdiction; and do not feel bound to conform to the verdict of a single jury, or the charge of a single judge, when entitled to the opinion of the entire tribunal. If *here*, finally, the jurisdiction be established, there can no longer be any question of its constitutionality. The decision of this Court is conclusive. I propose therefore to examine the proceedings of 1837, and will end this part of the case with that examination, which will be brief. And I begin with asking, by what law will you judge those proceedings? According to whose judgment will you judge them? What will you appeal to, as a ground of argument? I say that the acts of the Assembly of 1837 were good. Why? Because I think they were right. What I think, is however of no consequence to any body else. We must have some rule. What is it? The Presbyterian Church, by its highest tribunal, regularly constituted, has performed certain acts, deliberative and administrative; these, *prima facie*, are certainly good. But it is argued, that on some ground or other, they are wrong. Now, let us look closely at this matter. I do not, indeed, feel myself competent to form an opinion on spiritual questions for others. I go for one grand, consistent, constitutional principle, in all such matters: that every man must have exclusive cognizance of his own spiritual concerns. I cannot judge at all in regard to the spirit of another. How then am I to argue the question now proposed? Where will I find authority for my doctrines? Let us go to the Constitution of the Church. The Constitution declares, that the power of the Church and its jurisdiction, are purely spiritual and moral, and that the civil authority has no spiritual power. Now, how will you test these acts, and determine whether they are right or wrong? Will you appeal to the Scriptures? No; that would be a profane use of them. They are not to be brought into court, except where the law requires their use in the administration of oaths, or there are other cases of like necessity. But, if we do open the sacred volume, I may not understand it as others do, and they have a perfect right to understand it for themselves. My understanding of it is a guide for my own conduct only, not a directory for theirs. Yet the Scriptures are the rock on which they believe their peculiar system, their Church, to be built. I am not competent to say how they understand their Bibles. But our only security is on the foundation of the Scriptures; from this rock, we must endeavour to avoid being shifted or thrown off, each man upon his own individual responsibility.

We believe then that the acts in question are warranted by the constitution and laws of the Church, as we interpret them; that they are within the powers granted to the General Assembly according to our construction of the grant. Here are the general powers entrusted to that body.

Mr. Sergeant read Form of Government, Chap. XII. Sects. 4th and 5th.—*Vid. ante, pp.* 335, 336.

To this body, then, is given entire authority over all the affairs of the Church, authority to determine, not only the ends to be attained, but also

the mode in which power shall be exercised for their attainment. They are to correct the errors of other judicatories, but are not themselves subject to correction. They have a general superintending jurisdiction. The act here complained of is, that four Synods have been laid down or dissolved, for what the Assembly considered a sufficient cause. Suppose it is objected that they ought to have been suffered to remain in connexion with the Church; how long should they have been allowed to remain? If they cannot now be laid down, when can it be done? Must the relation continue to exist for ever? It is very easy to object, but our opponents must fill the whole of the chasm which they make; they must substitute an authority for ours. They must erect a tribunal which will do what Judge Rogers refused to do—and in this decision I think he was right—to admit evidence of the disorders which, according to our notions, exist in the four Synods. If an appeal is to be taken from the decision of the Assembly, the appellate court should have before it the whole of the evidence that was before the Assembly. They had collected testimony by a public examination, conducted in the presence of the delegates from the four Synods, and knew what the effects of the "Plan of Union" had been in all the borders of the Church, and in the General Assembly itself. They had therefore the means of forming a judgment, means to be made use of so far as they had liberty to use them; and if their decision was unconstitutional and void, when can they make such a decision; or, if they never can, what tribunal is to receive the same evidence and adjudicate the matter? How is the disorder to be remedied? I submit, that if our opponents cannot point us to such a tribunal and to such a remedy, this is a powerful argument against them. Disorder must then be remediless. This court may undo what is done by the Church, but can they do what is obviously essential to be done? They may defeat and counteract the rightful authority, but can they substitute a new one? Will they undertake themselves to administer the needful discipline and government?

Again, when a law enacted by a proper law-making power, or an administrative act performed by a proper administrative power, is submitted to examination on the ground of its unconstitutionality, there are certain well settled principles applicable to the question. For instance, if an act of Congress be impeached in a court of the United States; or an act of the Legislature of Pennsylvania in a court of the United States, or in one of our State courts, there are established rules of construction which must govern the case. And if this court can here try a question as to the constitutionality of an act of the Church, we must be allowed the benefit of these same principles and rules. What are they? There is one great one:—He who complains is bound to show, that the act is in conflict with some express provision of the constitution. He must lay the two instruments side by side, and show, either a manifest transcendence of power in that to which he objects, or a manifest interference between the two, so that they cannot stand together. An argument drawn from the general injustice of the act will not at all avail him. This has been decided in the courts of Pennsylvania, and in those of the United States, over and over again. Is it charged against an act of the legislature that it is retrospective? There is nothing in our Constitution, or in the Constitution of the United States which prohibits retrospective legislation. Accordingly, acts of the legislature have been confirmed in this court which were entirely

retrospective; and in a case brought up here from one of the northern counties, a retrospective lease was held good; by reason of which decision, was reversed in effect a judgment of this court, which had pronounced such a lease void. You must, as I have said, lay the two instruments side by side, and show that one cannot take effect without destroying the other: then you are to decide which is of the highest authority. Now you must extend this rule to the case before us, and point out that provision of the constitution of the church which inhibits the power exercised by the Assembly. Have our opponents done this? If not, and if it cannot be done, the acts to which they object are not unconstitutional in any sense. Do they require us to point out the part in which that power is granted? We say it is granted in the passages which I have read; that we have had it by practice, usage, and common consent, from time immemorial; or, what is amply sufficient for our purpose, that no clause of the constitution has been violated. Then, you cannot say, in this case, consistently with established principles, that the Assembly has passed an unconstitutional act. Well, will you say, that here was an improper exercise of power? To that length I think your Honours will not go. If the power exist, the Assembly alone is responsible for its proper exercise. If, however, this question is to be examined, I must enter upon it, though I do so with reluctance. Incompetent as I feel for the humble range of duties to which I am ordinarily called, I feel infinitely more incompetent for this task. I hardly know how to set out upon an inquiry which I am sure will be very unprofitable; but I will try to avoid being tedious.

I will endeavour, if I must enter upon this subject, to show, in the first place, that the separation effected by the several acts abrogating the "Plan of Union," and exscinding the four Synods, was essential to the welfare of the Church. I think this point is clearly in evidence before your Honours—I speak not of parol evidence, but of that of a more authoritative character. The resolutions of the Assembly give as one reason for those acts, that the "Plan of Union" itself had not been conformed to; and that the laxity of practice under it had been productive of great disorder and confusion: I suppose I may take for granted that the welfare of the Church is not promoted by confusion and disorder. On the same page of the paper-book which contains the affirmation of the foregoing fact by the Assembly, which must be taken to be sincere, we find certain resolutions of inquiry into the conduct of inferior judicatories offered and passed; which were immediately followed by a notice of a protest against them by Mr. Hay and others, and a notice from Mr. Cleaveland, for himself and others, of a protest against the abrogation of the "Plan of Union." Then,

"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." *Ante, p.* 38.

In the very adoption of this resolution was a declaration by the whole Assembly, that it was then expedient and essential to treat of a division of the Church. I hope this will never be lost sight of; and when we are charged again with sinister views, we may answer, that the whole Assembly—the New-school as well as the Old-school—were convinced that a separation could not be avoided; that the Church must be divided—peaceably, if it could be, but at any rate, that it must be divided. Then a committee was appointed, composed of five from one side and five from the other, for the two parties, by their votes, had become a known and distinguishable majority and minority. In subsequent pages, you will find what the two portions of this committee submitted to each other and to the Assembly. They negotiated just like the representatives of two foreign powers, acknowledged to be adverse in their views. Their appointment shows that it was impracticable to get along farther without division. They *were* already divided, irreconcilably. Here is the first proposition submitted by the Old-school—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 two portions called respectively the Old and New School parties, and represented by the majority and minority, in the present Assembly." *Ante*, 40.

What say the minority to this? "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:"

This is stronger than the language of the majority. The minority, as I understand the matter, may be called, unreservedly, the New-school.

"And whereas, 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:

"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." *Ante*, 41.

That is the language of the minority: "*Now, it is believed, a division of this body will be of vital importance to the best interests of the Redeemer's kingdom.*" And if separation was of vital importance to the best interests of the Redeemer's kingdom—a kingdom not of this world, though it concerns all who are in the world, it follows, that unless a separation had been effected, these interests must have been sacrificed. Who then will attempt to force us to sacrifice such great interests? I am aware—and I mean to do full justice to these gentlemen—that they afterwards endeavour to avoid the effect of what they had declared in the *projet*, laid before their brethren of the committee. In their report subsequently submitted to the Assembly, they say,

"The subscribers had believed that no such imperious necessity for a a division of the Church existed, as some of their brethren supposed; and 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 divi-

sion, provided the same could be accomplished in an amicable, equitable, and proper manner." *Ante*, 40.

Then, may it please your Honours, in the *projet* which they submit to one-half of the committee, the representatives of the majority, they do distinctly, without any equivocation or limitation, say that a division is of vital importance to the best interests of the Redeemer's kingdom; and offer this declaration, as a conceded basis of the concurrent report to be made to the Assembly, provided they should agree upon subordinate matters—the details of the plan. When the two committees—five and five—commenced their negotiations, on one thing they are agreed—that a division of the Church is indispensable. Well, did the Assembly agree in this opinion? I do not mean to lay great stress just now upon the difference in the language of the minority's committee, in their subsequent report. I take at present only their first opinion on the subject, as offered in terms to the other side, making no comparison between that and what they afterwards affirm, or the scene exhibited in 1838 in the church in Ranstead Court.

This purpose in which all seemed agreed, and the wisdom of which the minutes demonstrate, the majority afterwards carry into effect. Your Honours will perceive by the proceedings of both 1837 and '38, that there existed such difficulties, strife and disorder, as strongly confirmed the opinion thus expressed by both parties, as were subversive of church government and discipline; and that instead of the Assembly's having power to correct the evil, by any ordinary process, it threatened to destroy all the power that the body possessed. Such was the heat of controversy, that scarcely a resolution could be passed without being followed by a protest, scarcely a division made without an angry conflict. The known division of the house into two well defined parties, affected even the appointment of a committee, which bore the character of a congress of representatives from hostile powers. No one who looks at the situation of affairs can think the statements of either party exaggerated; can doubt that division was of vital importance to the best interests of the Redeemer's kingdom. In such a state of things the Assembly could not govern itself, much less the Church in its whole extent. All authority was lost—you see how completely and finally it was lost in 1838. But, in 1837, the line of division between the two parties was well defined: they were ranged on opposite sides—the Old-school and the New-school. When a committee was to be appointed, composed in equal portions of the two parties, every body knows where to look for New and where for Old school men. They no more mingled than do the waters of the Alleghany and Monongahela at their junction, where the colour of each is as distinct as where the streams flow separate.

Farther, the root of all this difficulty was understood—this cannot be disputed—was understood to be in the plan of union of 1801. The minutes of the Assembly of 1837 show this conclusively. The truth is that aliens had been admitted into the judicatories of the Church. This we could have proved, and, having offered to do so, are entitled to the benefit of the fact as if we had proved it. They were brought in under the operation of the plan of 1801. Now his honour, Judge Rogers, instructed the jury, 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 in contravention of the act of the Legislature of Pennsylvania, incorporating the trustees of the Church; but he did not see the bearing of this doctrine upon the present case. His views on the subject are more fully explained in the preceding pages of the charge. Speaking of the "Plan of Union," he says,

"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 safe-guard, or protection of the rights of all the parties to be affected by it, without any design to confer upon the Standing Committeee 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."

* * * * * * *

"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." *Ante*, 465, 6.

By these arguments he arrives at the conclusion that lay delegates were admitted only in a very limited manner by the "Plan of Union"—only when an appeal by a Presbyterian member of a mixed church was pending before the judicatory. To this point I beg leave again to invite the attention of your Honours: it has been debated already on both sides. The question turns on the construction of the last of the rules contained in the plan of 1801, especially the latter part of the rule: "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." Now I understand the construction contended for to be, that this right of sitting and acting in the Presbytery is restricted to the case of the appeal before mentioned. But the whole must be read in connexion in order to comprehend the matter fully.

Here Mr. Sergeant read Section 4th of the "Plan of Union."—*Vid. ante, p.* 49.

I presume this latter clause has been considered as a proviso; and it is so awkward written that it might appear to be such at first sight. It is not however a proviso; but the mode of expression used is merely another form for "If the said standing committee of any church shall depute one of themselves," &c. It is hardly an allowable mode of expression, but certainly is not intended as a proviso, or a limitation to what goes before. It is a farther enactment, which is clearly obvious from the fact that the case of an appeal is just the very one in which a ruling elder would have no right to sit; for no member of the inferior judicatory can sit in the superior, while an appeal from a decision made by himself as a member of the lower court is pending. The standing committee-man "may have the same right to sit and act in the Presbytery as a ruling elder of the Presbyterian Church." But in that Church a ruling elder cannot attend the Presbytery when it is engaged in hearing an appeal from his own session, except as a party; he cannot sit, debate, and vote. Such at least is my understanding of a provision to be found in the Book of Discipline, *Chap. VII., Sec. III., No.* 12.

"Members of judicatories appealed from cannot be allowed to vote in the superior judicatory, on any question connected with the appeal."

If a ruling elder of a body appealed from cannot vote and act in the higher court, in the trial of the appeal, surely it was not intended to give a standing committee man that right. If the provision means to give him the right of sitting and acting only, when a member of the Presbytery would enjoy the same right, upon the construction of the opposite counsel, he could not act at all. "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." That is, if his Honour's opinion be correct, he shall either have the right to sit and act, when an elder would have no such right, and in direct violation of an established principle of the constitution; or just as an elder, which would be not at all, or as if it were said, if the standing committee shall depute one of themselves he shall *not* have a right to sit and act, which is absurd. Not only is the present law of the Church such as I have shown, but from the Digest, page 332, it appears that such has been the law of the Assembly for near half a century.

"Ordered, that the business of the appeal, introduced last session, be now resumed: whereupon the parties were heard at full length; and previously to the discussion of the merits of the cause, it was *Resolved*, That no minister belonging to the Synod of Philadelphia, nor elder who was a member of the judicature when the vote appealed from took place, shall vote in the decision thereof by this Assembly. The Moderator being a member of the Synod of Philadelphia withdrew, and Dr. McKnight took the chair."

Then, may it please your Honours, it is perfectly manifest, that as a member of the lower court, cannot sit and act in the upper, while an appeal from the former is tried; as this was the practice as early as the year 1792, has continued to be so ever since, and is now the subject of an express constitutional regulation; since the rule is so imperative as to

require that even a Moderator shall leave the chair, the construction put upon this provision by his Honour must be erroneous. It must mean something else. And what else can it mean, than that the mixed churches shall be represented in the Presbytery by lay delegates? But if I have succeeded in showing that the clause under consideration is not a proviso, that it admits standing committee men to the Presbytery in all cases, and not only in the case of an appeal, what is the inevitable consequence? This construction of the "Plan of Union" overturns the whole basis of the argument on the other side. The opposite counsel deny that that plan admitted a single lay delegate to a seat in any church judicatory, except in the case of an appeal; acknowledging that if it had done so, it would have been bad. Because of this restriction upon the privilege of the committee men, say they, the "Plan" was unobjectionable; therefore the act of abrogation, and the exscinding resolutions were unconstitutional and void; therefore our proceedings in 1838 were rightful, and you were carried out of the church in Ranstead Court, and into the church on Washington Square without knowing it. If the basis fails the whole superstructure fails with it. It is evident from the minutes that the "Plan of Union" was repealed chiefly because it admitted aliens into the Church judicatories; and the argument on the other side is that the repeal was unnecessary because the plan did not admit aliens. If this construction of the act prove fallacious, the argument founded on it must fall to the ground; and if the repeal was necessary, no less so was the consequence of the repeal, the dissolution of the four Synods.

Let not any one say hastily that the admission of lay delegates into the judicatories of the Church is a small thing. I will not pretend to argue how material, how essential a matter it was to these parties. But let me say—and this in answer to the argument drawn from the alleged acquiescence of the Presbyteries—that one error like the first step in a wrong direction, though but an imperceptible departure from the right line, always results in deviating farther and still farther from the way of truth, until a distance is reached which could not at first have been anticipated. The admission of Congregationalists might have seemed a small thing in 1801. Doubtless, it was but a small thing then. Perhaps it was fit that the experiment should be tried, though the result has not suited all subsequent times. At that period the General Assembly could not pretend to see so far as the present day. What was then but an experiment, having since become known in its powerful and disastrous consequences, they have brought to an end. The "Plan of Union" was certainly not irrevocable. How could it be so? How could it be maintained for one hour against the will of the Assembly? Our Congretional brethren where at liberty to go whenever it pleased them, as are the members of any Church; and if the other party had this liberty, how is it that the party that I represent—the Presbyterians of the old stock, could not put aside the weight which oppressed them; could not shake off the burden under which they were bending to the earth. According to the doctrine of our opponents the Assembly made a one-sided bargain: such it is certainly claimed to be. The evils which resulted from the "Plan of Union" were gradually discovered. In the language of the committee of the minority they were "found to exist:" they had not been at all foreseen. When at last they came to

light the opposite party was admonished of their existence, and to both sides the question was submitted whether this root of evil should not be eradicated. But we are told that the welfare of the Church must be sacrificed; that the great interests of the Redeemer's kingdom must be abandoned, rather than that a separation should be effected. Yet the security of those interests which had been confided to the General Assembly—should it not have been the chief object of concern, the polar star which guided their course? Were they bound to suffer a vine capable of bearing fruit to perish in their hands, for want of lopping off a single branch? Nay, must they let the whole vineyard go to destruction rather than transplant one strange vine into a soil more congenial to its growth, the soil in which it first grew? If the Assembly had left this important work undone they would have betrayed the great interests confided to their care. The language of the minority is conclusive upon this point.

I did mean to have traced out the proceedings of the committee, the two portions of which disagreed chiefly in regard to the succession of the Assembly, which the New-school refused to allow us to retain. But it is enough to say that they were not reconciled; that an amicable separation could not be effected, though separation was on both sides declared indispensable. If then the four Synods were exscinded to compel a separation, instead of the acts, being what it has been termed, a wanton exercise of power, it was required by the clearest dictates of duty; we had no choice in the matter. The two parties, I have said, could not be reconciled: they could not separate in peace. Well, the majority made a separation; the minority went away and consulted counsel learned in law; and now they are both where you see them. And instead of being allowed to hope for the restoration of peace, that peace which we all agreed could be promoted only by division, we are told that we must be forced together again, that the two contending parties may renew in each General Assembly the scuffle for the ascendency; without caring for those great interests for the promotion of which the committee whose language I have used was appointed.

The act of excision was the act of the majority, and it was the only practicable measure that remained. They who performed it were the Assembly: they were in possession of all the powers and rights of that body, and were bound to provide for the interests of the Church under their care. As they knew well who were on one side, and who on the other; as the lines of demarcation were clearly perceptible, and it was perfectly evident where and how the separation could be best effected, with as much regard as possible to the feelings and interests of both parties, the act was performed. We have no cause for regretting what we have done. Our only regret is, that the other party, abandoning the ground that division is necessary to the welfare of the Church, now view the matter in a different light, and think that the best interests of the Redeemer's kingdom will have been promoted by this law suit, if they should prove finally successful. The utmost that their success promises to accomplish is to bring the two parties again together. From the history of the past your Honours may see plainly what must result from such an union.

If any more evidence on this subject is needed, I would refer to a little matter, which may be of some weight in its bearing on the same point,

though I shall not lay much stress upon it. In the pastoral letter drawn up by the Assembly that met in the First Presbyterian Church, they say,

"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." *Ante*, 192.

That is the account which the New-school give of those from whom they have separated. First, we are represented as usurping all power in the Church, and dispensing magnificent revenues; and in the next paragraph, as attempting to unite spiritual and temporal authority, which is plainly intimated by the reference to papal power; to found a papal throne. I take for granted that they really entertained the views here expressed: perhaps they thought there were already some popes in the house which they left. Do they not go a little farther? They say the Church is in danger of corruption; that though it is not now vitally affected, bad times may come which will realize their worst fears. Do they not tell us plainly, must not every one understand their language to mean, "We leave you because you are growing corrupt; because you have usurped an authority which is fast overspreading both spiritual and civil liberty, as did a power before you, which began more humbly than you have done"? To this language I advert as another indication of the truth of what both sides had previously alleged, that peace could not be maintained and religion promoted without a separation of the conflicting parties.

I have now submitted to your Honours my views of the evidence upon this point, so far as it lies before you, and they seem amply sufficient to support my position. This I have done, assuming the facts, to a certain extent, to be as stated. And was not the Assembly right in regard to these facts? Where has the contrary been shown? Has any proof been offered that they were not as represented? None at all. What then was wanting? Admitting as our opponents must, that we were right in substance; they say that we did not adopt the proper form of proceeding. This objection makes it necessary that I should say something in regard to matters of form; that the inquiry should be instituted whether the Assembly was bound to adapt its measures to those forms of process which the Constitution prescribes to the several church judicatories.

Court adjourned.

FRIDAY MORNING, April 26th—10 o'clock.

I suppose, may it please your Honours—beginning where I left off—that in order to establish the ground on which our case, so far as regards the proceedings of 1837, depends, two things must be considered—First, the substance of what was done, which I have already examined to some extent; and, secondly, the form adopted by the Assembly in repealing the "Plan of Union" and passing the acts of excision. I begin now with the latter point—the form of these proceedings. Here I understand the argument on the other side to be, that the General Assembly departed from its own established course of action, disregarding the forms of process prescribed in the Constitution. This argument seems to admit

that if these forms had been adopted, the conclusion, whatever it had been, to which the Assembly might have arrived, must have been received as unexceptionable, as of binding authority throughout the limits of the Church. That admission is an admission of our jurisdiction over the subject matter; my first object, therefore, is to show, as by established principles it certainly can be shown, that the course of proceeding which we adopted was correct; or rather that the Assembly may, in all cases within the proper sphere of its jurisdiction, determine for itself the form in which its power shall be exercised.

I contend that if the decision of the judicatory, arrived at and pronounced in any mode, would be conclusive, an examination, in this Court, of the steps by which such a decision has been reached is out of the question. Let us see whether this position be not correct. On what grounds do the allegations of the other side rest? I have not yet heard any assertion, that the Constitution of the Church, in which certain forms of process are provided, denies the right of proceeding in any other way. What regular process is, must be decided by the judicatories of the Church themselves. If any necessary form has been omitted by an inferior tribunal, an appeal may be taken from it to the next higher court, and from this to the next above; but when you have reached the highest there can be no farther appeal. The opinion of the Supreme Court of Delaware is decisive, that the judgment of an ecclesiastical judicatory is not examinable in a civil court. Suppose you complain in an upper judicatory, that an established course of proceeding has not been observed in a lower one, and it is decided that the alleged error below is of no consequence. Is it pretended that because it is so decided the decision is void; that the question may be submitted to a civil investigation, because the appellate tribunal has adjudged it in a particular way? Suppose you carry the complaint on to the final resort, and the objection is there overruled by the General Assembly itself, in a case precisely within the rules which prescribe certain forms of proceeding. Can the judgment of any one of these judicatories, affirmed upon an appeal, be examined and set aside by a temporal court? If that of the lowest may not, why should that of the highest? And if you cannot examine into the decision of an appeal, by the highest spiritual tribunal, it is impossible to understand why you may enter into such an examination of an original judgment in the same highest judicatory. In truth, if the jurisdiction of the court in this case be established, every part of the proceedings of all the judicatories of the Church, from the lowest to the highest, and whether acting as original or appellate tribunals, must be subject to the same species of review.

If such an examination is to be allowed here, the first question which arises is, was it the intention of those who framed the forms of proceeding which the Constitution of the Church prescribes, that they should be applied to such cases as the present? I submit that this was not their intention. I consider the whole of that part of the Constitution, as applying merely to a strictly judicial function, where there are specific charges of such a character, as to come under the cognizance of a spiritual court of justice. The forms there laid down, are adapted only to criminal proceedings, charges of delinquency, offences which make the offender liable to punishment—to admonition, censure, or expulsion. But the act of abrogation and the exscinding resolutions, while they state that irregu-

larities had occurred, inconsistent with those laws which the Assembly was bound to enforce, do not allege any individual or criminal misconduct, but impute all the fault to the "Plan of Union" itself. Instead of laying the blame upon their adversaries alone, the Old-school charge both sides with disorders, that were owing to the act of 1801, in which they had mutually concurred. Censure is cast as much upon the General Assembly, as upon the Association of Connecticut, and the Synods formed under that act. Was there any criminal charge made against the other side? Where can you show this, in either the resolution abrogating the "Plan of Union," or the resolutions by which the abrogation was carried out to its legitimate consequences? There was no such censure pronounced upon those connected with the four Synods, as a judicial sentence involves? They were not charged with attachment to the Congregational form of government, as a crime. And, besides, they were immediately afterwards assured, that no offence was imputed; that it was not intended to fasten upon them any stigma or reproach; for they were invited to come back, to prove not their innocence, but their Presbyterianism, with the promise that whenever satisfactory proof upon that point had been given, their connexion with the Church should be restored. Nay, still more, to facilitate their return, they were told to apply for admission to the nearest and most convenient Presbyteries. Each individual and church was told, "We do not charge you with any crime, we do not say that you are unfit to associate with us: we say, on the contrary, that you are fit, if you are Presbyterians. Go to the nearest, most convenient Presbytery, and prove your orthodoxy." I take it, that this was not a criminal proceeding at all. The exscinding resolutions profess to be, what I suppose those who passed them, understood that they were, the only legitimate and necessary consequences of the resolution abrogating the "Plan of Union."

In the next place, what was the whole effect of these exscinding resolutions, as they are commonly called? Did they impose a penalty upon any individual, or collection of individuals? They merely dissolved the connexion of four Synods with the General Assembly, but not for contumacy, not for any crime alleged against them. All that the resolutions proposed was to abandon them, for the good of that Church, under the protection of which they had thus far grown and flourished. The investigation had proceeded on general grounds, without doing any prejudice to personal character. Not a reproachful word was uttered against the members of the four Synods, unless it was a reproach to say that they were Congregationalists. I do not hold that to be a reproach. If the Assembly had a right to cut them off from the Presbyterian Church because they preferred another form of government and worship, it had no right to censure them for this preference. If being members of the Church, and professing Presbyterianism, their belief and practice had been inconsistent with the doctrine and laws of the Church, they might have been brought to trial; but if the Synods were formed under the plan of 1801, and that plan was so vicious as to render the connexion repugnant and detrimental to the Church—this in the estimation of the Assembly, for I do not myself say any thing now about the plan, or the formation of the four Synods—this might be and was a good reason for

separating them, but certainly was no reason for pronouncing a judicial sentence, or imputing crime.

The resolution then of Mr. Jessup (*Ante, p.* 45,) was by no means applicable to the case.

Mr. Randall. I beg leave to set the counsel right as to one matter of fact. The Assembly charged gross disorders upon the members of the four Synods.

Mr. Sergeant. What? Charged them with disorders arising out of the plan of 1801, as a crime, when the Assembly itself had given a license to these disorders by adopting the "Plan"? Those who had entered the Church under the "Plan of Union" came in by permission: nobody could complain of their entrance. The Assembly had no right to make a criminal charge against them. Suppose they had made such a charge before the "Plan" had been repealed, stigmatizing as a crime what that plan allowed—

Mr. Hubbell. Mr. Randall is I think mistaken. This is the resolution: Mr. Hubbell read the resolution No. 1—*Ante, p.* 46.

Mr. Randall. I should like to put the counsel right. I say that the General Assembly charged the Synods with extravagant disorders. The resolution which Mr. Hubbell has read does not indeed contain such a charge, but by referring to the second resolution he will find what I allude to. That does contain an accusation of gross disorders.

Mr. Hubbell. You will find what you mean in a previous resolution, which provides for the citation of inferior judicatories. *Ante, p.* 38.

Judge Rogers. The charge to which I suppose Mr. Randall refers, is to be found on page 20 of the paper-book. *Vid. Ante, p.* 46.

Mr. Randall. The resolution is as follows:—(Here Mr. Randall read resolution, No. 2.—*Ante, p.* 46.) That is the resolution to which I refer; and I say that it does distinctly charge gross disorders, and make them the grounds of the excision.

Mr. Sergeant. May it please your Honours, the resolution of which I was speaking, is to the following effect:

Mr. Sergeant read resolution, No. 1.—*Ante, p.* 46. That was the exscinding resolution. That was the act by which the four Synods were dissolved, or cut off; and then comes a statement of some of the grounds on which the Assembly place the expediency of their proceeding. Even if this statement were untrue, that does not affect the validity of the prior act; if it was untrue, still I say that the Assembly had a right to do what they did. The grounds that in their estimation supported the right, they gave in the first resolution. Afterwards, they set forth the reasons for their solicitude on the subject, and urgency for an immediate decision—not the grounds of the act itself—that had been perfected by the first resolution.

Mr. Sergeant here read resolution, No. 2.

Now, the difference between Mr. Randall and myself, is not so great as he seems to imagine. I was speaking of the so-called act of excision, and of the grounds on which it was put, as a matter of right, in the resolution. On the other hand, what he brings forward, is merely an after statement of the motives which induced the Assembly to act so promptly:—It had been made clear to them, that gross disorders prevailed in the

four Synods, and that the "Plan of Union" itself had never been consistently carried into effect. Well, for these reasons, speedy action had been necessary to the welfare of the Church. But this second resolution, which has been denominated a judicial sentence, was of no force to substantiate the Assembly's right to exscind: the whole work was effected without it, and before it had been passed. The latter three resolutions were intended, first, to give reasons why the Assembly had been so prompt in its action, and then, in kindness and charity, to invite those individuals, churches, and Presbyteries, who, though strictly Presbyterian, might perhaps have deemed themselves excluded by the laying down of the four Synods, to come in, and renew their connexion with the Assembly.

Now, let us see what Mr. Jesup's resolution was. (Here Mr. Sergeant read the preamble and resolution.—*Vid. Ante, p.* 45.) Previously, a similar mode of proceeding had been proposed by a member of the Old-school party. (Mr. Sergeant read the resolutions passed, to cite inferior judicatories to the bar of the Assembly.—*Vid. Ante, p.* 38.) These, you see, were not pointed at any Synod in particular. The yeas, on their passage, were a hundred and twenty-eight, to nays a hundred and twenty-two, with one *non-liquet*. Then, on the back of this close division, come two protests.

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

"Mr. Cleaveland, 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." Then the committee was appointed.

Now, may it please your Honours, I have stated the nature of the act of excision, and the Assembly's grounds for that act. Suppose the Assembly entertained the opinion expressed in the second resolution, which from the beginning I had intended to notice, and now take up, as well for my original reasons, as on account of the construction put upon it by Mr. Randall. Suppose it had been made clear to the Assembly that disorders and irregularities prevailed in the four Synods, which were a proper subject for the application of the process provided in the Constitution; which would have justified a criminal charge, and a citation to the bar of the Assembly for trial. Then there were two grounds of proceeding against the Synods:—First, the unavoidable consequences of the "Plan of Union," and, secondly, the actual working of the "Plan" in those Synods. A proceeding rested on one ground might work their dissolution, without the imputation of any crime; a proceeding on the other ground might have resulted in the same thing, but must have been a criminal proceeding. Either one, independently of the other, might have been sufficient to blot them out of existence. But, the first ground being sufficient, it alone is taken. Then the second ground is exhibited, not to support the measure of excision, but to show the importance of having acted promptly. I would call your attention again to the state-

ments made by the two committees of the majority and minority. They both concurred in the opinion that a separation was indispensable. In accordance with this view, the Assembly passed the first resolution—that, exscinding the Synods. And as to the second, though it alludes to the prevalence of disorders, it bears on nobody in particular, contains no personal imputation. I say again what I have said before, that the Assembly cut off no Presbytery, Church, or individual, strictly Presbyterian—the fourth resolution saves them all. And, moreover, I say—though perhaps I am not a competent judge of such matters—that, having listened attentively to all that has been said by the opposite counsel, and having listened attentively to his Honour's charge, I have heard nothing which has persuaded me that the course pursued by the Assembly was not the most tender, the most careful, the most in accordance with the spirit of their institutions, and the least liable to reproach of any that could have been adopted. The measure was necessary to preserve the peace of the General Assembly. Without intending the disparagement of one party more than the other, and hoping that the remark will be taken in its mildest sense, I must say that into the Assembly had already been introduced a system of tactics, more like the hostility of contending political parties, than the deliberations becoming a solemn council of the Church; and that peace required the two parties to be put asunder at least for a time.

But, again, the proceedings of the Assembly were against ecclesiastical bodies, not against individuals. Here I shall not repeat the argument of my colleague: a short statement of it will be sufficient. What bodies were they? They were Synods. Established by whom? By the General Assembly: they were bodies of its own creation. Nobody questions the right of the Assembly to establish Synods; and my colleague's argument has shown, manifestly, that as sure as they have the power to establish, so sure they have the power to lay down; that if they can create, they also can destroy. What answer is made to this, on the other side? The counsel do not deny the right to dissolve a Synod. If I have misunderstood their argument, I shall not find fault with their correcting me. This is a question of too much importance to be decided without a clear comprehension of its merits: every member of the society must wish that it should be rightly decided. I do not understand them to deny the power of the Assembly to dissolve a Synod, unless—as Mr. Randall qualifies the admission—rights have intermediately become vested. If no such rights have become vested, he agrees that a court cannot look into an act of dissolution.

Mr. Randall. I made another qualification, and now accept Mr. Sergeant's invitation, to remind him of it. Whether the Assembly can dissolve a Presbytery or Synod, in any case, is a vexed question; but it certainly has no power to do so, in the two cases which I before mentioned. First, where intermediate rights have become vested, and, secondly, where the consequences of the dissolution must be a suspension of the ecclesiastical privileges of individuals, no matter whether for a day only, or for a month, or a year. In the present case, it might perhaps have required eighteen months for some to regain their ecclesiastical rights. They are all to be re-admitted, as if they were foreigners; and this would take time, while the suspension operated instantly.

Mr. Sergeant. I think I should have satisfied the learned counsel, that I did not intend to overlook the latter part of his qualification. His first position is, that the Assembly has not the power, where intermediate rights have become vested; and, in the second place, he merely defines what sort of rights are intended. I take it, then, as a conceded point, that the Assembly has, in some cases, the right to lay down a Synod—as to the case of a Presbytery—that, at present, I do not touch. It appears, indeed, that a Presbytery has been dissolved, here in Philadelphia; and about the power, in that case, there seems to be no dispute, though there has been some conversation respecting it at the bar. The Assembly has the power, unless intermediate rights have become vested, or, as Mr. Randall says, unless the dissolution would suspend ecclesiastical privileges. What rights are vested in a Synod? He tells us, certain ecclesiastical privileges; and that if these should be taken away or suspended by the dissolution, it would be void. The rights of which he speaks, are only ecclesiastical rights. No Synod can be established with any other. A Synod is but a link in the chain of connexion which the form of government establishes, for purposes purely ecclesiastical; it has no right of representation in the Assembly, and no control over the corporation. Whatever is done by the formation of a Synod, is undone by its dissolution: nothing more can be undone, than that which has been done. But, we are told, that if ecclesiastical privileges have been conferred by the establishment of a Synod, the Assembly has no right to lay it down, because it would thus be deprived of those privileges? What are ecclesiastical privileges? The basis of every church connexion, is free and voluntary association. No one has the right of coming into the Church, who is not voluntarily admitted; no one who does not belong to it, can enjoy its privileges; and he ceases to enjoy them, who leaves its communion. The ecclesiastical rights with which a Synod is invested, are but a portion of that spiritual and moral power which belongs to the Assembly. These are the rights intermediately vested, of which the learned counsel speaks; and it so happens, that they are the very rights which cannot be affected by a civil process: I deny that this tribunal has any power to meddle with, or to take cognizance of them. The plain English of Mr. Randall's qualification of the Assembly's power, clearly is, that when that body has once created a Synod, it cannot lay it down, unless by a regular trial, condemnation, and sentence. Does any policy of the state require such a regulation as this? Is the law of Pennsylvania such as the learned counsel says? It cannot be. If the legislature should assume the power to tell the General Assembly, that they should not lay down a Synod, any citizen, lawyer or not, who looked at the third section of the Bill of Rights, might see that the Assembly could bid defiance to the legislature. They would have a right to do so, according to the plainest principles of the Constitution. Well, if the legislature cannot pass such a law, where will you look for an authority for the principle urged upon the other side? Not to the common law, because it is applicable in Pennsylvania, only so far as consistent with our Constitution and statutes. Those portions of it which are repugnant to the Constitution, are deemed of no authority. If in the common law, there were any such principle, it would not be applicable here. The answer we have to give to any one claiming protection here, for his asserted vested ecclesiastical rights, is that given by the

Supreme Court of Delaware—"We do not know you." I speak not as an individual. Of course, I may have a private opinion. But I do not mean to speak of *my* opinion: that is not the point. The true question is, whether this court has a right to sit in judgment upon such a case; to weigh the value of ecclesiastical privileges; to decide that certain persons must, or must not, continue members of a voluntary and spiritual association. Mr. Randall has put the very case, in which the judgment of a spiritual court is alone competent to weigh considerations of this nature. If this court can decide that a Synod cannot be laid down, because intermediate rights have become vested, it ought to prescribe some mode in which the Church may be purged. There is, at last, nothing intelligible to the law, in the limitation thus attempted to the power of the Assembly. There are no such rights, cognizable by the Civil Power: they are not civil rights.

Is it meant that these men suffer in the estimation of a part of the Church by being excluded? Is it said that these five hundred and ninety-nine clergymen have suffered in their feelings? The Court cannot take cognizance of such injuries. Suppose a man is excluded from a temperance society which is not incorporated. That may be a very great injury to him. Suppose that a man, woman, or child, is turned out of any voluntary society, the injury may be incalculable—it may be ruinous. He may be "cut dead," as the phrase is; but has a civil court jurisdiction in this case? Does the law provide a remedy? No. Why not? Because it has not been thought fit that the courts should exercise such a power; that they should be able to restore an individual excluded from a mere voluntary association. And why have they not the power as regards the Church? Because that is a voluntary association, into which all are invited, but none forced to come or to remain. None are excluded from it excepting when in the judgment of those who alone are competent to decide in such matters, there are grounds sufficient for the exclusion. For be it remembered, the union is voluntary on both sides. There is little danger of any one's being excluded without cause. Indeed, the tendency is to the opposite extreme. It is often said that the disposition of every Church is to extend its bounds as much as possible by proselyting—perhaps too much has been said about a proselyting spirit. But certain it is that the natural tendency is always against exclusion. Why, even here the majority are charged by the minority with entertaining plans for aggrandizing and spreading their influence and sway, as the power of Rome once did, until it reigned supreme over the whole Christian world. A disposition to cut off its members has never before been ascribed to any Church: it is very improbable that such a disposition exists here.

We offered to prove at the trial, that within the bounds of the four Synods there were numerous Congregational churches. To what extent we could have made out the allegation I cannot pretend to say. It has been stated at the bar, and we have a glimpse of the fact in the evidence, that in the Synod of the Western Reserve alone, out of one hundred and thirty-nine churches, there were but nine Presbyterian. We might have followed up this testimony by proof of not only the number of these churches in the other Synods, but also of the persons who had represented them in the several judicatories, until we came to the case of Mr. Bissell, who was not even a committee-man, and yet was allowed to sit in

the General Assembly. But his Honour would not receive such testimony. He thought there was another mode in which the question might be disposed of. But unless the General Assembly is left free to decide what infusion of Congregationalism is consistent with the purity of the Church, somebody else must decide the question. Suppose, I say, that its purity is destroyed by the existence of two Congregational churches, or one among a hundred and thirty-nine. Some one rises and advances a contrary opinion, and is listened to with great respect, as is usual; but the Assembly thinks he has not answered my argument, and decides that my opinion is correct. Do you think it competent to another tribunal—a civil court—to set aside this judgment, and to say, "Surely one Congregational church cannot poison and corrupt a whole Synod?" Where then is the freedom of the Church? They decide according to the knowledge which they have, and their own feelings, and the decision must be final, or they might as well pronounce no judgment at all. Look at page 11 of the paper-book, (*Vid. ante p.* 27,) and there I think you will find some tolerable foundation for the fears entertained by the Assembly upon this point, if not already convinced that they were reasonable. There is to be seen a report of the Synod of the Western Reserve to the Assembly of 1833, in the shape of a series of resolutions. The second of these is as follows:

"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."

That is the language of the Synod of the Western Reserve. Will any one tell me that there are not vital matters at issue between these two parties, when one of the exscinded Synods deliberately, and as a solemn decison of the whole judicatory, pronounced that the Constitution did not make the office of ruling elder essential to the existence of a Presbyterian Church? Suppose the Assembly to decide otherwise: who is to correct their judgment? That they do hold the office of ruling elder to be essential, scarcely requires proof. I will refer however to their opinion pronounced on this occasion.

"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 page 154, viz., that the eldership is not essential to the Presbyterian Church. In the opinion of the committee, the Synod advance a sentiment that contravenes the principles recognised in our Form of Government, Chap. II. Sec. 4. Chap. III. Sec. 5. Chap V. Chap. IX. Sec. 1, 2."

Your Honours will find in the evidence of Mr. Squier (*ante, p.* 71.) which was read by my colleague, an admission that lay members have

sat in Presbytery as the representatives of churches having no elderships.

"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 Genesee. They were the fewer in number, and the smaller churches, I should say. Churches, when first formed in a new country, are very small, and have few male members, hardly enough for the formation of an eldership; and in some instances the appointment of elders was delayed. In the mean time such a church was represented in the Presbytery."

Mr. Randall. Represented by ministers—the Presbyterian ministers who preached to them, Mr. Squier meant.

Mr. Sergeant. He certainly knew what the examination was about; and, besides, he says that the churches of which he speaks had scarcely male members enough for the formation of elderships, and therefore did not choose elders; but were governed by their male members. Well, he was asked whether these churches did or did not send representatives to the Presbytery, and answered, "Yes." Of course he meant lay representatives. He did not indeed admit that this was in fact practised extentensively. I have already shown that in one instance, an individual who was not even a committee-man was admitted to a seat in the Assembly. This was Mr. Bissell. And there was a protest against his admission signed by a number of persons—among others by Mr. Gilbert who was examined at the trial, and who, though I don't know him personally, is, I take for granted, from the station which he occupies, a very respectable man. Here then is evidence enough of the existence of two evils. First, a disregard of essential Presbyterian principles, becoming gradually bolder, until at length embodied in the formal resolutions of a Synod. Then, in another case, the "Plan of Union" affording a disguise under which Congregationalists exerted an influence, by representation, not only in the Presbytery, but even through to the General Assembly, the true origin of the evil not being ascertained. And here I take occasion to say, as to Charleston Union Presbytery, that there is no such thing there, as the disorder which we have sought to correct. Those churches within the bounds of that Presbytery which are not Presbyterian, though they have settled Presbyterian pastors, are marked in the statistical table as Congregational. Here there is no admixture of the two sects. These churches claim the right of being independent—nothing more. They have no representation in any Presbyterian judicatory. But in the other case there was an intermixture, though so disguised that it could not be traced or detected.

But, may it please your Honours, I contend farther, that the exscinding resolutions were the legitimate application of the act by which the "Plan of Union" had been abrogated. His Honour, Judge Rogers, decided that the abrogation was within the power of the Assembly. It follows then of course that the Plan was no part of the Constitution of the Church: indeed his Honour maintains in his charge that it was not. What was it then? If not a constitutional rule, the act by which it was passed was an exercise of the ordinary jurisdiction of the Assembly; and the abrogation of it was a like exercise of ordinary power, and not a criminal proceeding. Then follow out the abrogation of the "Plan":

what was to become of those who came in under its operation? They did not come in under the Constitution, and therefore they had no constitutional rights. I do not mean to say that if they had come in under the Constitution they might not have been exscinded; but they did not come in under it, and therefore could have no constitutional rights. They had rights arising only from an exercise of the Assembly's ordinary jurisdiction. I have heretofore contended that the Assembly had not the power to pass the "Plan of Union"—that it was inconsistent with the Constitution. But take it that they had—then it was simply no part of the Constitution. Those who derived their ecclesiastical rights from it, as the four Synods were alleged to have done by the General Assembly, did not derive them from the Constitution, but from an ordinary act of the Assembly—whether strictly a legislative act, or not, it is not necessary to say. The Constitution then is not applicable to the case—only the "Plan of Union." Will your Honours say that the abrogation was unconstitutional. His Honour, Judge Rogers has decided that it was not; that the "Plan" was no part of the Constitution. How then can the laying down of these Synods interfere with the Constitution? Did they derive their rights from it? No. If you admit that the "Plan of Union" was inconsistent with the Constitution it was void; but if its establishment was within the powers of the Assembly, if it was an ordinary act of that body, it follows of course, that what they did might be undone whenever they pleased. And as to those who had intermediately entered into ecclesiastical relations under its auspices—I have shown that they had no vested rights of which the law could take cognizance. Your Honours will answer whether you have not always understood the principle of our Constitution to be that every ecclesiastical association is voluntary; that this Church has been so from the beginning, so is, and must continue to be purely voluntary until it is dissolved. It appears to me that those who complain of the illegality of the resolutions exscinding the four Synods, are ignorant of the fundamental principles of the Presbyterian Church.

I have detained your Honours a great while with the consideration of questions which have appeared interesting. Much more might be said in regard to them, but no doubt you are weary, and as other work remains, I leave them with the observations which I have made. I now come to the lighter part of this argument. The road over which I am yet to travel is not, I think, so difficult for us, perhaps not so difficult for either party, because in discussing questions of parliamentary order, a little freedom may be allowed, which would be entirely unbecoming the greater topics which I have hitherto considered. Already in some measure have been intimated our cardinal objections to the position taken on the other side; to the proceedings on which they found their claims—proceedings which, as they say, resulted in putting the majority out of doors. Let us trace the steps of their course. And this would be a mere game of push-pin if it were not for the important consequences that may follow—if it might not result in overturning the Presbyterian Church. If by mere forms can be accomplished what in substance is so grave and important, questions of form are very serious. The gravity of the effect, of the consequences, must in that case measure the degree of consideration which this subject is to receive.

In the beginning I beg to remark, that the Assembly of 1838 met at

the proper time in the church in Ranstead Court—the time and place appointed. It was a new Parliament—if indeed there is any thing strictly analogous in the case of the two bodies—not merely a new session. The old Assembly had been dissolved, and a new one, like a new Parliament, summoned. The antecedent body, according to the usual form, prescribed in the Constitution, had directed when and where the next should meet, and who should act and what should be done up to a certain point. There is the ship lying off from the shore; but you cannot get to her without a boat; and it is necessary that a pilot should be at hand to carry you out. We will provide for you the boat and the pilot: after you are fairly on the great ocean, the pilot may leave you, but till then has you in charge. But this New-school party say, that it will not do to take the boat that has been provided, and wish to board the ship just when, and where, and how they please; or, having taken the boat, they wish to throw the pilot overboard, and the oarsmen overboard too. They are determined to possess themselves of the vessel on their own terms, and at their own time. That is about the amount of what the New-school wished and endeavoured to do, as exhibited by such an illustration. I suppose that the regulation of this matter, under the Constitution, belongs of right to the antecedent Assembly; that they are to provide a plan of proceeding up to a certain point. There can be no more doubt of it than of the fact that, at the opening of the session of the Congress of the United States, if the Vice President comes, no one else has a right to take the chair and preside in the Senate. Nay more, the Moderator appointed at the close of one Assembly, to preside in the organization of the next, must preside until removed. Every deliberative body, unless it be a town meeting, has some rules provided for the beginning of its session. If a party of gentlemen meet together to dine, there must be one to sit at the head of the table, though in that case if the individual who first takes the place be turned out, it is vain for him to think of remaining. There must be some rules to guide in the organization of every assembly. It is clear that in Parliament, when the Speaker is absent, all questions, such as can be dealt with in his absence, must be put by the clerk, unless a speaker *pro tempore* be appointed; and until the organization of the house, the clerk alone can act. This rule is laid down in all the manuals, and its authority is not to be disparaged. It is found in both Jefferson's and Sutherland's Manuals, and has been adopted by the House of Representatives as one of their rules. In that house the clerk puts the question in the absence of the speaker, or before the body is organized. In the Senate the chair is rarely vacant; but if it should be vacant, no doubt the parliamentary practice would there prevail. But when the chair is actually full, no body but the person in the chair can put any question, in either house of Congress, in the House of Commons, or in any deliberative body on earth, which pretends to be organized at all. And for this simple reason, that you cannot confide the privilege of doing this to one, without giving it to all. What is the advantage of having a presiding officer, if any person who pleases may preside?

Now the Assembly of 1838 met with full powers, excepting that the antecedent Assembly had sent down to it a Moderator, whom, up to a certain period of their session, they had no right to remove. That Moderator and the clerks who were to assist him in the organization were continued

in office to perform certain acts, and until these were performed, they were beyond the reach of the new Assembly, or rather that Assembly had not yet acquired the capacity to touch them? First, what were the acts to be performed by the clerks? Neither the new body, nor the Moderator was responsible for these clerks. They had not appointed them. What would be thought if a tribunal of Pennsylvania were made accountable for a clerk appointed by the Governor? They did not appoint the clerks, and had no power for a certain time to remove them. But even if they had that power, there was here no such reason as has been alleged for its exercise. The conduct of the clerks, as I shall contend, was perfectly correct, and not open to objection, unless upon a principle, which I have never known to be asserted but by one man, the principle that every one is to construe the Constitution and laws in his own way. I say that the clerks had no right to decide on the constitutionality of the acts of 1837. At the time when the commissioners presented their commissions to them, there was no power on earth competent to decide that matter. Till the new body was fully organized, there was no power that could undo what those acts had done. Will you tell me that the clerks had a right to decide on the constitutionality of the resolutions of the previous year, and to repeal them? That the Moderator was bound to exercise his own judgment upon these acts at his own risk; or that the individuals composing the body could, before it was organized, repeal them? I contend that this doctrine is utterly inconsistent with the rules of order and right.

At present, I am considering the conduct of the clerks only: the Moderator's conduct, I shall examine by-and-by. It is supposed that the clerks, by reason of their declarations in the antecedent Assembly, and the Moderator, had combined unlawfully to do a thing which they ought not to have done. I put, then, a simple question: Here was a resolution passed by the Assembly, still in full force, unrepealed, by which the Presbyteries, that had sent certain commissioners, whose commissions were offered to the clerks, were declared to be no part of the Presbyterian Church: were the clerks at liberty to take any notice whatever of such commissions? I don't know that any one has said, that they had a right to admit these men to the Assembly; but it is imputed to them, as an offence, that they did not put their names upon the rejected list—the list of doubtful cases. To my mind, the question as to this latter point is just as plain, as the question of the right of the clerks to admit these commissioners directly to the roll of the Assembly. The commissions offered, were of three descriptions. There were some persons who came from a regularly acknowledged constituency, with commissions regular in form. There were others who claimed to come from an undisputed constituency, but whose commissions were irregular, or defective, or who presented no commissions at all. Then, there was a third class—persons who had no constituency. The first sort—those who had regular commissions from an acknowledged constituency, were enrolled. The second—those whose constituency was undoubted, but whose commissions were irregular, defective, or missing, were reported on the rejected list. But, what was to be done with those who had no constituency at all? It is contended, that they too should have been put on the list of rejected commissioners. If so, the resolution of the antecedent Assembly would have been as entirely disre-

garded by the clerks, as if they had pretended to decide it unconstitutional and void. They might just as well have put on the rejected list, the names of men offering commissions regular in form, but coming from some other denomination, or from no denomination at all—from a body of men in no Church communion. Why should not the latter be put on the list? Simply, because they have no Presbyterian constituency. It is contended, then, that the clerks should have done the same thing, as if required to put these commissioners on the list of undisputed members; since, to have put them on any list, would have been an acknowledgment of their constituency. They, in fact, had no commissions at all, provided the acts of 1837 were valid; and this according to their own statements; for, when asked where they were from, they answered, from Presbyteries within the four Synods of Utica, Geneva, Genesee, and the Western Reserve, the very Synods which those acts had declared no longer connected with the Church. Was there no power competent to give them redress, if they had been wronged? Yes; the Assembly, when fully organized, might have repealed the acts of the former body. But, in the meantime, they require that the clerks should repeal it; that the Moderator should disregard it. They certainly had no power to repeal it, even if it were unconstitutional. In the argument on the other side, much has been said about the power of Moderators and clerks; about setting servants above their masters. Apply the same doctrine in this case: look at what is required of these officers, and say who would be the master, if they had complied with the requisition. It was impossible that they should disregard the exscinding resolutions, because they were not the officers of the new body, but of the antecedent Assembly, continued in office to begin the new parliament. I say that the clerk's conduct was perfectly correct; and, whether they were pledged or not, the Assembly by which they were appointed, or continued in office, had a right to expect them to obey its commands.

Then we come to the conduct of the Moderator, Dr. Elliott. He too had been appointed by the antecedent body, and sent down to preside in the new organization. The Assembly of 1838 were not accountable for him, nor he to them——I mean that for a certain time he was not accountable to them. The language of the rule is, that the last Moderator shall preside until a new one is appointed. This rule has been read several times. Being one of great importance it is laid down in two distinct places in the Constitution. First, *Form of Gov. Chap. XII. Sect.* 7—"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." And again, *Form of Gov. Chap. XIX. Sect.* 3—"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." It is obvious that this means till a new one can be chosen; and *when* that time arrives, is the next matter for our consideration.

Here I would submit it to your Honours, that when points of form acquire such power as to be able to overturn a whole Church, they must be very closely and strictly examined; they are equivalent in importance and force to the greatest laws. Now, by the rules of the Assembly what is the next thing to be done after the report of the clerks on the roll? The rules provide that the Clerks, as a Committee of Commissions, shall examine the commissions presented, and report the names of the undoubted members, who shall then take their seats and proceed to business; but they do not stop here. They direct that the first thing which the house shall do, after being thus ready for business, shall be the appointment of a Committee of Elections. Well, I suppose that is equivalent to saying, that nothing else shall be done until a Committee of Elections has been appointed. I interpret the whole of these provisions together as ordering, that the several things which they direct to be done, shall all be done before the Assembly proceed to the choice of a new Moderator. I am not at present inquiring into the power of the Assembly to make such rules: I do not ask what was their effect, but simply what they were. There was in 1826 a change in the form prescribed by the Constitution for examining commissions and enrolling the names. Previously it had been required that the commissions should be publicly read, but then it was ordered that they should be only examined. The article as changed was sent down to the Presbyteries for adoption, and at the same time was sent down the following resolution:

"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.

"I. Immediately after each Assembly is constituted with prayer, the Moderator shall appoint a *Committee of Commissions.*"

That is, after the sermon, the Assembly is to be constituted by prayer, and then the Committee of Commissions is to be appointed, who, according to the next rules, are to proceed immediately to examine the commissions. Subsequently the clerks were appointed a standing Committee of Commissions; but it must not be inferred that this arrangement made any change except in the constitution of the committee.

Mr. Rundall. The time of the committee's session was altered: it now sits between ten and eleven on the morning of the Assembly's meeting.

Mr. Sergeant. I agree. Formerly the Assembly adjourned until the afternoon, to give the committee appointed time to examine the commissions handed in. Now the clerks form a standing committee; and sit before the meeting, in order to avoid the delay of adjournment. Then what is the next thing to be done, after they have examined the commissions and reported?

"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." *Ante*, 156. There you have together the whole of the provisions made by these standing rules. Whether liable to alteration or not, until altered they are in force, and they can be altered only by the Assembly itself. Here are standing rules, which, as to the Assembly, are as strong as the provisions of the Constitu-

tion itself: they have been constitutionally made, and until changed or repealed, cannot be departed from. Where do you find an authority for departing from them? They can be changed only by the power which made them. Every body has certain forms of organization which are very material. In the British Parliament, a rule existed until very recently, that the first thing done after the organization was completed, should be the reading of a bill. This rule has been abolished; but so long as it was a standing order, no business could be transacted until the bill had been read. Now the question is, not whether it was in the power of the Moderator or of the clerks, but whether it was in the power of the house, to do any thing else until a Committee of Elections had been appointed. The old Moderator is put in the chair, not to perform all the offices of a speaker, but simply that he may suffer nothing to be done until the rule in regard to a Committee of Elections has been complied with. If Dr. Patton, or Dr. Mason, or Mr. Squier rise, and demand that some other business shall be transacted before the appointment of that committee, the Moderator is bound to treat them with all respect, but knowing well what the rule directs to be done next, must tell them that they are all out of order. And if they should demand the reason, he need only turn to the rule; and unless they have thrown off all government, all law, they must defer the business proposed until after the appointment of the committee. Until that time they are bound by the rules which I have read. Then the Assembly has the power to alter these rules. That body has, besides, certain rules applicable to the ordinary transaction of business; but those do not operate at all until after a Committee of Elections has been appointed. These five are all that they have to govern them before that period. When under their guidance the organization has been completed, the old Moderator reads to the new Moderator, for his direction, the ordinary rules for the transaction of business. Dr. Patton has himself borne testimony, though unwittingly, to the existence of this rule. It appears from his evidence that when Dr. Beman was appointed Moderator nobody read the rules to him, but that Dr. Beman told Dr. Fisher, after the election of the latter, that his conduct was to be governed by certain rules. If Dr. Elliott, when occupying the chair, had suffered these gentlemen to go on in the transaction of the business proposed until after a Committee of Elections had been appointed, he would have violated the only rules, with which he, or the house at that time, had any thing to do. And there could be no such thing as an appeal, until all that those rules prescribed had been effected: every previous attempt to make a motion or to take an appeal was out of order. The body was then just struggling into life: there was nothing on which an appeal could arise, and nobody by whom an appeal could be decided.

Every deliberative body which has succession, must have rules of some sort to control its organization. And, allow me to say, that such rules are of vast importance, first, to secure a fair organization of the body; and secondly, that every man may know what is doing, and to what he is required to attend. Every one who contributes to the action of a deliberative assembly is responsible for what is done. But to be so he must be a part of the body equal to any other part, excepting such portion of it as is invested with authority, not for authority's sake, but in order to preserve the equality of right among all the rest. A Moderator is appoint-

ed, that every man may hear the questions proposed, knowing from whence he is to expect them ; and that hearing he may assent or vote in the negative, acquiesce, or refuse to acquiesce, so as to be accountable thereafter for whatever is done. The Moderator too is bound to maintain order, and no voice must be heard in the assembly, excepting his own, or that of a person addressing *him*.

I submit that ever so small a departure from this rule must produce interminable confusion. The evident intention of it is to provide for all questions being put distinctly. When they are put from the chair, or by some person duly authorized and accredited, then no question such as that here agitated—whether all the members really heard—can be raised. The reason that the Moderator is put into the chair is not that he may have the honour of sitting in a high place, and bearing the insignia of office; but that the rest may be equal, may know their rights and understand what is doing. It is essential that all business proposed to the body should be proposed by an accredited and acknowledged authority, and also that the man exercising that authority should actually have the chair. Even the speaker has no right to put a question, excepting from the chair: the chair is as essential as the speaker himself. Will you tell me, that he may run down the aisle, and, standing in the middle of the church, propose a question to the house? Why, if the Speaker of the House of Representatives were to leave his seat, and come down upon the floor of the Hall, or go to the far end of it, and then put a resolution, he would be consigned to the custody of the Serjeant-at-arms. Here form becomes substance. The more I think on the subject, the more entirely am I satisfied that without strict adherence to these rules there can be no order, no knowledge of what is going on; that an assembly must be exposed to all sorts of tricks.

But again, there is a provision beyond this—a provision for the vacancy of the chair. Who shall put a question then? To enable any body not in the chair to assume the duty of a presiding officer, it is absolutely essential that the chair should first be vacant. So long as it is occupied *de facto*, as regards the members it is occupied *de jure*, and no body else than the actual occupant can propose any business to the house. If the chair is vacant, of course that is an emergency requiring the application of a new rule. Then the next person in the eyes of the members, as they all look towards the chair—the clerk—must put any resolution offered, and this until the chair is filled. All these rules, I say, are conducive to order, and are absolutely essential to the due transaction of business.

To return to the Assembly of 1838. I say, that until the Committee of Elections had been appointed, the body was in the hands of the officers of the preceding year. They were not under its control, or responsible to it, until the organization was complete, and it was clothed with its full and legitimate powers. And I say, farther, that Dr. Elliott could not entertain a motion or an appeal; that he had been placed in the chair merely to keep order and to perform a specific duty, ending with the organization, which was to be completed by the appointment of a Committee of Elections. Now it is clearly in evidence, that Dr. Elliott was keeping very good order, as any body must acknowledge who reads the provision which has been referred to. But if it were otherwise—if any thing improper had been done by Dr. Elliott, this was not to be visited upon the body,

which had no control over him; which, as I contend, could not remove him.

When the Assembly is fully organized, the rules provided for its organization are no longer in force, are at an end; and then certain others take their place. Many of these are found in the Appendix to the Constitution, and to some of them I shall hereafter refer. You will pardon me for attempting some little farther vindication of the Assembly and of Dr. Elliott, conducive to the main end of this argument. I invite your attention to the condition of the house and of the assemblage which filled it at the time of these occurrences. I acknowledge that this was in some respects peculiar; but their condition is always such as to demand the particular consideration of the Assembly. First a sermon was preached. To hear this, a miscellaneous assembly was collected, the whole church being thrown open, and all at liberty to take such seats as they could get, both up stairs and down. The sermon being finished, the clerks took their places at the desk, and the Moderator of the last year his seat, to preside during the organization. In the first place he again acknowledged the great obligations under which all rest to the divine goodness: with this prayer began the next process—the constitution of the body. As it was impossible to clear the seats appropriated to members, of the audience thus convened, without rudeness, they were yet suffered to remain. Therefore the assemblage was still a mixed one, and of course this was not the proper time for any especial, or nice question to be propounded or decided. What assembly would choose this occasion for dealing with such business? Here the roll of the house itself had not yet been reported. The circumstances in which the body had convened were in other respects peculiar. It was a divided body: two parties of opposing views were brought together, at first in seeming harmony, one of which however, as it appeared in the sequel, had come prepared to interrupt the ordinary business of the Assembly, and was only waiting an opportunity to effect their purpose. They could not, indeed, long wait to begin the contemplated struggle. They did but suffer the prayer to be concluded—that was all. Besides this, the body itself which claimed to be the Assembly was of a mixed character, and its different portions could be separated only by those to whom the members were known individually. So then while the ordinary difficulties are very great, here inconveniences were multiplied. Now, what was the Moderator sent down by the last Assembly to superintend the organization, to do? By-and-by I shall contend, that no question at all could at this juncture be put or decided; and that whether a majority voted or not, none had a right to vote. Mr. Adair, one of the witnesses for the relators (*Ante p.* 109) says, "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." He was not a member, and hereafter I will show that some who were not members even participated in the proceedings. But now I am attempting to vindicate the majority of the Assembly and Dr. Elliott; to establish the point, that it was not consistent with justice for them to depart in the smallest degree from the rules prescribed—the five rules which were to govern in the organization of the body; and at the same time to vindicate the rules

themselves; showing that when a contest was expected, and a black cloud lowered over them sufficient to envelope the whole body in storm; when Dr. Elliott knew that the elements of discord and strife were gathering in fury, and unless pent up, would break forth in the midst of those who had collected in the house of prayer for religious worship; that the assembly was composed of all descriptions of people, of friends and foes, of those belonging to the household, of strangers, and of persons claiming to be of the household, though their title was disputed; this was a sufficient, an imperative reason why he should not swerve for a single instant from the precise letter of his instructions. When we come to the question said to have been put by Mr. Cleaveland, we shall see whether it could, under such circumstances, be put; whether it was ascertained who voted or not, or how it was carried, or whether it was carried at all, unless as some have supposed, by operation of law. Here, for the present, is a plain position, which rests upon the provisions of the Presbyterian Law book; that the body had no right to act at this time, but upon questions incident to the organization; that none such were offered; but that those propounded were fit for the assembly's consideration only when it was fully organized. Dr. Patton's motion was on this account disallowed. And His Honour, Judge Rogers says, that in deciding it out of order the Moderator was right, because then there was no house in existence, as the Committee of Commissions had not reported. In this decision at the time all seemed to acquiesce. Next, Dr. Mason addressed the Moderator. He made a motion which was declared out of order, and then appealed, but his appeal was disallowed. In this too, all acquiesced. Herein it is supposed Dr. Elliott was wrong. It is admitted that in the former case he might be right in refusing to entertain either a motion or an appeal, if there was no body yet organized; but wherein do the two cases differ? At one time the report of the clerks had, and at the other had not been made. But I contend that it was not sufficient for this report to be made. Here stand five rules, prescribing, not only what the Moderator, and the clerks shall do, but also what shall be first done by the incipient body itself; one part of the rules is no more binding than the other, and if the Moderator cannot put an appeal, or the house perform any act excepting those prescribed, before the whole of these provisions are complied with, Dr. Elliott was just as right in refusing Dr. Mason's appeal, as in refusing Dr. Patton's. And the defect was, not only that Dr. Mason had no right to propose his motion or appeal then, but that neither the Moderator or the house had a right to entertain or consider it, before the appointment of a Committee of Elections. I do not want any higher authority than these standing rules, whether they are constitutional rules or not.

Well, Dr. Mason took his seat. Dr. Patton had been clearly out of order; but supposing that, in the other case, Dr. Elliott was disorderly, what can that avail the minority? His disorder could not put the association in the wrong, as it cannot be alleged that he was supported by the association. In his decision, all at the time acquiesced. Then Mr. Squier arose. It is agreed that he was out of order, and had no right to say a word. Mr. Squier still addressed the Moderator; and you will observe, that up to this time, all did so. Dr. Patton and Dr. Mason, both addressed him as presiding officer; and no intimation was given of any intention to dispute his right so to be addressed: it was not disputed. Up to this time,

if you had asked any member whom he considered the presiding officer, he would have said, Dr. Elliott. When, then, did he cease to be recognised as such? Never—never. Nor were the acts subsequently done, such as even to deny his right. But, the truth is, that a portion of the body had come, resolved to try out the question which their counsel had prepared for them, whether they might not effect a rightful organization at that time and place; and, if they could not, to exist by themselves as a separate assembly. Dr. Patton cannot rest, even until the report of the clerks is finished; Dr. Mason is very much afraid, that the advantages of that time and place will be lost; and Mr. Squier is equally anxious to secure that time and place, though his application, all agree, was out of order. Here, then, were three disorders to one, or two to one, or else three to none. But, I repeat it, up to this time, the authority of the Moderator was universally acknowledged. Every man considered him rightfully entitled to the chair: there was no dispute about his right to hold it: no suggestion had been made, whether it was not proper to address a motion to any other person.

What comes next? Mr. Cleaveland rises, and delivers a written speech. We have not been allowed to have the testimony of Dr. Beman, or Mr. Cleaveland; nor the best testimony of what the latter said, namely, the written paper, which is unfortunate—most unfortunate. The very witnesses, whose presence was more important than that of any others, were absent, and their testimony is lost. We are therefore obliged to take, what is said to be merely the substance of Mr. Cleaveland's remarks. Though they are the very pivot on which the whole case may turn, though every word is material, though exactly what he said, is the very thing which above all others, we ought to understand fully, we are furnished with only what he said in substance. On the expressions used by Mr. Cleaveland, the case may depend, yet they are not in evidence, and they ought to have been furnished by the other side. One Moderator is put in, another put out, and the matter may depend much upon the form of expression used. Some of his remarks are said to have been read from a paper; some, to have been thrown in extemporaneously; but the proof of exactly what they were, is not before us. But, taking the evidence we have, in the first place, I say, that his remarks were not directed toward the removal of the Moderator, and I challenge the authority for any such construction of them. Mr. Cleaveland did not offer any motion against him, but proceeded to read a speech, written before hand—of course, before Dr. Elliott had done what is now brought forward as the sole, or the great ground of complaint. Now, I say, that unless it be proved that this paper was written at the time, it cannot be contended that it contained any intimation, that a different Moderator was desired, or that there was any question of impeaching Dr. Elliott's authority to preside. They clearly meant to have an organization of their own; and what steps were taken to secure this object? They did not remove Dr. Elliott from his place: him they leave in the chair. But they put up another Moderator in the aisle; and then all the members are to look both ways, at the hazard of being construed on one hand, or the other, to have given assent to what they did not hear or understand. Heads, I win: tails, you lose—a very safe sort of a game. Yet this is the game played by the minority, which this court is called upon to justify. But, I rest distinctly upon this

ground, that no motion or remarks made, could be addressed to any one but the chair; that a motion, if lawful, must be repeated from the chair, and, if necessary, put in writing; that until all this had been done, no representative was bound to give his attention.

Let us now see what was the import of Mr. Cleaveland's proceeding; whether his intention was such as is declared to have been, or was not to organize the Assembly *de novo*. Here I shall not consider merely the motion, made, as it is alleged, to remove Dr. Elliott, but shall begin at the beginning—with Mr. Cleaveland's introductory remarks. Let us see what we have got here as the substance of what was said by that gentleman, and which could not be applicable at all to the case of the Moderator's violating his duty, because, as already stated, prepared before hand. The minute prepared by a committee of the New-school contains first something of its own, which, though merely a preface, one might easily be led to imagine, from the manner of its connexion, to be a part of what Mr. Cleaveland said; but it is not so, and this requires attention.

"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 Presbytery of Detroit, rose and stated in substance as follows:"—That is, the Moderator would not let Dr. Patton make a motion before the roll had been reported, nor Dr. Mason or Mr. Squier afterwards, Mr. Squier being not even a member. It was thus that he had impeded the constitutional progress of business. Now this that I have read does not profess at all to be what Mr. Cleaveland said. He, according to the minute, was raised to his feet by this gross misconduct of the officers, by which, personally, he was in no way affected, but which he could not possibly sit still and bear; yet nothing at all of that reason for his interference appears in his own words. He 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;"—this might very well have been prepared before, for he knew it must happen—"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"—All this was doubtless written beforehand: you observe, he says not a word about the outrageous conduct of the clerks and of the Moderator—"he trusted it would not be considered as an act of discourtesy, but merely as a matter of necessity, if we now proceed to"—do what? To turn out Dr. Elliott, declaring him unfit for the office of Moderator? Nothing of this kind. On the contrary, he disclaims all intention of doing any thing discourteous, and says that he acts under the advice of counsel learned in the law, who I am sure advised him to keep the peace, in attempting to effect a new organization. Does he say a word about removing Dr. Elliott? No; him he disregards entirely, as also the house as then constituted. No—"if we now proceed to organize the General Assembly for 1838, in the fewest words, the shortest time, and with the least interruption practicable."—(*Vid. ante, p.* 223.) What? His object was merely to go on with the organization already in progress? If so what was there to interrupt? No; he says, "We have come according to the advice of counsel, to

maintain our rights by means of a new organization; but do not consider us discourteous, and we will proceed to organize the Assembly with as little interruption as possible." Well, at this call, nearly every man of their party rises up, and forthwith, we are now told, with the utmost gravity, that the majority, without being conscious of the dilemma in which they are placed, or knowing what they do, are found voting, by their silence, to put Dr. Elliott out of the chair. Here form becomes substance—a thing of vast importance. I do not accuse Mr. Cleaveland of intending to deceive; but certainly if he then designed what it is now alleged that he did, he not only carefully avoided plain speaking and dealing, but directly and wilfully misinformed and misled those whom he addressed; and when he came with such honied words upon his lips, meditated a trick, a deception, a fraud, in his heart. But I entertain too much respect for Mr. Cleaveland to credit this: I do not believe he was capable of speaking thus, when he intended something so different from what his words conveyed; and of then turning about and claiming to have effected by intendment of law the same thing as if his words had candidly expressed his intention. For the present I have done with Mr. Cleaveland. He says plainly that he was attempting a new organization; and farther, his remarks are as clear a declaration as he could have made; "Gentlemen, we do not want to disturb you, nor you to interfere with us. Allow us to go on with an organization, and we will depart as soon as possible." *Ante*, 223.

Next take Dr. Hill's testimony on the same subject.—(*Vid. ante, pp.* 211–12.) He says, "I think there was sufficient time given for the vote on Mr. Cleaveland's motion for the appointment of Dr. Beman as Moderator, and I think the question was reversed. I think I may say, it *was* reversed, and I will give my reasons for saying so. When Mr. Cleaveland was about to put that question, in my estimation, it was the most critical and interesting moment in the whole proceeding, because it was the incipient step in the organization." "*Because it was the incipient step in the organization.*" Dr. Hill is a very honest old gentleman, as I saw and knew, independently of my seeing and knowing that he was a minister of the Gospel, and independently of the kind feeling and simplicity of heart which he manifested while on the stand. Here, undoubtedly, he spoke the truth. He was of the same party with Mr. Cleaveland; and he says that Mr. Cleaveland's question was the incipient step in the organization. The organization of whom? Those who did not consider themselves organized before—those who came to the church in a body and went away in a body. "I may state here," continues Dr. Hill, "that I had opposed the separate organization." Where had he opposed it? Not in that body. In his integrity he has told us that he had opposed it somewhere else. This then was the incipient step of an organization, to form which the rest had agreed, but to which he was opposed; and it was the incipient step of a *separate* organization. That is, they came to the house prepared to form the inception of a separate organization of the Assembly.

I will next call your attention to the testimony of Mr. Gilbert and Dr. Patton. Dr. Patton says, (*Ante, p.* 54,) "He" (Mr. Cleaveland) "did not call the Moderator by name, but looking toward him, addressed his remarks and put his motion to the house, a large portion of which was

between himself and the Moderator," and of course had their backs to him. So Mr. Gilbert also testifies. (*Ante, p.* 101.) "Mr. Cleaveland did not address the Moderator when he made these remarks: 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—that is, for the purpose of the new organization. Then here is the clearest proof to contradict the assertion now made, that we assented to the removal of Dr. Elliott. On what question they supposed themselves to be voting, is proved by the very vote to appoint Dr. Beman Moderator, that he might read to the new Moderator the rules; which, however, he afterwards neglected to do, though he referred Dr. Fisher to them. He was appointed, no doubt, because, having been Moderator before, he was supposed to be conversant with the constitution and forms of proceeding. So they made him Moderator first, and he put the motion on Dr. Fisher, and made known to him by what rules he was to be governed. This, then, was the organization of the Assembly from the very beginning: it is not correct in any sense to say, that they punished Dr. Elliott, or removed him from the chair.

Now, this proceeding was the most outrageous disorder from beginning to end, unless the New-school were attempting to effect a new and separate organization, which should embrace all the commissioners from the exscinded Synods, because they had been told by their counsel that this was necessary, which is their only excuse. This I assert for the following reasons. First, because the motion was out of season; a Committee of Elections not having been appointed; secondly, because it was not addressed to the chair. In regard to the latter point testify Dr. Hill, Mr. Gilbert, and Dr. Patton on the side of the relators, and Mr. Brown on the other side. Mr. Brown says, (*Ante, p.* 174,) "Mr. Cleaveland rose with a paper in his hand. At his first rising his face was towards the Moderator, and his back to me. I did not hear him say 'Mr. Moderator.' When he had commenced reading, he turned a little round from the chair, as if addressing persons to his right, and thus gave me an opportunity to see the hand-writing of the paper, and to hear, distinctly, what he uttered. I can recollect, perfectly, the main topics of his discourse, and nearly in their order. He commenced by declaring, we are about to form a new body; he expressed an apology for the interruption, and wished not to be considered discourteous, as they would do it 'in the fewest words and the shortest time possible.'" Which was all right in that view of the case—his intending to form a new body. He was certainly bound at any rate to respect order and decorum. But he could not afterwards take away our rights, on the pretence that we had consented to part with them. After saying that he intended but a little interruption of our proceedings—a thing of no consequence, he is not to carry off with him all our privileges. There are fables of that sort—cases where persons have thus taken advantage of the courtesy of others; but I never have heard of such conduct's being legally approved. If any one had risen then and asserted that Mr. Cleaveland did not mean what he said, the charge would have been resented as a slander.

Mr. Cleaveland did not address the chair. Now what is the rule of order upon this subject—if rules are to be applied to such a case? Let us

see. "Every member when speaking, shall address himself to the moderator, and shall treat his fellow members, and especially the moderator, with decorum and respect." So the next rule:—"Without express permission, no member of a judicatory, while business is going on, shall engage in private conversation; nor shall members address one another, or any person present, but through the Moderator." *Append. to Const. R.* 21, 22.—It is plain enough that Mr. Cleaveland violated all rules of order, if he considered himself to be acting as a member of the Assembly already partially organized. He did not address the Moderator, or treat either him or his fellow members, whom he did not address through him, with respect and courtesy. I might refer to many rules which he violated, but those which I mention are sufficient: they show clearly that if his object was really what it is now said to have been, if he intended merely to displace the Moderator, he was guilty of gross disorder. If his object was to effect a separate organization of a part of the commissioners, he was exempt from the operation of these rules; but if he meant what it is now contended he did, they were obligatory. There is another regulation his neglect of which made him in the highest degree disorderly. Mr. Cleaveland obtained what would be called out of doors a snap-judgment. "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."—*Append. to Const. R.* 11.—According to the other rule every motion must be addressed to the Moderator: according to this no member is bound to give attention to a motion, until it has been stated from the chair, after being first stated by the mover. It appears to me that these rules are decisive of the question.

These questions of order, I repeat it, cannot be too much insisted on: such rules are absolutely necessary to avoid snap-judgments. Every eye must be able to see, and every ear to hear, in order that all may participate, else they cannot be bound by what is done. It is of the utmost consequence that there should be some one in the chair to receive motions and communicate them to the house; but the eye cannot follow the movements of two presiding officers at the same instant, nor can every body be making a motion at one time.

Now, I say that the object of the New-school was to form a separate organization: they did not address our Moderator, or the chair, and the question was not stated from the chair and therefore was never submitted to the body. The argument of the other side is that we were bound because we did not vote on a disorderly motion, put at the other end of the house—a disorder which violated every rule of that body, and of every deliberative body, and which was allowed merely because Mr. Cleaveland said that he was acting under the advice of counsel learned in the law, and would interrupt as little as possible, it being generally understood that they would go away with what they had got—a little show of organization of their own, just enough to begin a controversy with. Of the majority there was not a single man who understood that the motion was addressed to him, or that he was voting on any motion; not a single man who, we may not take for granted, would have opposed such a motion as it is now pretended Mr. Cleaveland put. Here we may consider another question: what did any one of either party vote upon? If a

motion had been made to remove Dr. Elliott, that would have been perfectly intelligible. If a motion to put Dr. Beman in his place, that also might have been understood; but no such motion was made. The only question put, was, "Will you allow of our forming a separate organization? We wish to give no offence, but have been advised that such an organization is necessary to us." And then they put a question pertaining to their organization—"Shall we in our incipient state have Dr. Beman for our Moderator?" If we were silent what did we mean? Only, "You may have Dr. Beman for *your* Moderator: we have ours, and if you choose to separate from us, with as little interruption as possible to our proceeding, to be sure, you may take any Moderator you please." Now then, because we did not object to their having Dr. Beman as *their* Moderator, (which was the question put) are we to be considered as voting to give up ours? That, is an entirely different thing, and if the latter was the import of the motion, it certainly was not so put as to be intelligible to any man, woman, or child in the body. And whatever the motion may have been, if disorderly, it could have no such effect. Such a construction would be unfair and unjust.

Not only was the question not put by our Moderator, the Moderator in the chair—the actual and the legal presiding officer—but not from any *chair* entitled to the respect of the body. I go farther—I mean to disprove that we ever voted upon it by intendment of law, as we certainly did not in fact. It was not put by any officer authorized by the Assembly to put questions. Mr. Cleaveland never was so authorized; and neither Dr. Beman nor Dr. Fisher ever was; for Mr. Cleaveland did not ask the consent of the Assembly to his putting a question; and neither Dr. Beman or Dr. Fisher once claimed to be Moderator. They went out of the house leaving our body, with its Moderator and clerks as it was: they did not pretend at that time to disturb our organization. But no one is bound to notice any question which is not put by an officer of the house, or by some authorized person. And more especially was no one bound to give attention in this case, because the regular officers were there, in their places, and fully competent to act. There was no absence of a Moderator or clerk; no gap in the organization: all was complete. But these gentlemen came and asked, "Let us have an opportunity to form a little organization of our own, here behind you, in order that we may be ready for a lawsuit. We will interrupt you the least possible, and leave you as soon as we can." To this we consented; but authority to any one to put a question to us, we never gave.

Now let us advert to the condition of the Assembly, at the time of these transactions. All the witnesses agree that there was much tumult and disorder. How was this occasioned? It is ascribed to the Old-school; and this is supposed to justify what was done on the other side, and to be a sufficient reason for ousting us. What was this tumult and disorder, which is chargeable upon the Old-school? Some cried "Order!" some "Shame!"—some one thing, and some another, incited to it by the most disorderly proceedings. They saw a spectacle of disorder in its worst shape—while one Moderator was presiding in the usual manner and place, another getting up at the opposite end of the house, and paying no respect to either the officer thus presiding, or the house, and treating of things which did not concern the business then before the Assembly. If they

were disorderly how can you impute it to Dr. Elliott or any of the members, as a disorder, that they called to order, or cried "Shame"! It is an utter perversion. The only question is, were the New-school disorderly? If so it was the duty of the Moderator, and the privilege of every member to call them to order. They might have made as much noise as they could until Mr. Cleaveland stopped, and no one could have blamed them for it. I know of no other limit to the duty of the one or the privilege of the other. It is said we caused the disturbance, and therefore must submit to the consequences. How did we cause it? By calling to order? That I say was not a disturbance, when the person called to order was disorderly. The chair and every member had a right to persist until the disorderly individual obeyed the call. Farther, this call to order from the Moderator and members was a complete negation of the idea that the latter meant to vote: it shows that they were endeavoring to suppress the whole proceeding; that they did not consent to the removal of Dr. Elliott, but to secure the peace of the body called to order. They failed to restore order, but shall the attempt be imputed as an offence? They had a right to call order, if any were disorderly.

My simple position here is, that there could not be two presiding officers at the same time. Farther, I say, that in the Assembly, and in every other deliberative body, there must be a known place for the presiding officer to occupy; and while he occupies it, he alone is to be respected as the presiding officer. That place indicates who is the true officer. When he is absent, questions may be put by the Clerk, or by some one appointed for the purpose. I do not speak of the removal of an officer. If Mr. Cleaveland had effected Dr. Elliott's removal, then provision must be made as in the case of the Moderator's absence; but, in the meantime, until he was removed, to whom were motions to be addressed? Were the members to look before or behind them, or both ways? I suppose both. Even if Mr. Cleaveland's motion was in effect intended to remove Dr. Elliott, yet until the motion was carried, until his removal was decreed, he continued to occupy the chair, and to be Moderator; and while this was the case, no one was bound to pay respect or to attend to any other. I ask your Honours, what other course could be taken by the party called Old-school—as if that were a term of reproach? I can think of none. What course were they to take, supposing they were the majority? They were satisfied, as it appears, that Dr. Elliott had done his duty; they were satisfied that he should occupy the chair, and knew that so long as he was in the chair they were bound to respect him, and him alone. Could they, consistently with their respect to him and to themselves, vote on a question put by another person behind their backs? Would not that have been surrendering the whole case? If they had thus voted, they must have turned their backs on Dr. Elliott, and their faces to Mr. Cleaveland—towards the rising sun.

It is a material fact, that Mr. Cleaveland was not even in the neighborhood of the chair. Here was a large assembly, composed of those commissioners who had been reported on the roll, those not reported, of delegates from the exscinded Synods, and of persons who had come merely to hear the sermon, or to see what would take place. Of those entitled to vote, the great body could run no risk, as things at first stood, for they sat immediately in front of the chair. In the neighborhood of Mr.

Cleaveland, and behind him, were the most of the New-school members, the delegates claiming a seat, and many by-standers. There is no doubt of that. Now, who had a right to vote on any question? Those who had been reported, and none others. They were the members of the Old-school, and a few of the New-school. Of course I do not take into account the exscinded commissioners, though if they had been added, the New-school would still have been in the minority. Those who sat before Mr. Cleaveland had, without doubt, a right to vote: they were principally of the Old-school, who were satisfied with Dr. Elliott. Mr. Cleaveland, then, was not only not in the neighborhood of the chair, but was not in front of the great body, probably not of any part of those entitled to vote: he put the question to their backs. I believe there is no rule of order of any deliberative body which allows a question to be stated behind the backs of the members. It is a bull to talk of addressing people behind their backs. The forms of good breeding, as well as all rules of parliamentary order, forbid such a thing entirely.

The disorder which ensued from Mr. Cleaveland's motion, was so great, that several of the witnesses, as they have testified, were able to hear nothing. I have a list of sixteen, who have given testimony to that effect—and I know not how many more said the same—and I hope, that among these, whose names I shall read, there are none who will not be believed to have spoken the truth. They are Dr. Phillips, Dr. Wilson, Dr. Miller, Mr. Lowrie, Mr. Twitchell, Mr. Wilson, Mr. Symington, Mr. Boardman, Dr. Plumer, Dr. A. W. Mitchell, Mr. Auchincloss, Mr. J. B. Mitchell, and Mr. Agnew. They all swear, that so far from hearing what was done, they did not know at all, some of them until the next day, all until a considerable time afterwards, that Dr. Fisher had been elected Moderator. Could any thing be done in this way, so as to bind those behind whose backs the questions were taken? Mr. Cleaveland gets up a little way behind the great body of the members, and amid the distraction and confusion of a scene of almost unexampled disorder, puts a certain question, and you are called upon to wring, from our silence and astonishment, contrary to our own declarations, and to the manifest truth, an acquiescence by intendment of law. We did not see, hear, or know what was going on; and we answer to any one who contends that we were bound, that he must first establish the facts, that we actually heard, saw, and knew, before such a consequence can be fastened upon us. That must first be proved. In all cases, where questions are put by the presiding officer, the regularly constituted authority, it is perfectly plain, that all who have an opportunity of hearing are bound. But, where a person who has no authority to put a question, rises, and after a few words in explanation, makes a motion, and immediately puts the question upon it, behind the backs of a great portion of the members, not addressing the Moderator, nor giving him an opportunity to state the motion, can those behind whose backs it is put, be bound, when they swear positively to the fact that they did not hear what was said? Nay, the rules of every deliberative body require a reasonable pause after a motion has been addressed to the chair, and, if it be demanded, that the motion be put in writing; and so do the rules of the Assembly, which I have read. According to the latter, when a motion is offered, if it be in order, the Moderator must formally state it; and it must be put in writing, if he or any

member require. But Mr. Cleaveland, in the true spirit of his professed object, the forming of a separate organization, proceeded as rapidly and with as little interruption as possible. Indeed, he went on so rapidly, as to leave it in considerable doubt—that is enough for my purpose, if the negative be not fully established—to leave it in doubt, whether the question was reversed. The good old gentleman, to whose testimony I have referred—Dr. Hill, says that the rolling fire of the ayes had not yet ceased, when the reverse of the question was put. He says that the Old School were not in good training. Certainly *they* did not fire by platoons: there may have been some single guns. And, so far as Mr. Cleaveland was concerned, certainly there was good reason why he should not wait till the rolling fire had ceased, if, though the question was put behind our backs, and out of our hearing, we were to be bound, just as if we had first heard, and then said, aye. Now, what part of the rules is more essential, than that requiring a speaker to address the Moderator, and the motion to be stated from the chair, and opportunity be given for debate? Where was opportunity for debate allowed? All had a right to debate; yet not the least chance was given. Nay, the members were cautioned—so we may interpret Mr. Cleaveland's language—that there was to be no debate. At any rate, where was the opportunity given? Crack! crack! crack! the reverberating shouts of "Aye!" fell upon the ear, as if their learned counsel had told them, that they must not lose an instant; that they must not allow the thread of their proceedings to be broken; that they must get through at all hazards; and then it was proclaimed, that the Assembly had adjourned, to meet in Old Buttonwood. Could questions thus put, bind any but those who actually voted?

Here is a solution of the whole difficulty. There were in the house at the time, two well-known and distinct bodies, entertaining adverse views, not originating on that day, but long before—they had become so fully embodied that one party had consulted counsel about their difficulties—I don't know whether the other had done the same or not. There they met all on the same floor. One party wished to organize the Assembly according to their own views, and on their own plan; the other to organize it adversely. They certainly had a right to put such questions as affected their separate organization: we made no objection to that. But they had no right to attempt to put a question in our body. If an individual of their number claimed a right to make a motion, which we were to act upon, he must in presenting it address himself to our officers. This mode of proceeding would have been intelligible to all. They might appoint Dr. Beman or Dr. Fisher Moderator: that is not our concern, so long as there is question of their own party only. But if the question be whether we shall be affected, it is manifest that they could address us only through the accredited organ of our body. Else, they did not address us at all. They might speak French, or German, or Latin, as they chose, in addressing each other; but English is our language, and if they spoke in a strange tongue, we must take for granted that they were talking to somebody else, not to us: they must speak English in addressing us. Is not that the honest sense of the matter?

But we called these gentlemen to order. In this we committed no disorder, if they were disorderly. It is strange that they could not tell us in a plain way, without equivocation, what they wanted. If they had

done so, and we afterwards had consented, we might, perhaps, be bound by that consent. But surely we are not to be circumvented by disorderly stratagem.

I have almost done with this subject of the disorder which was made. But I would ask, why impute it to the Old-school? The Old-school is not one body—a unit. How, when there is no corporation, no association, are you to make one person answer for an offence committed by another? Supposing that some made a disturbance purposely to prevent a regular vote, are all bound by that vote, when prevented by the uproar from knowing what was done, unless you establish the fact of a conspiracy, and that all were parties to it? In this case there could be no conspiracy. The Old-school, being the invaded party, merely stood on the defensive: conspiracy was impossible. How then was it possible that all the members of a body which is not a unit, could be affected by the disorder of some of their number, supposing some were disorderly. I am not acquainted with any such rule.

But to what rule is it attempted to make all those which govern in the construction of ordinary affairs, yield in the present case? The consideration of this matter concerns us all, for it must be of universal application. Are we all willing to abide the consequences of such a rule? Can we live by it? Is it such an one as your Honours, if now framing a rule, would lay down? First, it is said that the question put by Mr. Cleaveland was a question of privilege. Not a privileged question, which is only one that is not necessarily out of order because another is depending, as the question put when it is thought better to postpone, or to commit a subject. These all have a definite order prescribed: they cannot cut off and interrupt every thing. A question of privilege is a very different thing. There is a difference in regard to them on the different sides of the Atlantic. The privilege of Parliament would not be borne here: that is entirely indefinite, which seems in the eye of some to constitute its great value. The House of Commons is at present wrangling about a question of privilege with Lord Denman, who is a firm man, and being well supported, has yet held to his own opinion, and from present appearances is not likely to yield. The history of this matter is a little curious. The House of Commons claims a right of printing whatever it pleases, and of being exempt from all question in regard to the same. So far as regards its own votes and resolutions, there can be no doubt of the right; but it claims, farther, the privilege of printing any paper whatever, and not only to print enough copies for its own use, but also to authorize the printer's issuing some for sale. In a recent instance the House authorized the printing of a slanderous paper, and allowed some extra copies to be printed and sold. One of these got into the hands of the injured person, and he brought the matter before the Court of King's Bench, which decided against the printer. In the House of Commons Sir Robert Peel has defended the rights of the House with great ability. An able article in the Quarterly Review takes the opposite side. The Lord Chief Justice is firm in supporting his judgment, that papers so printed may not be sold or distributed. This gives us some notion of what is called the privilege of Parliament: such a privilege certainly would not be suffered in this country.

But what is meant here by a question of privilege? Mr. Meredith

especially has dwelt upon this point. He says that the rejection of the exscinded commissioners was a breach of privilege, and that the object of Mr. Cleaveland's motion was to punish the Moderator for that breach. But parliamentary privilege is not the privilege of the member: it is the privilege of the body: so far from its being an individual right, the first Manual of legislative practice which you open, will tell you, that an individual whose privilege is invaded, cannot wave the right of prosecuting the matter: the house punishes the breach. Great solemnity too is required in the infliction of punishment for a breach of privilege. The first thing is to determine, that it is a breach of privilege. Then the question arises whether the house will agree to take it into consideration. Then, if it is so agreed, the question of privilege has precedence in the order of business at all times, and when not disposed of, continues to have precedence, often to the great annoyance of many of the members. Here the question arises, did any member of the Assembly say, "This is a case of a breach of privilege? If I may make any mention of my little experience in such matters, I would say, that I have never seen a question of privilege come up in such a shape: if this was one, it certainly appeared in a very strange disguise; and I cannot yet assent to its bearing that character. The motion made by Mr. Cleaveland looked like a very different thing. He certainly did not complain of a breach of privilege, and if a breach had been committed, it was another breach of privilege to foist it into the house in this way, before asking leave or making known what he meant. Had the house ever consented to take it into consideration? It had never been asked to do so. Mr. Cleaveland of his own authority put the question to the Assembly, therein being guilty of a breach of the privilege of every member, excepting those who expressly consented to this proceeding. He made a motion too, which, even if the house could be construed to have agreed to receive it, he did not pretend to be any thing of the sort now described. What then becomes of the argument founded on the assumption that the question proposed was a question of privilege?

Again, it is contended that the Assembly had a right to remove their Moderator. I incline, for reasons already stated, to think that they had not that right until the appointment made of a Committee of Elections. But, at any rate, they did not remove him: there was no motion made to that effect. There certainly is not a precedent for any man's usurping the place of Moderator. The case which occurred in 1828, in which Hollis was concerned, was of quite a different sort. There the speaker wanted to leave the chair, but was held in his seat by force. He was acting in obedience to the king's command; but already a contest had begun between the Parliament and the king, and you can see the true spirit of the contest in the occurrences of that day, as distinctly as you see it on the day when they cut off the king's head. It was that spirit which arrayed the Parliament, in the name of the king, against the king, and under the influence of which they raised troops in his name, to make war upon his person. They had then another head: that was king Cromwell. The speaker was acting by the king's authority, and he begged, prayed, and wept, but it was all of no avail. In the scuffle, Hollis who was in the neighborhood of the chair, collected the voices of the members in that neighborhood; but this opposition had no effect; the Parliament adjourned and was dissolved. And when, many years after, the transac-

tion came into review, what was done? Was it declared quite orderly? No. The act passed bears no such construction.

Hollis in the mean time had been arraigned before the Star Chamber, but there all his valour oozed out—whether at his fingers' ends or not, I do not know. But at any rate he was as humble and penitent as the speaker had previously been. The new Parliament voted, that the speaker ought not to have abandoned his duty and left the chair; that in doing so he had violated the privilege of the house; but without approving the conduct of Hollis.

What analogy can you find between this case, and that of Mr. Cleaveland, standing in the pew, and making the members vote the contrary of what they meant? I answer, that the case is no precedent; that it was not intended as a precedent for such times as these; though times like those which produced it, may not be far distant in England, if we are to judge from the number of pikes said to have been lately made, in one of her large manufacturing towns.

Again, it is said, that the clerks could not put any question, but by order of the house. The clerks, of course, cannot make an entry on the journal, but by order. 2 *Hatsell*, 201, 237. But you will find that it is in evidence, that in the Assembly, at least, the clerk may put a motion without an express order. Mr. Meredith, indeed, has discovered that in 1835, the question put by Dr. Ely, was put by him as a member, and not as clerk. I do not think so: I understand just the contrary; and the thing is certainly stated in the plainest terms. The original question on the appointment of the Moderator, was put by the Stated Clerk, who also called the house to order—this without the express consent of the body—and Dr. Beman was placed in the chair. After he had been there some time, he was discovered not to be entitled to the office. A motion was made, to re-consider the vote by which he had been appointed: the minute does not show by whom the question on this motion was put—I suppose by Dr. Beman—but it was decided to re-consider the vote; and, after some speaking on the subject, it was ordered that the question should be put by the Stated Clerk: "Whereupon Dr. Ely put the question;" and Dr. Ely was the Stated Clerk. The question was ordered to be put by the Stated Clerk. Was it then put by him as an individual member, or as Stated Clerk? If he put it as an individual member, that was not in accordance with the order. It appears, then, that it was put by the clerk; and by him must such questions be put, on all occasions. In that case, they were very attentive to the rules of order; for, when the motion was carried to re-consider the question, the chair was immediately regarded as vacant, every thing as respects it, was placed back in its original situation, as if nothing had been done, and the question was again put on the original motion, by the Stated Clerk. Then Dr. McDowell was elected, because he was entitled to occupy the chair. But here was a case in which the right person was already in the chair. The chair was full. Dr. Elliott had been the Moderator of the preceding Assembly, and it was clearly his duty to preside. In case of his absence, the clerk should have put the question; or, if there had been no clerk, a temporary officer might have been appointed for the purpose. But, so long as the chair was filled, and that with the right person, none but himself could put a question; unless, in a case of peculiar delicacy, he had retired from the

chair, and requested another person to occupy it, or, not leaving the chair, asked some one to put it for him.

I have now gone through with what I have considered my duty in this case, not without labour to myself, or fatigue, as I fear, to your Honours. But a sufficient apology may be found, as it appears to me, in the great importance of the questions which it involves. Those who know anything of this matter, know well that I have not sought the occasion of appearing here. Sickness prevented me from being present during the greater part of the trial, and I felt some reluctance to come in at the present stage of the case, not only because I had not attended the trial, but more particularly for other reasons. I have been long acquainted with many of the gentlemen on both sides, and have great respect and much kind feeling for them. I was sorry to see them here arrayed against each other in a civil court. I can assure them that it has not been without pain, that I have been obliged, professionally, to turn my face away from the view in which I have always before regarded them; and in which I shall continue to regard them, notwithstanding that it has fallen to my lot, to attempt in a professional capacity to show which party are in the right. I have now performed my duty, and disclosed the grounds on which I think the right of the defendants stands. And if I have consumed a considerable time, I may at least feel satisfied in the reflection, that I have had no inordinate desire to consume it, or needlessly to waste a single moment. On every ground, I trust it has been shown that the case is clearly with the defendants, and that the verdict must be set aside.

Court adjourned.

SATURDAY MORNING, April 27th—10 o'clock.

Mr. Randall said a few words in reply to Mr. Sergeant:—If he should attempt to reply to all the new matter which that gentleman's argument contained, he must reply to the whole. The ground taken by Mr. Sergeant in regard to the jurisdiction of the court, he had before understood to be entirely abandoned by the counsel for the defendants; that nothing had been heard of it since July, 1838. A case decided by the Supreme Court of Delaware had been referred to, but in the opinion of C. J. Johns, one part of which had been read, there was a distinction taken between acts of the ecclesiastical Presbytery, and of the civil Presbytery or corporation; and it was held that if an act of the latter, excluding the plaintiff, had been alleged, a *mandamus* would lie; but that the affidavit made no such allegation. (Here Mr. Randall read two or three short extracts from the opinion.—*Vid. ante* 537, *et seq.*) The jurisdiction of the court in such cases had been settled in both Pennsylvania and Maryland. He would allude to one other point of Mr. Sergeant's argument. Supposing a question to have been put, in 1835, by Dr. Ely as Stated Clerk, that did not sustain the position taken by the counsel. The Stated Clerk is not the clerk of the house: he is the depositary of the records. The clerks of the house, are the Permanent and Temporary Clerks.

WEDNESDAY MORNING, May 8th—10 o'clock.

Chief Justice Gibson delivered the 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 not a 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, by a minority of those who could be entitled to vote, including the exscinded 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 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 ratification of those bodies. It was evidently not intended to be permanent, and it conse-

quently 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 Presbyterial 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 those 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 exscinded 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 settle-

ments 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 contempla-

tion 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 exscinded 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 adjudge 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 exscinded 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 before hand 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 removable at the pleasure of the commissioners, would seem to have been unconstitutional.

But he was not removable 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. Coporally 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 the 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. Dr. 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 enrollment, 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 exscinded commissioners could be determined only by the action of the house, which could not be had before its organization were 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 *ultimo 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 apprized 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 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.

Rule for a new trial made absolute.

JUDGE ROGERS.—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.

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THE END.