CHAPTER VI.

THE STATE CONSTITUTIONS OF 1789.

OF all the state constitutions, that were in force at the adoption of the constitution of the United States, in 1789, *not one of them established, or recognized slavery.*

All those parts of the state constitutions, (i. e. of the old thirteen states,) that recognize and attempt to sanction slavery, *have been inserted, by amendments, since the adoption of the constitution of the United States.*

All the states, except Rhode Island and Connecticut, formed constitutions prior to 1789. Those two states went on, beyond this period, under their old charters.*

*The State Constitutions of 1789 were adopted as follows: Georgia, 1777 South Carolina, 1778; North Carolina, 1776; Virginia, 1776; Maryland, 1776, Delaware, 1776; Pennsylvania, 1776; New Jersey, 1776; New York, 1777; Massachusetts, 1780; New Hampshire, 1783.

These early Constitutions ought to be collected and published with appropriate notes.

The eleven constitutions formed, were all democratic in their general character. The most of them eminently so. They generally recognized, in some form or other, the natural rights of men, as one of the fundamental principles of the government. Several of them asserted these rights in the most emphatic and authoritative manner. Most or all of them had also specific provisions incompatible with slavery. Not one of them had any specific recognition of the existence of slavery. Not one of them granted any specific authority for its continuance.

The only provisions or words in any of them, that could be claimed by anybody as recognitions of slavery, are the following, viz.:

1. The use of the words "our negroes" in the preamble to the constitution of Virginia.

2. The mention of "slaves" in the preamble to the constitution of Pennsylvania.

3. The provisions, in some of the constitutions, for continuing in force the laws that had previously been "in force" in the colonies, except when altered by, or incompatible with the new constitution.

4. The use, in several of the constitutions, of the words "free" and "freemen."

As each of these terms and clauses may be claimed by some persons as recognitions of slavery, they are worthy of particular notice.

1. The preamble to the frame of government of the constitution of Virginia speaks of negroes in this connexion, to wit: It charges George the Third, among other things, with "prompting *our negroes* to rise in arms among us, those very negroes, whom. by an inhuman use of his negative, he hath refused us permission to exclude by law."

Here is no assertion that these "negroes" were slaves; but only that they were a class of people whom the Virginians did not wish to have in the state, *in any capacity* — whom they wished "to exclude by law." The language, considered as legal language, no more implies that they were slaves, than the charge of having prompted "our women, children, farmers, mechanics, or our people with red hair, or our people with blue eyes, or our Dutchmen, or our Irishmen to rise in arms among us," would have implied that those portions of the people of Virginia were slaves. And especially when it is considered that slavery had had no prior

legal existence, this reference to "negroes" authorizes no legal inference whatever in regard to slavery.

The rest of the Virginia constitution is eminently democratic. The bill of rights declares "that all men are by nature equally free and independent, and have certain inherent rights," * * "namely, the enjoyment of life and liberty, with the means of acquiring and possessing property, and pursuing and obtaining happiness and safety."

2. The preamble to the Pennsylvania constitution used the word "slaves" in this connexion. It recited that the king of Great Britain had employed against the inhabitants of that commonwealth, "foreign mercenaries, savages and slaves."

This is no acknowledgment that they themselves had any slaves of their own; much less that they were going to continue their slavery; for the constitution contained provisions plainly incompatible with that. Such, for instance, is the following, which constitutes the first article of the "Declaration of Rights of the Inhabitants," (i. e. of *all* the inhabitants) "of the state of Pennsylvania."

"1. That all men are born equally free and independent, and have certain natural, inherent and inalienable rights, among which are, the enjoying and defending life and liberty, acquiring, possessing and protecting property, and pursuing and obtaining happiness and safety."

The 46th section of the frame of government is in these words.

"The Declaration of Rights is hereby declared to be a part of the constitution of this commonwealth, and ought never to be violated on any pretence whatever."

Slavery was clearly impossible under these two constitutional provisions, to say nothing of others.

3. Several of the constitutions provide that all the laws of the colonies, previously "*in force*" should continue in force until repealed, *unless repugnant to some of the principles of the constitutions themselves.*

Maryland, New York, New Jersey, South Carolina, and perhaps one or two others had provisions of this character. *North Carolina had none, Georgia none, Virginia none.* The slave laws of these three latter states, then, necessarily fell to the ground on this change of government.

Maryland, New York, New Jersey and South Carolina had acts upon their statute books, *assuming* the existence of slavery, and

pretending to legislate in regard to it; and it may perhaps be argued that those laws were continued in force under the provision referred to. But those acts do not come within the above description of "laws in force"—and for this reason, viz., the acts were originally unconstitutional and void, as being against the charters, under which they were passed; and therefore never had been *legally* "in force," however they might have been actually carried into execution as a matter of might, or of pretended law, by the white race.

This objection applies to the slave acts of all the colonies None of them could be continued under this provision.— None of them, legally speaking, were "laws in force."

But in particular states there were still other reasons against the colonial slave acts being valid under the new constitutions. For instance: South Carolina had no statute (as has before been mentioned) that designated her slaves with such particularity as to distinguish them from free persons; and for that reason none of her slave statutes were *legally* "in force."

New Jersey also was in the same situation. She had slave statutes; but none designating the slaves so as to distinguish them from the rest of her population. She had also one or more specific provisions in her constitution incompatible with slavery, to wit: "That the common law of England * * * * * *shall remain in force*, until altered by a future law of the legislature; such parts only as are repugnant to the rights and privileges contained in this charter." (Sec. 22.)

Maryland had also, in her new constitution, a specific provision incompatible with the acts on her colonial statute book in regard to slavery, to wit:

"Sec. 3. That the *inhabitants*"—mark the word, for it includes *all* the inhabitants—"that the *inhabitants* of Maryland are entitled to the common law of England, and the trial by jury, according to the course of that law," &c.

This guaranty, of "the common law of England" to *all* "the inhabitants of Maryland," without discrimination, is incompatible with any slave acts that existed on the statute book; and the latter would therefore have become void under the constitution, even if they had not been previously void under the colonial charter.

4. Several of these state constitutions have used the words free" and "freemen."

For instance: That of South Carolina provided, (Sec. 13.)

that the electors of that state should be "*free* white men." That of Georgia (Art. 11,) and that of North Carolina (Art. 40,) use the term "free citizen." That of Pennsylvania (Sec. 42,) has the term "free denizen."

These four instances are the only ones I have found in all the eleven constitutions, where any class of persons are designated by the term "free." And it will be seen hereafter, from the connexion and manner in which the word is used, in these four cases, that it implies no recognition of slavery.

Several of the constitutions, to wit, those of Georgia, South Carolina, North Carolina, Maryland, Delaware, Pennsylvania, New York—but not Virginia, New Jersey, Massachusetts or New Hampshire—repeatedly use the word "freeman" or "freemen," when describing the electors, or other members of the state.

The only questions that can arise from the use of these words "free" and "freeman," are these, viz.: Are they used as the correlatives, or opposites of slaves? Or are they used in that political sense, in which they are used in the common law of England, and in which they had been used in the colonial charters, viz., to describe those persons possessed of the privilege of citizenship, or some corporate franchise, as distinguished from aliens, and those not enjoying franchises, although free from personal slavery?

If it be answered, that they are used in the sense first mentioned, to wit, as the correlatives or opposites of slavery—then it would be argued that they involved a recognition, at least, of the existence of slavery.

But this argument—whatever it might be worth to support an implied admission of the *actual* existence of slavery—would be entirely insufficient to support an implied admission either of its *legal*, or its *continued* existence. Slavery is so entirely contrary to natural right; so entirely destitute of authority from natural law; so palpably inconsistent with all the legitimate objects of government, that nothing but express and explicit provision can be recognized, in law, as giving it any sanction. No hints, insinuations, or unnecessary implications can give any ground for so glaring a departure from, and violation of all the other, the general and the legitimate principles of the government. If, then, it were admitted that the words "free" and "freemen" were used as the correlatives of slaves, still, of themselves, the words would give no direct or sufficient authority for laws establishing or continuing slavery. To call one man free, gives no legal authority for mak

ing another man a slave. And if, as in the case of these constitutions, no express authority for slavery were given, slavery would be as much unconstitutional as though these words had not been used. The use of these words in that sense, in a constitution, under which all persons are presumed to be free, would involve no absurdity, although it might be gratuitous and unnecessary.

It is a rule of law, in the construction of all statutes, contracts and legal instruments whatsoever—*that is, those which courts design, not to invalidate, but to enforce*—that where words are susceptible of two meanings, one consistent, and the other inconsistent, with liberty, justice and right, that sense is always to be adopted, which is consistent with right, unless there be something in other parts of the instrument sufficient to prove that the other is the true meaning. In the case of no one of all these early state constitutions, is there anything in the other parts of them, to show that these words "free" and "freemen" are used as the correlatives of slavery. The rule of law, therefore, is imperative, that they must be regarded in the sense consistent with liberty and right.

If this rule, that requires courts to give an innocent construction to all words that are susceptible of it, were not imperative, courts might, at their own pleasure, pervert the honest meaning of the most honest statutes and contracts, into something dishonest, for there are almost always words used in the most honest legislation, and in the most honest contracts, that, by implication or otherwise, are capable of conveying more than one meaning, and even a dishonest meaning. If courts *could* lawfully depart from the rule, that requires them to attribute an honest meaning to all language that is susceptible of such a meaning, it would be nearly impossible to frame either a statute or a contract, which the judiciary might not *lawfully* pervert to some purpose of injustice. There would obviously be no security for the honest administration of any honest law or contract whatsoever.

This rule applies as well to constitutions as to contracts and statutes; for constitutions are but contracts between the people, whereby they grant authority to, and establish law for the government.

What other meaning, then, than as correlatives of slavery, are the words "free" and "freemen" susceptible of, as they are used in the early state constitutions?

Among the definitions given by Noah Webster are these:

"*Freeman.* One who enjoys, or is entitled to a franchise or peculiar privilege; as the freemen of a city or state."

"*Free.* Invested with franchises; enjoying certain immunities; with *of*—as a man *free of* the city of London."

"Possessing without vassalage, or slavish conditions; as a man *free of* his farm."

In England, and in the English law throughout, as it existed before and since the emigration of our ancestors to this country, the words "free" and "freemen" were political terms in the most common use; and employed to designate persons enjoying some franchise or privilege, from the most important one of general citizenship in the nation, to the most insignificant one in any incorporated city, town or company. For instance: A man was said to be a "free British subject"—meaning thereby that he was a naturalized or native born citizen of the British government, as distinguished from an alien, or person neither naturalized nor native born.

Again. A man was said to be "free of a particular trade in the city of London"—meaning thereby, that by the bye-laws of the city of London, he was permitted to follow that trade—a privilege which others could not have without having served an apprenticeship in the city, or having purchased the privilege of the city government.

The terms "free" and "freemen" were used with reference to a great variety of privileges, which, in England, were granted to one man, and not to another. Thus members of incorporated companies were called "*freemen* of the company," or "*free* members of the company;" and were said to be "*free* of the said company." The citizens of an incorporated city were called "the freemen of the city," as "freemen of the city of London."

In Jacobs' Law Dictionary the following definitions, among others, are given of the word "freeman."

"*Freeman—liber homo.*" * * "In the distinction of a freeman from a vassal under the feudal policy, *liber homo* was commonly opposed to *vassus*, or *vassalus;* the former denoting an *allodial* proprietor; the latter one who held of a superior."

"The title of a *freeman* is also given to any one admitted to the freedom of a corporate town, or of any other corporate body, consisting, among other members, of those called *freemen.*"

"There are three ways to be a *freeman* of London; by servitude of an apprenticeship; by birthright, as being the son of a

freeman; and by redemption, i. e. by purchase, under an order of the court of aldermen."

"The customs of the city of London shall be tried by the certificate of the Mayor and Aldermen, * * * as the custom of distributing the effects of freemen deceased: of enrolling apprentices, or that he who is *free of one trade* may use another."

"Elections of aldermen and common-councilmen are to be by *freemen* householders."

"An agreement on marriage, that the husband shall take up the freedom of London, binds the distribution of the effects."

The foregoing and other illustrations of the use of the words "free" and "freemen," may be found in Jacob's Law Dictionary, under the head of Freeman, London, &c.

And this use of these words has been common in the English laws for centuries. The term "freeman" is used in Magna Charta, (1215). The English statutes abound with the terms, in reference to almost every franchise or peculiar privilege, from the highest to the lowest, known to the English laws. It would be perfectly proper, and in consonance with the legal meaning and common understanding of the term, to say of Victoria, that "she is free of the throne of England," and of a cobbler, that he "is free of his trade in the city of London."

But the more common and important signification of the words is to designate the *citizens*, native or naturalized, and those specially entitled, as a matter of political and acknowledged right, to participate in, or be protected by the government, as distinguished from aliens, or persons attainted, or deprived of their political privileges as members of the state. Thus they use the term "free British subject"—"freeman of the realm," &c. In short, the terms, when used in political papers, have a meaning very nearly, if not entirely synonymous, with that which we, in this country, now give to the word *citizen.*

But throughout the English law, and among all the variety of ways, in which the words "free" and "freemen" are used, as *legal* terms, they are *never used as the correlatives, or opposites of slaves or slavery*—and for the reason that they have in England no such persons or institutions, known to their laws, as slaves or slavery. The use of the words "free" and "freemen," therefore, do not in England at all imply the existence of slaves or slavery.

This use of the words "free" and "freemen," which is common to the English law, was introduced into this country at its first set-

tlement, in all, or very nearly all the colonial charters, patents, &c., and continued in use, in this sense, until the time of the revolution; and, of course, until the adoption of the first state constitutions. *

The persons and companies, to whom the colonial charters were granted, and those who were afterwards to be admitted as their associates, were described as "freemen of said colony," "freemen of said province," "freemen of said company," "freemen of the said company and body politick," &c. (See charter of Rhode Island.)

Many, if not all the charters had a provision similar in substance to the following in the charter to Rhode Island, viz.:

"That all and every the subjects of us, our heirs and successors," (i. e. of the king of England granting the charter,) "which are already planted and settled within our said colony of Providence Plantations, or which shall hereafter go to inhabit within the said colony, and all and every of their children which have been born there, or which shall happen hereafter to be born there, or on the sea going thither, or returning from thence, shall have and enjoy all liberties and immunities of *free* and natural subjects, within any of the dominions of us, our heirs and successors, to all intents, constructions and purposes whatsoever, as if they and every of them were born within the realm of England."

The following enactment of William Penn, as proprietary and Governor of the Province of Pennsylvania and its territories, illustrates one of the common uses of the word "freeman," as known to the English law, and as used in this country prior to the revolution — that is, as distinguishing a native born citizen, and one capable of holding real estate, &c., from a foreigner, *not naturalized*, and on that account subject to certain disabilities, such as being incompetent to hold real estate.

"And forasmuch as it is apparent that the just encouragement of the inhabitants of the province, and territories thereunto belonging, is likely to be an effectual way for the improvement thereof; and since some of the people that live therein and are likely to come thereunto, *are foreigners, and so not freemen, according to the acceptation of the laws of England, the consequences of which may prove very detrimental to them in their estates and traffic,*

* Since that time the words "free" and "freemen" have been gradually falling into disuse, and the word citizen been substituted — doubtless for the reason that it is not pleasant to our pride or our humanity to use words, one of whose significations serves to suggest a contrast between ourselves and slaves.

and so injurious to the prosperity of this province and territories thereof. *Be it enacted*, by the proprietary and governor of the province and counties aforesaid, by and with the advice and consent of the deputies of the *freemen* thereof, in assembly met, *That all persons who are strangers and foreigners*, that do now inhabit this province and counties aforesaid, *that hold land in fee in the same, according to the law of a freeman*, and who shall solemnly promise, within three months after the publication thereof, in their respective county courts where they live, upon record, faith and allegiance to the king of England and his heirs and successors, and fidelity and lawful obedience to the said William Penn, proprietary and governor of the said province and territories, and his heirs and assigns, according to the king's letters patents and deed aforesaid, *shall be held and reputed freemen of the province and counties aforesaid, in as ample and full a manner as any person residing therein.* And it is hereby further enacted, by the authority aforesaid, That when at any time any person, that is a foreigner, shall make his request to the proprietary and governor of this province and territories thereof, *for the aforesaid freedom*, the said person shall be admitted on the conditions herein expressed, paying at his admission twenty shillings sterling, and no more, anything in this law, or any other law, act, or thing in this province, to the contrary in any wise notwithstanding."

"Given at Chester," &c., "under the hand and broad seal of William Penn, proprietary and governor of this province and territories thereunto belonging, in the second year of his government, by the king's authority. W. PENN."*

Up to the time of our revolution, the *only* meaning which the words "free" and "freemen" had, in the English law, in the *charters granted to the colonies*, and in the important documents of a political character, when used to designate one person as distinguished from another, was to designate a person enjoying some franchise or privilege, as distinguished from aliens or persons not enjoying a similar franchise. They were never used to designate a free person as distinguished from a slave — for the very sufficient reason that all these *fundamental* laws presumed that there were no slaves.

Was such the meaning of the words "free" and "freemen," as used in the constitutions adopted prior to 1789, in the States of Georgia, North and South Carolina, Maryland, Delaware and New York?

The legal rule of interpretation before mentioned, viz., that an innocent meaning must be given to all words that are susceptible

* Dallas' edition of the Laws of Pennsylvania, vol. 1, Appendix, page 25.

of it — would compel us to give the words this meaning, instead of a meaning merely correlative with slavery, even if we had no other ground than the rule alone, for so doing. But we have other grounds. For instance: — Several of these constitutions have themselves explicitly given to the words this meaning. While not one of them has given them a meaning correlative with slaves, inasmuch as none of them purport either to establish, authorize, or even to know of the existence of slavery.

The constitution of Georgia (adopted in 1777) evidently uses the word "free" in this sense, in the following article:

"Art. 11. No person shall be entitled to more than one vote, which shall be given in the county where such person resides, except as before excepted; *nor shall any person who holds any title of nobility, be entitled to a vote, or be capable of serving as a representative, or hold any post of honor, profit or trust, in this State, while such person claims his title of nobility; but if the person shall give up such distinction,* in the manner as may be directed by any future legislature, *then, and in such case,* he shall be entitled to a *vote, and represent,* as before directed, and enjoy all the other benefits of a FREE citizen."

The constitution of North Carolina, (adopted in 1776,) used the word in a similar sense, as follows:

"40. That every *foreigner,* who comes to settle in this State, having first taken an oath of allegiance to the same, may purchase, or by other just means acquire, hold, and transfer land, or other real estate, *and after one year's residence* be deemed a FREE citizen."

This constitution also repeatedly uses the word "freeman;" meaning thereby "a free citizen," as thus defined.

The constitution of Pennsylvania, (adopted in 1776,) uses the word in the same sense:

"Sec. 42. Every *foreigner,* of good character, who comes to settle in this State, having first taken an oath or affirmation of allegiance to the same, may purchase, or by other just means acquire, hold and transfer land or other real estate; *and after one year's residence, shall be deemed a* FREE *denizen thereof,* and entitled to all the rights of a natural born subject of this state, except that he shall not be capable of being elected a representative until after two years' residence."

The constitution of New York, (adopted in 1777,) uses the word in the same manner:

"Sec. 6. That every male inhabitant of full age, who has personally resided in one of the counties of this State for six months, immediately preceding the day of election, shall at such election be entitled to vote for representatives of the said county in assembly, if during the time aforesaid he shall have been a freeholder, possessing a freehold of the value of twenty pounds, within the said county, or have rented a tenement therein of the yearly value of forty shillings, and been rated and actually paid taxes to the State. *Provided always*, That every person who now is a *freeman of the city of Albany, or who was made a freeman of the city of New York*, on or before the fourteenth day of October, in the year of our Lord one thousand seven hundred and seventy-five, and shall be actually and usually resident in the said cities respectively, shall be entitled to vote for representatives in assembly within his place of residence."

The constitution of South Carolina, (formed in 1778,) uses the word "free" in a sense which may, at first thought, be supposed to be different from that in which it is used in the preceding cases:

Sec. 13. The qualification of electors shall be that "every *free white man*, and no other person," &c., "shall be deemed a person qualified to vote for, and shall be capable of being elected a representative."

It may be supposed that here the word "free" is used as the correlative of slavery; that it presumes the "whites" to be "free;" and that it therefore implies that other persons than "white" may be slaves. Not so. No other parts of the constitution authorize such an inference; and the implication from the words themselves clearly is, that *some* "white" persons might not be "free." The distinction implied is between those "white" persons that were "free," and those that were not "free." If this were not the distinction intended, and if *all* "white" persons were "free," it would have been sufficient to have designated the electors simply as "white" persons, instead of designating them as both "free" and "white." If, therefore, it were admitted that the word "free," in this instance, were used as the correlative of slaves, the implication would be that *some* "white" persons were, or might be slaves. There is, therefore, no alternative but to give the word "free," in this instance, the same meaning that it has in the constitutions of Georgia, North Carolina and Pennsylvania.

In 1704 South Carolina passed an act entitled, "*An act for making aliens* FREE *of this part of the Province.*" This statute

remained in force until 1784, when it was repealed by an act entitled "*An act to confer the right of citizenship on aliens.*"*

One more example of this use of the word "*freeman.*" The constitution of Connecticut, adopted as late as 1818, has this provision:

"Art. 6, Sec. 1. All persons who have been, *or shall hereafter*, previous to the ratification of this constitution, *be admitted freemen*, according to the existing laws of this State, shall be electors."

Surely no other proof can be necessary of the meaning of the words "free" and "freeman," as used in the constitutions existing in 1789; or that the use of those words furnish no implication in support of either the existence, or the constitutionality of slavery, prior to the adoption of the constitution of the United States in that year.

I have found, in *none* of the State constitutions before mentioned, (existing in 1789,) any other evidence or intimation of the existence of slavery, than that already commented upon and refuted. And if there be no other, then it is clear that slavery had no legal existence under them. And there was consequently no *constitutional* slavery in the country up to the adoption of the constitution of the United States.

* Cooper's edition of the Laws of South Carolina, vols 2 and 4. "Aliens."