

## CHAPTER IX.

### THE INTENTIONS OF THE CONVENTION.

The intentions of the framers of the constitution, (if we could have, as we cannot, any *legal* knowledge of them, except from the words of the constitution,) have nothing to do with fixing the legal meaning of the constitution. That convention were not delegated to adopt or establish a constitution; but only to consult, devise and recommend. The instrument, when it came from their hands, was a mere proposal, having no legal force or authority. It finally derived all its validity and obligation, as a frame of government, from its adoption by the people at large. [\*1] Of course the intentions of the people at large are the only ones, that are of any importance to be regarded in determining the legal meaning of the instrument. And their intentions are to be gathered entirely from the words, which they adopted to express them. And their intentions must be presumed to be just what, and only what the words of the instrument *legally* express. In adopting the constitution, the people acted as legislators, in the highest sense in which that word can be applied to human lawgivers. They were establishing a law that was to govern both themselves and their government. And their intentions, like those of other legislators, are to be gathered from the words of their enactments. Such is the dictate of both law and common sense. [\*2] The instrument had been reported by their committee, the convention. But the people did not ask this committee what was the legal meaning of the instrument reported. They adopted it, judging for themselves of its legal meaning, as any other legislative body would have done. The people at large had not even an opportunity of consultation with the members of the convention, to ascertain their opinions. And even if they had consulted them, they would not have been bound at all by their opinions. But being unable to consult them, they were compelled to adopt or reject the instrument, on their own judgment of its meaning, without any reference to the opinions of the convention. The instrument, therefore, is now to be regarded as expressing the intentions of the people at large; and not the intentions of the convention, if the convention had any intentions differing from the meaning which the law gives to the words of the instrument.

But why do the partizans of slavery resort to the debates of the convention for evidence that the constitution sanctions slavery? Plainly for no other reason than because the words of the instrument do not sanction it. But can the intentions of that convention, attested only by a mere skeleton of its debates, and not by any impress upon the instrument itself, add any thing to the words, or to the legal meaning of the words of the constitution? Plainly not. Their intentions are of no more consequence, in a legal point of view, than the intentions of any other equal number of the then voters of the country. Besides, as members of the convention, they were not even parties to the instrument; and no evidence of their intentions, at *that* time, is applicable to the case. They became parties to it only by joining with the rest of the people in its subsequent adoption; and they themselves, equally with the rest of the people, must then be presumed to have adopted its legal meaning, and that alone—notwithstanding any thing they may have previously said. What absurdity then is it to set up the opinions expressed in the convention, and by a few only of its members, in opposition to the opinions expressed by the whole people of the country, in the constitution itself.

But notwithstanding the opinions expressed in the convention by some of the members, we are bound, as a matter of law, to presume that the convention itself, in the aggregate, had no intention of sanctioning slavery—and why? Because, after all their debates, they agreed upon an

instrument that did not sanction it. This was confessedly the result in which all their debates terminated. This instrument is also the *only* authentic evidence of their intentions. It is subsequent in its date to all the other evidence. It comes to us, also, as none of the other evidence does, *signed with their own hands*. And is this to be set aside, and the constitution itself to be impeached and destroyed, and free government overturned, on the authority of a few meagre snatches of argument, intent or opinion, uttered by a few only of the members; jotted down by one of them, (Mr. Madison,) merely for his own convenience, or from the suggestions of his own mind; and only reported to us fifty years afterwards by a posthumous publication of his papers? If any thing could excite the utter contempt of the people of this nation for the miserable subterfuges, to which the advocates of slavery resort, it would seem that their offering such evidence as this in support of their cause, must do it. And yet these, and such as these mere fragments of evidence, all utterly inadmissible and worthless in their kind, for any legal purpose, constitute the warp and the woof, the very *sine qua non* of the whole argument for slavery.

Did Mr. Madison, when he took his oath of office, as president of the United States, swear to support these scraps of debate, which he had filed away among his private papers?—Or did he swear to support that written instrument, which the people of the country had agreed to, and which was known to them, and to all the world, as the constitution of the United States. [\*3]

But even if the unexpressed intentions, which these notes of debate ascribe to certain members, had been participated in by the whole convention, we should have had no right to hold the people of the country at large responsible for them. *This convention sat with closed doors*, and it was not until near fifty years after the people had adopted the constitution itself, that these private intentions of the framers authentically transpired. And even now all the evidence disclosed implicates, *directly and absolutely*, but few of the members—not even all from the slaveholding states. The intentions of all the rest, we have a right to presume, concurred with their votes and the words of the instrument; and they had therefore no occasion to express contrary ones in debate.

But suppose that *all* the members of the convention had participated in these intentions—what then? Any forty or fifty men, like those who framed the constitution, may now secretly concoct another, that is honest in its terms, and yet in secret conclave confess to each other the criminal objects they intend to accomplish by it, if its honest character should enable them to secure for it the adoption of the people.—But if the people should adopt such constitution, would they thereby adopt any of the criminal and secret purposes of its authors? Or if the guilty confessions of these conspirators should be revealed fifty years afterwards, would judicial tribunals look to them as giving the government any authority for violating the legal meaning of the words of such constitution, and for so construing them as to subserve the criminal and shameless purposes of its originators?

The members of the convention, as such, were the mere scriveners of the constitution; and their individual purposes, opinions or expressions, then uttered in secret cabal, though now revealed, can no more be evidence of the intentions of the people who adopted the constitution, than the secret opinions or expressions of the scriveners of any other contract can be offered to prove the intentions of the true parties to such contract. As framers of the constitution, the members of the convention gave to it no validity, meaning, or legal force. They simply drafted it, and offered it, such as it legally might be, to the people for their adoption or rejection. The people, therefore, in adopting it, had no reference whatever to the opinions of the convention. They had no authentic

evidence of what those opinions were. They looked simply at the instrument. And they adopted even its legal meaning by a bare majority. If the instrument had contained any tangible sanction of slavery, the people would sooner have had it burned by the hands of the common hangman, than they would have adopted it, and thus sold themselves as pimps to slavery, covered as they were with the scars they had received in fighting the battles of freedom. And the members of the convention knew that such was the feeling of a large portion of the people; and for that reason, if for no other, they dared insert in the instrument no legal sanction of slavery. They chose rather to trust to their craft and influence to corrupt the government, (of which they themselves expected to be important members,) after the constitution should have been adopted, rather than ask the necessary authority directly from the people. And the success they have had in corrupting the government, proves that they judged rightly in presuming that the government would be more flexible than the people.

For other reasons, too, the people should not be charged with designing to sanction any of the secret intentions of the convention. When the states sent delegates to the convention, no avowal was made of any intention to give any national sanction to slavery. The articles of confederation had given none; the then existing state constitutions gave none; and it could not have been reasonably anticipated by the people that any would have been either asked for or granted in the new constitution. If such a purpose had been avowed by those who were at the bottom of the movement, the convention would doubtless never have been held. The avowed objects of the convention were of a totally different character. Commercial, industrial and defensive motives were the prominent ones avowed. When, then, the constitution came from the hands of such a convention, unstained with any legal or tangible sanction of slavery, were the people—who, from the nature of the case, could not assemble to draft one for themselves—bound either to discard it, or hold themselves responsible for all the secret intentions of those who had drafted it? Had they no power to adopt its legal meaning, and that alone! Unquestionably they had the power; and, as matter of law, as well as fact, it is equally unquestionable that they exercised it. Nothing else than the constitution, as a legal instrument, was offered to them for their adoption. Nothing else was legally before them that they could adopt. Nothing else, therefore, did they adopt.

This alleged design, on the part of the convention, to sanction slavery, is obviously of no consequence whatever, unless it can be transferred to the people who adopted the constitution. Has any such transfer ever been shown? Nothing of the kind. It may have been known among politicians; and may have found its way into some of the state conventions. But there probably is not a little of evidence in existence, that it was generally known among the mass of the people. And, in the nature of things, it was nearly impossible that it should have been known by them. The national convention had sat with closed doors. Nothing was known of their discussions, except what was personally reported by the members. Even the discussions in the *state* conventions could not have been known to the people at large; certainly not until after the constitution had been ratified by those conventions. The ratification of the instrument, by those conventions, followed close on the heels of their discussions.—The population meanwhile was thinly scattered over the country. The public papers were few, and small, and far between. They could not even make such reports of the discussions of public bodies, as newspapers now do. The consequence must have been that the people at large knew nothing of the intentions of the framers of the constitution, but from its words, until after it was adopted. Nevertheless, it is to be constantly borne in mind, that even if the people had been fully cognizant of those

intentions, they would not therefore have adopted them, or become at all responsible for them, so long as the intentions themselves were not incorporated in the instrument. Many selfish, ambitious and criminal purposes, not expressed in the constitution, were undoubtedly intended to be accomplished by one and another of the thousands of unprincipled politicians, that would naturally swarm around the birth-place, and assist at the nativity of a new and splendid government. But the people are not therefore responsible for those purposes; nor are those purposes, therefore, a part of the constitution; nor is its language to be construed with any view to aid their accomplishment.

But even if the people intended to sanction slavery by adopting the intentions of the convention, it is obvious that they, like the convention, intended to use no language that should legally convey that meaning, or that should necessarily convict them of that intention in the eyes of the world.—They, at least, had enough of virtuous shame to induce them to conceal this intention under the cover of language, whose legal meaning would enable them always to aver,

"Thou canst not say I did it."

The intention, therefore, that the judiciary should construe certain language into an authority for slavery, when such is not the legal meaning of the language itself, cannot be ascribed to the people, except upon the supposition that the people presumed their judicial tribunals would have so much less of shame than they themselves, as to *volunteer* to carry out these their secret wishes, by going beyond the words of the constitution they should be sworn to support, and violating all legal rules of construction, and all the free principles of the instrument. It is true that the judiciary, (whether the people intended it or not,) have proved themselves to be thus much, at least, more shameless than the people, or the convention. Yet that is not what ought to have been expected of judicial tribunals. And whether such were really the intention of the convention, or the people, is, at least a matter of conjecture and history, and not of law, nor of any evidence cognizable by any judicial tribunal.

Why should we search at all for the intentions, either of the convention, or of the people, beyond the words which both the convention and the people have agreed upon to express them? What is the object of written constitutions, and written statutes, and written contracts? Is it not that the meaning of those who make them may be known with the most absolute precision of which language is capable? Is it not to get rid of all the fraud, and uncertainty, and disagreements of oral testimony? Where would be our constitution, if, instead of its being a written instrument, it had been merely agreed upon orally by the members of the convention? And by them only orally reported to the people? And only this oral report of it had been adopted by the people? And all our evidence of what it really was, had rested upon reports of what Mr. A, and Mr. B, members of the convention, had been heard to say? Or upon Mr. Madison's notes of the debates of the convention? Or upon the oral reports made by the several members to their respective constituents, or to the respective state conventions? Or upon flying reports of the opinions which a few individuals, out of the whole body of the people, had formed of it when they adopted it? No two of the members of the convention would probably have agreed in their representations of what the constitution really was. No two of the people would have agreed in their understanding of the constitution when they adopted it. And the consequence would have been that we should really have had no constitution at all. Yet there is as much ground, both in reason and in law, for thus throwing aside the *whole* of the written instrument, and trusting entirely to these other sources for evidence of what any part of the constitution really is, as there is for throwing aside

those particular portions of the written instrument, which bear on slavery, and attempting to supply their place from such evidence as these other sources may chance to furnish. And yet, to throw aside the written instrument, so far as its provisions are prohibitory of slavery, and make a new constitution on that point, out of other testimony, is the only means, confessedly the only means, by which slavery can be made constitutional.

And what is the object of resorting to these flying reports for evidence, on which to change the meaning of the constitution? Is it to change the instrument from a dishonest to an honest one? from an unjust to a just one? No. But directly the reverse—and solely that dishonesty and injustice may be carried into effect. A purpose, for which no evidence of any kind whatever could be admitted in a court of justice.

Again. If the principle be admitted, that the meaning of the constitution can be changed, on proof being made that the scriveners or framers of it had secret and knavish intentions, which do not appear on the face of the instrument, then perfect license is given to the scriveners of constitutions to contrive any secret scheme of villainy they may please, and impose it upon the people as a system of government, under cover of a written instrument that is so plainly honest and just in its terms, that the people readily agree to it. Is such a principle to be admitted in a country where the people claim the prerogative of establishing their own government, and deny the right of any body to impose a government upon them, either by force, or fraud, or against their will?

Finally. The constitution is a contract; a written contract, consisting of a certain number of precise words, to which, and to which only, all the parties to it have, in theory, agreed. Manifestly neither this contract, nor the meaning of its words, can be changed, without the consent of all the parties to it. Nor can it be changed on a representation, to be made by any number of them less than the whole, that they intended any thing different from what they have said. To change it, on the representation of a part, without the consent of the rest, would be a breach of contract as to all the rest. And to change its *legal meaning*, without their consent, would be as much a breach of the contract as to change its words. If there were a single honest man in the nation, who assented, in good faith, to the honest and legal meaning of the constitution, it would be unjust and unlawful to change the meaning of the instrument so as to sanction slavery, even though every other man in the nation should testify that, in agreeing to the constitution, he intended that slavery should be sanctioned. If there were *not* a single honest man in the nation, who adopted the constitution in good faith, and with the intent that its legal meaning should be carried into effect, its legal meaning would nevertheless remain the same; for no judicial tribunal could lawfully allow the parties to it to come into court and allege their dishonest intentions, and claim that they be substituted for the legal meaning of the words of the instrument.

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[\*1] The Supreme Court say, "The instrument, when it came from their hands, (that is, the hands of the convention,) was a mere proposal, without obligation or pretension to it." "The people were at perfect liberty to accept or reject it; and their act was final."—*M'Cullock vs. Maryland*,—4 *Wheaton* 403-4.

[\*2] The Supreme Court of the United States say:

"The intention of the instrument must prevail: *this intention must be collected from its words*."—*Ogden vs. Saunders*,—12 *Wheaton*, 332.

"The intention of the legislature is to be searched for in the words which the legislature has employed to convey it."—*Schr. Paulina's Cargo vs. United States*,—7 Cranch, 60.

[\*3] "Elliot's Debates," so often referred to, are, if possible, a more miserable authority than Mr. Madison's notes. He seems to have picked up the most of them from the newspapers of the day, in which they were reported by nobody now probably knows whom. In his preface to his first volume, containing the debates in the Massachusetts and New York conventions, he says:

"In the compilation of this volume, care has been taken to search into contemporary publications, in order to make the work as perfect as possible; still, however, the editor is sensible, from the daily experience of newspaper reports, of the present time, that the sentiments they contain may, in some instances, have been inaccurately taken down, and in others, probably too faintly sketched, fully to gratify the inquisitive politician." He also speaks of them as "rescued from the ephemeral prints of that day, and now, for the first time, presented in a uniform and durable form."

In the preface to his second volume, which is devoted to the Virginia convention, he says the debates were reported by an able stenographer, David Robertson; and then quotes the following from Mr. Wirt, in a note to the life of Patrick Henry:

"From the skill and ability of the reporter, there can be no doubt that the substance of the debates, as well as their general course, are accurately preserved."

In his preface to the third volume, embracing the North Carolina and Pennsylvania conventions, he says:

"The *first* of the two North Carolina conventions is contained in this volume; the *second* convention, it is believed, was *neither systematically reported nor printed*." "The debates in the Pennsylvania convention, that have been preserved, it appears, are *on one side only*; a search into the contemporary publications of the day, has been unsuccessful to furnish us with the other side of the question."

In his preface to the fourth volume, he says:

"In compiling the opinions, on constitutional questions, delivered in congress, by some of the most enlightened senators and representatives, the files of the New York and Philadelphia newspapers, from 1789 to 1800, had to be relied on; from the latter period to the present, the National Intelligencer is the authority consulted for the desired information."

It is from such stuff as this, collected and published thirty-five and forty years after the constitution was adopted—stuff very suitable for constitutional dreams to be made of—that our courts and people now make their constitutional law, in preference to adopting the law of the constitution itself. In this way they manufacture law strong enough to bind three millions of men in slavery.